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The Loss of Sovereignty: How International Debt Relief Mechanisms Undermine Economic Self-Determination

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Abstract

This article discusses the process that debtor countries go through in the two mechanisms created to work out solutions for their huge and unpayable external debts, namely, the Paris Club and the Heavily Indebted Poor Countries (HIPC) Initiative. As the international lending process is structured today, it is through these mechanisms that debtor countries obtain debt forgiveness, reduction or rescheduling. The absolute control of these two mechanisms by creditor countries will be examined, together with the crucial role reserved to the International Monetary Fund (IMF) as the final dispenser of the 'stamp of approval' whether debtor countries will ultimately get debt relief. Also, this article identifies the so-called 'conditionalities' that are attached to debt relief obtained through the Paris Club and HIPC Initiative. What sort of policy prescriptions, 'structural adjustments' or other domestic changes are being pushed through these mechanisms? And finally, this article examines how these conditionalities comport with the principle of economic self-determination of peoples that supposedly guarantees their right to pursue an independent process of economic development. Essentially, this article attempts to answer these questions: Are the Paris Club and HIPC mechanisms fundamentally at odds with economic self-determination? And more generally, are they respectful of the 'rule of law' in the international system?

Keywords: External debt, debt relief, conditionalities, economic self-determination, Paris Club, Heavily Indebted Poor Countries (HIPC) Initiative

The Loss of Sovereignty:

How International Debt Relief Mechanisms

Undermine Economic Self-Determination

By Noel G. Villaroman

1. Introduction

Budget constraints are severely undermining the capacity of governments of developing countries to provide their people even the most basic of social services. This lack of finance is in turn caused by several factors including, among others, huge military spending, pervasive corruption and large repayments of debts owed to the developed world. These factors, either singly or in combination, eat up government funds that can otherwise be spent on education, health, housing and other social services. Economists have a better way of describing it - these factors 'crowd out' essential public spending designed to benefit the people. (Note 1) As a result, these governments are unable to steer their countries towards the path of economic development and entire peoples are unable to enjoy the most fundamental of economic, social and cultural rights.

Among the factors that drain a developing country's financial coffers, one stands out for its sheer magnitude - the periodic repayments of external debts. During the period 2000-05, for example, 29 of the poorest countries of the world paid around US\$15.3 billion in servicing their combined external debts. (Note 2) This figure roughly translates to about US\$210 million of debt servicing every month. It represents the amount of wealth that was transferred from these poor countries to the developed world. More accurately, however, there is an actual human cost behind these seemingly innocuous figures - that is, real people and real lives adversely affected by huge debt servicing. They are the children who had to stop studying because their government imposed school fees they could not afford; the families who had to reside in makeshift shelters because their government could not provide affordable housing; infants who had to die because the government has no adequate program to address malnutrition and disease, and the list of human suffering goes on.

The accumulation of external debts is like a pandemic that has seriously afflicted developing countries in many parts of the world. As a response, international mechanisms were created purportedly to provide a cure called 'debt relief'. The creation and operation of these mechanisms have been at the control of creditor countries who, like physicians bound by the Hippocratic Oath, take action based on their knowledge of the disease and feel that their professional duty compels them to treat it. Meanwhile, debtor countries have been relegated the role of ailing patients waiting in a long queue for their turn to be diagnosed and treated. The comparison, however, ends there and harsh reality sets in. The physicians turned out to be not so knowledgeable about this affliction; and the purported cure, akin to a major surgical operation, turned out to be so invasive and intrusive that the patient's entire activities are placed under a strict regimen of do's and don't's.

There seems to be a clear-cut division of labour among three international mechanisms created to work out solutions for developing countries' unpayable external debts: (1) the Bank Advisory Committee, also referred to as the London Club, (2) the Heavily Indebted Poor Countries Initiative, and (3) the Paris Club of creditor countries. Private external debts are dealt with in the London Club process, while public external debts are worked out in the HIPC Initiative (for low-income developing countries meeting predetermined thresholds) and in the Paris Club (for middle-income countries and low-income countries that do not meet the HIPC thresholds). The London Club is an *ad hoc* grouping of private commercial banks that aims to resolve impending defaults of debtor countries in repaying their 'private external debts' (Sturzenegger and Zettelmeyer, 2004, pp. 12-19). This article only examines, and confines itself to, the Paris Club process and HIPC Initiative – the two mechanisms presently dealing with external debts owed to public creditors (e.g. bilateral creditors and international financial institutions).

The objective of this article is three-fold. *First*, this article discusses the process that debtor countries go through in the Paris Club and HIPC Initiative in order to obtain debt relief. The term 'debt relief' broadly encompasses any kind of modification in a country's debt obligations for the purpose of avoiding or getting out of a default situation, including debt forgiveness, reduction and rescheduling (Rieffel, 2003, p. 20). The absolute control of these two mechanisms by creditor countries will be examined, together with the crucial role reserved to the International Monetary Fund (IMF) as the final dispenser of the 'stamp of approval' whether debtor countries will get debt relief. *Second*, this article identifies the so-called 'conditionalities' that are attached to debt relief obtained through both the Paris Club and the HIPC Initiative. What sort of policy prescriptions, 'structural adjustments' or other domestic changes are being pushed through these mechanisms? *And finally*, this article examines how these conditionalities comport with the principle of economic self-determination of peoples that supposedly guarantees their right to pursue an independent process of economic development. Essentially, this article attempts to answer these questions: Are the Paris Club and HIPC mechanisms fundamentally at odds with economic self-determination? And more generally, are they respectful of the 'rule of law' in the international system?

2. Debt relief through the Paris Club of creditor countries

2.1 Background

The Paris Club is an informal grouping of creditor countries that functions as a venue for resolving requests for renegotiations made by debtor countries that have defaulted or at the brink of defaulting on their official bilateral debts (Toussaint, 1998, pp.287-88). The Club was never formally formed by a treaty or an international agreement. Instead, it emerged from the decades-long practice of creditor countries of convening in an *ad hoc* manner to decide on requests for restructuring from a particular debtor country (Korner, et al, 1986, p. 66). The Club had an open membership until the early 1990s when official documents began referring to the 'nineteen permanent members' comprised of Austria, Australia, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, the Netherlands, Norway, Russia, Spain, Sweden, Switzerland, United Kingdom and the United States. (Note 3) Since the start of its operations in 1956, the Paris Club has concluded 408 agreements concerning 86 debtor countries; and the total amount of official bilateral debts covered in these agreements has been US\$513 billion. (Note 4)

Since 1956, creditor countries have collectively negotiated with debtor countries on a case-by-case basis that often resulted in the restructuring of loans for each requesting debtor country. The practice continued into the 1970s that much of the procedures of the renegotiation became routine that led to their eventual codification. In the 1980s, debt restructurings in the Paris Club substantially increased such that the process 'evolved to become part of the machinery of the international financial system, although it remained largely *ad hoc*' (Rieffel, 2003, p. 56) In the 1990s, the Paris Club varied its treatment of two groups of debtor countries. For the forty or so heavily indebted poor countries (all low-income countries), the thrust was towards a reduction of public external debts; while for middle-income countries the Club leaned towards debt rescheduling only without reducing their total debt (Rieffel, 2003, p. 56). This policy was changed in May 2003 when the finance ministers of the Group of Eight (G-8) countries, which are also the creditors with the largest debt exposure to developing countries, introduced 'a new Paris Club approach to debt restructuring' that includes the option of reducing the public external debts of middle-income countries (Rieffel, 2003, p. 56). Today, the Paris Club process is the only international mechanism available to debtor countries that need a reduction in their

external debt but are ineligible to participate in the Heavily Indebted Poor Countries (HIPC) Initiative whose stringent criteria for eligibility prevent many debt-distressed countries from receiving debt relief.

2.2 The IMF involvement in the Paris Club process

The IMF is at the centre of the Paris Club process and plays a pivotal role in it from beginning to end. The Paris Club openly admits the fact of IMF-imposed conditionality as an absolute requirement for debt relief under the Club's operations. It argues that debt relief must be tied to a debtor country's compliance with IMF's programs because 'the economic policy reforms are intended to restore a sound macroeconomic framework that will lower the probability of future financial difficulties.' (Note 5)

How pivotal is the role of the IMF in the Paris Club process? First, a debtor country cannot submit a request for renegotiation without an agreement with the IMF on how to restore its debt repayment capacity. Without this agreement with the IMF, a debtor country's request for Paris Club renegotiation is doomed to fail right at the beginning (Seiber, 1982, pp. 66-67). Second, during the negotiation proper, the IMF's analysis and projections about a debtor country's economic and financial condition are made the basis of specific restructuring terms (Rieffel, 2003, pp. 77-78). Also, the repayment burdens that a debtor country can be expected to bear in succeeding years are determined by using IMF analysis (Korner, et al, 1986, p.67). Absent a favourable endorsement from the IMF that a debtor country has sound economic fundamentals to restore its debt repayment capacity, no debt rescheduling nor reduction can come out of the Paris Club. And finally, a successful Paris Club renegotiation usually results in a restructuring agreement that will run for two or more years. (Note 6) In this multi-year agreement, the debt relief to be granted in the second and succeeding years is dependent on whether the debtor country is 'in good standing with the IMF' after it has reviewed the country's compliance with IMF prescriptions during the previous year (Rieffel, 2003, p. 89). These examples of IMF's endorsement *before, during* and *after* the renegotiations is the application of the 'principle of conditionality' that the Paris Club religiously follows in all its renegotiations with individual debtor countries. The principle of conditionality states that (Note 7):

The Paris Club only negotiates debt restructurings with debtor countries that:

- need debt relief. Debtor countries are expected to provide a precise description of their economic and financial situation,
- have implemented and are committed to implementing reforms to restore their economic and financial situation, and
- have a demonstrated track record of implementing reforms under an IMF program.

This means in practice that the country must have a current program supported by an appropriate arrangement with the IMF (Stand-By, Extended Fund Facility, Poverty Reduction and Growth Facility, Policy Support Instrument). The level of debt treatment is based on the financing gap identified in the IMF program.

In the context of external debts, 'conditionality' is the term used to refer to macroeconomic targets, policy and institutional changes, and other reforms that a developing country must reach or implement in order to receive or continue to receive debt relief (Buirra, 2003, p. 58). In effect, the IMF performs a 'signalling role' for Paris Club creditor countries certifying that a debtor country is indeed implementing a plan to get out of its repayment difficulty (Helleiner, 2000, pp. 90-91). The IMF also performs a 'monitoring role' that ensures that the debtor country remains 'on track' with this plan, or otherwise the creditor countries will discontinue the debt relief. Therefore, in a very real sense, a debtor country's access to the Paris Club renegotiation process is dependent on whether the IMF acting like a gate-keeper gives its 'seal of approval'. Also, the grant and continuation of debt relief are both dependent on whether or not the IMF overturns its initial assessment about the debtor country.

3. Debt relief through the Heavily Indebted Poor Countries (HIPC) Initiative

3.1 Criteria for eligibility

The HIPC Initiative is an international mechanism established and managed by the IMF and the World Bank to assist eligible low-income countries experiencing an unsustainable level of public external debts owed to external creditors. Launched in 1996, and enhanced in 1999, the Initiative aims to provide debt relief to debtor countries that meet certain eligibility criteria. According to the IMF, the paramount objective is 'to reduce to sustainable levels the external debt burdens of the most heavily indebted poor countries' and to 'ensur[e] that no poor country faces a debt burden it cannot manage'. (Note 8)

The HIPC Initiative does not cater to all developing country debtors, instead it only accommodates those that are the poorest and the most indebted based on certain eligibility criteria. The poorest countries are those eligible for highly concessional lending from the International Development Association (IDA) (Note 9) and from the IMF's Poverty Reduction and Growth Facility; while the most indebted are those that face an 'unsustainable' debt situation. (Note 10) For a country's debt to be unsustainable, it must have a fixed ratio of 150% for a country's debt-to-export levels or, if a country has an unusually high level of exports, a fixed ratio of 250% for a country's debt-to-government revenues. (Note 11) External debts covered by the HIPC Initiative are those owed to the IMF and the World Bank, bilateral and

multilateral creditors, and a limited number of private commercial creditors. According to the World Bank's figures, around 94 percent of the debts to be written off through the HIPC Initiative are owed to public external creditors, while only 6 percent are owed to private creditors. (Note 12)

3.2 Stages of the HIPC and the Vehicles of IMF Conditionalities

In order to obtain debt relief, a debtor country needs to successfully pass through three stages: pre-decision, decision and completion points. 'Pre-decision point' is the stage where the IMF and the World Bank assess whether a debtor country meets the level of poverty and indebtedness criteria and is therefore eligible (IMF and World Bank, 2001, pp. 2-5). In order to reach the next stage of 'decision point', a country should (i) have a record of macroeconomic stability as demonstrated by its staying 'on track' with implementation of an IMF program for three years, (ii) have prepared an interim Poverty Reduction Strategy Paper (interim PRSP), and (iii) have paid any outstanding arrears to preferred creditors. (Note 13) A PRSP is an economic plan of action that contains the policy and institutional reforms the IMF wants to see implemented in a debtor country over a period of time. It is purportedly 'country-owned' and prepared by the HIPC's themselves after a broad participatory process. (Note 14)

At decision point, a list of 'trigger conditions' that a country must comply to complete the HIPC process is formulated. At this stage, the IMF and the World Bank conduct a 'debt sustainability analysis' by examining every covered loan in order to ascertain a country's level of indebtedness and the debt relief it may receive. Debtor countries start receiving debt relief on a provisional basis during this stage. (Note 15)

For a debtor country to reach 'completion point', it is required to (i) carry out key structural and social reforms as agreed upon at the decision point (the floating trigger conditions), and (ii) implement a full PRSP satisfactorily for one year. At completion point, a debtor country receives the full amount of debt relief that then becomes irrevocable. (Note 16) The interim period between a country's decision and completion points varies in duration, and is contingent on how fast it can implement the trigger conditions formulated during the decision point.

From the above discussion, it can be summarised that there are two sets of conditionalities in the HIPC Initiative: one set is imposed in order to enter the HIPC process (i.e. reach decision point) and another one in order to complete it (i.e. reach completion point). A conditionality may either be: (i) expressly mentioned as a direct 'floating trigger condition' which, if all other trigger conditions are present, completes the HIPC process, or (ii) included in an interim PRSP or full PRSP of a debtor country. This ingenious scheme ensures that IMF conditionalities are present throughout the entire period that a debtor country prepares to enter the HIPC process, undergoes through it, and completes it. In many HIPC cases, it all adds up to more than a decade of waiting for debt relief while being under IMF conditionalities.

3.3 Debt relief after 'completion point'

Compared with the Paris Club process that results in either debt rescheduling or debt reduction, the HIPC Initiative only results in debt reduction for countries that complete it. Depending on the level of indebtedness that is 'sustainable' for a country as assessed by the IMF, the debt reduction may or may not be significant relative to a country's total external debt. A decade after its creation, the HIPC Initiative was supplemented by the Multilateral Debt Relief Initiative (MDRI) in 2006. The MDRI is an additional debt relief mechanism for debtor countries that have reached the completion point of the HIPC Initiative process. The MDRI allows for 100 percent debt relief (in other words, total debt cancellation) on 'eligible debts' only owed to four multilateral institutions: the IMF, the IDA of the World Bank, the African Development Fund (AfDF), and the Inter-American Development Bank (IADB). (Note 17) Eligible debts are those that were borrowed before end of December 2004 from the IMF, the AfDF and the IADB, and those borrowed before end of December 2003 from the IDA. (Note 18)

As of March 2009, forty-one countries participate in the HIPC Initiative at various stages as shown in *Table 1* at the end of this article. According to the World Bank's computation, the HIPC Initiative and the MDRI have thus far provided the participating debtor countries a total debt relief of US\$102.6 billion at end-2008 net present value (NPV) terms. (Note 19) This accounts to about an 80 percent reduction of the debt stock of the 35 post-decision point countries.

4. The Legal Compatibility between the Principle of Economic Self-Determination and the Conditionalities Imposed through International Debt Relief Mechanisms

4.1 Actual examples of conditionalities

The conditionalities that must be met in the Paris Club and the HIPC Initiative may be classified according to their nature as 'quantitative' or 'structural'. The former are quantitative targets for macroeconomic variables including but not limited to the fiscal deficit, expansion of domestic credits, and accumulation of international reserves. On the other hand, structural conditionalities are changes in policy processes, legislation and institutional reforms. The IMF has traditionally employed the former in its lending programs but, beginning in the late 1980s, it has combined the two types of conditionalities (Buirra, 2003, p. 57). Moreover, conditionalities may also be classified based on when they should be met by debtor countries. 'Prior actions' are conditionalities that a country needs to satisfy before the start of a

lending program or debt relief; while ‘performance criteria’ are those that have to be met to ensure the release of credit tranches or continued debt relief (Woods, 2006, p. 70). According to the IMF, conditionalities in the Paris Club and HIPC Initiative are essential for two reasons: first, they provide assurances to debtor countries that as long as they satisfy these conditionalities the resources of the IMF are available to them; (Note 20) and second, the aim of the conditionalities is to improve the macroeconomic condition of a country so that it can remedy its debt repayment problems and to ensure that they do not happen again in the future. (Note 21)

Previous studies have analysed the typical conditionalities that are included in a country’s arrangement with the IMF (in the case of the Paris Club) and the interim and full PRSPs (in the case of the HIPC Initiative). (Note 22) Relying on this secondary literature, *Table 2* at the end of this article classifies these conditionalities into several categories. Whether these conditionalities are ultimately beneficial or harmful to debtor countries’ economies is beyond the scope of this article. For sure, there are those who share the IMF’s view that conditionalities are designed to improve a debtor country’s macroeconomic fundamentals, in general, and restore its debt repayments capacity, in particular. Nicholas Hopkinson, for example, argue that without conditionalities the economies of debtor countries ‘will not be able to grow ... and debt will not be recovered’ (Hopkinson, 1989, p. 13) On the other side of the debate are those who argue that IMF conditionalities have in fact contributed to increasing poverty and marginalisation of the poor sectors of society. Several authors have reached this bleak conclusion about the long-term effects of conditionalities. (Note 23) This article will not substantially dwell on this raging debate. Instead, it will focus on the legal compatibility between the principle of economic self-determination and the conditionalities imposed upon debtor states through the Paris Club and the HIPC Initiative.

4.2 Generalisations about debt relief conditionalities

There are a number of crucial observations that can be made about conditionalities included in the Paris Club process and the HIPC Initiative:

First, with respect to an IMF program, the number of conditionalities has significantly increased in the 1980s and 1990s, resulting in the IMF’s dominant influence in the debtor countries’ economic and political systems (Buirra, 2003, p. 61). For example, during the Asian financial crisis, South Korea had to satisfy 94 structural conditions; Thailand 73 conditions; and Indonesia 140 structural policy undertakings. (Note 24) On average, however, Graham Bird computes that the number of conditions contained in each IMF arrangement increased to 9.9 in 1993, 10.5 in 1994, 11 in 1995, 13 in 1996, and 16 in 1997 (Bird, 2001, pp.29-49). This diminishes the debtor countries’ governmental domain where they exercise absolute and undivided authority. In the same vein, implementing a meticulous PRSP has resulted in a shrinking policy space for governments that leaves them with little or no option for midway policy maneuvers or adjustments if the need arises. The net effect is a development process whose direction and management are shared by national authorities with external actors at best, or are considerably surrendered by the former to the latter at worst.

Second, conditionalities attached to the debt relief mechanisms have acquired a broad range of subjects that adversely affect the quality and implementability of IMF prescriptions to debtor countries. It must be noted that the IMF’s expertise and original mandate only pertain to monetary, fiscal and exchange rate issues (Vreeland, 2007, pp. 5-37). However, conditionalities on debt relief have increasingly included ‘structural’ reforms over which the IMF has no or limited expertise (Buirra, 2003, p. 61). Prescriptions to reform the civil service and changes to land ownership rights of aliens, just to name a few, are undoubtedly outside the core competence of the IMF yet such conditions found their way into decision point documents, PRSPs or other instruments through which conditionalities are inserted. The term ‘mission creep’ is used to refer to ‘the systematic shifting of organizational activities away from original mandates’ (Babb and Buirra, 2005, p. 59). As will be shown later, an expanded area over which the Fund operates enables it to encroach further into the debtor state’s economic and social policies.

Lastly, it has also been observed that certain conditionalities are required of debtor countries regardless of their social and economic circumstances. (Note 25) For example, those pertaining to privatisation and liberalisation have become too pervasive to the point of being mechanical in their application. This wholesale ‘one-size-fits-all’ formula of applying conditionalities smacks of propagating a particular economic ideology at the expense of an entire people’s freedom to formulate their own national economic plans for themselves.

4.3 Economic self-determination as the legal basis of the ‘people’s right to pursue an independent process of economic development’

Article 1.2 of the United Nations (UN) Charter provides that one of the organisation’s purposes is the development of friendly relations among states based upon the ‘principle of equal rights and self-determination of peoples’. That the right to self-determination is recognised in the UN Charter itself, which some regard as the constitutional document of present-day international system (Simma, 2002, pp. 13-33), shows the right’s high standing in the hierarchy of international law norms. The International Court of Justice (ICJ), in fact, characterised the right to self-determination in the *Barcelona Traction Case* as a ‘norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances’ (ICJ reports, 1970, para. 72). According to Malcolm N. Shaw, the provisions of the UN Charter that deal

with the right to self-determination are further elaborated in an 'authoritative' manner by the 1970 Declaration on Principles of International Law Concerning Friendly Relations (Shaw, 2008, p. 253). The Declaration states, among others, that 'all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right.' (Friendly Relations Declaration, UN General Assembly Resolution 2625 (XXV), 1970).

Aside from the UN Charter, other major treaties recognise the existence of the right of self-determination. Common Article 1(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) provides that:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

It is clear therefore that the right to self-determination has two incidences: a people can choose whatever type of government they wish *and* they can freely undertake their economic, social and cultural development. It is the right's 'economic aspect' that is highlighted in this article – that which guarantees a people's right to pursue a process of economic development which is free from unwanted intrusion or interference from outside actors. The self-determination of peoples necessarily entails an independent control of a country's economy in general and an effective involvement in economic planning in particular. Without these, self-determination is never complete. This is only logical because, for a people who have liberated themselves from a colonial, occupying or racist state and have declared political independence, their newly found freedom will be meaningless if this is not coupled with the freedom to choose an economic system that is viable for the country and the freedom to determine their own model of economic development. This is not to say, however, that the right to self-determination is applicable only for peoples escaping the clutches of colonialism, occupation or racism. Antonio Cassese, for example, argues that present-day international law limits the application of the right to self-determination to three situations: '(1) an anti-colonial postulate; (2) a criterion for condemning those forms of oppression of a people involving the "occupation" of territory; (3) an anti-racist postulate' (Cassese, 1986, p. 135). However, the right's inclusion in the ICESCR and ICCPR ensures its continuing applicability well beyond the context of colonialism, occupation or racism. James Crawford observes that the right's inclusion in the two covenants has a 'tone of universality' (Crawford, 1988, p. 58). Consistent with this view, the International Law Commission expressed its opinion that the right to self-determination is of 'universal' application (ILC, 1988, vol. II, Part II, p. 64). In the two articles of the UN Charter where the right is mentioned (i.e. Articles 1(2) and 55), the contexts are different from issues of colonialism, occupation or racism which suggests the right's applicability in other situations (Crawford, 1988, p. 58). Therefore, the people of a state that is not colonialist, occupying nor racist also have the inherent freedom to choose their economic system and to determine their own model of economic development. Self-determination, including its economic dimension, is a continuing right of a people that does not end with their political emancipation. Even after political emancipation, the right continuously guarantees that a people can genuinely manage or lead their economic future.

Mohammed Bedjaoui equates the concept of economic self-determination with the 'right to development' when he stated that (Bedjaoui, 1991, p. 1184):

The 'right to development' flows from this right to self-determination and has the *same nature*. There is little sense in recognizing self-determination as a superior and inviolable principle if one does not recognize *at the same time* a 'right to development' for the peoples that have achieved self-determination. This right to development can only be an 'inherent' and 'built-in' right forming an inseparable part of the right to self-determination. (Emphasis original)

One obvious violation of the right to economic self-determination is 'economic coercion'. S. Azadon Tiewul describes 'economic coercion' as 'an attempt to constrain state conduct through the use of withholding of economic resources' (Tiewul, 1975, p. 670). Clearly, economic coercion can take on many forms and degrees ranging from discreet impositions in an onerous trade agreement to outright trade embargoes. The term 'economic coercion' does not include economic sanctions that may be lawfully imposed by the Security Council under the UN Charter. What the term encompasses are interventions in the internal and external affairs of another state using economic measures. This makes 'economic coercion' violative of another fundamental principle of international law – the principle of non-intervention (Dicke, 1988, p. 190). Citing several declarations of the UN General Assembly, Professor Oscar Schachter argues that 'economic coercion directed against the sovereign rights and independence of any state has been declared to be in violation of international law' (Schachter, 1976, p. 14). In the context of external debt, are the conditionalities being pushed through international debt relief mechanisms tantamount to 'economic coercion' upon debtor countries? Later sections of this article will attempt to answer this question.

4.4 Debt relief conditionalities infringe a 'people's right to pursue an independent process of economic development'

As previously discussed, the Paris Club and the HIPC Initiative both make debt relief conditional on whether a debtor country satisfies IMF conditionalities. In the way these international mechanisms are set up, all roads towards all forms of debt relief must pass through IMF conditionalities. If arranged along a spectrum, IMF conditionalities are between

two extremes: on one hand, there are conditionalities that debtor states will satisfy on their own volition; on the other hand, there are conditionalities that are being complied with only because of pressure being exerted by the Fund. Tony Killick classifies conditionalities into 'pro forma' and 'hard core' conditionalities. The former are those that a debtor country and the IMF will readily agree to because they involve little concessions from the debtor, while the latter are those that are made only at the strong insistence of the Fund 'that would not otherwise be undertaken' because of their overreaching economic, political and social repercussions on domestic conditions. He concludes that hard core conditionalities are 'essentially coercive' and goes on to compare these with economic sanctions (Killick, 1995, pp. 603-16). In the significant majority of cases, the IMF conditionalities that are being pushed through the Paris Club and HIPC mechanisms are of the latter type.

However, some authors dismiss the idea of 'hard core' conditionalities. John W. Head, for example, opines that (Head, 2005, p. 75):

[S]tates are under no legal obligation to accept the conditions of an IMF loan, for the simple reason that states are under no legal obligation to seek an IMF loan in the first place – or, for that matter, to join the IMF. ... it is also true that if a government is dead-set against adopting the economic and financial policies prescribed by the IMF, that government can reject them by rejecting IMF involvement.

The flaw in this argument lies in its over simplicity. It refuses to acknowledge that the world of international finance in general, and the field of sovereign borrowings in particular, are so heavily influenced by the IMF. Can debtor states seeking debt relief realistically survive the aftermath if they refuse to be under IMF conditionalities? The 'signalling role' that the IMF plays is very critical to a debtor country's ability to attract future capital. Without a favourable signal from the IMF, it is highly unlikely that future credits or investments will pour into the country. This is due to the high regard that public and private sources of capital place on the IMF's seal of approval. An existing arrangement or program with the IMF is often regarded as evidence that a debtor country has sound economic policies and it has genuine intentions to improve its future ability to pay (Woods, 2006, p. 70). With its future economic survival at stake, a debtor country is simply without an effective alternative but to swallow the bitter pill of IMF conditionalities. In a very real sense, therefore, debtor countries are pressured to be under conditionalities because this is the only way in the international financial system, as it is structured today, to restore creditworthiness and regain access to a lifeline of external finance (Korner, et al, 1986, pp. 53-54).

The IMF is an international organisation with its own legal personality separate and distinct from its member-states. It is an undeniable fact, however, that decision-making within the IMF is heavily skewed in favour of the most developed countries which are, not surprisingly, also the major creditor countries. Seventy-one percent (71%) of the total voting shares in the IMF is controlled by 13 major creditor countries, while only 29% is reserved to the developing countries (Rustomjee, 2005, pp. 10-11). These major creditor countries control the IMF through their voting shares in the Executive Board. Because voting shares are based on economic size, economically powerful countries 'can pressure the Fund to do their bidding' and sometimes use the IMF to advance political goals (Vreeland, 2007, p. 2). According to Lex Rieffel, it is a mistake to regard the IMF as an independent actor; it is in fact an 'instrument' of the major creditor countries (Rieffel, 2003, pp. 28-29). The nineteen permanent members of the Paris Club include the 13 creditor countries that control the IMF, (Note 26) while the HIPC Initiative is also being run by the IMF. The interlocking leadership structures of these debt relief mechanisms and the IMF is too glaring a fact to be overlooked, such that 'piercing the veil' of their supposed separate juridical existence is warranted *pro hac vice* - that is, at least in the limited context of external debt renegotiations.

How can externally-formulated conditionalities attached to debt relief be reconciled with a people's right to determine their own national economic policies? Or more to the point - when the Paris Club and HIPC Initiative exert financial and/or economic pressure upon a debtor state, do they infringe the latter's right to an independent development process?

Some argue that there is no pressure or coercion at all because debtor countries actually gave their consent to be under conditionalities when they voluntarily enter into an IMF program and freely participate in the Paris Club and HIPC Initiative. Karl M. Meessen insists that, in the case of conditionalities, '[e]ach word of consent expressed by debtor states... has to be taken at its face-value' (Meessen, 1986, p. 122). This argument is specious. Actual consent must not be mistaken with real, effective and freely-given consent. The dire consequences that await a debtor country by rejecting IMF conditionalities or by repudiating its debts are strong vitiating factors that render its ostensible consent problematic at best and coerced at worst. The gross inequality between affluent creditors and a desperate debtor distorts the very essence of 'freedom of contracts' and creates undue pressure that vitiates consent. While a 'problematic' consent may not be sufficient to legally invalidate an agreement with the IMF or participation in the Paris Club and HIPC Initiative, (Note 27) it does have an adverse implication upon a debtor country's right to an independent development process.

Some creditor countries view debt relief conditionalities as a form of benevolent policy advice in order to guide debtor countries to avoid a default situation. For example, the Australian government's official stance is to make debt relief to low-income countries conditional on the pursuit of 'good policies'. It regards debt relief conditionalities as a 'clear

incentive for countries' to pursue 'sound economic and social policies'. (Note 28) However, the conditionalities that the Paris Club and HIPC Initiative require are not mere 'incentives'. An incentive connotes the idea of volition; it is an enticement that may or may not be taken. (Note 29) A policy action that ought to be done, lest adverse consequences follow, is more like the Sword of Damocles hanging over one's head. This thesis submits that the Paris Club and HIPC Initiative, due to their dogged insistence to make debt relief conditional on IMF conditionalities, do infringe a debtor country's right to an independent development process.

At least in theory, the IMF itself admits that a development process should be 'country-owned' which imply that the formulation of economic policies must be left in the hands of national authorities. The rhetoric, however, does not correspond to actual practice where the IMF actually approves or rejects PRSPs being submitted by debtor states. (Note 30) The final form, contents and duration of PRSPs must have the imprimatur of the IMF, otherwise the same will be rejected or sent back to the debtor country to incorporate the IMF's positions. In reality, the IMF does have a substantial role in determining the contents of these documents. This is because PRSPs are subject to a *review* and *final approval* by the IMF to ensure that its 'expectations' regarding the so-called 'four pillars of priority public actions' (which in reality are categories of conditionalities) are met. (Note 31) These pillars pertain to a country's (1) macroeconomic framework, (2) structural and sectoral policies, (3) policies for social inclusion and equity, and (4) governance and public sector management. It must be noted that these pillars do encompass almost the entire gamut of economic policy-making, such that it is hard to imagine what government policy relating to economic development is not included in this list of mandatory contents. Angela Wood aptly describes the IMF's attitude in the preparation of program documents purportedly 'owned' by debtor countries (Wood, 2005, p. 70):

However, governments often have little choice but to agree to an IMF program and the IMF is by no means a passive advisor. Indeed, the IMF regards itself as an enforcer of policy change. [A past evaluation of an IMF lending program] heard from developing country officials that the IMF had an 'inflexible attitude' and that the IMF often 'came to negotiations with fixed positions so that agreement was usually only possible through compromises in which the country negotiating teams moved to the Fund's positions.

Several authors have analysed the dynamics of the relationship between debtor countries and the IMF and have arrived at the similar conclusion that the IMF has real and effective power to shape economic policies in these countries. According to Gerry Helleiner, the IMF has 'a major effect upon the design of macroeconomic policy in the poorest countries' through the application of its conditionalities and the leverage it has over debt relief (Helleiner, 2000, pp. 90-91). William Canak and Danilo Levi agree with this finding and lament the fact that the IMF is 'fashioning the economic policies for the debtor nation, including decisions that have powerful effects on domestic conditions' (Canak and Levi, 1989, p. 155). According to them, this situation creates a 'maximum amount of uncertainty for debtor nations and a maximum amount of flexibility and control for creditors' (Canak and Levi, 1989, p. 155).

Still, other authors maintain that the IMF's dealings with debtor countries amount to much more than 'pressuring' or 'exerting influence', but they in fact border on outright 'coercion' or 'imposition'. Angela Wood explains that the Fund employs its supposed superior 'technical know-how' in order to 'impose policies on weaker governments against their wishes and often those of their citizens too' (Wood, 2005, pp. 67-68). Sharing this view, Martin Feldstein cautions creditor countries and the IMF not to take advantage of 'currency crises as an opportunity to force fundamental structural reforms on countries, however useful they may be in the long term' (Feldstein, 1998, pp. 20-33) In the same vein, Ariel Buira characterises IMF conditionalities as 'coercive' under certain situations (Buira, 2003, p. 60):

Conditionality can be said to be coercive when the cost of not accepting the conditionality is so high that a country has no choice but to accept conditions that make it do things it would not otherwise, particularly as countries have a strong preference for avoiding the costs of default.

Whether debtor countries will be pressured or coerced to accept conditionalities ultimately depends, therefore, if they have alternative sources of finance to pay their public debts. If debtor countries can find alternative sources, like borrowing from private commercial banks or expanding their revenue base by tax increases or austerity measures, the pressure on them to accept conditionalities will be significantly less. On the other hand, if debtor countries do not have these options, the pressure on them to swallow unpalatable conditions will be heavier. It will be recalled that debtor countries that seek relief through the Paris Club and the HIPC Initiative are countries that have already defaulted on their debt service payments or are teetering at the brink of default. Therefore, obtaining finance from private commercial lenders will depend on whether the latter are willing to put their trust, and thus risk their money, on low-income countries' future ability to pay. While it is not totally impossible, it is highly unlikely without them getting the 'seal of approval' from the IMF. HIPC-eligible countries, it will be recalled, are eligible for highly concessional lending precisely because they lack access to private finance. For the 41 countries currently undergoing the HIPC Initiative, raising taxes or tightening their belts are unrealistic options because most, if not all of them, already have low levels of expenditures for basic social services. To paraphrase Jeffrey Sachs, how can belt-tightening be an option when these people cannot even afford to buy belts (Sachs, 2005, pp. 342-3)?

It is appropriate to discuss here the IMF's response to the recent global financial crisis which has spread from developed to developing countries in early 2009. Has the crisis caused the IMF to modify its lending policies as well as the conditionalities attached to loans? The answer is 'yes' and 'no'. First, in order to cushion the impact of the financial crisis to low-income countries, the IMF has announced the availability of 'significant new resources underpinned by new lending instruments' (IMF, 2009, p. 1). This means that there will be increased levels of concessional lending to 'eligible and qualified' low-income countries as determined by the Fund. Second, however, the global financial crisis has not affected the IMF's policy on requiring conditionalities on both loans and debt relief. This is because the new lending instruments do not deviate at all from the need to attach conditionalities. In other words, new funds became available to lend to low-income countries but the same old conditionalities are required of them. The announcement that the new lending instruments will require 'streamlined' conditionality (IMF, 2009, p. 1) should be taken with a grain of salt. The IMF has been assuring, and reassuring, debtor countries of 'streamlined' conditionalities for years, but the actual contents of decision-point documents, PRSPs and other debtor country documents paint a picture of a supranational institution dictating on debtor countries what they should and should not do.

Do conditionalities violate a debtor country's permanent sovereignty over its natural wealth and resources? When foreign control or influence inhibits a people from possessing, using or disposing of their natural wealth and resources as they deem proper, this particular specie of sovereignty is violated. Conditionalities that require the privatisation of primary export products (like coffee, cotton and copper) and energy sources (like natural gas, geothermal and hydroelectricity) are not easy to reconcile with the people's permanent sovereignty over natural wealth and resources. Natural resources like these are part of a debtor country's national patrimony that only it has the sovereign right to allocate, use or permit another to do so.

Although it is difficult to say with certainty, IMF policy prescriptions may in fact work and be beneficial to a debtor country in the long term. For example, trade liberalisation might indeed create more competition, lower the prices of commodities and encourage efficiency as is often claimed. But that is not the issue here. The problem arises when these policies are required of debtor countries as a condition for debt relief, because then the right of a people to pursue a process of development independently and free from intrusions is compromised. According to Martin Feldstein, 'the legitimate political institutions of the country should determine the nation's economic structure and the nature of its institutions' (Feldstein, 1998, pp. 20-33). Along the same line, Ariel Buira argues that the desperate financial and economic situation a country finds itself in 'does not give the IMF the moral right to substitute its technical judgments for the outcome of the nation's political process' (Buira, 2003, p. 57). Sabine Michalowski equates this trampling of the political process of debtor nations as 'a factual loss of sovereignty over their economic and social policies' (Michalowski, 2008, pp. 35-37). This was precisely the fear of some members of the British Parliament when they were presented the blueprint of the planned international credit union (which would eventually become the IMF) in the early 1940s – that IMF programs 'would entail policy conditions that would impinge upon national sovereignty' of member states (Vreeland, 2007, pp. 21-22). They were assured by John Maynard Keynes, who developed the British proposal for such credit union and who was considered the greatest economist of his time, that the future IMF would only offer limited policy 'advice' to governments and their economic and social policies would be 'immune from criticism by the fund' (Vreeland, 2007, pp. 21-22). History would later prove Keynes utterly wrong on this point.

The Paris Club and the HIPC Initiative are powerful and coercive instruments of the major creditor countries. Through these debt relief mechanisms, creditor countries are pushing their own economic paradigm to the poorest of debtor countries who are pressured, or rather coerced, to submission. In the Paris Club and HIPC Initiative renegotiations, creditors and debtors stand on highly unequal footing such that 'agreements' reached are not really meetings of the mind but coercions masquerading as covenants. The decision to undertake any economic or social policy must come from the debtor country itself, and not as a result of a policy imposition by an external and non-accountable institution.

5. Conclusion

The rules of international law play a less significant role in the Paris Club and HIPC Initiative as both rely exclusively on debtor countries' compliance with conditionalities to set their processes in motion. Conditionalities are often viewed as belonging to the exclusive realm of economics and have rarely been scrutinised under the lens of general international law. Considerations of, *inter alia*, respect for debtor states' economic self-determination, their sovereignty over natural resources, human and people's rights, or the requirements of effective international cooperation are noticeably absent in both mechanisms. While the Paris Club and HIPC Initiative are not proceedings before courts or quasi-judicial bodies, there is no cogent reason why the long arm of international law cannot reach both. Indeed, there is no reason why any actor in the international arena for that matter (especially the creditor states and the IMF) is exempt from general international law. Established and managed by states, the Paris Club process and HIPC Initiative are not immune from the demands of international law and, in particular, of the right to economic self-determination.

One is therefore tempted to ask - are the Paris Club and HIPC Initiative respectful of the 'rule of law' in the international system? Ross P. Buckley argues that the 'rule of law' is present in any system, whether domestic or

international, when a significant majority of the actors in that system do comply with an established set of laws which is seen as legitimate and enjoying a broad measure of community support (Buckley, 2005, p. 141). The Paris Club of creditor countries and the HIPC Initiative are undoubtedly international institutions exercising significant power and authority in the field of sovereign debt workouts. Their actions and decisions have far reaching ramifications in the lives of people in debtor countries. However, referring specifically to the principle of impartiality as a facet of the rule of law, Kunibert Raffer laments that (Note 32):

Present sovereign debt management does not honour the very foundation of the Rule of Law that one must not be judge in one's own cause, and change is not in sight. Creditors have been judge, jury, expert, bailiff, even the debtor's lawyer all in one, which mocks the very foundation of the Rule of Law.

The Paris Club and the HIPC Initiative are actors in their own right in the international system that ought to observe and comply with the rules of international society. Economic self-determination, sovereignty over natural resources, human and people's rights, and effective international cooperation, *inter alia*, are well-established rules of international law. These rules ought to be observed in both debt relief mechanisms because the international rule of law demands it. Spencer Zifcak argues that all institutions operating in the international arena are not immune from these rules (Zifcak, 2005, p. 52):

If the rule of law is genuinely to be globalized, it cannot be permissible for certain institutions of international governance to ignore or downgrade critical principles and values that underpin it. Instead, these values and principles must be incorporated into every aspect of their work.

Creditor states, when they create institutions like the Paris Club and the HIPC Initiative or participate in them, cannot divest themselves of the international duties or obligations they have assumed expressly by treaty law and impliedly by customary international law (e.g. customs and *jus cogens*). The Paris Club and HIPC Initiative do not provide creditor states a cloak of immunity from the general operation of international law rules. Both inside and outside these institutions, creditor states carry those duties or obligations and remain duty-bound to observe them.

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Note 26. On the influence of creditor countries on the decisions of the IMF, *see, eg*, Feldstein, M. (1998). Refocusing the IMF. *Foreign Affairs* 77(2), 20-33; Millet, D. & Toussaint, E. (2004). *Who Owes Who? 50 Questions About World Debt* (p. 41). London: Zed Books.

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Table 1. List of Heavily Indebted Poor Countries (HIPC) As of end-March 2009, The IMF

25 Completion Point Countries		
Benin	Guyana	Niger
Bolivia	Honduras	Rwanda
Burkina Faso	Madagascar	Sao Tome & Principe
Burundi	Malawi	Senegal
Cameroon	Mali	Sierra Leone
Ethiopia	Mauritania	Tanzania
Gambia	Mozambique	Uganda
Ghana	Nicaragua	Zambia
11 Decision Point Countries		
Afghanistan	Congo, Rep. of	Haiti
Central African Rep.	Cote d’Ivoire	Liberia
Chad	Guinea	Togo
Congo, D. Rep. of	Guinea-Bissau	
5 Pre-Decision Point		
Comoros	Kyrgyz Rep.	Sudan
Eritrea	Somalia	

Table 2. Major Groupings of IMF Conditionalities in the Paris Club process and HIPC Initiative

Conditionalities	Specific examples actually required of HIPCs
Trade liberalisation	<ul style="list-style-type: none"> • Non-protection of infant industries • Elimination or reduction of tariffs or import quotas • Promotion of exports
Government austerity measures	<ul style="list-style-type: none"> • Reduction of salary of public sector employees • Removal of agricultural subsidies • Level of spending on education and health • Charging 'user fees' for education and health services
Privatisation of state-owned enterprises	<ul style="list-style-type: none"> • Water utilities • Electricity generation and distribution • Telecommunications • Infrastructure • Primary export product like coffee or groundnut
Taxation reforms	<ul style="list-style-type: none"> • Introduction of the value-added tax or other regressive taxes • Changes in tax rates of corporations • Tax holidays for foreign corporations • Improvement of customs collection
Fiscal and monetary reforms	<ul style="list-style-type: none"> • Strict inflation targeting • Accumulation of international reserves • Expansion of domestic credits • Devaluation
Regulatory reforms	<ul style="list-style-type: none"> • Regulation of banks • Strengthening regulation of financial sector • Streamlining procedures for foreign investors • Changes in laws governing land ownership of foreigners
Reforms in the civil service (bureaucracy)	<ul style="list-style-type: none"> • Anti-corruption legislation • Improving public procurement
Others	<ul style="list-style-type: none"> • Prevention of money-laundering • Prevention of terrorist financing • Introduce energy conservation measures • Develop indigenous energy sources



The Family Trust In New Zealand and the Claims of ‘Unwelcome Beneficiaries’

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Abstract

In June 2009, at the Transcontinental Trusts conference in Geneva, His Honour Justice David Hayton said that the New Zealand Court of Appeal had got aspects of the law of trusts wrong in its decision in *Official Assignee v Wilson* [2008] 3 NZLR 45. The Court held that the test for proving a trust was a sham was whether the trustees and settlor had a common intention that the trust was not to be a genuine entity. Hayton prefers a more objective approach and looks to the objective effect of a shammer's conduct and not look for secret dishonest intentions which will hardly ever be revealed. Hayton's approach would ensure that trust property would be made available to creditors so that they were paid what they were due by declaring the trusts to be shams. Family trusts have become big business in New Zealand and are commonly used to protect a businessman's assets from creditors. While there is nothing illegal in setting up a family trust, it is my contention that the law pertaining to family trusts in New Zealand has become so far removed from the accepted principles of equity as to demand investigation.

This paper explores the origins of equity and compares the modern family trust against the equitable principles which have been developed over hundreds of years, even as far back as Plato's Greece. The paper links the equity of Ancient Greece to Cicero in Rome, through the early Roman Church to the Chancellors serving English Kings. The law of England leads to the law of modern New Zealand. The paper goes on to examine the way the family trust has been used to defeat the legitimate claims of creditors. I aim to show that the approach taken by the New Zealand Court of Appeal is too narrow and favours the 'shamming' settlor at the expense of creditors who have given good consideration in comparison with volunteer beneficiaries. Moreover the family trust has become a mechanism that bears little relationship to recognised equitable principles and should lose the protection accorded to properly constituted trusts.

Keywords: Hayton, Objective, Intention, New Zealand

In June 2009, at the Transcontinental Trusts conference in Geneva, His Honour Justice David Hayton said that the New Zealand Court of Appeal had got aspects of the law of trusts wrong in its decision in *Official Assignee v Wilson* [2008] 3 NZLR 45. The Court held that the test for proving a trust was a sham was whether the trustees and settlor had a common intention that the trust was not to be a genuine entity. Hayton prefers a more objective approach and looks to the objective effect of a shammer's conduct and not look for secret dishonest intentions which will hardly ever be revealed. Hayton's approach would ensure that trust property would be made available to creditors so that they were paid what they were due by declaring the trusts to be shams. Family trusts have become big business in New Zealand and are commonly used to protect a businessman's assets from creditors. While there is nothing illegal in setting up a family trust, it is my contention that the law pertaining to family trusts in New Zealand has become so far removed from the accepted principles of equity as to demand investigation.

In Chudleigh's case in 1594 (Note 1) Sir Edward Coke said that there are "two inventors of uses [trusts] fear and fraud; fear in times of troubles and civil wars to save their inheritances from being forfeited; and fraud to defeat due debts, lawful actions, wards, escheats, mortmains, etc.". Although the fear of losing inheritances through civil war may be past, many trusts are regularly created through a desire to avoid the claims of creditors, and what have been described as 'unwelcome beneficiaries'. (Note 2) The setting up of a family trust has been advertised as a smart move to ensure that a business is structured to operate in a financially beneficial way, protecting assets while paying the lowest possible tax. (Note 3). This particular firm refers to trusts as being 'a unique business form' and calls the settlors 'directors' of the trust who enjoy shared control of the assets with the other directors of the trustee company. Very often the companies promoting their services as trust advisers attract clients by offering to help them avoid tax, to shield their wealth from creditors, safeguarding against future inheritance taxes, showing them how to protect themselves against possible means testing on superannuation or medical or residential care benefits. The family trust is being sold as a clever way to make someone appear poor without him or her suffering the rigours of poverty.

While the law continues to assume that trusts are created for altruistic reasons, companies are selling their family trust services on the basis of the fringe benefits that a trust can confer. In fact if asked a client may reveal that the main

reason for the creation of the trust was to defeat creditors. In the recent case of *Taylor v Official Assignee* which was heard in the High Court in Auckland in August 2009 the Court found that the Taylors had established their family trust to shield family assets from legitimate claims for unpaid taxes arising out of business activities and to place their primary assets out of the reach of creditors. This is not to say that there are not proper reasons for setting up a family trust. Commonly these are used as legitimate vehicles for the protection of children's assets in case of relationship break down, to prevent a second wife from taking 50% of the family assets without regard for the interests of the children of the first marriage.

A common selling point offered by purveyors of family trusts is to say that the settlors will retain control over the trust assets. Settlors pass assets and funds to the trust with themselves as trustees and, often without reference to any other trustee, continue to use those assets and funds as if they were their own. For example in *Charman v Charman* (Note 4) the English Court of Appeal developed a test to decide whether the assets in the trust had been used as a resource by the settlor. In *Charman* the husband had set up a discretionary trust of which he was settlor and one of a class of beneficiaries. He instructed the trustee company that they must consult him before taking any action with regard to the trust. Mr Charman had sole power to remove and appoint trustees. If he required any of the assets held by the trust they were to be transferred to him without question. He also told the trustees that they should regard him as the principle beneficiary during his lifetime and that all income should be held for him alone. At the time of the marriage break up the accumulated income of the trust was 4 million pounds and the trust's assets were valued at 68 million pounds. The husband appealed the trial judge's decision that the assets and income of the trust were in fact the property of the husband and therefore available to be included in the division of property between the spouses. The Court of Appeal dismissed his appeal because the husband had exerted so much control over the assets as to make them his property. Two earlier cases, *In the Marriage of Ashton* (1986)(Note 5) and *In the Marriage of Goodman*(1990) were heard by the Full Court of the Family Court of Australia where it was found that the husband in each case was in full control of the assets of the trust to the extent that the trust property was in fact the husband's own property.

Control of the trust can have far reaching consequences. In 2006 the Federal Court of Australia heard the case of *Australian Securities & Investments Commission v Carey* (No 6) (Note 6) in which it was held that the trustee of a discretionary trust controlled the trust to the extent that the trustee was the alter ego of a beneficiary. In this case the property held in trust was seen to be the property of the beneficiary to the extent that receivers could take control of that property. This case turned on the effective control of the trust property which the court said could then be said to be included in the term "individual property" and therefore subject to the jurisdiction of the appointed receivers. These tests developed in the Australian case of *Carey* and the UK case of *Charman* to identify the settlor's 'control' and whether the trust assets were used as 'resources' do not hinge on intention by settlor or trustee. The courts in question were able to look through the trust to the reality of the consequences beyond the trust mechanism without the need to interpret intention as a central issue.

In the New Zealand case of *Taylor* the issue of intention was raised. This was related to s 60 of the Property Law Act 1952 where it was necessary to show "intent to defraud". However the Court cited the Supreme Court judgment in *Regal Castings Ltd v Lightbody* (Note 7) where the Court considered that the expression "intent to defraud" was "not happily chosen" and that the phrase had been considered as shorthand for intent to hinder, defeat or delay a creditor in the exercise of any right over the property of the debtor. The wording of Section 345(1)(a) of the Property Law Act 2007 reflects Blanchard J's interpretation of the way s 60 had come to be used. The new PLA demands that it be shown the debtor acted with intent to prejudice a creditor. Furthermore, the proof of intent in *Taylor* was arrived at by looking at the consequences of Mrs Taylor's actions. Her actions in transferring property to the Trust put the only valuable asset out of the reach of creditors and continuing to indulge in a lifestyle beyond her means put the Commissioner of Taxation at serious risk of not recovering the amounts owing. It was held that she must have intended this consequence even though it was not actually her wish to cause the commissioner loss at the time the trust was established. The Taylors may have intended to set up a trust at the onset of their dealings and the trust may have been validly constituted, but the subsequent actions of the parties, the deliberate ignorance of Mr Taylor and his wife's machinations were enough to allow the Court to remove the assets from the trust under their powers granted by S60 PLA 1952.

In New Zealand cases, even where there are no statutory provisions to be met, the issue of the parties' intentions at the time when a trust was created has become paramount. In *Official Assignee v Wilson* (Note 8) it was held that "there must be a common intention before a transaction is found to be a sham" meaning that both the settlor and the trustee must share a common intention to create an illusion of a trust before the court will find that the trust is a sham. Despite arguments like that of Jessica Palmer that the intention of a trustee has never been required in the creation of a trust, sham or otherwise, the Court of Appeal followed the line of cases established by *Snook v London & West Riding Investments* (Note 9) and sought subjective intent on the part of the settlor and the trustee as parties to a transaction. This was said to be the determinate feature that determines whether an act or document was intended to be operative according to its tenor or whether it was meant to cloak another, different, transaction.

It appears to me that this is the point at which the focus of the courts in these cases has been misdirected and because of this successful misdirection the misuse of equitable principles to hide assets has become obscured to the point where the courts seem to be interested only in the state of mind of the settlor and the trustee at the time of the formation of the trust. Once it has been accepted that the settlor and the trustee must have been *ad idem* in the purpose of creating some edifice that looked like a trust but in fact was something else entirely, it becomes almost impossible to penetrate the trust unless the circumstances can be said to allow section 357 of the Property Law Act 2007 to be used to set aside a transfer of property where it is detrimental to a creditor. However in most of the cases where the settlor intends to retain control of the trust assets and make use of the trust format as a device to protect those assets the settlor retains such control over the selection of the trustee that it is likely that the original trustee named at the creation of the trust would have been replaced several times, in accordance with the posers given to the settlor by the trust instrument. In those circumstances it is absurd to look for the intention of the trustee. The trustee's intention will simply be to retain the trust as a client and to adhere to the terms of the trust instrument to avoid breaching his fiduciary duty to the trust however it has been set up.

It is possible to see how settlors and the courts might have come to this point, where the certainties present at the time of the trust's formation have come to be more important than the way equitable principles are being used. The trust has come to be referred to as a 'transaction' or a 'business form'. Many trusts are advertised as being capable of operation as a trading business with profits spread among beneficiaries. Sometimes settlors are advised to link a settlor's limited liability company to the trust and utilised as the trustee. The trust has become associated with companies and the language of the company is commonly used when referring to a trust to the extent that looking through the trust mechanism is being likened to piercing the corporate veil. This is evident in *A v A* (Note 10) where Munby J was considering an application to allow trust assets to be made available to meet a claim in the Family Division. Munby J refers to the three divisions of the High Court in England and says that there is "but one set of principles...equally applicable in all three Divisions, determining whether or not it is appropriate to 'pierce the corporate veil'." Those divisions are Chancery, Family and the Queen's Bench. While it is clearly appropriate to talk of piercing the corporate veil when dealing with issues of breach of directors' duties I would contend that it is simply not appropriate to refer to corporate veils in relation to trusts, but if we accept the trust as being some alternative business form with the settlor's transfer of assets seen as a transaction then we are increasingly denying the importance of equitable principles in the operation of a trust. The family trust ceases to be a creature of equity, subject to equity's unique rules and becomes another way for a well informed person to hide assets from legitimate claimants.

In recent years fiduciary duties have been found to exist outside the trust and the more traditionally accepted roles of solicitor, trustee, agent etc. More and more we are importing fiduciary obligations into business transactions. The joint venture is a very good example of this where people bound by contract can find themselves also bound by equity. Sir Anthony Mason said in 1994 'Equity, by its intervention in commerce, has subjected the participants in commercial transactions, where appropriate, to the higher standards of conduct for which it is noted and has exposed the participants to the advantages and detriments of relief in rem'. It is true that there has been an attempt to bring to commerce a higher standard of trust and reliance in some circumstances. However this trend is undermined if we allow the blurring of the distinction between common law and equity to dilute or in any way erode or diminish the principles upon which equity was founded. It is those tenets that made the trust possible and it is not logical to now suspend those principles just because the elements of the three certainties that every law student must learn happen to be present. In some family trusts the form of a trust may be there but the essence of equity is not. In *Official Assignee v Wilson* (Note 11) at paragraphs 42 and 43 Robertson J cites cases where the three certainties of intention, subject matter and object are discussed and he uses the case of *Re Kayford Ltd* (Note 12) as authority to say that a court cannot hold that a trust exists unless in the surrounding circumstances an intention to create a trust has been manifested. This is undoubtedly true. But it is not true that simply because an intention to create a trust exists that entity then becomes impervious to the rigours of equitable principles and may escape unscathed even when the consequences of the trust are that injustice is permitted to prevail.

It is sometimes said that equity has evolved far beyond its historical roots and that, while equity may have been created to thwart injustice, the liberal approach to equity, such as Lord Denning espoused is outdated. Graham Virgo describes today's equity as a 'technical system' administered by the Court of Chancery. Lord Denning's approach has, of course, been criticised heavily. For example in *Dupont Steels Ltd v Sirs* (Note 13) Lord Scarman referred to the purposive, liberal approach to judging as an 'unguided, even if experienced, sage sitting under the spreading oak tree'. Dr J Morris (Note 14) called it 'Palm Tree Justice in the Court of Appeal'. However other notions of equity still prevail such as overriding or correcting the effect of rules and embodying good conscience and natural justice.

Fifteen years ago Sir Anthony Mason expressed the purpose of equity in modern society:

...the ecclesiastical natural law foundations of equity, its concern with standards of conscience, fairness, equality and its protection of relationships of trust and confidence, as well as its discretionary approach to the grant of relief, stand in

marked contrast to the more rigid formulae applied by the common law and equip it better to meet the needs of the type of liberal democratic society which has evolved in the twentieth century. (Note 15)

Despite this excellent description of modern equity it appears from some of the judicial pronouncements we have seen since that these standards of “conscience, fairness, equality” have been forgotten when dealing with family trusts. Instead of striving to maintain equitable standards courts have only looked at the form of the trust instrument and have become so fixated on questions of intention that the wider issues of whether equity has been served are lost. The other thing that strikes me in Sir Anthony Mason’s words is his reference to equity’s “discretionary approach to the grant of relief”. This seems to have been forgotten in cases such as those that follow the *Snook* line of reasoning, that if the trust is to be a sham then common intention between the trustee and the settlor must be there at the beginning. For example in *Shalson v Russo* [2005] Ch 281 it was held that “unless that intention is from the outset shared by the trustee (or later becomes so shared) I fail to see how the settlement can be regarded as a sham.” This reasoning led to the situation where the Official Assignee has to establish a common intention to create a sham trust by the settlor and the trustee at the outset (*Official Assignee v Wilson* (Note 16)). This requirement is tantamount to being insurmountable especially in cases where the settlor retains power to replace trustees who do not comply with his wishes. If the opinion expressed in *A v A & St George* (Note 17) is correct then a genuine trust (one where there is no common intention between the settlor and trustee) can never become a sham, even if a newly appointed trustee is the mere puppet of the settlor. Even if a subsequent trustee is removed for breach of trust the initial trust document remains valid, no matter what effect it may have.

I do not believe it is satisfactory to say that family trusts in New Zealand are often conducted in a manner which might be thought to be unconventional by reference to traditional concepts of trust administration. If family trusts are to be given the protections and flexibility offered by equity such as the imposition of fiduciary duties and the ability to split legal and equitable ownership, then the parties to the trust must also be bound by the higher standards imposed by equity. Sir Anthony Mason has identified the origins of those standards when he talks about the ecclesiastical beginnings of equity. But the obligations demanded by equity go back much further than the influence of the English chancellor on his King’s conscience. The ecclesiastical monopoly over equity held by the king’s chancellor dates from about 1274 when Edward I appointed Robert Burnell to the post of chancellor. Burnell was also Bishop of Bath and Wells from 1275. But the use of equitable principles to overcome the rigidity and shortcomings of the common law dates back to Plato in the 4th Century BC.

Equity is not just a mechanism or ‘business form’ to be used for the advantage of businessmen, no matter how much this might seem to be the case from the attitude of many providers in the family trust industry. Instead equity is the product of thousands of years of philosophical consideration of the law and its relationship to justice.

In Plato’s *Statesman* (or *Politicus*) the concept of equity is clearly articulated as being the conflict between the need to administer uniform law in general terms and the demands of justice in particular cases. Although Plato prefers the certainty of posited law “based on long experience and the wisdom of counsellors” he does leave some room for equity by recommending in *The Laws*, when the Athenian stranger replies to Cleinias, that every law should be issued with a preamble in order to expose the spirit of the written law. This idea was new in Plato’s time and it is important because it offered for the first time the opportunity to distinguish between the spirit and the letter of the law. Nature appealed to the scholars of the 4th century BC as the counterpart of law. At a later stage of philosophical development, most particularly with the advent of Stoicism, the law of nature began to be considered as a practical source of law. The explanation for this would appear to lie in the powerful development of equity in the jurisdiction of the democratic courts of this period.

Aristotle’s contribution to the development of equity is generally accepted as being much greater than that of Plato. In the *Nichomachean Ethics* (Note 18) Aristotle identifies an “annex” to his main scheme of justice which is equity or fairness; the correction of the law in cases where the law is found to be deficient by reason of its universality. This is similar to Plato’s expression of the concept of equity but Aristotle refines his articulation of equity in *Rhetoric* as being “justice that goes beyond the written law”. Aristotle advises that when the written law is against us we should have recourse to “the general law and equity as more in accordance with justice” (Note 19) It is possible for us to see some actual examples of the use of equity in Ancient Greek courts through the translation of some of the speeches by orators of the time. In particular the speeches of Isaios show how the orators who were employed to plead cases made recourse to principles of equity in cases of contract and testamentary disposition. In many cases appeal to equitable principles was necessary because of the archaic nature of some of the laws and the extremely cumbersome legislative process. The Heliastic Courts represented the sovereign people and possessed wide discretionary powers, exercising a residuary justice which arose out of prerogative power. Later it was the monarch’s prerogative power that enabled English Kings to depart from the common law and apply equity to promote justice in particular cases. This appeal by Greek orators to equity when faced with rigid or archaic statutes shows that equity was not merely an abstract conception but was an essential part of Greek justice. (Note 20)

When the Greek city states were absorbed into the Macedonian Empire of Alexander the Great, the philosophers became less involved with politics and looked to the achievement of peace of mind in a changing world. The Stoics emerged as a movement that concentrated on the common humanity that united all people. There was a conception of an ideal world state, in which everyone is a citizen living in harmonious order governed by a rational, universal set of rules – a law of nature binding on everybody. As the Macedonian Empire gave way to the growing power of the Roman Empire, the Romans adopted the Stoic concept of a universal natural law and used it to accommodate the legal systems of other communities into an overarching Roman law. This development in Roman philosophy was partly due to the great influence of Cicero, a Stoic and a prolific and gifted writer.

The writings of Cicero are an important step in the development of equity. Even at a time when rulers were supported by armies rather than philosophy, Cicero shows his sympathy with Plato in his belief that the pursuit of justice is the true aim of the state, with law fulfilling the role of the instrument that is used to achieve the state's aim. Later the English kings used equity to promote justice while exercising a prerogative power arising out of the status of the Crown as the origin of all law and justice. More proof that Cicero was influenced by the teachings of Plato can be seen in *De Legibus* where he says that it is the "crowd's definition of law" that identifies law with written decrees issuing commands and prohibitions. This would seem to be the attitude of judges who follow the *Snook* line of reasoning by taking the attitude that if the form of the trust exists in accordance with trusts law then it cannot be challenged even if it results in a terrible injustice. For Cicero "Justice is one; it binds all human society and is based on one Law, which is right reason applied to command and prohibition." (Note 21) We can see here the same dichotomy that was previously expressed by Plato that exists between the written law and an unwritten standard of justice. There is another aspect of Roman Law that served to promote the development of equity which is the power enjoyed by the praetor, the Roman chief magistrate, to set aside the *jus civile* and to allow equitable defences and remedies. This would appear to be a clear expression of the influence of Greek philosophy. Gradually principles of equity and bona fides became prevalent in Roman jurisprudence. This is an important step as it was through the influence of the Roman Catholic Church that equity came to be the tool of English kings and chancellors.

As the influence of Christianity was felt on the Roman legal system, there was a reciprocal exchange of ideas from Roman law into the organization of the Church. The Christian Fathers lived under this Jurisprudence and it is not surprising that they adopted some ideas from the legal system of their home state and adapted them for use in the organizational structure of the new faith. Eventually the Bishop of Rome became a legislator for the whole of the Christian church just as the Emperors of the Roman Empire had legislated for all the citizens in their empire.

The reciprocal relationship between the Church and the Empire was in no way an immediate development and in fact it took several centuries. The early Christian church suffered persecution at the hands of the Romans until the first quarter of the fourth century when Constantine took the first crucial steps that linked the Church with Rome. There is a story that he had a vision on the eve of a battle after which he instructed his soldiers to put a Christian monogram on their shields. After winning the battle in 312 he continued to acknowledge his old religion based on the cult of the sun but at the same time he began to show favour to Christians by restoring their property that had been denied them while Christianity had been an illegal religion. He went on to make substantial gifts to Churches, in particular the Church of Rome, and by 320 the sun no longer appeared on new coins. Constantine came to see himself as responsible for the well being of the Church and in 324, having defeated an imperial rival who had been persecuting Christians, declared himself to be a Christian. In 325 he called the first ecumenical council at which 300 bishops attended who laid down a Creed. The Christian Church from that time had the protection of Imperial Rome and just as the Emperor ruled a united Roman Empire so too did the Pope of the Church of Rome aspire to ruling an all-embracing church. The laws promulgated by the Church were influenced by the Roman law and political organization, and Roman jurists adapted the ideas of the Christian Fathers, identifying the 'jus naturale' of Roman law with the law of God. The Christian church attained the charisma of Rome and Imperial power.

During the early middle ages in Europe the two main influences on philosophy were Christian doctrine and knowledge of Greek philosophy which was made available through the Latin texts of scholars like Cicero and Seneca. The influence of Cicero on the Roman legal system culminated in the Code written by the Emperor Justinian in the sixth century and its accompanying Digest. This great work was finished just as the barbarians destroyed the Roman Empire in the west. It is to these works that scholars will turn in the great revival of legal philosophy in the twelfth century. In the thirteenth century many of the works of Aristotle were rediscovered and translated once more changing the face of theological tradition.

The story of how Roman law theory of equity came to be incorporated into English law and from there to New Zealand is as follows. The Roman army abandoned England in the 5th century leaving the country vulnerable to the invasion of barbarous Picts and Scots from the North and from the Jutes in the south east. Across Europe, in the wake of the Roman troops who were slowly converging on Rome to defend their homeland, the rule of Rome was displaced by the laws of the hordes that were sweeping across the empire, ripping it to shreds. But even after the fall of the Roman Empire the

influence of Roman jurisprudence did not altogether die out. The invading barbarian rulers who took over many of the Roman dominions compiled books of laws and preserved or imitated as much as they could of Roman culture and institutions. The influence of the Christian church was not entirely swept away during these dark years. Christianity had been established as the official religion of the Roman Empire a century before the fall of the Empire in the west and the Christian churches continued to look to the Church of Rome for guidance. Even though the Empire of Rome had fallen, the influence of the Church of Rome continued to expand. In 582 Pope Gregory sent Augustine and other monks to England where Ethlebert, who was at that time King of Kent, was converted. His wife was already a Christian, her family having been converted by earlier Christian pilgrims. The conversion of much of England followed, very often through the auspices of Christian queens who persuaded their husbands to look kindly on the religion that Saint Augustine of Canterbury and his monks were practicing. Paulinus converted Northumbria and established his see as Bishop of York. The seventh century saw the area of Northumbria flourish as an artistic, cultural and educational centre. Communication and exchanges of ideas between the Church of Rome and the scholars of Northumbria continued.

So it was in this way that the influence of the Greek and Roman philosophers, who saw the role of the state as being a vehicle for the promotion of equity and justice, came to the English kings through Christian teaching and influenced the future development of English Law. From the end of the sixth century onwards Codes of Anglo-Saxon law were compiled and published. They were written in Anglo-Saxon, not Latin and were expressions of the laws of England but those laws show the direct influence of the Church. The Church lent a new sanctity to the King as defender of the faith. The Church laid stress on the motives and intention behind people's actions that modified older notions of liability for wrongdoing. In modern times we say that equity operates on the conscience of the person who has wrongfully taken or kept what was not his beneficially. The Church that had inherited the ideas of the older civilization acted as a bridge to the 'modern' world and so it was inevitable that what the Church passed on would be coloured by the theories of law and equity that had been assimilated from the ancient Roman and Greek world.

Equity that was available for dispensation by the English Kings after William I was in part a product of the influences that shaped legal philosophy throughout Europe for hundreds of years before the Normans came to Britain. The twelfth century brought a renaissance of civilization in Europe and the rediscovery of the Emperor Justinian's *Corpus Juris*, written in the sixth century but lost after the fall of the Roman Empire. Some of the countries of southern Europe were becoming more profitable. People had more leisure time and were becoming more cultured. There was a great desire for knowledge of all sorts, and a need for a form of law that would befit the emerging enlightened world.

In eleventh century England William I began the process of securing his power against the local lords and establish his own royal power incorporating centralized power and a common law. However the laws that he enacted were of less importance than the English laws that were already in existence at the time of his accession. The laws of Edward the Confessor (1042-1066) were confirmed and the Christian religion was preserved. During the reigns of William I, William II and Henry I some laws were enacted but against a background of the customary law which must now adapt to the new situation created by the Conquest.

We are very fortunate in the fact that some of the early records of the Curia Regis were preserved. These are first hand materials showing the development of the Common Law beginning in 1194. The Plea Rolls give us an insight into the working of the Curia Regis in its early days and the cases that were decided there are the earliest authoritative statements of the Common Law. The influence of Henry the II on the law during his 35 year reign (1154-89) can be seen through the work of his clerks; usually men in Holy Orders, who compiled, illustrated and coordinated the information available in the court rolls. From the early years of his reign pleas were heard by itinerant judges who visited the counties and among them was Thomas Becket when he was Henry's Chancellor. In 1178 the King chose five men, two clerics and three laymen to form a permanent King's Court. This was to be a body of men who dispensed justice habitually in a central court. Most important from the point of view of the story of equity is the reserve of justice which remained in the King himself. One of those who were chosen to do this work was lawyer Ranulf de Glanvil who acted as counsellor and adviser to King Henry II. Glanvil was influential in the great strides made in the reform of English law and the founding of the common law by the King and it is said that he invented the action of *Replevin*. His fame comes to us through a book ascribed to his authorship but which is probably the work, at least in part, of his nephew, Hubert Walter who later became Archbishop of Canterbury and chancellor. Glanvil's treatise is a work of fourteen volumes and gives details of the differences between criminal and civil pleas, the pleas that were heard in the King's court and which were heard in other courts. Glanvil gives detailed accounts of the relationship between the king's courts and the ecclesiastical courts.

The earlier King's court was not fettered by rules of precedent and the judges showed they were willing to act on principles of equity. For example the view taken of cases involving mortgage reflected the same attitude that was ultimately adopted by the court of Chancery. This is in stark contrast to the attitude to mortgages that came to be taken by the later Common law courts. As an educated man Glanvil was well versed in Roman law and there are some

instances in the reforms of Henry where it is clear that the imprint of Roman law, with all its attendant influences, is present.

The rules of the King's court were, therefore, evolving at the hands of the ablest men of the day, men who had been educated in the Christian tradition, who used their knowledge of Roman law to rationalize the old customary law, adapting principles of Roman law to the needs of England. The remedies that could be dispensed by the King's court and the writs that could start action were not strictly limited. This court would not hesitate to overrule old customary law in the name of equity. It had a power and efficiency that made it superior to all its rivals. The Common law continued to be developed for some time by men who had been educated by the Catholic Church and whose ideas of law were influenced by Roman law.

However, gradually, and certainly by the reign of Edward I (1272-1307), lawyers ceased to be predominantly those from an ecclesiastical background and a distinct profession began to emerge. These new lawyers were not versed in the equitable elements of Roman law and therefore were not able to use Roman law to supplement the deficiencies of English law. For a while the common law remained flexible enough to continue to dispense equity in the royal courts. While the number of writs available was not fixed, the law could develop to meet new situations. The King's judges were not tied to rules of substantive law or procedure so they could continue to do equity.

Eventually, during the fourteenth century broad principles of law gave way to technical, less rational, adherence to rules. Before that time, however, we can see a new development which would enable the further development of equity. This comes about while Robert Burnell is chancellor to Edward I. In 1265 he emerged as one of Edward's clerks and after traveling in France with Edward, he became Edward's friend. In 1274 Edward made him chancellor and in 1275 he became Bishop of Bath and Wells. During his time as chancellor his position was akin to that of Prime Minister, trusted by the King and powerful in government. He was head of a commission of enquiry into serious corruption in the judiciary after which two out of every three judges from the Court of King's Bench and four out of every five of the judges of the court of common Pleas were dismissed.

Burnell was very active in Chancery and has been described by historians as the first of the great chancellors in English Law. While Chancery was not yet a court, or curia, it was receiving petitions when the King was absent from England. During Burnell's time in office the Chancellor ceased to follow the King whenever he went abroad and instead remained in England to respond to these petitions. It was during this time that Parliament, comprised of the House of Lords and the House of Commons, was established and the law of the church began to grow more and more distinct from the common law. Ecclesiastic courts were in competition with Royal courts and the legal profession had split into the two branches of attorneys and pleaders, who became known as serjeants. In Parliament the judicial discretion enjoyed by the King was vested in the King's Council which was assisted by judges in the enactment of laws. It was possible for cases to be brought before the King's council and frequently the King's response would be to tell the litigant to go to the common law. As yet the king's courts were still able to dispense equity from within the common law. However, as the common law courts became more and more bound by strict rules of procedure, the role of the King and his Chancellor changed to allow them to decide cases in equity for litigants who could have no redress in law.

The common law judges now advised litigants whose claims could not be satisfied in their courts to apply directly to the King and to those officials who were so close to the king that they were able to exercise his prerogative in his name. This responsibility therefore devolved to the Chancellor. The King's duty was to do justice even though the result is to overturn the decision of the common law court. The Chancellor as close adviser to the King and, having a state department of his own, was the obvious choice to act on the King's behalf. The equity that he dispensed was based on conscience in deciding what was morally right and equitable rules sat very comfortably with the canon rules with which the Chancellor, as a religious leader, would be very familiar.

The story of equity from this point is one of conflict between two systems of justice followed by reconciliation, but throughout that history there is a constant theme. The court that dispensed equity did so according to its own rules which remained rooted in the wisdom of Aristotle brought to the courts via the law of Rome through the Christian church. Equity is once again being dispensed by common law courts as it was in the King's Court of Henry II, and the availability of equitable remedies is dependent on the justice of the case. The discretionary nature of those remedies means that if justice will not be served by their application, the judge is not bound to hand down such a remedy. In the case of family trusts that serve no purpose but to act as a repository for assets that justice demands should be distributed to creditors, it is not within the province of equity to assist the settlor. In the Australian tax case of *Raftlands* in the appeal to the High Court it was said that the courts can

"send a clear signal that they will not be deceived into giving effect to unreal transactions, just because such transactions are expressed in documents that, to a greater or lesser extent, observe legal forms and give effect to apparent legal objectives."

As far as finding common intention was concerned Heydon J said (Note 22)

It may be inferred that, so far as the intention of the Settlor, Mrs Sommerville, was relevant, that intention was to be found in the minds of the Heran brothers, the principals of Mr Tobin, who was Mrs Sommerville's employer. So far as the intention of the Trustee, Raftland Pty Ltd, was relevant, the same was true in view of its directors and shareholders. In assessing that intention any evidence by Mr Tobin, the architect of the transactions, could be taken into account, particularly if it were adverse to the interests of his principals. It may also be inferred that the intention of Mr Carey as Trustee of the E & M Unit Trust was the intention of Mr and Mrs Thomas, the controllers of that Trust, and that that intention was the same as that of the Heran brothers.

This is demonstrably a departure from the formalistic approach that is so often a product of the reasoning in *Snook*. The inflexible approach of the New Zealand courts in similar cases, involving allegations of sham is demonstrated by some older and some recent judgments.

In *Paintin and Nottingham* (Note 23) Turner J made it clear that, in New Zealand, "[t]he word 'sham' has no applicability to transactions which are intended to take effect, and do take effect, between the parties thereto according to their tenor". In an earlier decision in *Bateman Television Ltd v Coleridge Finance Co Ltd*, his Honour had remarked, to like effect: (Note 24)

"[T]he occasions on which Courts have set aside the form of a transaction as a 'sham' are confined to cases in which, really doing one thing, the parties have resorted to a form which does not fit the facts in order to deceive some third person, often the revenue authorities, into the belief that they were doing something else."

Later, in *Mills v Dowdall* (Note 25), Richardson J postulated, as a test for sham, whether "the [documents do] not reflect the true agreement between the parties". Later still, in *Marac Life Assurance Ltd v Commissioner of Inland Revenue*, Richardson J emphasised that: (Note 26)

"The true nature of a transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out: not on an assessment of the broad substance of the transaction measured by the results intended and achieved or of the overall economic consequences."

This approach has laid the ground for a narrow operation of the doctrine of sham in New Zealand. So much was reaffirmed in the recent decision of the New Zealand Court of Appeal in *Accent Management Ltd v Commissioner of Inland Revenue*:

"[A]rtificiality and lack of commercial point (other than tax avoidance) are not indicia of sham. And the concepts of sham and tax avoidance are not correlatives. As well, while there are elements of pretence (and certainly concealment) associated with [the] transactions [here at issue], these are explicable on bases other than sham".

The principles of equity are being used as instruments in schemes allowing people to avoid their ordinary financial obligations while this narrow approach, with its emphasis on the evidence of intention to create a sham, prevails in New Zealand. This use is contrary to the very foundations of equity which is to supplement the common law in the pursuit of justice for which equity has been developed since Plato lived in Ancient Greece.

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Notes

Note 1. (1594) 1 Co Rep 113b,121b

Note 2. NZ Guardian Trust Co Ltd advice leaflet.

Note 3. Company Solutions Ltd. information leaflet

Note 4. [2007] EWCA Civ 503

Note 5. 11 Fam LR

Note 6. [2006] FCA 233 A.L.R. 475

Note 7.[2008] NZSC 87 at para [52]

Note 8.[2008] NZCA 122 [41]

- Note 9.[1967] 2 QB 786 CA
- Note 10. [2007] EWHC 99 (Fam)
- Note 11. Supra n 9
- Note 12. [1975] 1 All ER 604
- Note 13. [1980] 1 WLR
- Note 14. 82 LQR 196
- Note 15. Supra n 13
- Note 16. Supra n 14
- Note 17. [2007] EWHC 99 (Fam)
- Note 18. (Book V Ch 10)
- Note 19. Freese translation Rhetoric 1.xv
- Note 20. Vinogradoff, Historical Jurisprudence II (1922) 63 – 69
- Note 21. De Legibus I.42
- Note 22. At para 169
- Note 23. [1971] NZLR 164 at 175
- Note 24. [1969] NZLR 794 at 813
- Note 25. [1983] NZLR 154 at 160
- Note 26. [1986] 1 NZLR 694 at 706



Reform of Rules of Private International Law in Manitoba:

A Comparative Perspective

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Abstract

This paper is based on reform recommendations contained in a 2009 report by the Manitoba Law Reform Commission into the rules of private international law. The reform recommendations relate to (a) whether a flexible exception should be applied in relation to the application of the law of the place of the wrong in torts cases; (b) whether the rules regarding the classification of limitation periods as either substantive or procedural should be codified; and (c) that the rules in relation to the exercise of jurisdiction contained in the Uniform Law Conference of Canada be adopted. In critiquing the Commission's proposals, the law in these areas in other jurisdictions, including the United States, Europe (including the United Kingdom), and Australia are considered and compared.

Keywords: Private international law, Flexible exception, Choice of law in tort, Forum non conveniens

Introduction

In January 2009, the Manitoba Law Reform Commission released its Report on reforms to the rules of private international law (Note 1). In this paper, I explain the suggested reforms, before comparing them with developments in other jurisdictions in relation to similar issues. I then draw conclusions as to the efficacy of the proposed reforms.

1. Choice of Law Rule in Tort

1.1 Current Law

As readers will be aware, a difficult issue can arise when an alleged tort is committed with links to more than one jurisdiction. It must be decided which laws are to apply to resolve the dispute. The choice made can of course have very important consequences for the resolution of the issues, and often the parties in dispute disagree as to which law should apply.

The original approach taken derives from the judgment of Willes J in *Phillips v Eyre* (Note 2) where it was found that in order to found a suit in one jurisdiction (the forum) for a wrong alleged to have been committed elsewhere, the wrong must have been of such a character that it would have been actionable if committed in the forum, and not justifiable by the law of the place where it was done. This rule, which came to be known as the double actionability approach, was adopted in many jurisdictions, (Note 3) including Canada. (Note 4)

Fundamental change occurred in 1994 when the Supreme Court of Canada decided *Tolofson v Jensen; Lucas v Gagnon (Tolofson)*. (Note 5) There the Supreme Court abandoned the *Phillips* approach, favouring a territorial approach where the law of the place of the wrong would be applied, at least in the vast majority of cases. The court favoured such an approach because it was consistent with notions of territorialism whereby a state has jurisdiction within its own land mass, it was consistent with judicial comity, and the rule was certain, easy to apply and predictable, and meet the normal expectations of the parties. (Note 6)

The Court next considered whether any exceptions should be created to the (new) general rule whereby the law of the place of the wrong was applied. (For ease of reference, I will refer to this as the 'flexible exception'). It noted that in other jurisdictions, including the United States and United Kingdom, a proper law approach had been adopted, whereby the law of the jurisdiction which had a closer connection to the parties and the dispute might apply, either as the approach to be taken, or as an exception to the general rule favouring the law of the place of the wrong. The court noted the uncertainty inherent in such an approach and its potential to create delays and anomalies. (Note 7) A majority of the court concluded that an exception should not exist to the general rule favouring the law of the place of the wrong in respect of disputes involving more than one province, (Note 8) but was more open to an exception in respect of disputes involving more than one nation. This was because, in such cases, 'a rigid rule on the international level could give rise to injustice ... I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary'. (Note 9)

In subsequent cases, there are several examples where this exception has been applied in international cases, such that the law of the forum was applied rather than the law of the place of the wrong, a State of the United States. (Note 10) There is one reported case where the exception was applied in an intra-national case, so that forum law applied rather than the law of the place of the wrong. (Note 11)

1.2 Commission's Recommendations and Reasoning

The Manitoba Law Reform Commission recommends legislating for the flexible exception to the application of the law of the place of the wrong described above, and for it to be applicable to both international and interstate torts cases. It agrees that the general rule should favour the law of the place of the wrong. The place of the wrong is the 'country' (although the recommendations apply to intra-Canadian cases also) in which the elements constituting the tort in question occur. The Report provides specific rules to determine this where elements occur in different 'countries'. In respect of a personal injuries action, this is (generally) where the individual was when they sustained the injury; for damage to property it is (generally) where the property was when damaged, and in other cases it is the country in which the most significant element or elements of the tort occurred. There is also recommended a residual exception, even in personal injuries and property cases, to apply the law of another country that is more closely connected with the issues than the indicated country. (Note 12)

Presumably the Commission believes there is a need for further flexibility in departure from the law of the place of the wrong than was expressed in *Tolofson*, or which has actually been demonstrated in cases subsequent to *Tolofson*. The Commission does not point out specific cases where it believes unjustness has occurred as a result of applying the *Tolofson* approach. It does not make express, but perhaps would accept, the traditional argument against a blanket application of the law of the place of the wrong, which is that sometimes that place is purely fortuitous, and/or that place has little or no actual connection with the parties, other than the fact that a dispute involving them occurred there. The facts of well-known cases such as *Chapin v Boys* (Note 13) and *Babcock v Jackson* (Note 14) are prime examples of this difficulty.

1.3 Other Jurisdictions

As has been acknowledged, the United Kingdom legislated to overcome the rules of double actionability. Lord Wilberforce had pointed out in *Boys v Chaplin* that

To fix the liability of two or more persons according to a locality with which they may have no more connection than a temporary, accidental and perhaps unintended presence, may lead to an unjust result. (Note 15)

The *Private International law (Miscellaneous Provisions) Act 1995* (UK) provides in respect of most torts cases (except defamation), the law of the place of the wrong should be applied to resolve the case. This is generally the place in which the events constituting the tort occurred. Particular rules, similar to those recommended above by the Manitoba Law Reform Commission, apply to resolve this question where those events occur in different countries. A flexible exception is provided where, having considered the significance of the factors connecting a tort with the place of the wrong and connections with another country, it is substantially more appropriate for the law of the other country to apply. Relevant factors include matters relating to the parties, to any events constituting the tort, or any of the circumstances or consequences of those events. (Note 16)

A very recent development has been the introduction of the *Rome Convention on the Law Applicable to Non-Contractual Obligations (Rome II)*, Regulation EC 864/2007, which became effective in January 2009. The Convention states the general rule that the law of the country where the damage has occurred applies to resolve an international torts case. (Note 17) Two exceptions to the general rule are provided – Article 4(2) states that where the plaintiff and defendant are resident in the same country, the law of that country should apply. (Note 18) Further, despite the general rule, where another country is manifestly more closely connected with the dispute than the place of the wrong, the law of that country should be applied, (Note 19) in cases where the Convention is applicable.

In Australia, there had been a suggestion from some of the judges in *Breavington v Godleman* that there was a need for a so-called flexible exception to avoid in some cases the law of the place of the wrong on the basis that it might be arbitrary:

To fix the liability of two or more persons according to a locality with which they may have no more connection than a temporary accidental and perhaps unintended presence may lead to an unjust result ... The mechanical application of the (law of the place of the wrong) cannot do justice to the infinite variety of cases in which persons come together in a foreign jurisdiction from different legal backgrounds ... the qualified or flexible application of the law of the place of the wrong copes with the incidents of tort law in the modern age of travel when the place of the accident may be fortuitous ... and the parties may have no substantial connection with the law of that place or with that place at all. (Note 20)

In *John Pfeiffer Pty Limited v Rogerson*, (Note 21) Australia's version of *Tolofson*, the High Court of Australia officially abandoned the double actionability approach in favour of the application of the law of the place of the wrong. However, in doing so, it rejected a flexible exception for reasons similar to those expressed in *Tolofson*:

Adopting any flexible rule or exception to a universal rule would require the closest attention to identifying what criteria are to be used to make the choice of law. Describing the flexible rule in terms which are 'real and substantial' or 'most significant' connection with the jurisdiction will not give sufficient guidance to courts, to parties, or to those like insurers who must order their affairs on the basis of predictions about the future application of the rule. What emerges very clearly from the United States experience in those States where the proper law of the tort theory has been adopted is that it has led to very great uncertainty. That can only increase the cost to parties, insurers and society at large. (Note 22)

Pfeiffer was decided in the context of an inter-state (province) dispute. In a subsequent case involving international aspects, it had been expected that the High Court would also rule out a flexible exception in such cases. However, the joint reasons suggested that

questions that might be caught up in the application of a 'flexible exception' to a choice of law rule fixing upon the law of the place of the wrong in practice may often be subsumed in the issues presented on a stay application, including one based on public policy grounds. (Note 23)

These comments are very similar to the joint reasons of the Supreme Court of Canada in *Tolofson* in doubting the need for a flexible exception in international cases. (Note 24)

Most recently in *Neilson v Overseas Projects Corporation of Victoria Ltd*, (Note 25) the High Court was faced with litigation brought by an Australian resident living in China, who was injured there while staying in accommodation provided by her husband's Australian-registered company. That company was insured for relevant purposes by an Australian insurance company. The plaintiff alleged that the premises were unsafe. Clearly the place of the alleged wrong was China, and applying the rules set out above, the law of China should have been applied to resolve the dispute. However, the court ended up applying Australian law to resolve the dispute, by enlivening the controversial *renvoi* doctrine, (Note 26) and by applying a controversial presumption that, in the absence of evidence, foreign law was the same as local law. This case might be seen as a 'red flag' to suggest that some kind of flexible exception is required, as in fact one of the judges acknowledged. (Note 27) One leading commentator notes the case as an example of 'desperate measures judges are prepared to take to get to the *lex fori*'. (Note 28)

In the United States, the *First Restatement* (Note 29) called for the strict application of the law of the place of the wrong. However, subsequently there was the important decision of the New York Court of Appeals in *Babcock v Jackson*. (Note 30). That case involved an action by one New York resident against another in relation to an accident that occurred in Ontario. The Court applied New York law as the jurisdiction 'which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation'. (Note 31)

This decision influenced the *Second Restatement*, which embraces the proper law of the tort, specifying a range of factors to be considered in deciding which law to be applied in such cases. These include the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation and place of the business of the parties, and the place where the relationship, if any, between the parties is centred. (Note 32) This proper law approach is the dominant theory applied in the United States, with a small number of states continuing to apply the law of the place of the wrong without exception. (Note 33)

1.4 Commentary on Commission's Proposal

I support the Commission's proposal. The experience in other jurisdictions, borne out by the facts of cases such as *Chaplin*, *Babcock* and *Neilson*, is that sometimes the place where the wrong occurs is fortuitous. Anomalous results could arise if courts were forced to routinely apply the law of that place, without exception. Some flexibility is required. And surely this issue of the place of the wrong being 'fortuitous' is equally applicable to inter-provincial cases as international cases.

The principle of territoriality, that a state has the power to regulate activities and events that occur within its boundaries, is well established and recognised. As has been noted, it accords with the expectations of most individuals. Its essential soundness should be reflected in a starting position that the law of the place of the wrong is the applicable law. This is the approach taken by the United Kingdom legislation and Rome II. This approach is favoured over the American 'centre of gravity' approach, which counts the place of the wrong as just one of the factors to be considered, and accorded no superiority. In my view, the starting point should be that the law of the place of the wrong is the applicable law. In my view, and accepting that reasonable minds may well differ, this starting point provides the appropriate balance between certainty and the need for some flexibility to do justice in a particular case. This rule can be displaced if various factors suggest a closer connection with another jurisdiction.

It is suggested that the Commission might also have considered a specific situation in *Rome II*, where the residence of the plaintiff and defendant is common, and is not the place of the wrong. In such cases, *Rome II* directs that the law of the common domicile should apply, based on a notion that the place of the wrong has little or no interest in the outcome of the case, since it does not affect its residents or (presumably) its insurance companies. This was also the situation in the Australian case *Neilson*, where both the plaintiff and defendant were resident in Australia, arguing over events that occurred in China. It was said there that, as demonstrated by its choice of law rules, China had little interest in the outcome of the litigation. It is suggested then that, if there is to be some statutory reform in this area, that provision should be made for the specific situation of a common domicile between plaintiff and defendant different from the place of the wrong.

I note that no exception is provided to the application of the law of the place of the wrong based on notions of 'public policy'. I support this non-inclusion. There is a danger that, if a public policy exception were allowed, it would simply mask a preference for forum law. This point is acknowledged by Jean-Gabriel Castel QC

Of course, there is always the possibility of resorting to public policy to avoid the application of the foreign *lex loci delicti*. Thus, where the forum has a serious relationship to the issues or the parties, it could apply its own law and in so doing base its choice on considerations of public policy as, for instance, if the *lex loci delicti* gave little or no recovery at all. (Note 34)

In my view, it should not be enough to discard the application of the law of the place of the wrong that it doesn't provide a remedy that the forum court might think should exist. The consequence of a strong application of territorialism sometimes does mean that the result is different to what would have occurred had forum law been applied. This is not a reason for refusing to apply the law of the place of the wrong. As the joint reasons in *Tolofson* concluded:

To permit the court of the forum to impose its views over those of the legislature endowed with power to determine the consequences of wrongs that take place within its jurisdiction would invite the forum shopping that is to be avoided if we are to attain the consistency of result an effective system of conflict of laws should seek to foster. (Note 35)

Perhaps there is a very limited need for a public policy exception, but I believe it must be tightly constrained lest it be used as a mask to give preference to forum law. (Note 36)

2. Limitation Periods

2.1 Current Law

Traditionally, limitation periods were treated differently according to whether they extinguished the right on which the claim was based, or merely provided that no remedy existed for the infringement of the right. The former were classified as substantive, with the latter being classified as procedural. This is important because it is accepted that matters of substance are governed by the law of the cause (here, at least primarily, the law of the place of the wrong), while matters of procedure were a matter for the forum. (Note 37)

In *Tolofson*, this distinction was abandoned by the Supreme Court. It spoke of the differentiation between 'what is part of a court's machinery and what is irrevocably linked to the product', and considered the reason for the distinction, which was primarily about convenience and efficiency. The court did not find a distinction between right and remedy convincing. As a result, the relevant limitation period to be applied was the one provided for by the law of the cause, primarily the law of the place of the wrong. (Note 38)

The *Tolofson* approach to limitation periods has been followed by courts in both interprovincial and international torts cases. However, legislative attempts have been made in some provinces to change the rules, (Note 39) and in one recent decision, *Vogler v Svendroi*, the Nova Scotia Court of Appeal characterised provisions determining when an action is deemed to have commenced for statute of limitations purposes as procedural, to be governed by forum law rather than the law of the cause (Wyoming). (Note 40)

2.2 Commission's Recommendations and Reasoning

The Commission agrees with the approach taken in *Tolofson*, and suggests it should be codified, as has occurred in Ontario. (Note 41)

2.3 Other Jurisdictions

There has been real difference of opinion in the United Kingdom regarding where the line is to be drawn between matters of substance and matters of procedure. One way in which this can be shown is by considering the way in which the law is expressed by the one of the leading texts. While Dicey in the first edition states that English lawyers 'give the widest possible extension to the meaning of the term 'procedure'', (Note 42) by the fourteenth edition the view is that 'the practice of giving a broad scope to the classification of a matter as procedural has fallen into disfavour because of the tendency to frustrate the purposes of choice of law rules'. (Note 43) Legislation was introduced in 1985 to declare

that foreign statutes of limitation should be applied as substantive law. (Note 44) The 1995 Act did not change the previous position regarding the distinction between substance and procedure. (Note 45)

The *Rome Convention on the Law Applicable to Non-Contractual Obligations (Rome II)*, effective from January 2009, provides in Article 15(h) that the issue of the manner in which an obligation may be extinguished, including the commission, interruption and suspension of limitation periods, are matters for the law of the cause (primarily the law of the place of the wrong, as discussed above). This rule is contrary to the finding of the judge in *Vogler* that a rule regarding commencement of a limitation period is a question of procedure.

A slim majority of the High Court of Australia in *McKain v R W Millar and Co (SA) Ltd* (Note 46) applied the traditional distinction between a statute of limitations that merely barred a remedy (procedural) and one that extinguished the right (substantive). In dissent, Mason CJ pointed out that the view of the majority would frustrate the purpose of choice of law rules, encourage forum shopping, and reflected a doctrine developed when international judicial comity was not valued. It was sensible for courts to apply their own rules of procedure from an efficiency perspective. (Note 47) Deane J in dissent found the distinction between right and remedy confounded good sense and reality. (Note 48)

These dissenting views were accepted by the High Court in *John Pfeiffer Pty Ltd v Rogerson*, (Note 49) where the court found that the plaintiff 'cannot ask that the courts of the forum adopt procedures ... of a kind which their constituting statutes do not contemplate'. (Note 50). States also enacted legislation to overcome the effect of *McKain*, at least in interstate tort cases. (Note 51)

In the United States, the *Restatement (Second)* (applied by most states) provides a general rule that, unless exceptional circumstances exist making such a result unreasonable, the forum should apply its own statute of limitations barring the claim, and its own statute of limitations permitting the claim, unless (a) maintenance of the claim would serve no substantial interest of the forum, and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence. (Note 52)

An example of the general application of the *Restatement* position occurred in *Franchise Tax Board California v Hyatt*, (Note 53) where the parties were litigating over wrongs allegedly committed primarily in California. The action was commenced in Nevada, and the United States Supreme Court found the Nevada court was correct in applying its limitation rules, rather than those of California (including state sovereign immunity rules). An example of the application of the exception being applied is *Huynh v Chase Manhattan Bank*, (Note 54) where a California court refused to apply Californian limitation periods because of the lack of connection between the claims and California. The Supreme Court of New Mexico recently applied a New Mexico limitation period in respect of a claim based on an accident in that jurisdiction, although the limitation period related to claims against New Mexico government entities, and this claim was against an Arizona state entity. Arizona law had applied for a different limitation period in respect of claims against Arizona state entities, but this law was not applied to the claim. (Note 55)

2.4 Commentary on Commission's Proposal

It is submitted that the Commission's proposal is a good one. The approach of the Supreme Court of Canada in *Tolofson* was correct, with respect, and should be enshrined in legislation. The concept of what is procedural should, in accordance with clear trends in the United Kingdom, Europe generally, and Australia, be confined to the machinery of proceedings, due to efficiency considerations. By doing so, we minimise the options for forum shopping, and provide for maximum effect to be given to the law of the cause, which is as it should be. The approach of the *Restatement (Second)*, with the continuing primacy it gives to the law of the forum in limitations matters, is seen as out of step with developments elsewhere and is in need of reform.

3. Jurisdiction

3.1 Current Position

Traditionally, the bases of a court's jurisdiction over a particular defendant have included presence within the jurisdiction, and valid service outside the jurisdiction. In relation to the latter, the Supreme Court of Canada has declared the need to establish a 'real and substantial connection' between the court and the action. (Note 56) It did not define what was meant by this concept. In subsequent cases, several factors have been indicated as relevant in determining whether the connection test is satisfied. (Note 57) However, there is doubt over several matters; including whether or not the real and substantial connection approach is confined to interprovincial matters or applicable also to international matters, (Note 58) whether the traditional grounds of jurisdiction are separate from or subsumed into the real and substantial connection test, (Note 59) and whether the test unacceptably mixes up factors more relevant to a *forum non conveniens* application into a question of whether a court has jurisdiction or not. (Note 60) Relevant factors in relation to a *forum non conveniens* application have been set out by the Court. (Note 61) The Supreme Court of Canada has said (Note 62) that the Canadian doctrine of *forum non conveniens* is consistent with the British common law position espoused in *Spiliada Maritime Corp v Cansulex Ltd*. (Note 63)

3.2 Commission's Recommendations and Reasoning

The Commission recommends the adoption of the Uniform Law Conference of Canada's *Uniform Court Jurisdiction and Proceedings Transfer Act*, with a slight amendment. (Note 64) The Act firstly clarifies the bases upon which a court generally (Note 65) has territorial competence, to include (as separate and discrete heads) on the one hand by agreement (or other kind of submission) or residence, (Note 66) and on the other hand that there is a real and substantial connection between the province and the facts on which the proceeding is based. (Note 67) This provision removes the doubt expressed above as to whether the real and substantial connection is an all-consuming test, or a stand alone alternative test. Under the Act, it is clear the latter interpretation is correct. (Note 68)

Section 10 is an important section clarifying the meaning of 'real and substantial connection'. It provides that, without limiting other cases in which such a connection might be shown, a connection will be presumed if:

- (a) the case involves rights in immovable or movable property in the jurisdiction
- (b) it concerns the administration of an estate of a deceased person in relation to immovable property of the deceased person in the jurisdiction, or movable property of a deceased who was ordinarily resident in the jurisdiction at the time of death;
- (c) is brought in relation to a contract in relation to immovable or movable property in the jurisdiction, or movable property of a deceased person who was ordinarily resident in the jurisdiction at the time of death;
- (d) is brought against a trustee in relation to a trust with links to the jurisdiction (eg trust property in the jurisdiction is the subject of the claim, trustee is ordinarily resident in the jurisdiction, trust is primarily administered in the jurisdiction etc);
- (e) concerns contractual obligations, and they were to be substantially performed in the jurisdiction, or the contract contains a choice of law clause favouring the jurisdiction, or the contract relates to the purchase of property/services for private use, and resulted in solicitation for business in that jurisdiction by the provider;
- (f) contains restitutionary obligations that arose primarily in the jurisdiction;
- (g) concerns a tort committed in the jurisdiction;
- (h) concerns a business carried on in the jurisdiction;
- (i) is a claim for an injunction ordering a party to do or refrain from doing anything in the jurisdiction, or in relation to property in the jurisdiction;
- (j) is for the determination of personal status or capacity of a person who is ordinarily resident in the jurisdiction;
- (k) is for enforcement of a judgment of a court made in or outside the jurisdiction or an arbitral award made in or outside the jurisdiction; or
- (l) is for the recovery of taxes or other indebtedness and brought by the Crown of the jurisdiction or by a local authority of the jurisdiction.

It is clear in the explanatory comments that the above are presumptions only, and the defendant still has the right to show that on the particular facts, the connection is not 'real and substantial' despite the above list. (Note 69) On the other side, a plaintiff whose claim does not fit within any of the situations above can still argue that a real and substantial connection exists.

Section 11 provides the rules regarding forum non conveniens. It states that after considering the interests of the parties to the proceeding and the ends of justice, a court may decline to exercise jurisdiction on the ground that a court of another state (defined to include another province or another country) is a more appropriate forum in which to hear the proceeding. In deciding this question, relevant factors include:

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses in litigating in the court or in any alternative forum;
- (b) the law to be applied to issues in the proceeding;
- (c) the desirability of avoiding multiplicity of legal proceedings;
- (d) the desirability of avoiding conflicting decisions in different courts;
- (e) the enforcement of an eventual judgment; and
- (f) the fair and efficient working of the Canadian legal system as a whole.

The explanatory comments state the provision is designed to reflect the existing common law, including the factors that have been taken into account by courts in assessing such applications.

3.3 Other Jurisdictions

European Council Regulation (EC) No 44/2001 deals with jurisdiction issues. (Article 70) Article 23 provides for cases of exclusive jurisdiction, in cases involving immovable property within a jurisdiction, issues surrounding companies which have their seat in the jurisdiction, proceedings concerning the validity of entries in public registers within the jurisdiction, proceedings concerning the registration or validity of intellectual property rights applied for in a jurisdiction, or the jurisdiction in which enforcement of a judgment is sought. In such cases, courts of that jurisdiction have exclusive jurisdiction. Apart from these specific cases, the general rule is set out in Article 2. It provides that a person domiciled in a Member State shall be sued in the courts of that Member State.

Exceptional rules are provided for in relation to contractual matters, where the jurisdiction in which performance is/was to occur can hear the matter. (Note 71) In matters of tort, courts of the place where the harmful event occurred or may occur have jurisdiction, and in cases involving trusts, courts of the place where the trust is domiciled have jurisdiction. (Note 72) Other special rules apply to insurance, consumer contracts, and contracts of employment. (Note 73) The Regulation does not deal with the *forum non conveniens* doctrine; it merely provides that where matters involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the first one seised should stay its proceedings. (Note 74) Otherwise, the law of member states will be applied in relation to *forum non conveniens* type applications.

As I have indicated, the British approach is to grant a stay where ‘the court is satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice’. The more appropriate forum is the one with which the action has the most real and substantial connection. Relevant factors include the availability of witnesses, the law governing the relevant transaction and the places where the parties live or carry on business. (Note 75)

In Australia, originally the basis of a court’s jurisdiction was the defendant’s presence within the jurisdiction or submission. In relation to service outside of the jurisdiction but within Australia, a writ issued by either the High Court or Federal Court of Australia can be served on any defendant anywhere in Australia. (Note 76) The same result is achieved in respect of proceedings commenced in State and Territory courts by the *Service and Execution of Process Act* 1992 (Cth). That legislation does not require any territorial connection between the issuing state and the parties or subject matter.

Where proceedings were commenced in a State Supreme Court, application can be made to transfer proceedings to another Supreme Court pursuant to cross-vesting legislation. (Note 77) Similarly where proceedings were commenced in another court, application can be made for a stay of proceedings on the ground that another court is more appropriate to hear the matter. (Note 78) The court has said that in such cases the interests of justice are paramount, and have adopted an approach that is similar to that of the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd.* (Note 79) There is no presumption in favour of the plaintiff’s choice of court.

In relation to service outside of Australia, leave of the issuing court will be required. Generally, each of the grounds (Note 80) on which service outside of Australia will be authorised require some connection between the jurisdiction and the cause of action. A connection can be established in relation to the performance of obligations in, or other issues relating to, a contract with some connection to the jurisdiction, where a tort is committed within the jurisdiction, breach of a federal statute (and in some cases a state statute), issues relating to land within the jurisdiction, where the remedy sought is an injunction to restrain performance of an act within the jurisdiction, for the administration of an estate of a person within the jurisdiction, proceedings for the execution of trusts governed by the law of the jurisdiction, as a member of a corporation formed or carrying on part of its affairs in the jurisdiction, relate to arbitration brought within the jurisdiction. Submission and residence are also recognised, as are cases where the defendant is a necessary and proper party to an action against a person served within the jurisdiction.

In these cases, however, a different approach has been taken when the defendant seeks a stay of proceedings on *forum non conveniens* grounds. The High Court has stated that in such cases it will not consider whether there is a more appropriate forum to hear the matter. Rather, it is up to the defendant in such a case to prove that the forum chosen by the plaintiff is ‘clearly inappropriate’. (Note 81) In effect, then, there is a strong presumption in favour of the plaintiff’s choice of forum.

While each jurisdiction in the United States has rules in relation to the jurisdiction of its courts, these rules must conform with the United States *Constitution*, in particular the due process clause. The Supreme Court has interpreted this clause to mean that there must be minimum contacts between a state and the individual, in order that the state has jurisdiction over a matter in which that individual is concerned. (Note 82) While presence in the jurisdiction would be sufficient, it is not necessary in order for minimum contacts to be established. Jurisdiction over the defendant must not offend fair play and substantive justice. The mere fact that an individual has contracted with an out of state party is not sufficient; the details of the contract including performance must be evaluated. (Note 83) There is a difference between

a defendant who deliberately chooses to do business in the jurisdiction (in which jurisdiction will likely be established), and a defendant whose products might simply have been used in products sold in the jurisdiction (not sufficient of itself to attract jurisdiction). (Note 84)

Forum non conveniens applications will be dealt with on a similar basis to that described elsewhere. The relevant issue is whether another forum is more convenient, by considering where the evidence is, availability of compulsory process for the attendance of the unwilling, the cost of obtaining attendance of willing witnesses, and all other practical issues that would make trial of the case easy, expeditious and inexpensive, whether any judgment obtained would be enforceable, and relative advantages and obstacles to a fair trial. The public interest is also relevant. (Note 85) There is a strong presumption in favour of the plaintiff's choice of forum. (Note 86)

3.4 Commentary on Commission's Proposal

There is much to commend the Commission's proposal to adopt the Uniform Law Conference of Canada approach. As discussed above, much confusion and criticism continues to surround the 'real and substantial connection' test, so it is useful to provide a list of specific examples where such a connection will be presumed. This is similar to the European approach discussed above. Such an approach should increase certainty in the application of the test, and allow clients to be advised with a higher degree of accuracy than currently is the case in relation to jurisdiction questions. The approach balances some certainty with flexibility, by not making the examples given exhaustive, and by allowing either the plaintiff to show that despite the situation not being specifically mentioned, such connection does exist, or the defendant to show that, despite the situation not being specifically mentioned, such connection does not exist. The proposals will clear up some existing ambiguity in this area, by clarifying that the approach is to be adopted to both interprovincial and international matters, and that the real and substantial connection test is not all-encompassing.

I am not in favour of the aspect of the European approach that favours adoption of the domicile of the defendant as a default jurisdictional rule. It may be that other rules were considered 'too unbalanced, and not sufficiently concerned with the legitimate interests of the defendant'. (Note 87) However, the European approach risks being found not to be sufficiently concerned with the legitimate interests of the plaintiff. Why should the plaintiff be forced to conduct suit where the defendant happens to be domiciled, particularly where the evidence or witnesses are elsewhere, the defendant's domicile is a significant distance from the plaintiff's domicile etc? Accepting that no position in this regard is perfect, in my view, this issue is best resolved with the presumptions with flexibility approach advocated in the Uniform Law Conference of Canada approach, together with choice of law rules favouring the law of the place of the wrong (in tort cases), a broad conception of what is substantive, and continued application of the *forum non conveniens* principle.

Further, in mirroring the existing common law rules regarding *forum non conveniens*, the suggested approach is commendable. Such an approach is well known and has worked effectively. It is not suggested that Manitoba take the Australian approach to *forum non conveniens* applications, which has been criticised for its parochial nature. (Note 88) However, perhaps Canada should consider a regime like the Australian *Service and Execution of Process Act*, whereby the need for a connection is dispensed with where there is a question of jurisdiction in relation to a defendant present in Canada but not in the jurisdiction in which the matter is to be heard. Some of the American cases mentioned can provide further guidance in future as to factors relevant to the decision as to whether a 'real and substantial connection' exists. The courts or the legislators should also clarify whether the list of factors given in *Muscutt* should be used in future.

4. Conclusion

The Commission's proposals should generally be supported. The suggested introduction of a flexible exception for the choice of law rule in tort is sensible, and the need for it borne out by the cases. Specific provision could be made for situations where the plaintiff and defendant live in the same jurisdiction, and that jurisdiction is not the place of the wrong. I support the Commission's re-assertion of *Tolofson* in relation to the substantive nature of limitations periods. The Commission's adoption of the Uniform Law Conference of Canada position on jurisdiction questions is also sound. It clears up some areas of ambiguity and disagreement. I have suggested some issues that might require some further clarification, and that (subject to constitutional constraints), federal legislative action might be sensible in cases involving jurisdiction questions facing a court where the defendant is in Canada but in a different province in order to streamline process.

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Notes

Note 1. *Private International Law*, Report 119 (January 2009).

Note 2. (1870) 6 LR QB 1, 28-29.

Note 3. In the United Kingdom – *Chaplin v Boys* [1971] AC 356; in Australia – *McKain v R W Miller and Co (SA) Pty Ltd* (1991) 174 CLR 1; and in New Zealand – *Baxter v RMC Group PLC* [2003] 1 NZLR 304.

Note 4. *McLean v Pettigrew* [1945] S.C.R. 62.

Note 5. [1994] 3 S.C.R. 1022 (the decision was unanimous, subject to a reservation by Sopinka and Major JJ of possible exceptions to the general rule favouring the law of the place of the wrong in some cases).

Note 6. 1049-1052.

Note 7. 1055-1062

Note 8. La Forest, Gonthier, Cory, McLachlin and Iacobucci JJ, Sopinka and Major JJ dissenting on this point.

Note 9. 1054 (La Forest J, with whom Gonthier Cory McLachlin and Iacobucci JJ agreed); McEvoy, J P (1995) 'Choice of Law in Torts: The New Rule' 44 *University of New Brunswick Law Journal* 211

Note 10. *Hanlan v Sernesky* (1998) 38 O.R. (3d) 479 (C.A), where the dispute involved an accident in Minnesota, but both parties lived in Ontario, the relevant insurance policy was issued in Ontario, there was no real connection with Minnesota other than the fact the accident occurred there (the court also took into account the claim was not recognised by the law of Minnesota); *Wong v Wei* (1999) 45 C.C.L.T. (2d) 105 (British Columbia Supreme Court), involving a claim between two British Columbia residents over an accident that occurred in California, again there was little to connect the parties to California other than the fact the accident occurred there); and *Lebert v Skinner Estate* (2001) 53 O.R. (3d) 559 (S.C.J.). Examples where the exception was argued but not applied in international cases include *Wong v Lee* (2002) 58 O.R. (3d) 398, *Britton v O'Callaghan* (2002) 62 O.R. (3d) 95 (C.A) and *Somers v Fournier* (2002) 60 O.R. (3d) 225 (C.A) and in domestic cases *Brown v Kerr-McDonald* (2002) 326 A.R. 267 (Q.B) and *Soriano v Palacios* (2005) 225 D.L.R. (4th) 359 (Ont C.A).

Note 11. *Lau v Li* (2001) 53 O.R.(3d) 727 (S.C.J).

Note 12. Renvoi is specifically excluded. No exception applies in respect of defamation actions, unlike the legislation on which the Commission's recommendations are based, the *Private International Law (Miscellaneous Provisions) Act* 1995 (UK). Reforms to the lex loci delicti rule were also recommended by Walsh, C (1988) 'A Stranger in the Promised Land?: The Non-Resident Accident Victim and the Quebec No-Fault Plan' 37 *University of New Brunswick Law Journal* 173.

Note 13. [1971] AC 356.

Note 14. 191 NE (2d) 279 (1963).

Note 15. [1971] AC 356.

Note 16. S12(1) and (2).

Note 17. Article 4(1). It specifically states that the law of the place where the events giving rise to the damage, or where the indirect consequences occur, is not determinative.

Note 18. This is similar to the provisions of the *Hague Convention on Traffic Accidents*, which provides for an exception to the application of the law of the place of the wrong where all parties involved in the accident are from the forum.

Note 19. Article 4(3).

Note 20. (1988) 169 CLR 41, 76 (Mason CJ) and 162 (Toohey J).

Note 21. (2000) 203 CLR 503.

Note 22. 538 (Gleeson CJ Gaudron McHugh Gummow and Hayne JJ). This decision has been criticised; see for example Gray, A (2004) 'Flexibility in Conflict of Laws in Multistate Tort Cases: The Way Forward in Australia' 23 *University of Queensland Law Journal* 435; James, E (2001) '*John Pfeiffer Pty Ltd v Rogerson*: The Certainty of Federal Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications' 23 *Sydney Law Review* 145.

Note 23. *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, 519 (Gleeson CJ Gaudron McHugh Gummow and Hayne JJ); Kirby J specifically left open the question of a flexible exception in international tort cases (535).

Note 24. 1054.

Note 25. (2005) 223 CLR 331.

Note 26. Gleeson CJ (341-342), Gummow and Hayne JJ (364), and Kirby and Heydon JJ (389, 420) favoured a 'double renvoi' approach, Callinan J a single renvoi approach (414). McHugh J dissented (349). The case has attracted criticism: see for example Mortensen, R (2006) 'Troublesome and Obscure: The Renewal of Renvoi in Australia' 2(1) *Journal of Private International Law* 1; Gray, A (2007) 'The Rise of Renvoi in Australia: Creating the Theoretical Framework' 30(1) *University of New South Wales Law Journal* 103.

Note 27. Callinan J ‘no matter which solution is adopted by Australian courts, the result will not be entirely satisfactory intellectually and in logic. This does not stem wholly however from the unwillingness of the Court to recognise in Zhang what in hindsight might have resolved this case, a flexible exception ... but from the fact that absolute rules however apparently certain and generally desirable they may be, almost always in time come to encounter a hard and unforeseen case’ (413).

Note 28. Mortensen, R (2006) ‘Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches’ 55 *International and Comparative Law Quarterly* 839, 873.

Note 29. American Law Institute *Restatement First, Conflict of Laws* (1934).

Note 30. 12 NY 2d 477 (1962).

Note 31. 481; in that case, New York was where the driver and passenger lived, where the car was kept, licensed and insured, and the place where the weekend journey was to begin and end.

Note 32. American Law Institute *Restatement Second, Conflict of Laws* (1971) s145(2).

Note 33. Symeonides, S (2006) ‘Choice of Law in the American Courts in 2006: Twentieth Annual Survey’ 54 *American Journal of Comparative Law* 697, 713.

Note 34: (1995) ‘Back to the Future: Is the New Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?’ 33 *Osgoode Hall Law Journal* 35, 68.

Note 35. 1073.

Note 36. This problem was alluded to in Mortensen, R (2006) ‘Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches’ 55 *International and Comparative Law Quarterly* 839, 868-870; this exception might be limited to what Cardozo J referred to as laws that ‘shock our sense of justice or menace the public welfare, or violates some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal’: *Loucks v Standard Oil Co of New York* 120 NE 198, 202 (1918).

Note 37. Ailes, E (1941) ‘Substance and Procedure in the Conflict of Laws’ 39 *Michigan Law Review* 392.

Note 38. 1067-1073; Walker, J (1995) ‘Choice of Law in Tort: The Supreme Court of Canada Enters the Fray’ 111 *Law Quarterly Review* 397, 398.

Note 39. For example, in Newfoundland and Labrador the Limitation of Actions legislation declares that it applies to actions in the respective provinces to the exclusion of the limitation periods of other jurisdictions: S.N.L 1995, c. L-16.1. The rule in Saskatchewan is similar (S.S 2004, c. L-16.1); and apparently in Alberta (R.S.A 2000, c L-12), though that provision has been interpreted not to override the limitation period specified by the law of the place of the wrong: *Castillo v Castillo* (2004) 376 A.R 224 (S.C.C); Janet Walker (2006) ‘*Castillo v Castillo*: Closing the Barn Door’ 43 *Canadian Business Law Journal* 487.

Note 40. *Vogler v Szendroi* [2008] NSCA 18; on the basis that the question of limitations only arose due to the commencement of a claim in accord with the rules of the forum (however, with respect, all conflicts issues arise only because a claim is commenced in accordance with forum rules – this reasoning could be used to justify applying forum law to other matters such as liability and remedies).

Note 41. S.O 2002 c.24 Sch. B, s23.

Note 42. *Conflict of Laws* (1896) p712.

Note 43. *Dicey, Morris and Collins on the Conflict of Laws* (2006) 14th ed, p178.

Note 44. *Foreign Limitation Periods Act* 1985 (UK) s1(1)(a); *Prescription and Limitation (Scotland) Act* 1984 (UK) s23A. Notwithstanding, the Court of Sessions has suggested that limitation periods could be procedural: *Milne v Moores* [1999] Scot CS 305; cf *Barks v CGU Insurance Plc* [2004] Scot CS 241.

Note 45. *Harding v Wealands* [2006] 3 WLR 83; C Dougherty (2007) ‘Private International Law: *Harding v Wealands*’ 56 *International and Comparative Law Quarterly* 443.

Note 46. (1991) 174 CLR 1 (Brennan Dawson Toohey and McHugh JJ), Mason CJ Deane and Gaudron JJ dissenting.

Note 47. 25. Cook also saw the distinction in terms of efficiency: Cook, W W (1933) ‘Substance and Procedure in the Conflict of Laws’ 42 *Yale Law Journal* 323, 343-344. and see Beckett, W E (1934) ‘The Question of Classification in Private International Law’ 15 *British Yearbook of International Law* 46, 71; and Carruthers, J (2004) ‘Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages’ 53 *International and Comparative Law Quarterly* 691, 710; Panagopoulos, G (2005) ‘Substance and Procedure in Private International Law’ 1 *Journal of Private International Law* 69.

Note 48. 50.

Note 49. (2000) 203 CLR 503.

Note 50. 543; see Kirby J to like effect 554; see Panagopoulos, G (2005) 'Substance and Procedure in Private International Law' 1 *Journal of Private International Law* 69; Gray, A (2008) 'Loss Distribution Issues in Multinational Tort Claims: Giving Substance to Substance' 4(2) *Journal of Private International Law* 279.

Note 51. See, for example, the *Choice of Law (Limitation Periods) Act* 1993 (NSW) and comparable legislation in other States and Territories.

Note 52. In *Cole v Milet* (1998) 133 F 2d 433, the Court of Appeals (Sixth Circuit) applied the forum's limitation period to a claim resulting from an agreement to which the parties had agreed Californian law would apply. Notwithstanding this, the court applied the limitation period of the forum (Ohio). The distinction between statutes that bar the remedy and those that extinguish the right is maintained in some states – see for example *Gomez v ITT Educational Services Inc* 71 SW 3d 542 (Arkansas, 2002).

Note 53. 538 US 488 (2003).

Note 54. 465 F.3d 992 (9th Cir, 2006).

Note 55. *Sam v Sam* 134 P. 3d 761 (N.M 2006).

Note 56. *Morguard v De Savoye* (1990) 76 D.L.R. (4th) 256 (S.C.C).

Note 57. The connection between the forum and the plaintiff's claim, the connection between the forum and the defendant, unfairness to the defendant in assuming jurisdiction, unfairness to the plaintiff in not assuming jurisdiction, the involvement of other parties to the suit, the court's willingness to recognise and enforce an extra-provincial judgment rendered on the same jurisdictional basis, whether the case is interprovincial or international in nature, and comity and standards, of jurisdiction, recognition and enforcement prevailing elsewhere: *Muscutt v Courcelles* (2002) 213 DLR (4th) 577 (Ontario Court of Appeal).

Note 58. In *Spar Aerospace Ltd v American Mobile Satellite Corp* [2002] 4 S.C.R 205, a unanimous Supreme Court appeared to confine the real and substantial connection test to interprovincial matters only (231-233). This was subject to criticism: see for example Black, V and Walker, J (2003) 'The Deconstitutionalization of Canadian Private International Law' 21 *Supreme Court Law Review* 181, 188-192, Pitel, S and Dusten, C (2006) 'Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction' 85 *Canadian Bar Review* 61. In *Beals v Saldanha* [2003] 3 S.C.R 416, a majority of the court said the test was applicable to both interprovincial and international matters (McLachlin CJ Gonthier, Major, Bastarache, Arbour, Deschamps, Iacobucci and Binnie JJ, LeBel J dissenting).

Note 59. In *Beals v Saldanha* [2003] 3 S.C.R 416, Major J held that a 'real and substantial connection is the overriding factor in the determination of jurisdiction', and that 'presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties'.

Note 60. As Monestier puts it, '*Muscutt* has essentially transformed the question of whether a court can hear a case (jurisdiction simpliciter) into the question of whether a court should hear a case (forum non conveniens). This has invited inconsistent results, increased uncertainty for litigants, and rendered the role of *forum non conveniens* largely redundant': (2008) 'A "Real and Substantial" Mess: The Law of Jurisdiction in Canada' 33 *Queen's Law Journal* 179.

Note 61. They include the residence of the parties, witnesses and experts, the location of the material evidence, where the contract was negotiated and executed, the existence of proceedings pending between the parties in another jurisdiction, the location of the defendant's assets, the applicable law, advantages conferred upon the plaintiff by its choice of forum (if any), the interests of justice, the interests of the parties, and the need to have the judgment recognised in another jurisdiction: *Lexus Maritime Inc v Oppenheim Forfait GmbH* [1998] Q J No 2059 (QL), referred to with approval

Note 62. *Spar Aerospace Ltd v American Mobile Satellite Corp* [2002] 4 S.C.R 205, 238.

Note 63. [1987] 1 AC 460 (discussed below)

Note 64. The Commission agrees with the add-on provision enacted by jurisdictions such as Yukon, to clarify that the presumptions are not conclusive.

Note 65. Section 6 provides that even when none of the factors exists, the Court retains a discretion to hear the proceeding if it considers that there is no other court in which the plaintiff can commence the proceeding, or the commencement of the proceeding in a court outside the province cannot reasonably be required.

Note 66. S7-9 clarify the meaning of residence for companies, partnerships and unincorporated associations respectively. A slight change to the way in which residence in relation to partnership is made by the Saskatchewan

provision, considering the residence of an individual partner rather than where the partnership's central management occurs.

Note 67. S3.

Note 68. The explanatory notes make clear that the meaning of 'real and substantial connection' is not confined by the rules of court.

Note 69. This point is made explicitly in the Yukon legislation, a precedent the Commission supports in its Report here.

Note 70. A proposed *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* did not materialise in that form, instead morphing into the *Hague Convention on Choice of Court Agreements* (2005). The Regulation applies to proceedings commenced after 1 March 2002 (Article 76).

Note 71. Article 5(1).

Note 72. Article 5(3) and (6); other sub-articles deal with maintenance issues, issues involving both tort/restitution claims and a criminal claim, and cargo salvage.

Note 73. Articles 9-14, 15-17 and 18-21 respectively.

Note 74. Article 27.

Note 75. *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460, 482-284 (Lord Goff). Other factors of lesser importance were mentioned, including the place in which the matter can be heard earliest, where there is greater scope for discovery, better recovery of damages and opportunity for enforcement, more generous limitation period etc.

Note 76. High Court of Australia Order 9; Federal Court of Australia Order 7.

Note 77. *Jurisdiction of Courts (Cross-Vesting) Acts* 1987 (Cth) s5.

Note 78. S20(4) of the Act states that relevant factors include the place of residence of the parties and the witnesses likely to be called in the proceedings, the place where the subject matter of the litigation is situated, the financial circumstances of the parties, any agreement between the parties about the court or the place in which the proceedings should be instituted, the law that would be most appropriate to apply in the proceedings, and whether a related or similar proceeding has been commenced against the person served or another person.

Note 79. [1987] 1 AC 640; *Lubbe and Cape Plc* [2000] UKHL 41; *BHP Billiton Limited v Schultz* (2004) 211 ALR 523.

Note 80. The rules are found in *High Court Rules* 1952, *Federal Court Rules* 1979, *ACT Supreme Court Rules* 1937, *Northern Territory Rules of the Supreme Court*, *New South Wales Supreme Court Rules* 1970, *Queensland Uniform Civil Procedure Rules* 1999, *South Australia Supreme Court Rules* 1987, *Tasmania Rules of the Supreme Court* 1965, *Victoria Rules of the Supreme Court* 1996, *Western Australia Rules of the Supreme Court* 1971. See Keyes, M *Jurisdiction in International Litigation* (2005)

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Fair Trial Rights in ICCPR

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Abstract

Articles 14 and 15 in ICCPR provide fair trial rights. The 16 concrete guarantees of fair trial rights are usually classified into three parts: basic rules, minimum guarantees and other provisions. A proceeding complying by those concrete guarantees can not necessarily accord with the requirement of fair trial rights, because article 14, paragraph 1 provides a special kind of right—the general right to a fair trial. Unlike the concrete guarantees, the general right to a fair trial requires to evaluate the proceedings as a whole. In the process of interpreting ICCPR, the Human Rights Committee has added more and more concrete guarantees to fair trial rights via the general right to a fair trial.

Keywords: Fair trial rights, ICCPR, The general right to a fair trial

Fair trial rights, also referred to as the right to a fair trial, is one of the most important fundamental human rights. Since articles 10 and 11 of Universal Declaration of Human Rights acknowledged fair trial rights in 1948, they have been provided by many international human rights documents, such as International Covenant on Civil and Political Rights (simply referred to as ICCPR in the followings), Convention for Protection of Human Rights and Fundamental Freedoms, American Convention on Human Rights, African Charter on Human and Peoples' Rights, etc.. Among these international human rights documents, articles 14 and 15 in ICCPR are the most detailed provisions on fair trial rights.

Article 14 is of a particularly complex nature, combining various guarantees. The first sentence of paragraph 1 sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies. The second sentence of the same paragraph entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, if they face any criminal charges or if their rights and obligations are determined in a suit at law. In such proceedings the media and the public may be excluded from the hearing only in the cases specified in the third sentence of paragraph 1. Paragraphs 2 – 5 of the article contain procedural guarantees available to persons charged with a criminal offence. Paragraph 6 secures a substantive right to compensation in cases of miscarriage of justice in criminal cases. Paragraph 7 prohibits double jeopardy and thus guarantees a substantive freedom, namely the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted. Compared with article 14, article 15 is very simple, only referring to the right not to be held guilty for an act or omission not constituting a criminal offence.

Fair trial rights are usually classified into three parts: basic rules, minimum guarantees and other provisions. Basic rules of fair trial rights consist of paragraph 1 and paragraph 2 of article 14. Minimum guarantees refer to paragraph 3 of article 14. Other provisions comprise of the rest of article 14 and article 15.

1. Basic rules of fair trial rights

Paragraph 1 and paragraph 2 of article 14 provides the right to be equal before the courts; the right to a fair and public hearing by a competent, independent and impartial tribunal established by law; and the right to be presumed innocent.

1.1 The right to be equal before the courts

The first sentence of article 14, paragraph 1 guarantees the right to equality before courts and tribunals. The right to be equal before the courts includes all people having equal rights to access to the court and equal equipment between defendants and prosecutors.

Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness. This guarantee prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status.

The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and

reasonable grounds. There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision.

1.2 The right to a fair and public hearing by a competent, independent and impartial tribunal established by law

The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.

The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial. The former is called the subjective test of impartiality, and the latter is called the objective test of impartiality.

All trials in criminal matters must in principle be conducted orally and publicly. The right to a public hearing includes the publicity of hearings and judgment. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children. The publicity of judgment has two means: oral publicity and documentary publicity.

1.3 The right to be presumed innocent

According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence.

2. The minimum guarantees of fair trial rights

2.1 The right to be informed of the charge

The right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in paragraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. Notice of the reasons for an arrest is separately guaranteed in article 9, paragraph 2 of the Covenant. Paragraph 3 (a) is only applicable to formal prosecution. The right to be informed of the charge “promptly” requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such. The right to be informed of the charge “in detail” requires that the information indicates both the law and the alleged general facts on which the charge is based.

2.2 The right to prepare defence and to communicate with counsel

Subparagraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their

defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.

What counts as “adequate time” depends on the circumstances of each case. If counsel reasonably feels that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial. A State party is not to be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice. “Adequate facilities” must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory.

2.3 The right to be tried without undue delay

The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal. All stages, whether in first instance or on appeal must take place “without undue delay”. What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.

2.4 The right to be present during trial, to defend and to legal assistance

Article 14, paragraph 3 (d) contains three distinct guarantees. First, the provision requires that accused persons are entitled to be present during their trial. Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons decline to exercise their right to be present, although the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.

Second, the right to defend refers to two types of defence which are not mutually exclusive. Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case, within the limits of professional responsibility, and to testify on their own behalf. At the same time, paragraph 3 (d) provides for a defence to be conducted in person “or” with legal assistance of one’s own choosing, thus providing the possibility for the accused to reject being assisted by any counsel. However, this right to defend oneself without a lawyer is not absolute. The interests of justice may require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused.

Third, paragraph 3 (d) guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it. The gravity of the offence is important in deciding whether counsel should be assigned “in the interest of justice”. In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings. Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused. Unlike in the case of privately retained lawyers, blatant misbehaviour or incompetence may entail the responsibility of the State concerned for a violation of article 14, paragraph 3 (d), provided that it was manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice.

2.5 The right to call and examine witnesses

Paragraph 3 (e) of article 14 guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel. There are two ways to question and challenge witnesses: personally and through their counsel. Giving the defendants a proper opportunity to question and challenge witnesses against them during the trial or other stages of the proceedings can fulfill the requirement of paragraph 3 (e). It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence.

2.6 The right to the free assistance of an interpreter

The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14, paragraph 3 (f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings. This right arises at all stages of the oral proceedings. It applies to aliens as well as to

nationals. However, accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.

2.7 The privilege against self-incrimination

Article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will. The privilege against self-incrimination doesn't allow drawing adverse inferences from the defendant's silence.

3. Other provisions of fair trial rights

3.1 The special guarantees for juvenile persons

Article 14, paragraph 4, provides that in the case of juvenile persons, procedures should take account of their age and the desirability of promoting their rehabilitation. Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14. In addition, juveniles need special protection. In criminal proceedings they should, in particular, be provided with appropriate assistance in the preparation and presentation of their defence; be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardians, unless it is considered not to be in the best interest of the child. Detention before and during the trial should be avoided to the extent possible. Whenever appropriate, measures other than criminal proceedings, such as mediation between the perpetrator and the victim, conferences with the family of the perpetrator, should be considered, provided they are compatible with the requirements of ICCPR and other relevant human rights documents.

3.2 The right to appeal

Article 14, paragraph 5 provides that anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. The right to appeal is also known as the right to be reviewed. The Human Rights Committee considers that the right to appeal is absolute. The absolute nature of the right to appeal is reflected in the following three aspects: the right of appeal applies to all types of crimes, that is, not only applies to serious crimes; the right to appeal applies not only to the case of conviction in the first instance, but also equally applies to the case whose acquittal judgment in the first instance is overturned in second instance; the Supreme Court can not enjoy the jurisdiction of first instance. In order to effectively protect the right to appeal, the appeal court cannot limit the scope of trial to the legal issues. However, the right to appeal does not call for a comprehensive review, as long as the appeal court reviewing the facts of the case would be sufficient. In addition, the leave to appeal does not necessarily violate the right to appeal.

3.3 The right to compensation for wrongful conviction

According to paragraph 6 of article 14, compensation according to the law shall be paid to persons who have been convicted of a criminal offence by a final decision and have suffered punishment as a consequence of such conviction, if their conviction has been reversed or they have been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice. The right to compensation for wrongful conviction is based on the following four conditions: Firstly, a person has by a final decision been convicted of a criminal offence. Secondly, subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice. Thirdly, the person who was convicted is not responsible for the non-disclosure of the unknown fact in time. Fourthly, penalties have been actually implemented.

3.4 The right against second trial for the same offence

Article 14, paragraph 7, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of *ne bis in idem*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence. The principle of *ne bis in idem* is not at issue if a higher court quashes a conviction and orders a retrial. Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal. It also does not prohibit the resumption of a criminal trial with respect to the national jurisdictions of two or more States, although States should make efforts to prevent retrial for the same criminal offence through international conventions.

3.5 The right not to be held guilty for an act or omission not constituting a criminal offence

Article 15 requires that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Article 15 also requires that no one shall be imposed a heavier penalty than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. However, nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

4. Conclusion

In addition to the 16 concrete guarantees mentioned above, article 14, paragraph 1 provides a special kind of right—the general right to a fair trial. (“...everyone shall be entitled to a fair ...hearing...”.) Unlike the concrete guarantees, the general right to a fair trial requires to evaluate the proceedings as a whole. If any of these concrete guarantees are not respected, the trial cannot be viewed as having been fair. However, on the other hand, the fact that those rights have been respected does not yet guarantee that the trial was fair. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects. Expressions of racist attitudes by a jury that are tolerated by the tribunal, or a racially biased jury selection are other instances which adversely affect the fairness of the procedure. The general right to a fair trial makes the right to a fair trial be exoteric, and can accommodate to the development of the society. In the process of interpreting ICCPR, the Human Rights Committee has added more and more concrete guarantees to fair trial rights via the general right to a fair trial.

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Cooperatives' Tax Regimes, Political Orientation of Governments and Rent Seeking

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Abstract

The paper focuses on the strict relation between the continuous changes of the diversified tax regimes of the various types of cooperatives and the political composition of the governments succeeding each other in Italy from the after war period to the present. It emerged that the different types of cooperatives prevailing in the leftwing League of Cooperatives or in the Confederation of Italian Cooperatives (CCI) of catholic orientation or in both organization had a different possibility of exerting successful rent seeking with the various Governments with different political orientation. Consumption cooperatives operating in the mass retail which obtained generous tax treatments by Governments leaning to the left, lost most of them by centre right Governments. The cooperatives of agriculture and food processing, those of small fishing and those of production and labor, important both in the League and in CCI, were able to obtain from different Governments special privileges in the postwar period and kept most of them also under the centre right Governments of the last period. Social cooperatives object of a special legislation in 1992 under a Government of Giulio Andreotti, a leader close to the catholic organizations, kept their preferential tax regime with all the subsequent governments. They are important both in CCI and in the League and have a peculiar electoral power because of their capillary activities.

Keywords: Strict relation, Tax regimes, Political composition of the governments, Organization, CCI

Introduction

The purpose of this paper is to show that the continuous changes of the differentiated fiscal treatment of the different types of cooperative appears in strict relation with the changes in the political composition of the governments that took place in Italy from Republican Constitution until now. The sector of the cooperative's firms that did grow continuously in terms of turnover and employment, it is composed of different types of cooperative with different linkages and support in the different political movements via the left wing National League of Cooperatives and the catholic Confederation of Italian Cooperatives (CCI). And, given the close connection of the League of the cooperatives and of CCI to the political movements which were ruling the country, when preferential fiscal and financial treatment were conceded to the various types of cooperatives, one may argue that the economic and social importance of the cooperatives sector is, at least partly, due to successful rent seeking. As matter of fact the centre right governments that in the last period reduced or cancelled a large part of the benefits of the types of cooperatives mostly important in the League, did not do so for the other cooperatives with an important electorate in the catholic world. They claim that were responding to requests of correction of the distortions of market competition made by the European community. But are we sure that some of the important fiscal benefits that do remain for the cooperatives influential in CCI do not distort market competition? And why the above mentioned corrections have not been done by the government leaning to the left, that ruled from 1996 to 2001 and realized the entrance of Italy in the European Monetary Union in 1997? Or by the Prodi government with a similar composition, that ruled from 2005 to 2006?

However in this paper we shall not discuss whether the fiscal policies favoring the cooperatives have damaged or promoted collective welfare, valued from the point of view of the principles of a competitive market economy system non indifferent to the correction of social and economic disequilibria. This complex issue is beyond the scope of this paper. But one should concede that, even with a broad spectrum of public policy objectives, in a market oriented public economy, some preferential tax and financial treatments of cooperatives may be "unfair rents" (Note 1)

The paper is divided in three parts. In the first, of general character, we outline the basic principles of the Italian Constitution for the cooperatives and of the following basic law which originated and regulated the different types of cooperatives, allowing the existence of several different tax regimes. We shall also give a synthetic picture of the present economic importance of the main types of cooperatives in terms of revenue, employment and number of members, considering separately those adhering to the League and to CCI. This review it is interesting in order to throw light on the different opportunities that these various types of cooperatives adhering to the two national organizations may have had of exerting rent seeking activities, in connection with different types of governments.

The second part of the paper considers the evolution of the favourable fiscal treatment of the profits and incomes of the cooperatives and of the preferential regime of some types of them, as for the contracts with the public administrations. It emerges that substantial benefits to the cooperatives were given in 1947 immediately after the enactment of the

Constitution, favouring both the cooperatives adhering to the League and to CCI. The (big) cooperatives of the League with important political-electoral influence on the leftwing parties obtained increased benefits in the '70 under coalition governments supported by the left. The differentiated favourable treatments for the cooperatives of agriculture and food processing, of small fishing, and of production and labour, particularly important in the CCI and also relevant (even if somewhat less) in the League, resisted to all the changes of governments. The social cooperatives that are now an huge sector, obtained a particular regime, with special preferential treatments, at the beginning the '90 of the last century, when the Democratic Christian Party (DC) had a particular power. Subsequently, under the centre right governments, there was a drastic reduction of the favourable treatments of the big cooperatives of mass retail and of the dynamic production and services cooperatives that flourished in the League. The other types of cooperatives were able to preserve most of their fiscal benefits.

The third part of the paper is devoted to the peculiar fiscal and financial treatment of the societal loans to the cooperatives by their members, an important traditional source of finance at the origin of the growth of the cooperative movement (Note 2).

After having shown the causes of their great importance for the financing of the Italian cooperatives of any type and dimension from the after war period with particular regard to the big consumption cooperatives of mass retail, we consider the evolution of their tax and financial discipline in connection with the changes of governments. And here emerges that the laws and regulations favourable to them have continued, with some moderations in 1985 under the first centre left Craxi government and in 1995 under the first (short living) Berlusconi government. In 2008 under the third Berlusconi governments these benefits have been substantially downsized. Conclusions follow.

Section I

Basic Laws on Cooperatives. Their Typologies, Economic Importance and Political Influences

1. The cooperative movement in Italy grew in the last decades of the nineteenth century and at the beginning of the twenty century, from two kinds of the political –ideological points of view: that of the left wing parties, i.e. the socialist, the republican and the leftwing liberals and that of the catholic movement. Until the end of the first world war both of them were organized in the National League of Cooperatives. The League was founded at the end of the nineteenth century with socialist, liberal or republican orientation. The catholic cooperatives originated in the same period, decided to enter in the League in the first decade of the twenty century. They left it in 1919, under the determinant influence of Luigi Sturzo leader of the Popular Party (the catholic party) who formed the Confederation of Italian Cooperatives (CCI), This organization in its charter proclaimed adherence to the social doctrine of the Church, outlined in the “Enciclica” *Rerum Novarum* of Leon XIII. Merged in the fascist cooperative movement, the two organization, “red” and “white”, remerged after the second world war. The League after an initial president of the Italian Socialist Party,(PSI) was soon afterwards controlled by the Italian Communist Party (PCI) which appointed its president and the main executives. But the presence of affiliates to or sympathizers of PSI and of the Republican Party (PRI) did remain important. The white cooperatives movement, of CCI, reconstituted after the second world war, became closely connected with the Democratic Christian Party (DC) heir of the Popular Party.

At the origin of the favourable legislation for the cooperatives, in Italy, in the second post war period, thus, there is the consensus of PCI and DC, to whom the League and CCI were respectively collateral, on a Constitutional preferential treatment of the cooperatives to promote their growth. Article 45 of the new Italian Constitution, affirms that “ The Republic recognizes the social function of the cooperation with characters of mutuality and without ends of private speculation. The law promotes and favours its growth with the most appropriate means and assures by opportune controls its character and end “.

To make possible the preferential fiscal regime for the cooperation with characters of mutuality, affirmed in the Constitution and to assure the conformity to these characters of the cooperatives asking for it, a specific “Basevi Law “on cooperatives was enacted in 1947. Not only it determined –albeit with looseness –the basic requisites of mutuality to which the preferential tax regime should be conditioned. It gave also an official role of vigilance on these requisites of the cooperatives, to “national associations of cooperation recognized by the state”. In this way any cooperative to get the benefits granted to those endowed of requisites of mutuality, was obliged to enrol either in the League or in CCI. The two new born movements thus were able to become well structured organizations with numerous affiliates in the entire country and an assured important political influence.

For the Basevi Law the basic requisites of mutuality of the cooperatives benefiting of preferential fiscal treatment were the following

- 1) no distribution to the co-operators of dividends in excess to the “legal” interest measured on the capital of the cooperative really disbursed;
- 2) no distribution of reserves to the co-operators during the existence of the cooperative;

- 3) in case of dissolution of the company devolution of its entire patrimony, net of the capital disbursed and of the new dividends if any, to purposes of public utility conforming to the spirit of mutualism;
- 4) minimum 9 co-operators;
- 5) as for the consumption cooperatives, at the moment of the request, co-operators must be at least 50;
- 6) cooperatives of production and labour are admitted to the public contracts, if have less than 25 members but at least 9;
- 7) members of labour cooperatives must be workers and exert (only in their cooperative) the art or work corresponding to the specialization of that type of cooperatives or to similar ones;
- 8) technical and administrative workers in any cooperative are admitted as co-operators only in a number strictly necessary for the good functioning of the company; and, except for the cultivation of land, cannot exceed 12% of the work force;
- 9) members of the cooperatives of cultivation of land must directly exert this activity; technical and administrative workers are allowed to be members in a measure not exceeding 8%;
- 10) the value of the shares cannot be less than 5.000 lire and more than 100.000; and each co-operator cannot have shares for a value higher than 100.000 lire. The upper values are doubled for the cooperatives processing and trading agricultural products ;
- 11) cooperatives may constitute syndicates of cooperatives with the form of cooperative; these can be admitted to the contracts with the public administrations; requisites are : a minimum of 3 members and a capital of one million lire, of which at least half disbursed; the shares of each cooperative member of the syndicate cannot be lower than 50.000 lire nor exceed 1.000.000 lire;
- 12) cooperatives of fishermen-workers may syndicate in cooperatives with at least 3 members with a minimum capital of 500.000 lire; of which at least half disbursed;

As one can see the only really demanding requisite of mutuality of the Basevi law was that of no distribution of the reserves.

Actually the Basevi law allowed the cooperatives of consumption to sell to non members in any amount, without losing the character of mutuality. And all the types of cooperatives could hire as workers, any number of non members as workers without losing this character. In addition the Basevi law, for the cooperatives with character of mutuality, did accept the Civil Code of 1942 rules allowing the cooperative to be either companies without legal personality or companies with legal personality, with the form of joint stock companies or as companies with limited liability. And, therefore, under the Basevi law, cooperatives, could become joint stock companies preserving the character of mutuality. Given this possibility and given the looseness of the requisites of mutuality, the Basevi law opened the way to the growth of groups of joint stock cooperatives which could keep the official requisites of mutuality while becoming big entities with "capitalistic" characters. This growth, to which a generous fiscal exemption of the (undistributed) profits has been instrumental, was also fostered by the relaxation of the limits to the remuneration of the loans to the cooperatives by their members. And the big (groups of) cooperatives acquired particular importance in the "League".

The Basevi law, in relation with these different rules, relating to the different problems of the various kind of cooperatives, classified them in the following seven types:

- 1) consumption
- 2) construction
- 3) transportation;
- 4) small fishing;
- 5) agriculture;
- 6) production and work;
- 7) mixed.

The classification of the cooperatives in seven (then eight) different types fostered the organization of associations of cooperatives of the various sector adhering either to the League or to CCI and operating as sectoral pressure groups; this fostered a diversified tax treatment of the cooperatives of the different sectors. Their rationale is often difficult to understand unless in terms of different success in rent seeking.

Subsequently (in 1991) the new type of "social" cooperatives has been introduced with another ad hoc fiscal regime. The housing cooperatives were an earlier new entry.

The reform of the civil code of 2005, done under the second Berlusconi Government, introduced a new, less permissive, distinction between cooperatives with prevailing mutuality and cooperatives without prevalence of mutuality, relevant

also as for the fiscal regime. Notice that this was a centre right government. And as shall be shown, the cooperative which lost a substantial part of their tax privileges, were mostly belonging to the League.

Both the cooperatives with prevalence of mutuality and those without that prevalence according to new article 2525 of the Civil Code must conform to the following basic requirements

- 1) The nominal value of each stock or share cannot be less than € 25 nor higher than € 500 (Note 3);
- 2) No member shall have a share higher than € 100.000, nor an amount of stocks whose nominal value exceeds this amount;
- 3) The charter of a cooperative with more than 500 members may allow an increase of this limit up to 2% of the social capital.
- 4) The stocks exceeding this limit shall be redeemed or sold by the administrators in the interest of the member concerned; the rights must be devolved to the indivisible reserve.

The cooperatives with prevalence of mutuality (art.2512 of civil code) are characterised by the existence of a mutual exchange between the cooperative and its members.

The cooperatives have prevalence of mutuality if :

- 1) perform their activity mainly for their members, consumers or users of their goods and services.
- 2) their revenues from the sale of goods and supply of services to their members exceeds 50% of their aggregate revenues.
- 3) the cost of the labour of the members of the cooperatives exceeds the 50 % of the total labour cost.
- 4) do not distribute dividends in a percentage on the capital really disbursed exceeding the maximum interest rate on the postal bonds increased of 2 points,.
- 5) the loans of the member of the cooperatives to their company have a remuneration not exceeding that of point 4) al.
- 6) while existing do not distribute reserves to their members
- 7) in case of dissolution the entire patrimony of the cooperative (net of social capital disbursed and of new payable dividends) is assigned to mutuality funds for the promotion and development of cooperation.

When in a given cooperative there are simultaneously several types of mutual exchanges the condition of prevalence must be documented with reference to the weighted average.

As for the agricultural cooperatives the condition of prevalence of mutuality exists when the quantity or the value of the goods conferred to the cooperative by its members is greater than the quantity or value of its own products.

A cooperative loses its prevalence of mutuality if for two consecutive exercises does not fulfill the above prevalence conditions

2. Let us now consider (TABLE 1 in Appendix) the importance in terms of revenue, employment and members of the various types of the cooperatives, in the present period, distinguishing them by their affiliation to the two big national organization, the “red” League and the “white” CCI.

To this end, instead of the above seen official classification, we adopt a classification in six main types: consumption, agriculture (inclusive of processing and trade of agricultural products), production and services, small fishing, sport and tourism and social cooperative adding the housing cooperatives and the cooperatives non classifiable in the above types (inclusive of the cooperatives of mixed types)

The housing cooperatives which were not considered by the Basevi law became very important with the urban development. However we do not deal with them here because they belong to another chapter of the influence of the pressure groups on tax policy, that of the (would be) home owners.

It emerges that the League and CCI are both very important in terms of revenue, employment and affiliates. Both the League and CCI have a revenue of about 50 billion. The cooperatives of the League employ about 400.000 workers, those of CCI 470.000, with a larger revenue. Their revenue per worker on average it is slightly smaller. This difference may be explained by the fact that in the League the capitalistic cooperative are more important than in CCI. The co-operators of the League are about 7,7 millions, potentially a gigantic pressure group (Italy has about 60 million inhabitants) with an enormous influence on the leftwing parties, while those of CCI are 2,7 millions a less numerous ensemble, however still big and distributed between the centre right and centre and centre left parties.

Between the two cooperative movements there are other big economic and social differences, which emerge considering the different typologies of cooperatives. The League's *economic* strongholds are in the “capitalistic” sector of cooperatives of consumption and of production of goods and services. Indeed, in the area of consumption cooperatives, the League has a revenue of about 18 billion consisting of a 11,75 billion revenue in the area of mass retail and of 7,8 billion in the small retail. The 11,75 billion revenue in the mass retail is obtained with 53.800 workers i.e. 218.000 euro

per worker and 6,4 million of coo-operators. Its market position in the retail distribution is reinforced by qualified network of small and medium size shops (with the brand Conad) that together make a 7,8 billion revenue with about 35.000 workers (about 223.000 of revenue per worker). In the sector of the cooperatives of production and work (where the cooperatives of construction predominate) the League makes a revenue of about 9 billion with 35.000 workers and 152.000 members. The important *social-electoral* stronghold of the League is the provision of services where it employs 150.000 workers with a revenue of 6,5 billion (only 43.000 per worker) and in the area of agriculture and food processing where it gets a revenue of more than 7 billion with 23.700 workers (295.000 per worker). In the area of social services the League makes a revenue of about 2 billion with about 63.000 workers (about 32.000 per worker) and 60.000 members. A respectable result. But this type of cooperatives, from the social-electoral point of view- it is much more important in CCI. In the small fishing the League has an important presence with a revenue of 840 million of euro and about 50.000 workers. The revenue per worker however it is only 16.700 euro. Perhaps an explanation of this small revenue is the difficulty of the tax administration of assessing this revenue. In tourism and related services the League has a minor presence. But the reason is that in this area as in the area of culture its activity is merged in the broad sector of the cooperatives of services.

The *economic* stronghold of CCI is, by far, in the area of agriculture and food processing and trade, where its activity shows “capitalistic” characters. Actually here it makes half of its 50 billion total revenue, with 66.700 workers (a revenue of 357.000 per worker) and a similar amount of members. On the other hand its presence in the small fishing sector is less relevant than that of the League both in terms of revenue and of workers, but is much more relevant in terms of revenues per worker, as the revenue of nearly half billion, with 7900 workers (and a number of members less than the double). The revenue per worker here is 60.000 euro.

In the consumers sector CCI has a revenue of about 9 billion euro with about 9.800 workers, a revenue of 918.000 euro per worker and 283.000 members. Its sub sectors are of two kinds: wholesale purchase which give 83% of the total revenue and small retailers which give 17% or 1,5 billion euro with 950 shops of small size (mostly less than 200 square meters each) (Note 4) doing collective purchases. In the sector of the cooperatives of capital and work and of services it makes a revenue of 9,5 billion with 187.000 workers, i.e about 51.000 euro per worker, with 445.000 members.

CCI has a *social orientation* more pronounced than that of the League and operates mostly with small cooperatives. Actually in the sector of social cooperation it employs 184.000 workers supported by 940 affiliates with a revenue of about 4,7 billion euro, with a revenue per worker of only 25.500 euro. In the area of culture, tourism and sport the CCI is mostly present with services of volunteers to the users because it makes only 662 million of euro with 14.000 “workers” (less than 5.000 euro per worker) and 320.000 affiliates.

The different tax regimes of the revenues of the different types cooperative through time are interwined with the different presence of the League and CCI in these various types.

As we shall show, in the next section (see Table 2 in the Appendix) the favourable tax regimes conquered by the cooperatives from the Basevi law resisted to the political changes of the last sixty years chiefly in the area of the cooperative that the new civil code defines with prevalence of mutuality. And this may appear logical. However these privileges are systematically greater for the cooperatives agriculture, fishing, small distribution, social and cultural services. Furthermore the consumption cooperatives operating by the mass retail of the supermarkets with requisites of mutuality have been the object of specific legislation of the centre right governments cancelling their fiscal privileges. As one could see from the above analysis, CCI is well represented in the cooperatives with prevailing mutuality of agriculture, fishing, small distribution, social and cultural services but not in the mass retail. On the other hand do belong to the League most of the big cooperatives of production and work without prevailing mutuality which have been spoiled of most of their privileges.

There is now a wide difference between the fiscal regimes of the incomes of the eight different types of cooperatives considered in Table 1 which can only be explained by the fact that some types of cooperatives are present in CCI or both in CCI and the League, and therefore retain greater fiscal benefits because of their differential electoral-political influence. Other are mostly present in the League and therefore are not protected by the centre right governments.

Section 2

Evolution of the Preferential Fiscal Regimes for the Cooperative'S Incomes

1. The fiscal regimes with which we deal in this section, as already said, underwent continuous changes as for the different types of cooperatives, in relation to the changes of Governments. with different political orientation (see table 2 in Appendix). Broadly speaking, one may distinguish six periods:

I) In the first period, that of the formation of the Constitutional Chart, in which all the anti fascist parties had a power, a broad consensus emerged between the Demo Christian Party (DC), the Communist Party (PCI) and the Socialist party (PSI) and the small Republican party (PRI) on a future preferential policy for the cooperatives with characters of mutuality broadly defined. The vague statement of Article 49 of the Constitution, which was the result of that consensus,

corresponded well to the expectations of the numerous cooperatives adhering to the new borne National League of the Cooperatives and of the less numerous (but growing) group of white cooperatives adhering to CCI.

II) In the second period, the centrist one, which lasted for about fifteen years from 1947 to 1963, the cooperatives got an extremely favourable tax treatment. In December 1947, under the centre Government of Alcide De Gasperi, the Basevi law was enacted, which provided total the exemptions from taxation of the profits of the cooperatives with characters of mutuality and of the loans of the co-operators to their cooperatives. To the co-operators--workers was given the exemption from the social security contributions. Their wages were taxed with the normal rates of the real income tax but could be determined discretionally. And there fore by their manipulation it was possible to minimize their tax burden. The remuneration of the members of the cooperatives working in professional activities too were freely determinable for tax purposes and , therefore, could be manipulated to reduce the overall tax burden on the cooperatives and their members

The interests on the loans of the co-operators to their cooperative were exonerated from the real tax on the income of financial capital up to a given amount. The amount exonerated was doubled for the loans to the cooperatives of processing and trading of products of agriculture and for the cooperatives of production and work.

The cooperatives were also exonerated from the tax, introduced in 1953, on the extra profits of the corporations and other collective entities, The largest part of the then existing cooperatives to whom these generous fiscal benefits were conceded were entities of small dimension, organized as companies without distinct personality But there was already a number of not so small cooperatives organized as corporations with own personality. Among them predominated, both in the League and in CCI, the cooperatives engaged in the processing and commerce of agricultural product.

III) The third period, lasting twelve years from 1962 to 1974, was that of the (moderate) centre left governments, succeeding each other. They had always a DC premier, but had with different fiscal policies in relation to the different political affiliation of the Ministers of finance and of Treasury. At the end of the period the fiscal regime of cooperatives became less generous, as a consequence of the general tax reform, prepared in the previous years, to modernize and rationalize the tax system,. The reform was conceived under the influence of the business associations as well as of the pro market tendencies present in PRI and PSDI (Social Democratic Party) who prepared the reform. The new income tax system was based on three pillars: a moderately progressive personal income tax, a profits tax on the incomes of the corporations and other entities with own personality, an additional local tax (ILOR) on all the incomes different from wages. In principle the incomes of the cooperatives where subject to all these three taxes. But as for the cooperatives the rate of the tax on their profits, both for the personal income tax, for the corporation income tax, a well for ILOR was reduced to 75% of the standard rate. And a total exemption from these taxes was given to the profits of the cooperatives of agriculture (in which also those operating for the processing and trade of the agricultural products are included), small fishing, production and labour. The dividends received by the co-operators-workers were exonerated from their income tax up to 10% of the total profits.

The interests received by the co-operators on their loans to the cooperatives were subject to the normal rates applied to the "income of financial capital."

IV) This new tax regime did not resist to the political changes of the '70, caused by the emergence of a new DC-PCI parliamentary alliance, which lead to governments of "national solidarity", headed by DC leaders with ministers of DC and minor parties and PCI supporting the Government by abstaining from voting. With a Pandolfi law of 1977 to the benefit of the taxation of the incomes of the cooperatives at a rate equal to 75% of the normal rate was added the full deduction from the tax basis of the profits devolved to "indivisible reserve" The Pandolfi law also introduced an exemption from the personal income tax for the preferential stocks received by the co-operators, in occasion of an increase of the social capital due to the devolution of reserves to capital. The reimbursement to the co-operators of the social capital in case of dissolution of the company was not considered taxable income provided that the dissolution was at least five after its formation. These two last provision are still in effect. Therefore practically the capital gains of the co-operators are never taxed. All these new fiscal benefits gave particular advantages to the new "capitalistic" cooperatives operating in mass retail by supermarkets, in constructions industry and in the transformation and trade of agricultural products.

V) The fifth period, which began in the early '80 and ended in 1994 was characterized by a re-edition of the centre left coalition with a greater role for PSI. The preferential rules of the Pandolfi law for the cooperatives were retained. In 1983 a Forte law (Note 5) allowed the cooperatives organized as joint stock corporations or companies with limited liability to pay dividends up to a percentage equal to that granted to the loans of the co-operators (see below). The new law was intended to limit the power of the managers arising from by passing the profits of the cooperatives to self financing an to enhance the role of the coo-operators. In 1991, under an Andreotti government, a new type of cooperatives was introduced in the Italian legislation: the social cooperatives. They were given the advantageous tax treatment reserved to the cooperative of capital and labour and a privileged position as for the contracts with the public administration. This last provision implied a derogation to the European rules in this matter. In 1992, again under an Andreotti government, a total

exemption from the personal income tax was given to the members of the cooperatives as for the profits distributed to them that they reinvested in their company. On balance in this period both the red and white cooperative gained benefits.

VI) The last period, from 1994 to the present days it is characterized by an alternation between centre right (Berlusconi) governments and governments leaning to the left. In this period whenever centre right governments have been in power the cooperatives underwent considerable losses of fiscal and contractual benefits. In 2001 the Berlusconi Government stated that, the wages of the co-operators as for incomes tax purposes should be considered at least equal to the minimum contractual wage set in the corresponding national labour contracts and could not exceed them of a percentage greater than 30%. These wages were also subjected to the social security contribution. As for the remunerations of the members of the cooperatives with contracts of independent labour, their amount could not be lower of the corresponding average remunerations as determined in the market and could not exceed them more than 30%. These new rules preventing the manipulation for income tax purposes of the remunerations of the workers co-operators were mostly relevant for the cooperatives of production and work, of services, of retail, where the labour factor is important, much less relevant for the cooperatives of transformation and trade of agricultural products and for the social cooperatives.

From 2002 on were also downsized the fiscal benefits of the indivisible reserves of the big cooperatives without prevalence of mutuality and of consumption, which, as seen, are mostly affiliated to the League of Cooperatives.

3. But let us now consider in detail the changes in the tax regime of these reserves, as for the various types of cooperatives. As seen in 1977, with the Pandolfi law, the indivisible reserves of the cooperatives were fully exempted from taxation. This preferential tax treatment resisted for 25 years, until 2002. In this year a law of the centre right government reduced substantially this tax benefits, distinguishing the cooperatives without prevalence of mutuality from the others. For the first type of cooperatives only the obligatory reserves were fully exempted. The indivisible reserves in excess to them were granted an exemption up to 39% of their amount. For the cooperatives of agriculture and of small fishing this additional exemption was 60%.

A bigger change took place with the financial law of 2004, following the mentioned reform of the civil laws code which, introduced for the future years the above mentioned dichotomy between cooperatives without prevalence of mutuality and cooperatives with prevalence of mutuality

To the cooperatives with prevalence of mutuality of agriculture and fishing an exemption of 80% of the indivisible reserves has been conceded. For the social cooperatives the exemption was 100% For all the other cooperative with prevalence of mutuality the exemption was 70%

To the reserves of the cooperatives without prevalence of mutuality two different hypothesis were considered.

The first hypothesis was that of the cooperatives whose charter states the indivisibility of the legal reserves. These indivisible reserves up to 30% of the profits, were exonerated from the tax. The remaining 70%, was taxed with the ordinary rates.net of a 3% to be destined to the mutuality fund,

The second hypothesis is that of the cooperatives with charters that do not state the indivisibility of the legal reserve. In this case the share of profits to be taxed with the ordinary rates became 97%: 100% minus the 3% destined to the mutuality fund)

The exemption of 30% of the profits sent to indivisible reserve was still a substantial benefit; however the clause of indivisibility of these reserves with the constraint of their devolution to purposes of mutuality in case of dissolution of the company put a big limit to the advantages of this regime, as for co-operators that do not control their company. On the other hand, this provision could be appreciated by the managers of the big cooperatives who could justify with fiscal reasons, a policy of reinvestment of a large share of the profits.

The new dual tax regime did not appear sufficient to downsize the fiscal benefits on the reserves of the big consumption cooperatives operating by supermarkets, which were able to preserve the prevalence of mutuality, having more than 50% of their sales with their affiliates. To be member of the consumption cooperatives may be advantageous for their customs given the practice of discounts reserved to the affiliates. In 2008, under the IV Berlusconi centre right government, a Tremonti decree reduced to 45 % the exemption of the reserves of the consumption cooperatives with prevalence of mutuality and abolished any exemption for the reserves of the cooperatives without prevalence of mutuality.

The decree also abolished the preferential treatment of the social cooperatives in the contracts with the public administrations, in adherence to the European rules.

The decree obliged the cooperatives with prevailing mutuality to devolve 5% of the revenue to a solidarity fund for the less to do citizens, if these cooperatives had loans from their members for an amount higher than 50 millions of euro, and this amount exceeded the patrimony of the company. This last norm was against the big cooperatives of mass retail. With the conversion of the decree in law this new rule was limited to the years 2008, 2009, while the other measures of the decree were confirmed.

The abolition of the privileges of the social cooperatives as for the contracts with the public administrations has certainly damaged the social cooperatives adhering to CCI. However one should remember that they still keep a 100% exemption from taxation of their incomes.

Section 3

The Loans to the Cooperative by Their Affiliates

1. The fiscal and financial regime of the societal loans of the co-operators to their companies has had a paramount importance for the growth of them. In 1989, when the Bank of Italy felt it necessary to adopt an *ad hoc* regulation for these reserves, in the consumption cooperatives of mass retail of the League the societal loans, on average, according to their official statements, provided the highest percentage of their standing financial resources: 52%. Social capitals plus reserves provided another 22,5% while the long term debts contributed for 7,7% and short term the remaining 17,7%.

In the Italian legislation, the societal loans are allowed for any kind of company and may also take the form of deposits similar to those in the banks. The societal loans, as of the cooperatives, are suitable to a peculiar development for several reasons, not necessarily related with tax privileges. Indeed there may be a trust relation between the co-operators and their company due to the "one person –one vote principle". This trust may be increased by the fractioning of the social capital deriving from the limits to the individual property of shares, that makes impossible to any member to get the control of the company. Cooperators who invest in societal loans have updated personal information about the situation of the company, because of their frequent contacts with them. The members of consumption cooperatives go to shop periodically in their supermarkets and hypermarkets. These are ideal places for the collection and administration of these deposits of the cooperators who go there to shop. The workers members the cooperatives of production and work too are in daily contact with their company. And the same may be true for the members of the cooperatives of agriculture and fishing. When these loans take the form of deposits at the porter the secrecy of the investment it is higher than for any banking deposit, because the cooperatives are not subject to inspections of the authority supervising the financial intermediaries.

On the other hand, if these loans are subject to a small flat tax, as now, the member-workers of the production and labor cooperatives may be able to elude the burden of the progressivity of the personal income tax on their incomes from the cooperatives by them. Indeed they may commute in loans a share of their wages or bonuses eluding the income tax on them.

2. As for the changes of the fiscal and financial regime of the cooperatives' societal loans too we may distinguish different periods (broadly speaking nine) in connection with the different types of governments. (see table. 2 in Appendix).

I) In first period immediately after the Basevi law, the interests on the societal loans could not exceed the official discount rate of the central bank. Therefore they appeared as sacrifices of the members of the cooperatives for the common interest of the company. Their exemption from the real tax on the income from financial capital, motivated on this ground, was unable to entice their diffusion.

II) The societal loans of the cooperatives got a big impulse by a 1971 law (February 17, 1971, n. 127 art.12) that allowed the interests on them to be set at the level of the rate on the postal bonds. And the exemption from the real tax on the income from capital became relevant in enticing their popularity.

III) With the 1973 tax reform that abolished the system of real income taxes and introduced the local proportional income tax (ILOR) on all incomes different from wages, the interests on the societal loans were exonerated from this tax up to a given amount, provided that their rate did not exceed the rate on the postal bonds. The limits of the exemption was set at 20 million lire (10.000 euro) for each member of cooperatives, increased to 40 millions (20.000 euro) for the cooperatives of agriculture and of production and labor. A limit of 3 million lire per year (1.500 euro) was also set on the withholdings of shares of wages and bonuses of the members of the cooperatives, to be automatically commuted in societal loans. However the interests on these loans were subject to a 10% flat withholding tax replacing the personal income tax (D. L. 8.4.1974 n. 95). The flat withholding tax was 12,5% for the interests of obligations and higher for the interests on bank deposits. A signal that the influence of the white cooperatives on the government, as for this preferential tax treatment of the societal loans of the cooperatives, is the fact that the cooperatives of transformation and trade of agricultural product and of production and work, got an exemption from ILOR double than the other cooperatives. For the cooperatives of production and work the loans of the workers co-operators are traditionally one of the basic means by which they are able to form the enterprise. But the same does not appear true for the cooperatives of processing and trade of product of agriculture. Indeed the farmers-owner of the land can get credit on their property.

IV) In the 1980, the Forlani (DCI) government did increase the limit to the interests on the societal loans to the maximum level of the postal accounts plus by 2,5% (item 6 bis of D.L. 31.10.1980). The limits of 20 and 40 million were increased yearly by reference to the official inflation rate. The exemption from ILOR and the 10% flat rate on the interests not exceeding these amounts remained.

In 1985, (Law 12/27 1985 n. 49 article 23), under the first Craxi government, under a pro market minister of finance of PRI (Visentini) the final withholding tax on the societal loans of the cooperatives was put at 12,5%, aligning it to that generally applied to the interests on obligations. But on bank deposits was (and it is still) 27%. The new tax regime of the societal loans, however less favorable than the previous one, was still quite advantageous.

V) In 1992 (Law 31.1.1992 n. 59 art. 10) with the same Andreotti government, that introduced the new typology of the social cooperatives, the limit to the societal loans of the cooperatives has been doubled to 40 million lire for the normal cases and to 80 million for the cooperatives of processing and trade of agricultural products and for the cooperatives of production and labor. The rule of the yearly increase of these limits on the basis of the official inflation rate was kept, in spite of the fact that, for wages, the escalator clause had been abolished.

VI) The amount of the societal loans was continuously growing because of their differential yield, made possible by their favorable tax treatment in comparison with that of the bank deposits and of the peculiar possibilities of the cooperatives, particularly the consumption cooperatives, of promoting them. Therefore in 1994 the Bank of Italy, considering that they appeared an anomalous form of collection of mass saving, by non financial intermediaries, found it necessary to limit their dimension in relation to the social capital of the cooperatives to which were destined. This limit by a decree of the Committee for Credit and Saving of March 3, 1994, was fixed by the Ciampi Government, supported by PDS (former PCI) at three times the value of the aggregate social capital of any given cooperative. A very high level. The head of the government, Carlo Azelio Ciampi was the former governor of the Bank of Italy. To mitigate somewhat this largesse, each cooperative was required to issue a regulation of its loans, under the control of the Bank of Italy, as authority of surveillance of the financial market.

VII) The centre right Berlusconi Government, that succeeded to the Ciampi government, after the general elections of summer 1994, issued a ministerial decree of October 7 1994, by which the societal loans were subject to the rules of transparency of the banking law. The decree could be considered as a first step for a future submission of the societal loans to the general rules for the financial intermediaries collecting mass savings.

VIII) But under the subsequent leftist Prodi government, the line of liberality as for the social loans came back. In 1998 (Financial Law 12/ 23. 1998 n. 448 art. 59) the preferential limits to the societal loans of the cooperatives of processing and trading of agricultural production and of work and capital were extended to the housing cooperatives. Notice that both in the CCI and in the League these cooperatives have traditionally an important role (Note 6). And both CCI and the League were influential with this government. Prodi is an historical leader of the left wing catholic movements. The most important party of that government was PDS.

IX) In 2008, under the fourth Berlusconi centre right government, with a Tremonti decree the flat withholding tax on the societal loans has been increased to 20%. It is an important increase in comparison with the previous 12,5%. However these loans get still a preferential treatment in comparison with the bank deposits that have a final withholding tax of 27%.

On the one hand one may argue that this treatment is justified by the fact that for the cooperators it is not possible to make use of the sums deposited in their accounts, by issuing checks. On the other hand with the total abolition of the fiscal secrecy as for the bank accounts these loans benefit of a privacy that the bank accounts do not enjoy. And the cooperatives employing these loans get an advantage over the banks, with the bank accounts, because are not conditioned by any patrimonial "tier". Moreover, as noted, the societal loans may be employed to elude the progressive taxation of wage incomes and profits of the cooperators.

On the other hand one may observe that any joint stock or limited liability company may issue loans to be subscribed by their members, with the final withholding tax of 20% on the interests. Therefore this tax regime cannot be considered a preferential treatment of the cooperatives *over the ordinary commercial companies*. And likely an increase of the withholding tax on these loans might be considered a favor for the banking sector, whose popularity in this period appears in decline

Concluding Remarks

At present it appears that do exists at last nine different tax regimes for the different types of cooperatives. 1) The social cooperatives enjoy a total tax exemption for the profits devolved to their indivisible reserve. 2) For the cooperatives of agriculture and processing and trading of agricultural products and the cooperatives of small fishing with prevalence of mutuality the indivisible reserves are exonerated for 80% of their amount. 3) For the cooperatives of consumption with prevalence of mutuality the share of the reserves exempted is 45%. 4) For all the other cooperatives with prevailing mutuality the share of the reserves exempted is 70% except for the cooperatives of mass retail. 5) These cooperatives even if endowed of the requisites of prevalence of mutuality are subject to the tax regime of the cooperatives without prevalence of mutuality 6) For the cooperatives without prevalence of mutuality the reserves are taxed at the normal rate. 7) The cooperatives of production and work have a preferential treatment as for the limit to the loans of the cooperators, which it double than the normal one. 8) The regime of the cooperatives of processing and trade of agricultural products differs from the preferential regime of the other agricultural cooperatives for the same reason, relating to their societal

loans 9) The regime of cooperatives of home owners differs from the general regime of the cooperatives, because the limit to the loans of the cooperators is double than the normal one; their tax regime differs from that of the cooperatives of work and capital that benefit of the same privilege, because unlike the other cooperatives, their properties and those of their members are exonerated from the local tax on the real estates (ICI).

In this paper we did not want to discuss if and how much the fiscal and financial benefits obtained by the various types of cooperatives in the past were acceptable from the point of view of principles of efficient allocation and of equity, under the assumption of given principles of political economy.

However it appears difficult to argue that the nine different fiscal regimes now existing for the different kinds of cooperatives may be entirely justified in terms of rational allocation of resources and distributional policies, rather than in terms of differential success in rent seeking.

In this respect it appears that:

- the alternation between periods of increases and reductions of the preferential treatments of the various kinds of cooperatives is strictly connected with the alternation of governments with different political orientation.

- the persistence of a more favorable regimes for the cooperatives with prevalence of mutuality *different from the consumption cooperatives of mass retail* in comparison with the others and the differentiated preferential regimes of the societal loans may be explained by the fact that they are important both in the CCI and in the League.

The persistence of *differentiate regimes of particular favor*, for the cooperatives of agriculture and for the processing and trade of agricultural products and for the fishing cooperatives, important both in CCI and the League, and for the cooperatives of production and labor might be additionally explained by their particular power as pressure groups because of their territorial concentration and their links with the respective Unions of workers.

The peculiar favor of the tax regimes and -until the most recent times- the preferential treatment in the contracts with the public administrations obtained by the social cooperatives, important both in CCI and Union the League, may be explained by the fact that they supply social services. However these social services could also be supplied by *true nonprofit organizations*. An additional explanation of their extremely favorable tax treatments may lie in their great electoral power deriving from their close contacts with a large number of voters who, because of poor economic conditions, precarious health state and /or old age, may be easily influenced by those who assist them.

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Notes

Note 1. Actually the authors of this paper do believe that the cooperatives may have a important functions in a pluralistic society, in order to realize the "subsidiarity principle", particularly in the social and cultural sector and for the promotion of the economic growth of the less favored areas and social groups. Notice that the rent seeking process does not necessarily cause "distortions" in the public choices see Forte F. (2000), Chapter V, Second Part On rent seeking of pressure groups see Becker G.S (1983), Becker G.S (1985), Buchanan J.M., Tollison R.D and. Tullock G (eds) (1980) Muller D.C (2000) Muller D.C (2002) Roger D. Congleton, Arye L. Hillman (2008) 1 and 2. The rent seeking may result in increased public expenditures or in tax benefits. Authors as Muller (2002) focus on the effects of rent seeking on the size of Government. He consider, in the first place, the case of agricultural pressure groups. Here we focus on the taxation side. Rent Seeking may be exerted by electoral and political influence trough financing or trough voting. In our case both may be relevant. And political financing mostly, obviously, can be done legally. We don't consider here the dark side of corruption, which for this sector as for Italy, does not seem relevant.

Note 2. For the intrinsic importance of these loans for the cooperatives since their birth in the nineteen century, see A. ROSSI,

Note 3. If the law does not state differently

Note 4. Source : Federconsumo , the organization of the cooperatives of consumption and distribution adhering to CCI

Note 5. Francesco Forte co-author of the present paper was then Minister of Finance. He was the leader of the growing pro market wing of the socialist party

Note 6. A large share of the housing cooperatives of the League are cooperatives with undivided property, while the CCI housing cooperatives are normally cooperatives with property of the individual members which end when they enter in possession of their own house.

Appendix

Table 1. Revenue, employed and members of the various types of cooperatives belonging to the League and CCI

The cooperatives sector in Italy

I Consumption	LEAGUE	CCI	Total
Revenue (millions of €)			
mass retail	11.750	-	
small retail and wholesale purchase	7.800	-	
Total	19.550	9.130	28.680
Employed			
mass retail	53.800	8.250	62.050
small retail and wholesale purchase	35.200	1.530	36.730
Total	89.000	9.780	98.780
Members			
mass retail	6.400.000	-	-
small retail and wholesale purchase	3.600	-	-
Total	6.403.600	282.000	6.685.600
II Production and work and services	LEAGUE	CCI	Total
Revenue (millions of €)			
production and labour and services	9.090	-	
Services	6,5	-	
Total	9.090	9.500	18.590
Employed			
production and labour and services	35.000	-	
Services	150.000	-	
Total	185.000	188.000	373.000
Members			
production and labour and services	24.400	-	
Services	128.000	-	
Total	152.400	448.659	601.059
III Agriculture and food processing	LEAGUE	CCI	Total
Revenue in millions of €	7.380	25.617	32.997
Employed	23.740	66.640	90.380
Members	22.000	67.620	89.620
IV Small Fishing	LEAGUE	CCI	Total
Revenue in millions of €	829	466	1295
Employed	4930	7.880	12810
Members	18.900	13.171	32.071
V Social	LEAGUE	CCI	Total
Revenue in millions of €	2.130	4.690	6.820
Employed	66.300	184.025	250.325
Members	63.200	940.000	1.003.200
VI housing	LEAGUE	CCI	Total
Revenue in millions of €	1.022	3.100	4.122
Employed	1.530	976	2.506
Members	420.000	67.620	487.620
VII others types of cooperatives	LEAGUE	CCI	Total
Revenue in millions of €	3.650	8.801	12.451
Employed	43.000	35.000	78.000
Members	45.600	940.000	985.600
VIII All cooperatives	LEAGUE	CCI	Total
Revenue in millions of €	43.651	52.591	96.242
Employed	413.500	470.645	884.145
Members	7.125.700	2.759.070	9.884.770

The data for the League of Cooperatives refer to years 2006 and for CCI to year 2008

Table n. 2. Political composition of the governments and fiscal measures for the cooperatives

year	Law or decree	Premier (name and party)	Parties of the government	Proponent of the legislation (name and party)	Political line	Effect for the Cooperatives	
						Benefits	Reduction of benefits
1947	D.PR n.1577 December 14 (Baseli's law)	De Gasperi, DCI	DCI, PCI, PSI, PRI,PLI	Basevi PSI	grand coalition	For all	////////////////////
1971	Law n. 127 February 17	Colombo DCI	DCI, PSI,PSDI,PRI	Ferrari Agradi DCI	C	for all	////////////////////
1973	DPR 597/598/600/601 September 29 (Italian Tax Reform)	Rumor DCI	DCI, PSI,PSDI, PRI	Colombo DCI	C and CL	For all	For all in particular for cooperatives of agriculture, food processing, small fishing, production and labour
1974	D.L n. 95 , April 8	Rumor DCI	DCI, PSI, PSDI	Tanassi PSDI	C and CL	////////////////////	For all
1977	Law n. 904 December 16.	Andreotti DCI	DC and coalition with support of PCI	Pandolfi DCI	L	For all	////////////////////
1980	Decree (DL) paragraf 6 bis October 31, (D.L)	Forlani, DCI	DCI, PSI, PSDI, PRI	Andreatta DCI	CL	For all	////////////////////
1985	Law n.49 Paragraf 15/23 February 27	Craxi PSI	DCI, PSDI, PRI, PLI	Goria DC	CL	For all	For all
1991	Law n. 381 November 8	Andreotti DCI	DC,PSI,PSDI,PLI	Formica PSI	CL	social cooperatives	////////////////////
1992	Law n. 59 January 31	Andreotti DCI	DCI, PSI, PSDI, PLI	Formica PSI	CL	for agricult	////////////////////
1994	Ministerial Decree May 3,	Ciampi, independent of the left	DCI, and coalition with support of PCI (PSI,PSDI, PLI)	Barucci DCI (left)	L	For all	/////
1994	Ministerial Decree October 7	Berlusconi FI	AN, LN, CCD, UDC	Dini FI	CR	////////////////////	For all
1996	Law n. 52 February 6	Dini, independent of the left	coalition of left and independent	Fantozzi Independent (left)	L	Social cooperatives	////////////////////
1998	Financial Law n. 448 Paragraf 59 December 23	D' Alema, Ulivo (L)	Ulivo PDC, UDR	Ciampi Ulivo	L	For all	////////////////////
2001	Law n. 142 April 3 2001	Amato Ulivo	Ulivo, PDC, UDEUR	De Turco Ulivo	L	For all	////////////////////
2002	Decree (DL) n. 63 April 15	Berlusconi FI	F I, AN,L.N , CCD-CDU	Tremonti FI	CR	////////////////////	For all except agriculture and fishing
2004	Law n. 311 item 1 paragraf 460-466 financial law December 30	Berlusconi FI	F. I, AN, L.N, CCD-CDU	Siniscalco Independent FI	CR	////////////////////	For all except agriculture and fishing
2008	Decree n.112 June 25	Berlusconi PDL	PDL e L.G	Tremonti FI	CR	////////////////////	For all, in paticular for big consumption cooperatives excepted agriculture and fishing
2008	Law n. 133 August 6	Berlusconi PDL	PDL e L.G	Tremonti FI	CR	////////////////////	For all , in paticular for big consumption cooperatives excepted agriculture and fishing

Meaning of initial for legislation: Dpr = decree of the president of the republic, D.L decree/ law

Meaning of Initial for party C= Centre L= Left R= right DCI= Italian Democratic Christians [CR]; PLI= Liberal Party[R]; PRI = Republican Party[C]; PSDI[C]= Socialist Democratic Party; PSI [CL]= Socialist Party, PCI [L]=Italian Communist Party; DS[L] Democratic Left (former PCI), ULIVO[L]=DS +DemoChristian Left; PD[LC] Former DS and DemoChristian Left; AN [R]= National Alliance; FI [CR]= Party for Italy; PDL[CR] = Party of Liberty; LN [RC]= Northern League; UDEUR[CL] = Democratic European Republican Union UDR [CL] = Democratic European Union; Biancofiore [C] = CCD+UDC; CCD [C] = Christian Democratic Center; UDC [C] = Union of Democratic Christians; PDC [L] = Party of Communist Democracy



Military-Entrepreneur Relations in China since 1979: From Political Divide to Social Reconciliation

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Abstract

There have been substantial changes in the relationship between the PLA and the emerging private entrepreneurs since China's reform and opening-up. As a consequence, these relations have shifted from the old model of political divide to a new model of social reconciliation, which could be described by four major indicators: recruiting policy, civil-military mutual support movement, the private sector's engagement in military procurement and private employers' participation in the reemployment of veterans. This paper compares the PLA's ideological and policy changes between the 1979-1991 period and the period since 1992, and finds time lags exist between the PLA's ideological progress and policy innovation, which results from the gap between the CCP's intention and social opinion. The PLA under certain circumstances is encouraged by political and military leaders to promote its relationship with the new social stratum. Despite the achievements, value barriers, mutual distrust and new partnership challenges still remain serious obstacles. A complete legal system and new thoughts are essential for further development of their relationship.

Keywords: People's Liberation Army, Private entrepreneurs, Relations, 1979

1. Introduction

China's economic transformation from government-dominated economy to market mechanism brought about a new social stratum of private employers and self-employed individuals, usually known as private entrepreneurs. Although numerous research endeavors have been made by economists to analyze the rising new economic division, few studies have been conducted to examine the relationship between the People's Liberation Army (PLA) and the emerging private entrepreneurs either in Chinese or international academic community. In practice, the great social change since reform and opening-up brought the new social division of entrepreneurs into the agenda of political and military decision-making. As a consequence, the PLA gradually changed its attitude and policy toward this social group. But why the military's policy and attitude changed and where are the military-entrepreneur relations developing? This paper conducts a comparative historical analysis of the evolving relations to find out how political and social factors influence the PLA's policy and tries to identify future challenges in their relations.

2. Historical context of the relations before 1979

Before examining the PLA and the emerging new social class, it is necessary to look back on their history in the Mao Zedong era.

2.1 Adversaries and struggle

During China's domestic revolutionary war from 1927 to 1949, the ruling class known as the Chiang Kai-shek group, landowners and bureaucratic capitalist entrepreneurs constituted the main targets of class struggle and thus the enemy of the army led by the Chinese Communist Party (CCP). Mao Zedong developed his revolutionary politics and philosophical thoughts based on Marxism's class analysis framework and proposed the strategy of encircling the cities from the countryside by mobilizing the poor. In Mao's theory, the word People is a political terminology and consists of certain classes and groups with variations during some periods. (Qiu, 2008, p.63) The PLA was ordered to unite with and fight for the people, who were mainly poor peasants, workers and unemployed masses. Given the class struggle nature of Chinese civil war, it is not surprising that military officers were primarily selected from middle peasants, industrial workers, farm laborers and reliable intellectuals. The metaphor of fish in the water has been used frequently and for a long time to describe the relationship between the PLA and the class of peasants and proletariat. On the contrary, the metaphor of water versus fire is rather appropriate to portray the relationship between the PLA and interest

groups of landlords and comprador bourgeoisies.

2.2 Utilization and transformation

Among the first few years after the founding of the People's Republic of China, private enterprises helped the recovery of urban economy, relieved the serious material shortage and became a source of procurement for the Chinese People's Volunteer Army since the outbreak of the Korean War, but their illegal commercial behaviors, such as bribery, tax evasion and cheating on military contracts, were severely condemned by the military authority and stricken by government. Since 1953, Mao carried out the policy of transforming capitalist industry and commerce into socialist economic components. To ensure a peaceful transition through the form of state capitalism, members of the PLA were informed of government decisions and requested to write to family members and relatives of capitalist background to persuade them to support the movement. (CCP History and Political Work Research Center of National University of Defense Technology, 1989, pp.61-65) After the transformation, private entrepreneurs as a social class vanished, and China's society is composed of two main classes: peasants and workers, with intellectuals as an element of the latter.

In general, the relations between the PLA and the group of bourgeoisie and small business owners witnessed more conflicts than cooperation, and this was to a great extent predetermined by the class struggle nature of Chinese revolution, political thoughts of the CCP and the socio-economic oppression in old China as well.

3. Theoretical framework

3.1 Limitations of cultural and motivation perspectives

Existing research about the relationship between the PLA and the social group of entrepreneurs employed mainly two distinct analytical approaches, cultural perspective and motivation perspective.

Cultural approach is adopted by both military experts and civilian scholars, and explains the military's reluctance to build close relations with private business owners during civil-military mutual support movement in the 1990s. The private-military cultural dichotomy assumes that the two spheres are organized by different types of logic. The military sphere is considered the realm of selfless service, discipline, sacrifice and the symbol of collectivism. By contrast, the private business sector is based on individualism and is regarded as the domain of profit-pursuing. The cultural distinction between these two spheres is often cited by military officers and government officials to defend the stagnant military-entrepreneur relations. Motivation approach is applied when discussing the new social group's poor representation in military recruitment. This theory argues that current recruiting policy and military payment can not generate enough mandatory and incentive mechanism toward the wealthy youth. While both perspectives prove to be inspiring in the above issues that took place since the 1990s, neither can interpret the profound changes in military-entrepreneur relations since 1979. A new theoretical model is needed to explain the changing relationship.

3.2 The approach of political legitimacy

In socialist China, private economy and entrepreneurs possess a peculiar status in the political domain, and the PLA is in nature a political instrument. Military-society relations have been considered an important part of the PLA political work since its establishment in 1927. Therefore, a political approach is essential to grasping the dynamics in military-entrepreneur relations.

Since explanations operating at either level alone are bound to be misleading, this paper takes previous research perspectives as embedded supplements and proposes the core concept of political legitimacy, which is based on the CCP's political confirmation and civilians' acceptance. The understanding of legitimacy is derived from the PLA's officially defined role as people's army led by the CCP and the content of ideological and political work that determines the PLA's behavior to a significant degree. President Hu Jintao's speech at the 80th anniversary celebration of the foundation of the PLA stressed that the two primary objectives of political and ideological education were to guarantee the CCP's absolute control and the PLA's service to the people. (*PLA Daily*, 02/08/2007) Because the PLA has an urgent desire to accelerate its modernization process, this motivation is also taken into account as a vital factor that affects its attitude toward the group of entrepreneurs. In sum, the CCP's political resolution, civilians' acceptance and the PLA's modernization motivation are the three leading factors to be examined in military-entrepreneur relations.

Four indicators are selected to demonstrate the route of change and to testify the role of the above three influential factors: political background check in recruitment, civil-military mutual support campaign, private enterprises' participation in military procurement and the private sector's role in veterans' reemployment after retirement.

In view of the fact that political intention and civilian opinions are dynamic and witness constant changes, a historical comparison between the 1979-1991 period and the period since 1992 is conducted to illustrate how these variables lead to different results.

4. Conservative ideology and the divide: 1979-1991

4.1 Difficult recognition by the CCP and the PLA

Although the economic reform since 1979 changed China's ownership structure at unprecedented speed, breakthroughs

in ideology and social structure tended to be much slower and were full of contradictions. China's new constitution in 1982 recognized the role of individual businesses as a complement to the public economic sector, and the self-employed were given legal status. The 13th National Congress of the CCP adopted the new strategy of public-ownership-dominated and diversified economic structure, and the new version of constitution in 1988 granted legal status to private employers. Private employers and the self-employed were gradually accepted and trusted by the ruling party and in the government's official documents, but voice of suspicion and criticism in the party and the PLA still existed.

In the early 1980s, influenced by left ideology in the Cultural Revolution, some army cadres, including a number with long service behind them, didn't understand the policies adopted since the Third Plenary Session of the CCP Central Committee, which they regarded as capitalist. (Note 1) Deng Xiaoping urged the military to learn and follow the intention of reform. *PLA Daily* distributed through the armed forces and the massive ideological and political education proved to be successful in delivering timely CCP policies. As a result of these efforts, the PLA seemed to achieve strong consensus on and take positive attitude toward the growth of private employers and self-employed individuals. Compared with its narrow-minded civilian counterparts, the PLA's attitude was more progressive in that period of China.

4.2 Discrimination from the public and the PLA in dilemma

On the other hand, the society still held negative opinion, which left the new social group in an embarrassing situation and reduced the degree of its political legitimacy. Domestic Marxist theorists raised a debate concerning private employers in the mid 1980s, and some scholars insisted that those private companies employing more than eight workers should be considered capitalist. The risk of punishment and the stigma of being a self-employed individual or private employer motivated many business owners to register their enterprises under other forms of ownership arrangements. (Susan, 1995, pp.4-5) Besides the political discrimination, social bias was clear when compared with the iron-rice-bowl workers, and severe critiques fell on the new social stratum's fraudulent business behavior and immoral deeds.

On the above issue, the PLA held the same viewpoint as the public. It recognized the development of private economy while opposing the illegal and degraded moral and behavior standard represented by the growing self-employed and private employers in the initial stage of market economy. As a matter of fact, the PLA found itself trapped in a frustrating dilemma because its various commercial and production activities increased military fund while the deteriorating social ethics infiltrating into the armed forces were threatening its combat readiness and concentrated devotion to national defense. In the second half of the 1980s, rejecting money worship was an important topic on the PLA's political and ideological work list. Heavy criticism was directed toward the unhealthy social values, and private employers and the self-employed were thought to be the social component who should take some responsibilities. What's worse, driven by economic gains, some military officers and units got involved in illegal commercial bribery and smuggling, which was evidenced by the PLA's combating against economic crimes in 1982. (Deng, Ma & Wu, 1994, pp.208-210)

4.3 Visible divide in military-entrepreneur relations

Progress in the PLA's ideology takes time and adequate public support to transform into advances in policy. As the protector of socialist regime and builder of domestic economy and society, the PLA plays a peculiar role in political and social life. When addressing external relations, the PLA always attributes its fighting power to the CCP's leadership and civilians' support. Therefore, correct political orientation and wide social support are the absolute prerequisites of any adjustment in policy. The disagreement between the CCP reform intention and public recognition prevented any possible tremendous policy change.

The wide gap between the PLA and the new social group was clear, which was indicated by the conscription policy and the civil-military mutual support movement. In Mao Zedong's political theory about armed forces, the PLA, as a tool of class struggle and regime protection, should choose military cadres from workers and peasants and indoctrinate all servicemen to guarantee their loyalty to the proletariat. Affected by the extreme left ideology, the PLA adopted severe checking procedures and applied high political standards in recruitment, excluding most young applicants relative to the private economic sector. During the whole 1980s and early 1990s, the PLA took family political background as a critical checking consideration, preferring youths from families of poor peasants and workers. It was difficult for the self-employed and private employers to prove their political attitude and behavior because they did not belong to any state-owned working unit, and thus resulted in low probability of successful enlistment.

The gap was also reflected by the civil-military mutual support movement. To solve historical tensions and conflicts in civil-military relations brought about by the "Three Supports, Two Military Governings" in the Cultural Revolution, Deng Xiaoping and his colleagues promoted the civil-military mutual support campaign to construct the socialist spiritual civilization. Historical records of the PLA political work proved that this movement was carried out mainly

between the PLA and state-owned companies, government agencies, rural villages, urban communities, schools and state-run charity organizations. (Hou, 2003, pp.64-71) As a regular national mutual interaction mechanism still followed by the PLA today, this movement did not get the self-employed and private employers involved. Available evidence demonstrated that the PLA's primary goal in selecting support targets was to produce wide social influence. (Mass Work Bureau of the General Political Department, 1989, pp.312-314) Because most people believed the self-employed and private employers were indecent, relations with them could not bring favorable social image for the PLA. Although no material indicates a political prejudice or discrimination against private entrepreneurs, it is obvious that cultural and moral gap made the PLA reluctant to develop close relations with the new social group, and the private sector's low proportion in national economy might also be a reason. Besides, military records showed only a small number of self-employed individuals took part in the activities of supporting frontline soldiers fighting against Vietnam's invasion. (Yan, Zhu & Zhou, 1988, pp.602-603)

5. Breakthroughs and reconciliation since 1992

Benefiting from its increasing economic power and scale, the self-employed and private employers have received higher political status and wider social respect since 1992, and the PLA has to find new strategies to develop links with this new social stratum.

5.1 Consensus between the CCP and Chinese society

Deng Xiaoping's speeches concerning reform and opening-up in 1992 and the decision by the CCP's 14th National Congress to establish a market economic system dispelled all the doubts and uncertainty. The 16th CCP National Congress took more progressive approaches toward private employers' admission into the CCP and government. Data from the United Front Work of the CCP Central Commission showed that, in the year 2006, 136 representatives of the National People's Congress, 107 members of the National People's Political Consultative Committee and 7 vice chairmen of the National Federation of Industry and Commerce came from the non-public economic sector. (Network of the United Front Work Department, 2006) Statistical figures from the State Administration of Industry and Commerce indicates that the total number of self-employed individuals had exceeded 29 million by the end of 2008, and private employers increased from 0.139 million in 1992 to 5.2 million in 2007. The social opinion and media response became more open-minded and similar. The ideological consensus reached between society and the CCP provides the PLA with solid political and social support to expand relations with the new social stratum. The political work inside the armed forces delivered the CCP's policy and intentions, and helped achieve agreement throughout the ranks. To improve political legitimacy and win more social support, the PLA began to make incremental changes in conscription, civil-military mutual support, procurement and reemployment of veterans.

5.2 Changes in the four indicators

5.2.1 New standard in conscription

Social standard instead of political threshold dominates the political checking work in recruitment and many youths with non-public economic background joined the PLA. Traditional political checking of applicant fell into three major categories: the applicant's political identity, family member's political record and the applicant's moral and practical performance. The profound economic success provided the CCP with substantial confidence and legitimacy, and transformed its governing ideology. In 1993, 1996 and 2004, the PLA made several upgrades and amendments to its recruiting policy, emphasizing the applicant's performance and abolishing discriminatory articles toward the emerging new social group.

The CCP leaders and top military commanders took open and positive attitude and encouraged youths from the private sector to enroll. The report of Li Xiangqun by the PLA General Political Department and major domestic news media reflects military and political leaders' role and standpoint. Li, the son of a wealthy private employer in Hainan special economic zone, sacrificed his life in the 1998 flood rescue and relief operation and earned the honor of Hero Soldier in the New Era authorized by then commander-in-chief Jiang Zemin. Domestic media report focused on his wealthy family background, outstanding performance and high virtue standard. (Xu & Liu, 2004, p.441) The propaganda reached its peak during the first half of 1999 and content analysis showed that military media's coverage and comments combined Li and his father together to show the success of political work facing challenges from the market economy and highly praised the patriotism rooted in the new social group.

5.2.2 The expanded civil-military mutual support movement

A new trend has occurred that the PLA is expanding the civil-military mutual support campaign to include the rising new social stratum. Developing better relations and closer links with the private economic units and social organizations has become a matter of significance advocated by both the Ministry of Civil Affairs and the PLA leadership. This change is mainly attributed to the growing power of the non-public sector. Neither the CCP nor the PLA could ignore the private sector booming.

Material published by the PLA in the late 1980s suggested that some army units stationed in Guangdong province, southern China, attempted to build mutual support relations with nearby private farms and factories. In the 1990s, the PLA had been accustomed to inviting local community leaders and private employers to visit its camp on important celebration days, and regular mutual support with the private sector was highlighted.

5.2.3 Partnership in procurement

Economic cooperation between the PLA and the private sector went through many barriers and came a bit late. Unlike the voluntary and extensive mutual support between the PLA and the class of peasants and workers, this new partnership is based on mutual benefits and follows the laws of market economy. During the Cultural Revolution and a long following period, PLA units had invested resources in almost every social and economic sector, engaged in excessive commercial businesses and playing too many unnecessary social functions. The self-sufficient nature of the armed forces reduced its dependence on the larger society including the private sector. Private companies were forbidden to produce or develop military supply material and equipment. The upsurging market pressure faced by national defense industry in the 1990s and the reform of logistical support system in 1999 pushed China's highest military decision-making body to introduce private market players to enhance cost-effectiveness. In July 2007, China's Commission of Science, Technology and Industry for National Defense released progressive policies to encourage the private companies to invest in military infrastructure construction, conduct scientific research for national defense projects and weaponry production, participate in the regrouping of military firms and cooperate with military firms to develop technology for military and civilian use.

Although many obstacles remain there, the private sector and the PLA are apparently establishing partnership efficiently and quickly. Recent information from military news media shows that the current worldwide economic crisis has accelerated the cooperation. *PLA Daily's* report of the private companies in Zhejiang province, east China, indicates that they want cooperation with the PLA more urgently to survive the economic recession. (*PLA Daily*, 22/05/2009) For the PLA, reduction in cost and production cycle is effective and appreciated by high-level military leaders.

5.2.4 The private sector's role in veterans' reemployment

The self-employed and private employers became an important actor in the reemployment of retired soldiers and some officers. China's reform in government, state-owned companies and public institutions decreased available jobs for retired soldiers, and a considerable amount of non-public economic organizations arose as the largest employers of the workforce. To cope with possible social disturbance caused by unemployed veterans, government and the PLA asked all economic units to take the responsibility of employing retired soldiers in 1994. (Sun & Zhao, 2001, pp.13-15) Being aware of the strength of market economy, the PLA encouraged private employers to participate in civilian technical training and reemployment of veterans. The PLA also encouraged retired soldiers and some officers to find jobs or run business by themselves, while asking the local government for awards and preferential taxation measures. An increasing number of soldiers are working in the non-public sector. However, historical figures from *PLA Daily* indicated that lower percent of officers were willing to choose to work in the non-public sector since 1997. (*PLA Daily*, 03/12/2008)

Last but by no means the least, the PLA has maintained close relations with many of the first generation private employers and self-employed individuals who stemmed mainly from former rural peasants, laid-off workers, technicians and even veterans. The dual use talents program implemented since the mid 1980s by the PLA transformed millions of veterans to village company workers, rural grass-root level governors and technicians, part of whom in turn became self-employed individuals and private employers in the 1990s. A survey by the Private Economic Association examined the occupational identity changes of private employers and found their previous occupations ranged from farmers, technicians, workers, cadres to retired officers. (Research Group of Chinese Private Enterprises, 2003, pp.138-161)

6. New challenges and issues in the relationship

6.1 Value barriers and distrust

Development of China's market economy and social transformation drove social values to be increasingly diverse and mixed. The highly organized military and the private sector are respectively following different values. Money worship and individualism, still prevalent among private employers, run counter to the PLA's long-held beliefs and ethics. At the highest level, the CCP Central Committee and Central Military Commission issued directives to strengthen political and ideological work in the PLA in order to withstand the dangers of mammonism, hedonism and extreme individualism. Former president Jiang Zemin put forward the theory of governing the nation by law and morality, prohibited the PLA from engaging in commercial activities of any kind and rectified military servicemen's immoral thoughts.

Although the general social spirit has been improved, the pursuit of profit remains the core for the survival and growth of any market player. Affected by the incomplete legal system and messed-up social values, money worship can hardly be rooted out. Without prospect of economic gains, most private employers and those self-employed are not well motivated to develop mutual support activities with the PLA. As for the military, it emphasizes discipline, collectivism

behavior and dedication to maintain the servicemen's morale and fighting power. Contrary value orientations derived from different organizational objectives and standards of conduct might collide with each other and impact the PLA's ideological indoctrination efforts, which are concerned about by many military commanders and political commissars.

Value barriers and mutual distrust are taken as the reasons why military-entrepreneur relations have been stagnating in many developed areas and cities. Take Pudong district of Shanghai for instance, until June 2005 only 20 private employers had joined the mutual support program while the number of registered private companies had reached 32 181. (Civil-Military Mutual Support Office of Pudong District of Shanghai, 2007)

6.2 Unstable partnership in procurement

The civil-military integration strategy, proposed by the 17th CCP National Congress, will definitely allow more private enterprises to participate in military product design, research and production. However, there is no royal road to integration. To build a healthy and stable partnership, the PLA's current procurement system must undergo great reform and those traditional management policies relying on administrative means and the CCP internal regulations need to be revised. In addition, the adoption of commercial management concepts, business regulations and protection of intellectual property rights are indispensable to enhancing cooperation with the private sector. On the other hand, the private sector must strive to meet the PLA's high requirement standards on quality, specification and secrecy.

Since neither side has been well prepared for the other's demands, disputes and even failures are inevitable during procurement. Managing the fluctuating partnership needs both legal work and innovative measures.

6.3 New recruiting requirements and social justice

Beginning from the winter of 2008, the PLA targeted graduates from colleges, senior middle and vocational schools as primary and preferential recruiting source in an effort to modernize the army. Rural and unemployed urban youths, who received junior middle school education and had for decades constituted the majority of new recruits, are believed to be difficult to meet the PLA's new human resource demand. This shift enables the PLA to integrate with domestic educational accomplishments more closely, but does not provide adequate attraction to young adults from wealthy families.

Many scholars contended that unfair education resource allocation was created by the market-oriented reform in college education system since 1979. (Zhou, Phyllis & Nancy, 1998, pp.199-222) Further empirical study proved private employers and those self-employed benefited greatly from economic prosperity, and their descendants could usually attend better colleges. (Lee, Li & Sun, 2004, pp.412-414) The high percentage of university enrollment, severe eyesight and weight requirements by the military, draft deferments for students and poor economic motivation accounted for the low representation of private entrepreneurs. RAND's research on U.S. military recruits' socioeconomic backgrounds confirmed that recruits came primarily from families in the middle or lower middle class, and the high end of the distribution was not well represented. (Bernard, 2006, pp.7-8) Due to secrecy policy, specific data are not available to estimate social representation in the PLA. Nevertheless, Chinese local news media's occasional report of youths relative to the self-employed and private employers in recruitment indicates that they are failing to carry their share of the military burden.

The issue of social justice concerning recruitment has been noticed by few military scholars, and no solution has been suggested yet. (Jiang, 2007, p.242) In a transforming society, this disproportionate burden of national defense on segments of society might become intense and lead to confrontation during mass mobilization and war. What's even worse, the young generation takes enlistment more as a selection of jobs rather than a citizen's obligation, placing military-society relations in a dangerous and fragile situation.

7. Conclusions and implications

Ideological shifts have not been accompanied by simultaneous policy changes. Time lags between the PLA's ideological progress and policy change have been witnessed many times ever since the reform and opening-up, because of disagreement between the CCP and society. When considering its policy toward the new social stratum, the PLA attaches great importance to both directives from the CCP and the state of public opinion. The greater the ideological unity between the CCP and society, the higher the probability of policy change in the PLA to win support from the new social stratum. This kind of time lag has its larger political and social background that China's reform originated from ideological breakthroughs and then transformed to policy adjustment. Reform in the PLA followed the same path. The CCP dominated the PLA's policy stance through its political education system and kept the PLA's ideology in pace with the Central Commission's reform strategy. However, other factors, especially the social opinion, influenced the PLA's policy agenda to a great extent. Inherited from Mao Zedong's military and political thoughts, the unity between the army and the people has been taken as one of the three leading principles of political work and the guarantee for continuous military success. (Note 2) This principle held resolutely by all service members prevents any radical reform if the majority of civilians are not favorable toward that issue. The conservative public were doubted about market economy and private employers during the first decade of reform, and the PLA was inclined to keep its previous

policies. Under circumstances where the society accepted the new social class since 1992, the PLA tended to be more proactive and speeded up the step of reform.

Like some foreign armed forces, the PLA played a role of catalyst in certain social experiment. The intensive and massive media coverage of Li Xiangqun in 1999 can be considered as such an attempt. The interaction between military and media was controlled by General Political Department and top political leaders to shape the new social stratum's favorable social image and a better reputation in the army. With regard to the dramatic growth of private economy, the endeavors by the PLA are much pioneering to contribute to social harmony. This action also implies that the CCP expects the PLA to play a constructive rather than coercive role in society-building.

Traditional military culture is adapting to the new social environment while maintaining its organizational and political characteristics. The wider and deeper interactions in ideology, business and social activities between the PLA and the rising new social stratum bring new challenges and problems. Solving disbeliefs in their relationship needs more efforts.

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Notes

Note 1. During the talk with leading comrades from the General Political Department of the PLA on March 27th 1981, Deng Xiaoping criticized wrong ideological tendencies in the army including left ideology and decadent bourgeois ideas. For more details, please read Deng Xiaoping's remarks on *opposing wrong ideological tendencies*. *Selected*

Military Works of Deng Xiaoping Volume 3. Beijing: Military Science Press, 2004, pp. 190-193.

Note 2. In the interview with British journalist James Bertram on October 25 1937, Mao Zedong explained the army's political work and said it was guided by three basic principles: the unity between officers and soldiers, the unity between the army and the people and disintegrating the enemy troops and giving lenient treatment to prisoners of war. These doctrines are unswervingly observed by the contemporary armed forces. For more information about the interview, please read *Selected works of Mao Zedong volume 2*. Beijing: People's Press, 1991, pp. 378-340.



Policy of Attention to the User of Drugs in Brazil

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Abstract

The aim of this article is to reflect on Anti-Drug City Councils (COMADs) having as the main idea the proposal done by the Brazilian Anti-Drug Policy. In this way, it starts from the conception of the contradictory space that covers the councils of policy and, in specific, as the creation of the Councils in 10% of the Brazilian cities that had not resulted in its effective implementation. For this analysis it was used a data base supplied by the Anti-Drug National Department (Senad) and a research applied to the State and City Councils (by E-mail) using a questionnaire developed for this end. Making an analysis of this policy, it is identified that the situation of the COMADs shows that Brazil does not practice it, what corresponds to a situation in which its proposal in federal and state level depends on specific decisions taken in the city sphere. And the city decisions the COMADs creation do not come followed by conditions for its full effectiveness.

Keywords: Public Policy, Drugs, Anti-Drugs City Council, Social Control

Background

Brazil is a developing country with an estimated population of 189,399, 727 inhabitants (Brazil, 2007). Throughout the last century the country became the largest economy in Latin America. Conversely, it also became the most socially unjust, exhibiting a perverse concentration of income: 10% of the population possesses 47% of the national income, while 50% of the population possesses a mere 13% of the total (Sader, 2003). According to statistics provided by UNICEF, 10% of the Brazilian population lives on less than \$1 a day.

The aim of this article is to reflect on the Anti- Drug City Councils (COMADs) having as the main idea the proposal done by the Brazilian Anti-Drug Policy. In this way, it is necessary to start questioning the issue and how the historical and socially constructed conceptions will shape the proposals of the policy of confrontation face to the growth of the offer and the demand.

The use of drugs appears as a complex phenomenon of the life in society that involves political, economical, social and cultural issues (Bucher, Oliveira, 1994), being seen under different prisms: the relation modified between man and drug; the economic aspect of the market, the social impact generated by its increasing consumption, the historical, social and legal aspects involved in this process. Such debates receive contours that vary between position (and politics) sometimes of repressive character (Dry Law, prohibition of the marijuana use, for example) sometimes of flexible character (marijuana use for therapeutical ends, or all the debate around the decriminalization or release of cannabis) that vary as the historical moment.

When considering the estimates that point that 11.2% of the adult Brazilian population still have alcoholic addiction and, 6% of the population present serious psychiatric upheavals resulting of the alcohol use and other drugs (Brazil, 2005), we verify that the question of the improper use of alcohol and drugs in general comes being incorporated to the Brazilian politics agenda mainly since the 80s.

The dimension of the kinds of problems related to drug abuse can vary in relation to the time, country or in its different impacts on the community. Analyzing the public policy for the improper use of drugs, it is observed that these oscillate between measures of control on the behavior of the drug consumer and measures of control on the access of these drugs (Garcia, Leal, Abreu, 2008). On the other hand, the measures in relation to the illicit drugs center on the

reduction of the offer through the combat to the drug traffic and the money laundering (Ribeiro, 2000). Also there are a broad range of commercial interests and different actors, as the governments (in the three instances), the media, the Non-Governmental Organizations (NGOs), the public opinion and the related activities, the users of drug, the scientific community, among others (Babor, Caetano, Casswell, 2003).

In general, the annual revenue that comes from the illegal industry of the drugs reaches US\$ 400 billions, or equivalent 8% of the total international trade. This industry brought some power to the organized criminals, it corrupted governments in all levels, eroded the internal security, stimulated violence and distorted the moral values and, also, of the economic markets. These are the consequences that do not come from the use of drug itself but of decades of inefficient policies on the sphere of reduction of offers and on the sphere of reduction of demand (Ribeiro, 2000).

To think about this issue and its implications requires studying the context that it inserts itself. It is a basic thematic of the Social Policy, for characterizing itself as expression of the social matter (4), consisting in a social reality that can be studied scientifically. The improper use of drugs is also fruit of the expressions that the social matter adopts in the current moment of the capitalist society. The social matter inserts in the context of the impoverishment of the labor class with the consolidation and expansion of the capitalism since the beginning of the XIX century, as well as the picture of fight and the acknowledgment of the social rights and the corresponding public policy, beyond the space of the organizations and movements for social citizenship (Gorgulho, 2006). On the other hand, the historical context of formation of the Brazilian society was established with a logic based on assets, with the Latin America appropriation and agrarian concentration and not for the formation of the public thing (Ribeiro, 2000).

All this set of factors is added to the conceptions that are produced from the issue of drugs, conceptions these that will modulate the proposed actions. In the case of the policy of attention to the use of drugs it is observed that the speeches concentrate between two polar areas: one of moralist tone and the other of scientific tone. The moralist tone includes the phenomenon in an anti-drug crusade, which is, in an ideological-moral articulation that spreads out drugs as dangerous and extremely destructive substances. The prohibition, the natural way of fighting against it, is strengthened by the policy, the media, religious and health authorities that tend to describe drugs in its ideological speeches in an extremist and moralist tone.

The social matter can be characterized by a concern as to the capacity to keep the cohesion in a society. The rupture threat is presented by groups whose existence shakes the cohesion of the group (Castel, 1998). In this way, we can size the shake caused by the improper use of drugs and its implications into the contemporary society.

A second scientific speech presents, in general, an epidemiologic tone. Here is described the way of behavior of usage, abuse and dependence of drugs and related damages. Attention still for methodological problems of the subject, considering the definition of categories and processes of analysis. In general, the subject drugs is tense and contradictory so that it can define an approach, involving the segments of the oppressed class of the society, racism, organized crime, social banditry (Ribeiro, 2000), public policy (Bucher, Oliveira, 1994), until the individual that consumes drug (WHO, 2001). Therefore, more journalists make the stories with the view of their formation; psychologists determine the approach from the illness of the individual; the morality of the common sense determines a look deceived by prejudice and the criminalization that comes from this morality feeds a technical dominant analysis. In the dialectics relation between man and drugs, the contradictions are so diverse and current, beyond being used to the coexistence in the illicit one, that they end for losing the dimension of its gravity (Procópio, 2000).

The anti-drug policies implemented in many countries have a regulation character (according to the classification of Frey, 2000), that is, work with orders and prohibitions and decrees. The referred effects to the costs and benefits are not determined beforehand, they depend on the concrete configuration of each policy. Costs and benefits can be distributed in an equal way and balanced between groups and sectors of the society, in a similar way as well as they can take care of the particular and restricted interests. The processes of conflict, of consensus and coalition can be modified according to the specific configurations of the policy.

This regulation process also comprehends the concept of social control, which passes through the relation State x Society. This relation is in the base of the understanding of the social policy and the citizenship, where the society is the main opposite of the State, but also its main term of complementation. This relation is passed by the antagonism and reciprocity that put into motion the scene of history. And facing these conflicts there are, in the relation of the State with the society, two ways of intervention: the pure and simple coercion, typical of the restricted State and the politics as possibility of solve conflicts by consensus (even so it has the coercion as possibility), where inserts the contradiction (Pereira, 2002).

When social control in Brazil is debated; it is brought to the scene the councils that currently possess a different configuration of its origins. Starting from the labor councils (that are organized ways of democratic participation that look for breaking with the centrifugal power, which tries to restrict the social fights and class conflicts in the productive unit - plant or country property), there is in its interior a historical fight that gained force in the XIX century, when the

workers had started to organize themselves in order to have a policy of public, universal, free and secular education, labor laws respected and dignity, as the example of the Commune of Paris. For a long time, this subject was debated in the left field and particularly by Karl Marx (Leher, 2004). It is a subject that Marx theorized in an outline of the fight for a society without exploitation. Marx and Engels (2004) affirmed that the form of participation praised by liberals did not assure the democracy. Gramsci (2002) also theorized on the relation between State X Councils. He said that to construct a democratic State, it must have as basis the councils of workers in the plants, in the field etc. Thus, these workers could think different ways of organizing production in the plants, school and communitarian work, cultural activity, health etc. In the strategy of councils, Gramsci (2002) places in action a new political practice. This author does not make opposition between council and party, between base movement and political direction (Leher, 2004).

In this historical process of evolution of the councils, what we can perceive is that the appropriation made by the capitalism and the neoliberal thought attributed to the council a completely different sense of that one proposed by fractions of the left. Whereas for the left the councils aim to assure the self-organization and the self-determination of workers, for the liberal ones, the councils are instruments to extend the privatization of the State, as the logic of the capital. They are ways of containment of the contradictions and the class conflicts on behalf of established order (Leher, 2004). In this sense, many governments work with councils as a way of organize workers, entrepreneurs and the government in favor of the peace of the capital, such as in fascist Italy in 1930, Hitler in Germany, Franco in Spain, Getúlio Vargas in Brazil (decades of 30/40). It was done to diminish the autonomy and the critics of the left labor unions movements. It was about the autonomy end the critics to the labor union movement of left. In this way, the councils appear as a way of “social consensus” (Leher, 2004).

The councils appeared in Brazil in the 80s and 90s differentiate itself of the previous ones, for constituting in locus privileged of the processing of the mechanism of the decentralization, which one would become possible to allow the society the control on its proper reproduction and on official decisions (Pereira, 2002). Carvalho (1995), referring to experiences in the area of health, says that there is nothing in the history of the Brazilian State that if resembles the councils nowadays, and for its social representation or for the wide range of legal power invested in them.

According to Leher (2004), the subject “council” is central in any strategic analysis of the future, because it mentions the way of participation of the society in the social control of the politics implemented by the State. The participation of the councils in the processes of formation of politics (policy formation) is considered important, since they enjoy of high visibility and its work seems relatively integrated to the knowledge and expectations of the agents, especially the government. However, they can still stop at some limits that still exists, and that, in some way, reduce its capacity of sharing and influencing in some governmental decisions (Draibe, 1998).

Considering these aspects, the political component an of the councils is very important for the process that decides about public policy This politic component involves correlation of forces, articulacy with segments of the civil society, principles of democracy and transparency, with technical capacity and legal ability that the council members have in guarantee spaces of participation and control of the public thing; capacity of the council members, in the use of its legal attributions, to overcome typical red tape and legalist trends (Rizotti, Lopes, Santos, 1999).

1. The Drugs problem in Brazil

As for the current issue of drugs, all this dynamics inscribes itself in the adoption of legislations for the majority of countries that follow the agreements of Single Convention on Narcotics Drugs of 1961 and the Convention on Psychotropic Substances of 1971. These international agreements, promulgated under strong American pressure, approach the issue of drugs from a limited perspective, introducing classifications of strict pharmacologic nature and giving almost no attention to the factors of social or cultural order. As much in the international treaties as in the national legislation and politics that come from them, it doesn't recognize the problems pointed out for the use of psychoactive as cultural production, ignoring deep heterogeneities in the consumption ways, reasons, beliefs, values, rites, styles of life and visions of world that support it (MacRae, 2000).

The historical absence of politics that promote the social protection, health and treatment of the people who use, abuse or are dependents of drugs in Brazil reproduce a scenery of focal politics, organized in an excluding logic. In this context, it is identified the shaping of a policy in which the politic guidelines and agendas evidence contradictions: a) association of the alcohol use and other drugs to violence, in a direct association; b) in spite of deny, politics end adding stereotypes to users, reaffirming its social segregation; c) absence of social and economic analyses that point out with respect to the inclusion of the traffic as an alternative of work and generation of income for poor populations, in special to the use of young workmanship in this market; d) No inclusion of the user of drugs in the composition of councils, reproducing the illegality of the as a possible obstruction to its social participation in an organized way; e) the legal treatment and in an equal way to every member of the “organizational chain of the world of the drugs” is different in terms of penalization and alternatives of intervention.

For Ribeiro(2000), all these issues have direct relation with the existing economical and political processes, mainly in

the Latin American countries and with desperate options of entrance in the capitalist market, even if for the almost exclusive way of “illegal” and “illicit” businesses. According to him, there is a set of prejudiced, ethnocentric and ideological explanations that hide such consequences and are presented in an official way with international endorsement, involving National Congresses, The Army and World- Wide Organisms. Although of a speech centered in a sanitary concern of drug trafficking eradication, the interests of the U.S.A. with the ones of the internal elites match, what practically can be translated contents that also can disclose an economic dispute in direction of the illicit business (Ribeiro, 2000).

From this historical description, it realizes that drug policies can be understood from different points of view: first, it believes that the “problem” will disappear when eliminating the use. And, in this case, the policy supports itself on the judicial and police powers, it would be a repressive reply; second it believes that the “problem” exists due to little flexibility of the society and the policy would be the promotion of the self management on the use and organization of a social system that compensated the contingent damages, in a reply of legalization; then it assumes that the “problem” does not have definitive solution but that there is the necessity of support to a range of social programs. In this case, the policy periodically reorganizes itself because of new drugs, new habits of consumption and crises in the social relations that disturb the subjectivity of the individual, in a pragmatic reply (Acserald, 2005).

Thus, to think the Policies of Attention to the Improper Use of drugs, it is necessary to question itself after all what are the councils - they are structures that widen the democratic space or are agencies submitted to the logic of the State; which the paper of these spaces inside of these policies; and, above all the optics of the social control that establishes itself from these instances, among others aspects. When considering the councils in the area of drugs as one of the spaces to bring into effect the social control, in a perspective of the society as public actor (that it establishes a relation of accompaniment of the State in its actions directed toward the public) it is to consider the daily process of taking public decision as spaces of greater democratic reach. This requires that it carries out urgently a balance, pointing out difficulties for full accomplishment of actions.

2. The Anti-drugs councils in Brazil

The anti-drugs councils had appeared with the implementation of the National System of Prevention, Control and Repression of Narcotics, in the 80s. They were denominated Councils of Narcotics in federal, state and municipal instances - CONFEN, CONENs and COMENs, respectively. Although they had been created in the 80s, the anti-drugs councils had not been created from pressures of the civil society or from the fight of social movements, as observed in other existing councils in Brazil. However, these spaces also are influenced by the scenery of the neoliberal hegemony, with the reduction of the social rights, unemployment and precariousness of work, dismounting of the public welfare and trashing of the social politics, in a way to debilitate the collective representation and social control over the State, achievement of the CF of 1988.

The creation of these councils identifies a phase of drugs policy in Brazil. Nevertheless, in fact the innovative action of these spaces was limited to punctual interferences: as the evaluation of prevention campaigns released in the media, in an attempt to rethink the repressive content of the same ones; it implemented a debate that resulted in the legalization of Santo Daime (5); creation of the communal council in the CONEN-RJ, with representation of many sectors of the society (NGOs, institutions in the area of drugs, universities, entities of students etc). In this council it was criticized the repressive policy and the criminalization of the user was considered a problem to be faced; implantation of nucleus of studies and research in primary attention and treatment of drug dependence in many states of Brazil, linked to state universities (NEPAD/UERJ, PROAD/SP, CETAD/BA etc). From these nucleus, some questions had been debated, for example, the prevention concept (to avoid that something happens) is substituted by the concept of primary attention (a set of measures that promotes a critical decision, basic instrument in the educators qualification courses) (Acserald, 2005).

In 1998, the government extinguished the CONFEN and, in its place, instituted the CONAD. Some changes had occurred in this transition: first the association (it left the Ministry of Justice to associate the Cabinet of Institutional Security) and denomination (of Federal Council of Narcotics for e National Anti-drug Council) and, second, as the composition. However, the new members are governmental representatives and it is still verified negation of the organized civil society participation, without the governmental indication (Brazil, 1998). Subsequently, the President modified this composition with the Decree nº 4,513 of 13/12/2002 and granted to the president of the council the power to invite a representative of the State Council of Narcotics or Anti-drugs to compose the CONAD. The choice of this representative happens by means of process of indication and approval of the presidents of the state councils (Brazil, 2002).

In Brazil, there are 26 Anti-drug State Councils, among them Amapá the single state that does not possess a Council in state or city levels. As the association of these Councils, it varies as the state (in some to the Health Department; in other to Public Security and social defense, and, still, to the Justice State Department) (Brazil, 2005). It shows us that each state fits its Council in the Department that evaluates to be the responsible one for dealing with the drug

phenomenon. These associations translate with them the focus given to the prevention and repression and also a polarization of the structures that compose the Anti-drugs System, consequence of fragmented measures and detached from the other actions of this issue confrontation.

In the Database of the SENAD it has 548 City Councils, but an analysis of the same one demonstrates that some Councils are listed in duplicity and some are State Councils. Therefore, the total of Councils registered in this data base is of 540. Around 10% of Brazilian cities possess COMADs, but great parts of these are inactive (Garcia, Leal, Abreu, 2008). The expectation of the National Anti-drugs Department was to implant the COMADs in 80% of the Brazilian cities up to 2002 (Salgado, 2002). Thus, the data points that the same 10% existing in 2002 remain in 2006.

An analysis of these COMADs points that the majority meets inactive or was only created but not implemented. The reality points for the non accomplishment of this privileged space of involvement of the local community in the formulation, debate and implementation of drug problematic strategies of confrontation.

It is up to the Councils to accomplish the City Anti-drug Policies and to each member the accompaniment and control of the full development of the referring actions to the drugs demand reduction close to the several community sectors (Brazil, 2002). It is still up to the Councils acting as coordinators of activities of all the institutions and entities whose activities are related to this thematic. Its action requires being aware of the communitarian movements, the organized entities, as well as the representations of the existing institutions in the scope of the performance of each Council and ready to cooperate with the anti-drugs cause (Brazil, 2002).

With the ability of formulate the city anti-drug policy and follow its implementation, the current situation points the space empty. Such fact, paraphrasing Gramsci: the analysis points to a "pessimism of the reason" but contradictorily it reaffirms the necessity to assume optimism in our actions for the accomplishment of the Anti-drugs City Councils.

3. Conclusion

The social control subject is central in any strategic analysis of the future, because it is related to the tense relation between State and society. Concentrating the debate around the participation in the interior of the Councils that manage policies of many kinds (health, school, communitarian, black, woman etc), the issue of the analysis of these spaces as contradictory spaces and fight only recently got into the agenda of Brazilian researchers (end of 80s).

As a space of democracy construction, the Anti-drug Council is requiring a balance sheet makes possible to uncover the obstructions for its accomplishment. So, it is as part of the State, but independent of the government, that the councils will be able to find its renewed role in the democratic reform of the State. Although the mere existence of councils in 10% of the Brazilian cities already has a general an cultural effect, it is in the daily decision process that these agencies can find greater democratic reach. As important ways of collective participation and creation of new politics relations between governments and citizens, the anti-drug councils potentially bring the possibility as much of creation of spaces of public debates as of establishment of negotiation mechanisms and agreement to socialize the governmental actions and deliberations. On the other hand, the reality points that the anti-drug councils are being created and not implemented in the city sphere, generating an emptiness of this space as space of fight and deliberation of the city anti-drug policy.

Making an analysis of this politics, it is identified that the situation of the COMADs in Brazil explicit the non execution of the formulated policy, that corresponds to a situation in which the proposed policy in federal and state levels depends on specific decisions taken by the city sphere. And these city decisions of the COMADs creation do not come followed of conditions for its full accomplishment.

Thus, the current moment is of reflection and action; reflection on the way to understand these spaces, their potentialities and limits; action to call up the cities and the National and State Anti-drug Council to put into debate the current scenery and the necessity of accomplishment of strategies for the COMADs empowerment.

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Notes

The Daime is an extracted tea of two hallucinogen plants. These plants, of which produces the tea, are used at Daime and the Union of Vegetal Cult. They are practiced in the North (Amazonia and Acre regions), as well as in the region Center West, in the States of São Paulo and Rio de Janeiro.



Legal Regulation of Administrative Monopoly As Viewed from Chinese Antimonopoly Law

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Abstract

The administrative monopoly breaks the principle of justice, and has large harm to the society. The special chapter in Chinese Antimonopoly Law regulates the contents and corresponding legal responsibilities of administrative monopoly, but the law still has some deficiencies. The Chinese Antimonopoly Law should be perfected from increasing the operation property, confirming the comprehensive legal responsibilities, confirming the law enforcement agency of anti-administrative monopoly, expanding the range of legal regulation and establishing the judicial review system.

Keywords: Chinese Antimonopoly Law, Administrative monopoly, Regulation

In china, the administrative monopoly mainly means the behaviors that administrative subjects harm the market competition and destroy socialism market economy order by the administrative power. The administrative monopoly initially belongs to economic monopoly, and its harm is more than economic monopoly, and it destroys the principle of justice, and induces the occurrence of unfair competition and monopoly in special market, and it harms the benefits of most market subjects, and largely wastes effective resources, and blocks the establishment and perfection of the socialism market competition mechanism. Therefore, it should seek solution and regulation methods from various approaches for the administrative monopoly. Only in this way, the obstacle of Chinese economic system reform and the development of market economy can be removed, which can promote the quick development of economy, enhance the living level of people, improve the total survival environment, and realize the harmony and stability of the society.

1. Regulation of administrative monopoly in Chinese Antimonopoly Law

For the regulation of administrative monopoly, there are many researches and discussions among Chinese scholars, and the system reform view and the legal regulation view are representative views. The system reform view thinks that the administrative monopoly is the product of system, and it can be completely solved by deepening the economic system reform and the political system reform, and the legal measure is hard to solve the problem of administrative monopoly. The central content of the legal regulation view is that the administrative monopoly is very harmful, and it must be forbidden mainly by the laws. The legal regulation view is also can be divided into two factions, and one is to mainly use the administrative law to regulate the administrative monopoly, and the other thinks that Chinese Antimonopoly Law is the main power to regulate the administrative monopoly.

Because Chinese economic and political system reform is a gradual process which needs quite long-term endeavors, and this transfer needs large patients and willpowers, so the administrative monopoly has been a very hot potato at present, and it has seriously blocked the economic development of China with large social harms, and it even blocks the economic and political system reforms which is being in China, so it must be forbidden as soon as possible, or else, the large destroying function on the development of Chinese economy will be hard to image. Therefore, it is too ideal to only depend on the system reform to regulate the administrative monopoly, and the effect is not obvious. In the present national situation, law is the feasible measure to regulate the administrative monopoly. Because the administrative monopoly roots in economic monopoly and has many characters and harms of economic monopoly, more and more legal scholars want to utilize Chinese Antimonopoly Law to regulate the administrative monopoly. "It is the characteristic of Chinese Antimonopoly Law to take the administrative monopoly as the control object of antimonopoly, and it seems a necessary selection according to the national situation, because the administrative monopoly forming in traditional planned economy system is impossible to be removed by administrative measure, and it can only be solved by the legal measure, i.e. the Antimonopoly Law (Zhang, 1993, P.357)".

At August 1 of 2008, Chinese Antimonopoly Law became effective in people's expectations, and the fifth chapter specially regulates the content of administrative monopoly, and the articles from 32 to 37 respectively generalize the elimination of administrative power abuse and the behaviors of competition limitation, and completely regulate the concrete represent form of administrative monopoly, and article 51 regulates corresponding legal responsibilities. Thus, the regulation of administrative monopoly is first regulated in law, and the legal approach is the main measure to govern the administrative monopoly, which indicated that the legal regulation view had been adopted finally. The contents of

administrative monopoly in the Antimonopoly Law embodies the advancement of Chinese legal theory study and legislation technology, and it showed the decision of Chinese legislators to standardize the enforcement of administrative power and stop the abuse of administrative power. Of course, law is only one most important measure to regulate the administrative monopoly, and the reasonable and effective reforms in polity and economy also have very important meanings for the regulation of administrative monopoly behaviors.

2. Deficiencies of administrative monopoly regulation in Chinese Antimonopoly Law

Relative regulations about administrative monopoly in Chinese Antimonopoly Law are active and helpful exploration to regulate administrative monopoly behaviors by law, and corresponding legal regulations are deeply meaningful and influencing to eliminate the bad influences of administrative monopoly, promote the fair competition, establish normal market order, and guarantee the ordered development of market economy. However, whether relative corresponding systems or the articles in the chapter 5 still have some deficiencies, and the anti-administrative monopoly much still remains to be done.

2.1 Regulations are too fundamental to operate

The articles in the chapter 5 of Chinese Antimonopoly Law are some principled articles lacking in operation, which make the judiciary and law enforcement agencies are difficult to distinguish. And many abstract concepts such as what extent can achieve administrative monopoly, and what is that the abuse of administrative power to block the free circulation of commodities can not be defined clearly in only five legal articles, so the catchwords of anti-administrative monopoly appear incapable. At August 1 of 2008, the first day when Chinese Antimonopoly Law was implemented, Chinese State Administration of Quality Supervision, Inspection and Quarantine encountered the first case about Chinese Antimonopoly Law. However, in the expectation of ten thousands of people, this case came to an untimely end, and though the court adopted the article that the limitation of actions was over to evade this case, but it can be supposed that if the court can not evade it by relative reasons, what is the result? Was the behavior that Chinese State Administration of Quality Supervision forced to push the electric supervision code business of Citic Guoan Information Technology Co., Ltd with its own shares in 69 kinds of product an administrative monopoly behavior? The result might reach the same goal by different routes. And relative regulations about the current antimonopoly law endow law-officers too much discretion to make them to “go after profits and avoid disadvantages”.

2.2 The regulations about the legal responsibility of administrative monopoly are deficient

Chinese Antimonopoly Law regulates the civil, administrative and criminal responsibilities assumed by managers who implement monopoly behaviors in detail, but for the legal responsibility of the behaviors of administrative monopoly, only the article 51 of Chinese Antimonopoly Law regulates that “If administrative power by government and organizations to which laws and regulations grant rights to administer public issues abuse administrative power, to eliminate or restrict competition, shall be ordered by superior authorities to correct themselves; people in direct charge and people directly involved shall be imposed administrative punishment. The antimonopoly execution authorities shall supply suggestion to related superior authorities to handle according to law.” Many administrative responsibilities such as “shall be ordered by superior authorities to correct themselves; people in direct charge and people directly involved shall be imposed administrative punishment” form different legal results of different subjects to implement monopoly behaviors, so people begin to suspect the justice of laws, which virtually helps the administrative subjects to implement administrative monopoly, and the deterrent force will be reduced largely. At the same time, though the responsibility of Chinese Antimonopoly Law is too lighter and becomes a mere formality, and the law is not obeyed and strictly enforced, so the administrative monopoly remains incessant after repeated prohibition.

2.3 The jurisdiction of antimonopoly law enforcement institution is limited

The definition about the anti-administrative monopoly law enforcement agency in the fifty first article of Chinese Antimonopoly Law is still blurry, and on the one hand, the supervision procedures should be independently established to restrain laws by this law, and on the other hand, the law regulates that the administrative monopoly should be dominated by superior authorities, and the article that “If administrative power by government and organizations to which laws and regulations grant rights to administer public issues abuse administrative power, to eliminate or restrict competition will be handled by another regulation, shall be applied to another regulation” has left large space for the rights of relative departments and supervision institutions, which has eliminated the jurisdiction of anti-administrative monopoly law enforcement agent to the administrative monopoly. At the same time, it is not reasonable to handle the behaviors of administrative monopoly by the superior authority of lawbreaker for the legal responsibilities. The superior authority is not a specific authority, because the authorities implementing administrative monopoly are different, and divided policies come from various sources, and the law enforcement has be decomposed to various functional authorities, which will easily induce repeat law enforcements or blank law enforcement. Furthermore, the superior authority is not the authority to specially dominate administrative monopoly, or the special judicial authority, and it just is common law enforcement authority (Wang, 2007). Staffs in superior authority may not have strong antimonopoly

consciousness, and both the cognition and treatment result all lack in authorities, and they also lack in the ability to treat the cases about administrative monopoly.

2.4 The range of administrative monopoly regulation is too narrow

The article 33 of Chinese Antimonopoly Law limits the object of administrative monopoly in the domain of goods trade. "Administrative power by government and organizations to which laws and regulations grant rights to administer public issues shall not abuse administrative power to carry out following conducts, to hinder the free flow of the commodities between regions". In fact, the character of the transfer of modern economic industry structure is that the proportion of the service industry is enhanced increasingly, and if the object of the anti-administrative monopoly is only limited in the domain of goods trade, the domain which is bigger and occupies more proportion will be abandoned out of the supervision of Chinese Antimonopoly Law. Though the article 34 forbids and excludes that exterior managers participate in local bid invitation and bidding activities, and the article 35 forbids and excludes that exterior managers invest or establish branches including the domain of service trade in local region, but there are many items in the service industry out of these two ranges, and the legal regulation about administrative monopoly behaviors in the domain of service industry is still blank in Chinese Antimonopoly Law.

2.5 Regulation measures for abstract administrative monopoly are deficient

Though Chinese Antimonopoly Law has prohibitive regulations about the behaviors of abstract administrative monopoly, but it regulates nothing about legal responsibility and relief ways. If the illegal behavior of abstract administration can not be redressed in time (including the mode of administrative lawsuit) in practice, it will always induce larger harm (Huang, 2001). Many administrative monopoly behaviors in practice are implemented by the mode of abstract administrative monopoly behavior, and even certain concrete administrative monopoly behavior is always done according to administrative rules, but these rules and byelaws must be examined and approved, recorded or agreed by superior people's governments or charge authorities when they are constituted, and when they are dissented, the judgment right is always in original authorities which will be hard to deny the rules and byelaws what they constituted. In addition, most countries adopt the judicial review system to treat the abstract administrative behavior by the mode of inefficacy or nonexistence, but this system in Chinese Antimonopoly Law is deficient, so the illegal behaviors of administrative subject is hard to be redressed.

3. Perfection of administrative monopoly regulation in Chinese Antimonopoly Law

Above aspects about the legal regulation for the administrative monopoly in Chinese Antimonopoly Law all need to be perfected and simple opinions are offered as follows.

3.1 Using foreign mature experiences as references and increasing the operation feature of Chinese Antimonopoly Law

Law enforcement should be executed according to laws, and that means the clear description of legal concepts is the premise to exactly enforce laws, and the specific description of legal rules is the base to enforce laws strictly, but the problems about administrative monopoly in Chinese Antimonopoly are very complex, and some legal concepts have not been defined, and detailed legal standards and concrete legal responsibility should be further confirmed. Therefore, the content of the chapter 5 in Chinese Antimonopoly Law can be regarded as the principled legal rules to regulate administrative monopoly, and the explanation of general principles is a complex and hard task, just as when US modified the transverse merger directory in the Antimonopoly Law, it added the word of "efficiency judgment", and the American Competition Bureau used 13000 words to explain it. It is necessary to explain the criterion of general rules, and only to constitute suited rules as soon as possibly, and explain the principled articles in detail, the operation character of Chinese Antimonopoly Law can be added, and the uniform law enforcement standards can be established to effectively regulate the administrative monopoly behaviors by law.

3.2 Establishing various administrative monopoly legal responsibility systems

The past laws in China only regulated administrative monopoly by administrative responsibility, but ignored the function of civil responsibility and criminal responsibility. To more effectively regulate administrative monopoly, the particularity of administrative monopoly should be considered fully, and constitute comprehensive legal responsibilities including administrative responsibility, civil responsibility and criminal responsibility according to the principle of legal responsibility, proper responsibility and own responsibility. When maintaining special competitors' benefits, the behavior of administrative monopoly harms other competitors' competition right at the same time, and it belongs to a kind of tort, and it should assume corresponding civil responsibility, and though the administrative responsibility includes the system of administrative compensation, but the range of administrative compensation is limited, and it doesn't include the administrative compensation. And to better protect relative parties' legal rights, Chinese Antimonopoly Law should specially regulate that victims of administrative monopoly have rights to institute civil actions, and obtain corresponding civil damages. At the same time, the behavior of administrative monopoly has large social harm, and it should be adjusted by the criminal law when it seriously harms the society, and furthermore, the social harm extent achieved by administrative monopoly is far bigger than some economic crimes and occupational

crimes regulated in current criminal laws, so the measure of criminal punishment is necessary to be adopted.

3.3 Confirming independent antimonopoly law enforcement institutions and perfect the law enforcement system

The legal construction in China is to solve practical problems in the final analysis, and the setup of antimonopoly law enforcement institution is not exceptional. Except to solve economic monopoly, Chinese antimonopoly law enforcement institution should treat more complex issues of administrative monopoly. And as the socialism country where the market economy system was established initially, Chinese political economy system has its own peculiarity, so the setup of antimonopoly law enforcement institution must be linked with Chinese politics, economy and legal system, and only in this way, the “rejection reaction” of system “grafting” can be overcome effectively, and when designing one system, advanced experiences and national situations can not be ignored (Liu, 2005, P.151).

The antimonopoly law enforcement institution should be highly independent. To keep the independent is the life line of antimonopoly law enforcement institution, and the meaning of antimonopoly law, that is also the successful experience to effectively execute antimonopoly laws in most countries. The administrative monopoly means the abuse of administrative power, so the legal regulation about administrative monopoly must be independent with general administrative departments, and it should be balanced with the administrative power of administrative monopoly. And antimonopoly law enforcement institution must have high specialty character, and the antimonopoly law enforcement is not simple market management, and it comes down to the contents about economy, law and management, so it is a complex project, which decides the personnel composing and basic conditions of antimonopoly law enforcement institutions. For example, the “Monopoly Committee” of Germany is composed by five experts from public economics, business administration, social policy, technology and economics (Lv, 2004, P.14). Professional organization system is the important factor to guarantee the effective operation of law enforcement institution.

Independent and professional antimonopoly intuition should be endowed by extensive administrative power, quasi-legislative power and quasi-judicial power, and that is the need to regulate administrative monopoly in China and the requirement to treat the development of international antimonopoly.

3.4 Combining the generalization mode with the listing mode to specially limit the range of administrative monopoly

Because Chinese Antimonopoly Law defines the range of administrative monopoly by the listing mode, and it is mainly limited in the domain of goods trade, which induces that the regulation range of administrative monopoly in China is too narrow and lacks in corresponding flexibility. Using foreign relative experiences as references, China should adopt the mode combining the generalization mode with the listing mode to define the range of administrative monopoly.

On the one hand, the main representative form of administrative monopoly should be listed specially, and the concrete regulations to regulate administrative monopoly behaviors in the domain of servicing industry should be added. And according to these rules, the antimonopoly law enforcement institutions should quickly judge representative administrative monopoly behaviors, and predict its legal result and increase the efficiency. On the other hand, according to relative authority data, the range of the industry about the national economy and the people’s livelihood should be specially defined, and the monopoly of these industries should be protected by laws, and the protective range and degree should also be defined, and for the behavior to illegally expand the monopoly range, corresponding punishment measures should be regulated.

3.5 Judicial relief approach to perfect anti-administrative monopoly

According to article 12 in Chinese Administrative Procedure Law, abstract administrative behavior has not the character of justiciability, i.e. the abstract administrative behavior is not the object of judicial review, which doesn’t accord with relative obligation of judicial review in WTO when China entered into WTO. At present, Chinese Antimonopoly Law had brought the abstract administrative behavior into the adjusted range, but it is just the first step, and Chinese Antimonopoly Law should advance with the times and develop continually, and establish judicial review system about corresponding abstract administrative behavior, so the behavior of abstract administrative monopoly can be regulated according to law. Matching with the review system after the event, the review before the event about the abstract administrative monopoly is very necessary, i.e. Chinese antimonopoly law enforcement institution should have the review right before the event for the administrative rules, regulations and other standard documents about the competition issued by all administrative departments including State Department, and if it thinks that relative rules block the fair competition of market, it can block the establishment and implementation of them.

Through above analysis, the legal regulation of administrative monopoly behaviors in China just starts, and the relative rules about the administrative monopoly behaviors in Chinese Antimonopoly Law needs to be further perfected and crystallized, and the legal responsibilities about the administrative monopoly behaviors and the jurisdiction of law enforcement institution need to be further confirmed, and the regulation range of administration monopoly needs to be further expanded, and corresponding juridical relief approaches need to be gradually established. At the same time, the system reforms in the economic and political domain need to be further deepened, and the continual perfection of system reform can essentially reduce and stop the happening of administrative monopoly behaviors, and both the

system reform and the legal regulation need to be strengthened, which is the essential way to solve the problem of administrative monopoly.

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Material Transfer Agreements on Teff and Vernonia – Ethiopian Plant Genetic Resources

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Abstract

Humans require plant resources to satisfy their basic needs for clothing, food, medicines, shelter, and so on. In order to conserve and sustain the use of these resources, the Convention on Biological Diversity (CBD), and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture have been adopted as international measures, and the African Union's Model Law has been adopted as a regional measure, to provide legal frameworks for how these resources are to be accessed and how the benefits obtained from their use should be allocated. As a signatory to the CBD, Ethiopia issued its Access and Benefit Sharing law in 2006. Ethiopia has signed material transfer agreements on teff (gluten free and nutritious) and vernonia (the green chemical plant of the 21st Century) with two European companies. This article discusses and seeks to interpret the terms of the agreements on teff and vernonia. Furthermore, it analyzes the implications of the terms of the agreements for the realization of the objectives of the CBD (e.g. access, benefit sharing and conservation).

Keywords: Access, Benefit sharing, Ethiopia, Plant genetic resources, Teff, Vernonia

1. Introduction

1.1 Overview: Laws

The international community gave expression to the need to ensure the conservation and sustainable use of plant genetic resources with the adoption of the Convention on Biological Diversity (CBD), the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (FAO Treaty) and the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising from their Utilization (the Bonn Guidelines) (Note 1).

Conservation, sustainable use, appropriate access, and fair and equitable sharing of the benefits arising out of the use of genetic resources are the objectives of both the CBD and the FAO Treaty (Note 2). The CBD defines sustainable use as 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations' (Note 3).

The FAO Treaty and the CBD provide a comprehensive framework for the conservation and sustainable use of plant genetic resources. Both legal instruments require the Contracting Parties to take general measures, including but not limited to the enhancement of the application of traditional cultural practices that are compatible with the sustainable use of plant genetic resources (Note 4).

The rights and obligations derived from this framework of the FAO Treaty and the CBD are addressed to the Contracting Parties, so that the obligations, strategies, policies and measures are to be implemented at national level. The Contracting Parties have to enact laws and adopt policies accordingly. The details of the measures taken by different countries may differ, depending on the need, capacity and choice of each country. Ethiopia is a party to the CBD and to the FAO Treaty. In order to fulfil its obligations under these treaties, Ethiopia has adopted the National Policy on Biodiversity Conservation and Research. Furthermore, in 2006, Ethiopia enacted its Access and Benefit Sharing law (ABS law), officially entitled the 'Access to Genetic Resources and Community Knowledge, and Community Rights proclamation No 482/2006' (Note 5).

Ethiopia's National Policy on Biodiversity Conservation and Research states that, 'the government of the Federal Democratic Republic of Ethiopia shall take the necessary steps to discharge its obligations under the treaties concerning the protection, conservation or utilization of biological resources' (Note 6). Ethiopia enacted its ABS law in fulfilment of its obligations as a Contracting Party to the CBD. The objective of the legislation is 'to ensure that the country and its communities obtain fair and equitable share from the benefits arising out of the use of genetic resources so as to promote the conservation and sustainable utilization of the country's biodiversity resources.' This is the very same goal as that found in the CBD.

The Bonn Guidelines and the Ethiopian ABS law are aimed at fulfilling the objective of the ‘fair and equitable sharing of the benefits arising out of the utilization of genetic resources’, as set out in the CBD. The FAO Treaty, which is aimed at the sustainability of plant genetic resources, is only applicable to plant genetic resources for food and agriculture. The FAO Treaty is also considered to be a measure implementing the CBD.

In summary, the objectives of the CBD, the FAO Treaty and the Ethiopian ABS law are to ensure ‘sustainable use of plant genetic resources’, ‘conservation of plant genetic resources’ and ‘access to and benefit sharing from the utilization of plant genetic resources’.

1.2 Meaning of plant genetic resources

Understanding what a ‘plant genetic resource’ means is important not only for understanding the importance of the conservation of these resources, but also for understanding the different implications of material transfer agreements. The CBD defines genetic resources as ‘genetic material of *actual or potential value*’ (emphasis added), and genetic material is defined as ‘any material of plant, animal, microbial or other origin containing *functional units of heredity*’ (emphasis added) (Note 7). Despite the fact that the meaning of ‘plant genetic resource’ depends on the meaning of the two key terms (‘functional units of heredity’ and ‘actual or potential value’), the CBD does not define these two key terms. The opinion of technical experts is that ‘functional units of heredity’ refers to DNA (deoxyribonucleic acid) and RNA (ribonucleic acid) (Note 8).

The Ethiopian ABS law defines a plant genetic resource as ‘any genetic material of biological resources *containing genetic information* having *actual or potential value* for humanity and it includes *derivatives*’ (emphasis added) (Note 9). A ‘derivative’ is a product extracted or developed from biological resources, and this may include products such as plant varieties, oils, resins, gums, chemicals and proteins (Note 10). However, the CBD does not include derivatives. For example, *vernonia* is a plant genetic resource, and oil derived from *vernonia* is a biological product. Oil does not contain RNA and DNA and thus it cannot be considered a plant genetic resource (Note 11). Despite this, the ABS law considers derivatives of plant genetic resources, such as oil derived from *vernonia*, to be a genetic resource. Does this mean that the ABS law regulates the export of *vernonia* oil rather than international trade law? The answer may be in the affirmative, as *vernonia* oil is within the scope of ‘plant genetic resources’ according to the ABS law.

1.3 Financial resources for the conservation of plant genetic resources

Countries are dependent on each other for plant genetic resources. No country is self-sufficient in plant genetic resources. However, there is an imbalance in the distribution of plant genetic resources in the world. Developing countries (the South) are home to many plant genetic resources and they are expected to ensure the conservation of the plant genetic resources in their territories. However, ensuring the conservation of these resources is not costless. As Roger A. Sedjo has said: ‘If preservation were costless, then all genetic resources would be preserved’ (Note 12). Even if developed countries had been able to obtain benefits from the exploitation of plant genetic resources prior to the adoption of the CBD, there was no clear framework to support providing countries in negotiating the sharing of benefits with user countries. Therefore, ‘developing countries felt resentful to invest in the sustainability of plant genetic resources – due to absence of benefit sharing from the side of the developed countries’ (Note 13).

The Brundtland Commission Report on sustainable development required states to integrate conservation into their planning of development activities. The Report also called on developed countries to support and assist developing countries in matters of environmental protection and sustainable development (Note 14). Requiring the Contracting Parties to provide sound measures, policies and strategies for conservation is not enough to ensure the conservation of plant genetic resources. Except for Australia, most of the countries with natural plant genetic resources are too poor to invest in the conservation and sustainable use of their plant genetic resources.

Given the lack of financial resources, the CBD and the FAO Treaty have devised two mechanisms aimed at establishing or strengthening the financial capabilities of countries, especially developing countries, with respect to the sustainable use and conservation of plant genetic resources. The *first* mechanism requires developed countries to provide ‘new and additional financial resources’ to assist developing countries in meeting the incremental costs of implementing measures to fulfil their obligations for the sustainable protection of plant genetic resources (Note 15). To implement the first mechanism for financial and technical assistance, the FAO Treaty has established the Global Plan of Action and the CBD has provided financial resources through the Global Environmental Facility.

The *second* mechanism follows from the reaffirmation of the sovereign right of states to determine access to their plant genetic resources. This mechanism is aimed at strengthening states’ capabilities, both financially and technologically, to protect plant genetic resources sustainably. The sovereign right of states over their natural resources is a well-accepted principle of public international law. Principle 21 of the Stockholm Declaration of the UN Conference on the Human Environment and Principle 2 of the Rio Declaration on Environment and Development reaffirmed the sovereign right of states over their natural resources, and this was restated in Article 3 of the CBD (Note 16).

The CBD has reaffirmed states' sovereign rights over their plant genetic resources, stating that: 'the authority to determine access to genetic resources rests with the national governments and is subject to national legislation' (Note 17). Thus, following the CBD, countries have enacted laws laying down who decides on access permits. For example, Article 5(1) of the ABS law states: 'the *ownership* of genetic resources shall be vested in the state and the Ethiopian people.' Thus, access to Ethiopian plant genetic resources has to be negotiated with the Ethiopian government. With the clear reaffirmation of states' sovereign right to decide on access to their plant genetic resources, Ethiopia, for example, has negotiated two access agreements following the adoption the CBD.

2. Background to the Material Transfer Agreements

2.1 Teff

Teff belongs to the genus *Eragrostis*, which is one of a large family of wild grasses. It originated in and was domesticated in Ethiopia and is grown as a cereal. Teff is an important cereal at the national level. Ethiopia is the only country that is a source of genetic diversity for teff.

Teff has as much or even more food value than major grains such as wheat, barley and maize (Note 18). Moreover, grains such as wheat, rye, barley, and derivatives of these grains contain gluten. Gluten intolerance (coeliac disease or gluten sensitivity) is 'a lifelong autoimmune disorder in which a person's body cannot tolerate a group of grain proteins known as gluten' (Note 19). Since teff is gluten free, it can be used for the preparation of foods for gluten-intolerant individuals (Note 20).

In Ethiopia, teff grain is ground into flour and fermented for the preparation of teff-based foods (Note 21). Teff flour is the preferred grain for preparing *injera*, a traditional gluten-free pancake (Note 22). The traditional uses of teff flour also include the preparation of teff bread and a pudding (*genfo*), while teff grain is used to make local alcoholic drinks such as *tella* and *katikala* (Note 23).

More than a century ago, in 1886, long before the adoption of the CBD, the Royal Botanic Gardens at Kew, England, accessed teff. The Royal Botanic Garden then distributed teff to other botanic gardens in Australia, Africa and Asia (Note 24). Teff is currently being commercially produced for human consumption by an American company (The Teff Company) and a Dutch company (Health and Performance Food International).

The Teff Company, based in Idaho, is currently cultivating teff for human consumption and as animal fodder (Note 25). The founder of the Teff Company, Wayne Carlson, was involved in Ethiopian affairs in the 1970s. Upon his return to Idaho, he was able to plant teff successfully. There is no information, however, as to how he accessed teff plant genetic resources. This might be because, prior to the adoption of the CBD, access to plant genetic resources was unregulated.

2.2 Vernonia

Vernonia (vernonia galamensis) is a tall plant with shiny black seeds that originated in Ethiopia (Note 26). Robert E. Perdue first identified vernonia near the old city of Harar in Eastern Ethiopia in December 1964. Vernonia, being an endemic tropical plant, is most suitable for dryland farming and requires drained soil and low rainfall (Note 27).

Vernonia has unique properties that make it interesting, both economically and ecologically. Vernonia oil (35 % to 42 % of the seed) contains vernolic acid (72 % to 80 % of the oil) (Note 28). Vernolic acid is a useful raw material for the manufacture of adhesives, varnishes, paints and coatings. Using vernolic acid for paints and coating helps to avoid photochemical pollution (Note 29).

Vernonia grows in most parts of Ethiopia. Traditionally, farmers considered it to be an indigenous weed, so they tended to eradicate it in order to free their land for other crops. Due to the increased awareness of the importance of vernonia, however, it is now considered a potential crop for inclusion in the agricultural system of the country (Note 30).

2.3 Parties to the agreements

In 2004, Ethiopia signed its first material transfer agreement on teff. This agreement was made between the Ethiopian government (the Institute of Biodiversity Conservation and Research and the Ethiopia Agricultural Research Organization (EARO)) and the Dutch Company, Health and Performance Food International BV (now called Soil and Crop Improvement BV) (Note 31). In 2005, the Ethiopian government (the Institute of Biodiversity Conservation and Research and EARO) and a UK company Vernique BioTech Ltd (Vernique) signed a material transfer agreement on vernonia plant genetic resources (Note 32).

In Ethiopia, the Institute of Biodiversity Conservation and Research is a national institute with the authority to grant and regulate access to genetic resources (Note 33). EARO is responsible for the coordination of national agricultural research on teff (Note 34).

EARO is not responsible for providing access to teff plant genetic resources, but because it has developed different teff varieties and is responsible for research on teff, it is a party to the agreement. The involvement of EARO seems relevant, since it is the central organization in the country with regard to teff. In contrast, no institute comparable to EARO is

involved in the ABS agreement on vernonia. The involvement of EARO in the teff agreement also indicates the importance of teff as a plant genetic resource at national level.

Both material transfer agreements will last for ten years from the date of their conclusion (Note 35). The parties may renegotiate the agreement at the end of the ten-year period. Among other things, the agreements lay down details on access, benefit sharing, intellectual property rights, and the law governing the agreement.

3. Terms of the agreements

3.1 Access

3.1.1 Overview

The FAO Treaty and the CBD provide a comprehensive framework for how access is to be granted. This framework has to be implemented in the national laws of the Contracting Parties. The CBD provides a legal framework applicable to plant genetic resources in general, whereas the FAO Treaty only applies to plant genetic resources for food and agriculture (Note 36).

Because of the special nature of plant genetic resources for food and agriculture, the Contracting Parties to the FAO Treaty established the Multilateral System for facilitating access to and sharing of the benefits obtained from the exploitation of plant genetic resources for food and agriculture (Note 37). However, the scope of the Multilateral System is limited to plant genetic resources which are included in Annex I of the FAO Treaty. Therefore the FAO Treaty has to be consulted first regarding access to plant genetic resources for food and agriculture and benefit sharing. Access to and sharing benefits of plant genetic resources for food and agriculture that are not covered under the Multilateral System and other non-food plant genetic resources must be in accordance with the CBD. For example, teff and vernonia are not included in the Multilateral System of the FAO Treaty, and thus access to these resources is regulated under the CBD and the Ethiopian ABS law.

The Bonn Guidelines, which are not legally binding, identify the steps in the access and benefit sharing processes (Note 38). Thus, individual transactions on access to and the sharing of benefits obtained from the exploitation of plant genetic resources are governed by contract law and administrative procedures (Note 39).

3.1.2 Access under the Ethiopian ABS Law

According to its Article 4, the ABS law is applicable to access to plant genetic resources found both *in situ* and *ex situ*, and to community knowledge. The ABS law is not applicable to *customary use and exchange of genetic resources and community knowledge by and among Ethiopian local communities* (Article 4(2)(a)) (Note 40).

The ABS law defines access as ‘the collection, acquisition, transfer or use of genetic resources and/or community knowledge’ (Note 41). The definition of the term ‘access’ is limited to the act of accessing, and it does not qualify the person who is accessing, and thus it is possible to say that the definition of ‘access’ shows that the scope of application of the ABS law is not limited to access to plant genetic resources and community knowledge by foreigners.

Two requirements have to be fulfilled for a given access to plant genetic resources to fall outside the scope of the ABS law. *First*, the access has to be for customary use and exchange, and *second*, such access has to be by and between Ethiopians. Thus, in specific circumstances the non-applicability of the law to access is clear. For example, exchange of teff plant genetic resources between Ethiopian farmers can be considered as access for customary use by and between Ethiopians. Whereas, if an Ethiopian company wants to use vernonia for the production of vernonia oil, the use may not be considered customary use and thus even a domestic company may be required to comply with the access and benefit sharing requirements of the ABS law. This may be supported by the fact that vernonia does not have customary use in Ethiopia as it is considered by Ethiopian farmers to be an indigenous weed.

The ABS law is also not applicable to the sale of products of biological resources for direct consumption which does not involve the use of the genetic resources as such (Note 42). ‘Direct consumption’ refers to the situation where, for example, a person buys coffee beans to use directly, and not to plant them. However, if the person takes the coffee beans and plants them, this will not be ‘direct use of plant genetic resources.’

3.1.3 Prior informed consent and facilitated access

National authorities determine access, and it is a requirement that access is subject to prior informed consent. Prior informed consent is the first step when a user company or country initiates negotiations with a providing country. Among other things, prior informed consent may include specifying the intended use of the plant genetic resource and the expected results (Note 43).

According to the Bonn Guidelines, which emphasize the importance of prior informed consent, under the system of the CBD the Contracting Parties are required to ‘control’ users of genetic resources under their jurisdiction; in other words, the providing country must take measures to prevent the use of plant genetic resources obtained without prior informed consent (Note 44).

It follows from the Bonn Guidelines that states are required to facilitate access to plant genetic resources. Access has to be facilitated at minimum cost. Any restriction on access should be based on legal grounds. For example, the ABS law has listed some conditions for the denial of access, such as the intention of the user company to use the genetic resource for a purpose which is contrary to the national laws of Ethiopia or of international treaties to which Ethiopia is a party. There are also conditions related to the environment, such as when the access may risk cause harm to an ecosystem.

However, the conditions for denial of access under the ABS law lack clarity. For example, it is not clear when the use of a plant genetic resource is contrary to international treaties to which Ethiopia is party. As the CBD requires parties to avoid arbitrary restrictions that are contrary to its objectives, the Ethiopian authorities must be careful when applying the conditions for denial of access.

Without facilitated access, the exploitation of plant genetic resources may not be enhanced, and failure to facilitate access may result in poor exploitation of plant genetic resources ('the tragedy of the anticommons') (Note 45). Access is not subject to negotiation costs when the plant genetic resource is covered by the Multilateral System of the FAO Treaty. For example, as teff is not covered by the Multilateral System, Health and Performance Food International obtained access to twelve teff varieties by negotiating with the Ethiopian government (Note 46).

3.1.4 Access and specification of use

As mentioned before, plant genetic resources have both actual and potential values. Such values can be used for 'taxonomy, collection, research, and commercialization' (Note 47). It is on the basis of these values and uses that a providing country and a user country (or company) agree on terms, including the types of uses and limitations on the possible uses of the material (Note 48). Access under the Multilateral System of the FAO Treaty is limited to the purpose of exploitation and conservation for research, breeding, and training for food and agriculture; this excludes non-food/feed industries (Note 49).

Users are required to use plant genetic resources in a manner that is consistent with the agreed purposes. Any change of use, even if the use is unforeseen, requires a new application to be made for prior informed consent and agreed terms (Note 50). According to the Bonn Guidelines, states may monitor whether the use of plant genetic resources complies with the terms of access and benefit sharing.

Health and Performance Food International can 'use the genetic resource of teff only for the purpose of developing non-traditional teff-based food and beverage products that are listed in Annex 3 to this agreement' (Note 51). The lists of products in Annex 3 of the agreement include teff flour (gluten free flour, which can also be premixed, and a bread mix with teff) and seeds (which includes gluten-free beverages such as beer and distilled drinks). The agreement prohibits the company from using teff genetic resources for any unspecified uses, including chemical and pharmaceutical uses (Note 52).

Vernique is allowed to access vernonia seed to export and use for developing and commercializing the vernonia seed oil products specified in the annex to the agreement. The annex lists 27 products and applications of vernonia seed, such as adhesives, cosmetics, pharmaceuticals, paper and wood products, lubricants, waxes and polishes. If Vernique wants to use vernonia seed for other purposes and applications not stipulated in the list of 27 products, the company must first secure the written prior informed consent of the provider (Note 53).

3.1.5 Exclusive access and its implications

Following the specification of the uses of teff in the material transfer agreement, the Ethiopian government is bound by two terms. The *first* term states that the Ethiopian government shall not grant access to teff genetic resources to any other party for the purpose of producing the products of the company listed in Annex 3 unless the Ethiopian government secures the consent of the company. The *second* term binds Ethiopia not to export teff seeds if the importer or anyone else wants to use teff for products listed in Annex 3 (Note 54).

Similarly, Ethiopia cannot grant access to vernonia to any other party if that party wants to use vernonia seeds for the production of the 27 products listed in Annex I. However, if the company does not start producing those products within two years of entering into the agreement, Ethiopia can grant access to vernonia to other parties for the production of the products listed in Annex I.

Since the company has exclusive access to vernonia, Ethiopia will not be able to sign an agreement with other parties. However, if the company does not begin producing the products, it will not earn benefits and Ethiopia will not obtain benefits. Thus, by including this provision, Ethiopia can put pressure on the company and enhance the possibility of gaining benefits from the use of vernonia. Alternatively, if the company does not begin commercialization of the products, then Ethiopia is free to enter an agreement with another company.

There is no similar term in the teff material transfer agreement. Since the vernonia material transfer agreement was the second agreement negotiated by Ethiopia, the inclusion of this term can be seen as an improvement over the teff agreement, which was the first agreement signed.

The inclusion of the term 'exclusive access' however, prohibits Ethiopia from signing another agreement and allowing access to another party who wants to use vernonia for the same purpose (Annex I). If Ethiopia were free to create a second access agreement, for example with another US company, it could be an additional source of funding for investment in the conservation of plant genetic resources.

This is especially true with regard to the exclusive access term in the teff material transfer agreement, compared to the vernonia agreement under which Ethiopia can grant other parties access to vernonia if the company does not start production of vernonia products within 2 years from the date of the agreement. The additional benefit sharing could improve Ethiopia's capacity to invest in conservation and the sustainable use of plant genetic resources.

The right to determine access to plant genetic resources is important in negotiating the terms for the sharing of benefits. It is this shared benefit that will strengthen the ability of Ethiopia to invest in the sustainable protection of plant genetic resources. Thus, the right to determine access is not an end in itself; it has to be exercised so as to agree benefit sharing clauses. The exercise of such a right is possible where other opportunities exist, i.e., where there are others demanding access to teff plant genetic resources and Ethiopia is able to grant access. This means that granting a monopoly on existing uses of teff under the guise of claiming that these are new uses will have a negative effect on the enhanced exploitation of teff genetic resources by other companies.

By including exclusive access in the agreement, and by assuming that Ethiopia is the only source of these genetic resources, the company has avoided potential competition in the market for the sale of similar products. If the exclusive access is granted because the company claims to have come up with new ideas for producing the products, then it is possible to say that the exclusive access is equivalent to intellectual property protection for the company during the ten year period of exclusive access.

However, Ethiopians have long made *injera* from teff flour, which is gluten-free, and teff can also be used for making local drinks such as *tella* and *katikala*. Thus, questions can be raised about the exclusive access. Is the production of gluten-free teff flour a new idea that belongs to the company? Would the exclusive term have been granted if the company had asked for access without claiming that the gluten-free teff products were the company's own idea – a new idea emanating from the company?

It is the author's view that Ethiopia should be free to decide on access to its plant genetic resources for any interested parties. The fact that the country has entered into an access agreement with one company should not prevent it entering into another agreement on the same matter, i.e. teff plant genetic resources, with another company. Companies which develop new applications or uses for plant genetic resources must seek protection under the intellectual property laws of their own country or they must use other mechanisms to ensure that others will not benefit from their investment.

4. Benefit sharing

4.1 General

The fair and equitable sharing of the benefits arising from the exploitation of plant genetic resources is the third objective of the CBD and the FAO Treaty (Note 55). Sharing benefits give states the capacity and incentive for the conservation and sustainable use of plant genetic resources. In his legal writing Gulati noted that 'benefit sharing is not based on charity but as recognition for States' investment and the principle that States should not have to bear the entire burden of subsidizing global public goods necessary for human survival' (Note 56). Benefit sharing helps the implementation of the *in situ* conservation of plant genetic resources. Benefit sharing from the exploitation of plant genetic resources that are covered by the Multilateral System of the FAO Treaty is one benefit arising from the use, including commercial, of plant genetic resources for food and agriculture (Note 57).

The benefit sharing has to be fair and equitable, and this depends on the existence of various factors (Note 58). From the *teff* example, one of the factors can be the limits which an agreement imposes on the country's opportunity to agree access and benefit sharing with other parties for uses that have already been granted exclusively to another company. Parties to a material transfer agreement can agree both monetary and non-monetary benefit sharing.

4.2 Monetary benefit sharing

With regard to monetary benefits, Ethiopia and Health and Performance Food International agreed on a lump sum, calculated as gross net income for a number of years (1 % of the average gross net income for years 2007, 2008 and 2009) and an annual payment of 30 % of the profit obtained from the sale of basic and certified seeds. The term 'gross net income' is not clear as it has to be either gross income (income before expenses such as tax is deducted) or net income (income after expenses such as tax is deducted). The annual royalty rate in the material transfer agreement for vernonia is 5 % of the net profit after tax from the commercialization of products derived from vernonia. The royalty from the sale of products is set according to the price of the product, for example 2 % of the sales value of vernonia products sold at up to EUR 2,000 per ton, and 4 % of the sales value of products sold at between EUR 2,001 and EUR 10,000 per ton (Note 59).

Vernique agreed to an upfront payment of EUR 35,000 upon signing the agreement. By comparison, the teff agreement requires Health and Performance Food International to pay a sufficient sum of money in advance which is set against the amounts due to the provider. By requiring an upfront payment, Ethiopia can obtain a payment even if the company does not use the plant genetic resources. Compared to other types of benefit sharing, which are dependent on the company's income from the exploitation of the resources, an upfront payment will help the country obtain something from the agreement, while if Vernique does not produce anything, Ethiopia is free to give access permits to other companies.

4.3 Non-Monetary Benefits

Vernique has agreed to source at least 75 % of its annual requirements for vernonia seed by producing it and/or by buying it from contract-growers or local communities in Ethiopia (Note 60). The purpose of this term is to ensure that local communities benefit from the agreement through job opportunities and developing the skills to grow vernonia. Thus, this term attracts foreign investment to the country. However, if by *force majeure* the company is prevented from producing vernonia seed in Ethiopia, then the company is free to produce vernonia seed in places other than Ethiopia.

In order to fulfil the remaining 25 % vernonia requirements of Vernique, it is stated in the agreement that the company can produce vernonia seed in Zambia and Australia. Similarly, Health and Performance Food International is required to establish teff operations such as teff farming, cleaning and milling enterprises, and bakeries in order to contribute to the local Ethiopian economy.

The Ethiopian government and Health and Performance Food International agreed to establish a Financial Resource Support for Teff (FiRST). In order to support FiRST, the company agreed to contribute 5 % of its net annual profit, which cannot be less than EUR 20,000. The purpose of FiRST is to improve the living conditions of local farming communities and to develop teff businesses in Ethiopia (Note 61).

As part of the non-monetary benefits, Vernique has agreed to train local communities. The company must share research results and technologies with the provider, as long as this does not affect the commercial advantage of the company. For the implementation of this benefit sharing, the parties will agree the research results and technologies that affect the commercial advantage of the company. Similarly, under the teff agreement, Health and Performance Food International has agreed to share research results on teff with the provider and EARO. Furthermore, the company must ensure the participation of Ethiopian scientists in its research activities.

5. Intellectual Property Rights

5.1 IPRs as part of non-monetary benefit sharing

As part of the non-monetary benefits, states can negotiate the possibility of joint ownership of intellectual property rights with users of plant genetic resources (Note 62). As shown in the teff example, the Ethiopian government and Health and Performance Food International agreed to jointly own new teff varieties that are developed by the user company (Note 63).

In addition, the agreement includes the sharing of research results, knowledge and technologies developed using teff (Note 64). There is no similar term in the vernonia material transfer agreement. This may be because there is not much research on vernonia in Ethiopia. In contrast, since teff is an important cereal at the national level, EARO has been doing research on teff plant genetic resources, and many varieties have been developed by EARO.

In neither agreement is the company allowed to obtain intellectual property rights over the genetic resources or over parts of the genetic resources. Under the teff agreement, however, the company is allowed to gain plant variety rights for new varieties of teff. Under the vernonia agreement, the company can obtain intellectual property rights relating to inventions, products or applications developed using vernonia oil (Note 65). According to the definition of plant genetic resources under the ABS law, derivatives such as oil are included within the scope of plant genetic resources. Hence, vernonia oil is considered a plant genetic resource. The company is not allowed to obtain intellectual property rights on vernonia plant genetic resources such as vernonia oil. However, the company is allowed to obtain exclusive rights on products developed from vernonia oil.

5.2 IPRs on teff and vernonia

The European Community Plant Variety Office has issued three plant variety rights to Health and Performance Food International. The teff varieties are named ADINA, AYANA, and TESFAYA. The applications were made on 17 December 2004, and the rights were granted on 21 April 2008. The three varieties belong to the species *Eragrostis tef*; however, the European Community plant variety right for teff is not the first protection granted for a teff variety. In the USA the Teff Company has obtained a plant variety right for a variety named Dessie teff.

Health and Performance Food International applied for patent rights on the processing of teff flour. The application was made through the Patent Cooperation Treaty and had many designated states, including the European Patent Office, Australia, USA, the African Regional Intellectual Property Organization, and the African Intellectual Property Organization (Note 66).

On the 10 January 2007, the European Patent Office granted a patent (EP 2004774832) for the processing of teff flour to Health and Performance Food International. The invention related to flour of *Eragrostis teff* and to products derived from this flour. The invention 'makes it possible to provide food products with an eating value (taste, smell, texture, structure) acceptable in the western world which can be used as a functional food.' (Note 67)

Vernique has applied for a patent through the Patent Cooperation Treaty (PCT/GB2007/000022) for the use of epoxidized compounds. The application is pending at the European Patent Office (EP 2007700327) and in Japan (JP 2008549057). The invention relates to the use of epoxidized compounds such as oils, esters and waxes, which are based on vernolic acid. These epoxidized compounds have been found to be useful for treating lesions on mammalian skin. The lesions may be caused by disease or wounds. Particularly preferred epoxidized compounds include oils extracted from *vernonia galamensis* seed.

6. Implementation of material transfer agreements

6.1 Implementation provisions in the ABS law

It is one of the basic preconditions for access that a company must present the Ethiopian government with a letter from the competent authority of its home state stating that the authority shall uphold and enforce the access obligations of the user company (Article 12(4) of the ABS law). The CBD requires states to monitor the implementation of material transfer agreements. The monitoring can include applications for intellectual property rights relating to the material supplied (Note 68). In addition, countries can encourage users to disclose the country of origin of plant genetic resources in their applications for intellectual property rights (Note 69). Since the Bonn Guidelines are voluntary, such monitoring depends on the initiatives taken by the home state, for example, the Netherlands in the case of Health and Performance Food International.

According to Article 12 of the ABS law, one of the preconditions for access to plant genetic resources in Ethiopia is that the company accessing the plant genetic resources must carry out the research in Ethiopia; this means that exporting genetic resources from Ethiopia is not allowed. The rule is that the user country or company must carry out the research in Ethiopia, and that the user country or company may only exceptionally export the genetic resources from Ethiopia, if carrying out the research in Ethiopia is impossible.

When a company exports genetic resources from Ethiopia, it must present a letter of assurance from the institute that hosts or sponsors the research, and the letter must provide assurance that the research institute will observe the obligations attached to the access. Even though its implementation may be unrealistic, the inclusion of such provision in the ABS law is very important. Once plant genetic resources have left their source country, it is very complicated and it may be impossible to control their dissemination. Hence, others may be able to use these resources without the permission of the source country. As a result, Ethiopia, which is the source country, may not be able to benefit in future from the exploitation of its plant genetic resources.

An example of this may be the access to teff by the American Teff Company. Although there is no evidence as to how Wayne Carlson gained access to teff from Ethiopia, it is possible that the access may have been free and unregulated. In that case, the teff left Ethiopia and there is no agreement between Wayne Carlson and the Ethiopian government that requires him to share the benefits which the Teff Company obtains from the exploitation of teff plant genetic resources. The Teff Company is currently distributing teff seed and teff flour in the USA, but the benefits are not shared with the Ethiopian government. As there is no material transfer agreement between the Teff Company and the Ethiopian government, the Teff Company is not bound by any legal prohibition of the transfer of teff genetic resources to third parties. Thus, the Teff Company is free to transfer teff genetic resources to others. Therefore, Ethiopia not only does not share in the benefits that the Teff Company is earning for itself, but it also misses out on all the potential benefits that other companies may obtain by using teff plant genetic resources accessed via the Teff Company.

Thus, allowing the export of plant genetic resources has both short term and long term implications for the source country's interests in their plant genetic resources. Even if Ethiopia's efforts to require user companies to conduct research in Ethiopia are ambitious, the problem that it is trying to solve by this means is real.

The export of plant genetic resources from Ethiopia can have the same consequences for both regulated access and unregulated access. The consequences are similar because the implementation of material transfer agreements depends on the willingness of the user companies. The terms included in the agreements, for example prohibiting the company from giving or transferring the plant genetic resources to third parties, are aimed at controlling the dissemination of the resources. These terms may be breached, however, and enforcement may not be easy. Thus, if the user company uses the genetic resources in Ethiopia, implementation problems can be avoided more easily. Requiring companies to conduct their research in Ethiopia may also help give the country a share in technological knowledge, avoid the transfer of plant genetic resources to third parties, and prevent the use of plant genetic resources by the company after the expiry of agreement.

6.2 Enforcement terms in the agreement

Provision 10 of the material transfer agreement on teff lays down terms for the enforcement of the agreement. As part of the enforcement mechanism of the material transfer agreement, Health and Performance Food International is required to submit annual financial statements to the Ethiopian government. Also, whenever there is a research result that can be protected by an intellectual property right, the company must report the full details of the research result (if an application for an IP right is made) or report the research result in general terms (if an application for an IP right is not made). The providing party and the user party have agreed to hold a meeting at least once per year in Ethiopia.

Both Health and Performance Food International and Vernique must pay a penalty if they do not pay royalties in time, and under the vernonia agreement the fine will increase as any delay in paying becomes longer. Under the teff agreement, terminating the contract in the event of the non-compliance of the company on the payment of royalties is the last resort for the government of Ethiopia. Under the vernonia material transfer agreement, the company must pay EUR 50,000 to the provider if the company transfers vernonia plant genetic resources to a third party without obtaining the permission of the provider.

If a dispute arises regarding the interpretation and application of the agreement, the parties have agreed to seek a solution by negotiation. If the negotiation fails, the parties will submit the dispute to an arbitration tribunal to be established by both parties.

7. Conclusion

This article examines the details of the material transfer agreements that Ethiopia has entered into with European companies. It looks in particular at some of the unique or unusual terms both in the agreements and in the ABS law.

The ownership of plant genetic resources is vested in the state and the Ethiopian people, and thus access to these resources has to be negotiated with the Ethiopian government. The definition of 'plant genetic resources' in the ABS law includes not only plant varieties but also oils, chemicals and proteins developed from the plant genetic resources. Thus the scope of the term 'plant genetic resource' is broader in the ABS law than in the CBD.

The teff material transfer agreement was the first for Ethiopia, and the experience gained from this negotiation improved the terms in the vernonia material transfer agreement. Compared to the teff material transfer agreement, while both agreements allow exclusive access for the companies, under the vernonia agreement it is possible for Ethiopia to grant access to other parties if Vernique does not produce the listed products within two years from the date of the agreement. Furthermore, Vernique has agreed to source at least 75 % of its annual requirements for vernonia seed by producing it and /or by buying it from contract growers or local communities in Ethiopia.

Health and Performance Food International and Vernique have gained exclusive access to teff and vernonia respectively. The companies claimed they had come up with new ideas for producing products from these resources. It is the author's view that when companies come up with new ideas for producing products from plant genetic resources, instead of gaining exclusive access to these resources, the companies should have to seek some form of protection (which can be intellectual property rights) in the countries where they intend to exploit the products commercially. Thus, the providing country must be free to enter into material transfer agreements with other parties.

The sharing of benefits from the exploitation of plant genetic resources not only strengthens a state's ability to invest in conservation and sustainable use of plant genetic resources, but also provides an economic return on the state's investment in the conservation of plant genetic resources. Thus, the enforcement of material transfer agreements, so that the benefits obtained from the exploitation of these resources are in fact shared, has an immense impact on the conservation of plant genetic resources in financially poor but gene-rich countries like Ethiopia.

In order to ensure the enforcement of its material transfer agreements, Ethiopia has included strong provisions in its ABS law and in the material transfer agreements. By law, Ethiopia does not allow the export of plant genetic resources, unless carrying out the research in Ethiopia is impossible. However, once a genetic resource has left the source country, the enforcement of the terms of a material transfer agreement will depend on the willingness of the holder of the genetic resource (user company) and perhaps the states where such companies reside.

Therefore, in order to better implement the objectives of the CBD (access, benefit sharing and conservation of plant genetic resources), first access has to be negotiated, next the capacity of providing countries to negotiate material transfer agreements has to be improved, and above all the terms of the agreements have to be enforced.

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The Health and Performance Food International BV, website <http://www.soilandcrop.com/> or the English version <http://www.soilandcrop.com/index.php?lang=eng>.

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The European patent on processing of Teff flour, Patent No EP 1 646 287 B1 of 10 January 2007, Bulletin 2007/02.

William Payne, 'Evaluation of Teff, Lupins, Sorghum and Other New Potential Dryland Crops in Northeastern Oregon, available at <http://pnwsteep.wsu.edu/directseed/conf99/dspropWP.htm>.

Notes

Note 1. The CBD was adopted at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil, in 1992 and entered into force on 29 December 1993. The 1983 FAO International Undertaking was adopted as a non-binding conference resolution (FAO Resolution 8/83), which later became the FAO Treaty in

November 2001 and entered into force on 29 June 2004. See also, Biber-Klemm & Cottier, *Rights to Plant Genetic Resources and Traditional Knowledge*, 2006 at p. 5.

Note 2. Convention on Biological Diversity, Art. 1 and FAO Treaty Art. 1. Concerning the requirement of sustainability see CBD Art. 6(a) and see FAO Treaty Art. 6(2)(f).

Note 3. Convention on Biological Diversity, Art. 2, sixteenth paragraph.

Note 4. FAO Treaty Art. 4 and Art. 6(1). See the Convention on Biological Diversity, Art. 6 and Art. 10(c).

Note 5. Ethiopian Access Proclamation No. 482/2006, Art. 1.

Note 6. National Policy on Biodiversity and Research, Section 3(13).

Note 7. Convention on Biological Diversity, Art. 2.

Note 8. Morten Walloe Tvedt and Tomme Young, 'Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD', at p. 54.

Note 9. Ethiopian Access Proclamation No. 482/2006, Art. 2(6).

Note 10. Ethiopian Access Proclamation No. 482/2006, Art. 2(3).

Note 11. Morten Walloe Tvedt and Tomme Young, 'Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD', at p. 54.

Note 12. Roger A. Sedjo, 'Property Rights, Genetic Resources, and Biotechnological Change', in *Journal of Law and Economics*, Vol. 35, No 1, April 1992 pp. 199-213 at p. 199.

Note 13. Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, at p. 6.

Note 14. The World Commission on Environment and Development, *Our Common Future*, 1987 at p. 349.

Note 15. FAO Treaty 7(2)(a) and The Convention on Biological Diversity, Art. 20 and Art. 21.

Note 16. 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or area beyond the limits of national jurisdiction.'

Note 17. Convention on Biological Diversity, Art. 15(1).

Note 18. National Academy of Sciences, 'Teff', in *Lost crops of Africa*, at p. 222.

Note 19. Kimberly A. Tessmer, *Gluten for a Healthy Life*, at p. 15.

Note 20. Ibid, at p. 221. Teff does not contain the gluten which wheat contains. See also, Stallknecht et al., 'Teff: Food crop for Humans and Animals', in *New crops*. 2 at p. 33.

Note 21. William Payne, 'Evaluation of Teff, Lupins, Sorghum and Other New Potential Dryland Crops in Northeastern Oregon, available at

<http://pnwsteep.wsu.edu/directseed/conf99/dspropWP.htm>.

Note 22. 'Access and Benefit Sharing (ABS) in Africa, cases of bioprospecting and ABS legislations in Eastern and Southern Africa', at p. 8, available at

<http://www2.gtz.de/dokumente/bib/06-0526.pdf>.

Note 23. Feaven Workiye, 'Agreement on access to, and benefit-sharing from, Teff genetic resources', 2007, available at <http://www.abs-africa.info/uploads/media/ET-EragrostisTef-IBC-FW-2007-03.ppt>.

Note 24. National Academy of Sciences, 'Teff', in *Lost crops of Africa*, at p. 230.

Note 25. <http://www.teffco.com/>.

Note 26. *Vernonia galamensis* L. ssp. *Galamensis* var. *ethiopica* (Noya), also known as 'iron weed', see Muriel Lightbourne, 'Assessing the Economic Implications of Different Models for Implementing the Requirement to protect Plant Varieties' – case study of Ethiopia, at p. 29.

Note 27. Tesfaye Baye and Sileshi Gudeta, *Pest Survey of Vernonia galamensis in Ethiopia*, at p. 219.

Note 28. Tesfaye Baye, 'Genotypic and phenotypic variability in *Vernonia galamensis* germplasm collected from eastern Ethiopia', at p. 161.

Note 29. R.E. Perdue et al., 'Vernonia galamensis: a promising new industrial crop for the semi-arid tropics and subtropics', in *New crops for food and industry* at p. 197.

Note 30. Tesfaye Baye, 'Genotypic and phenotypic variability in *Vernonia galamensis* germplasm collected from eastern Ethiopia' at p. 161 and p. 219. Only in one part of Ethiopia (the Arsi region), it is identified as a medicinal plant (to treat an eye disease). See, Tesfaye Baye and Heiko C. Becker, 'Exploration of *Vernonia galamensis* in Ethiopia, and variation in fatty acid composition of seed oil', at p. 809.

Note 31. The agreement is available at http://www.abs-africa.info/uploads/media/Teff-ABS-Agreement-2004-12_01.doc, and the website of the company: <http://www.soilandcrop.com/> or the English version at <http://www.soilandcrop.com/index.php?lang=eng>.

Note 32. <http://www.verniquebiotech.com/>.

Note 33. Ethiopian Access Proclamation No 482/2006, Art. 2(8).

Note 34. The Agreement on Access to and benefit sharing from teff, Preamble 3(5).

Note 35. The Agreement on Access to and benefit sharing from teff, Provision 10, and the Agreement on Access to and benefit sharing from *Vernonia*, Provision 9.

Note 36. The Convention on Biological Diversity, Art. 4.

Note 37. Cary Fowler, 'Accessing genetic resources: International law establishes multilateral system', *Genetic Resources and Crop Evolution*, Vol. 51, No 6, September 2004 pp. 609-620 at p. 612.

Note 38. The Bonn Guidelines were adopted by the Conference of the Parties to the CBD at its sixth meeting held in The Hague in April 2002.

Note 39. Moore, and Tymowski, 'Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture', IUCN Environmental Policy and Law Paper No 57, 2005 at p. 39.

Note 40. Article 4(2)(a). 'Local community' means a human population living in a distinct geographical area in Ethiopia as a custodian of a given genetic resource or creator of given community knowledge. See, Art. 2(9), Ethiopian Access Proclamation No. 482/2006.

Note 41. Ethiopian Access Proclamation No. 482/2006, Art. 2(1).

Note 42. Ethiopian Access Proclamation No. 482/2006, Art. 4(2)(b).

Note 43. Bonn Guidelines Provision 36(f & k).

Note 44. Bonn Guidelines Provision 16.d(iii).

Note 45. The tragedy of the anticommon refers to more 'complex obstacles that arise when a user needs multiple patented inputs to create single useful products.' There is a possibility that the same situation may arise if access to plant genetic resources is made very complex and the transaction costs outweigh the benefits to be reaped from exploiting these resources. See Michael A. Heller and Rebecca S. Eisenberg, 'Can patents deter innovation? The Anti Commons in Biomedical Research', in *Science*, 1 May 1998, Vol. 280 No 5364, pp. 698-701 at p. 699.

Note 46. Agreement on access to and benefit sharing from Teff, Recital 2(8). For the lists of varieties, see Annex I of the Agreement.

Note 47. Bonn Guidelines Provision 42.b(e).

Note 48. Ibid. Provision 44(b).

Note 49. FAO Treaty Art. 12.3(a).

Note 50. Bonn Guidelines Provision 16.b.(iv) and Provision 34.

Note 51. Agreement on Access to and benefit sharing from Teff, Provision 3(2).

Note 52. Ibid. Provision 3(3).

Note 53. Agreement on Access to and benefit sharing from *Vernonia*, Provision 3(b).

Note 54. Ibid. Provision 3(4) and Provision 6(4)

Note 55. The Convention on Biological Diversity, Art. 1 and FAO Treaty Art. 13(1).

Note 56. Chetan Gulati, 'The "Tragedy of the Commons" in Plant Genetic Resources. The Need for New International Regime Centred Around an International Biotechnology Patent Office', in *Yale Human Rights & Development L.J.*, Vol. 4, 2001 pp. 63-107, at p. 106.

Note 57. The benefit sharing mechanism includes 'exchange of information, access to and transfer of technology, capacity building and the sharing of the benefits arising from commercialization'. See FAO Treaty Art. 13(2).

Note 58. Bonn Guidelines Provision 45.

Note 59. Agreement on Access to and benefit sharing from Vernonia, provision 7(1).

Note 60. Agreement on Access to and benefit sharing from Vernonia, provision 7(2.c).

Note 61. Agreement on Access to and benefit sharing from Teff, Provision 7(4) and 7(5).

Note 62. Bonn Guidelines, Provision 44.

Note 63. The Teff Agreement between the Dutch company and Ethiopia, Provision 4(2).

Note 64. Ibid. Provision 7(6).

Note 65. Agreement on Access to and benefit sharing from Vernonia, Provision 4.

Note 66. The company is now named Soil and Crop Improvement BV. However, on the patent application for the processing of teff flour, the company is named as Health and Performance Food International BV.

Note 67. International Application No: PCT/NL2004/000524.

Note 68. Bonn Guidelines, Provision 55.

Note 69. Ibid. Provision 16.d(ii).



On Reasons for the New Labor'S Continuous Success in Elections

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Abstract

Tony Blair has led the New Labor's Party to three successive victories in the election since 1997. Gordon Brown who is a member of the New Labor Party has been confirmed as the new Prime Minister. This is the first time for the British Labor Party to remain at the helm of Britain from the time it was established. How could the British's New Labor Party still be elected after being involved in the Iraqi War? This is a matter that has surprised many people. This article analyses reasons for the success and recommends them for reference on party management.

Keywords: Tony Blair, New Labor Party, Victory, Election, Reason

The reforms carried out by the New Labor Party have accelerated Britain's development. This has in turn endeared the British electorate to the party. Politically, the party is favored by people because of its highly demonstrated democratic values. For example, it believes in a majority rule and respects individual thoughts. It has set up a new democratic government by removing the traditional hereditary in the House of Lords. The House of Lords consists of religious and secular groups. The secular group is composed of hereditary peers, life peers and the Law Lords. The hereditary peers have the rights to sit in the House of Lords without any election or commission. However, the New Labor Party abolished this tradition, though under strong opposition from the Conservative Party. Currently there are 92 elect members of the hereditary peers in the House of Lords (Baodi 40, 2004). An electable and transparent government is upheld and respected by the public. In reforming the House of Commons, the New Labor Party set up a special select committee to review its procedure by pre-legislative scrutiny. This has since made the major law-making power—the House of Commons operate more transparently. To showcase democracy, the New Labor Party advocated an open government. In 1997, it issued a Freedom of Information Act—Your Right to know to strengthen people's right to know the operation of the government. (Zhenhua 133, 2003) The party has further devolved more power to the local governments. The decentralization of power to Scotland, Wales, London and the Regions of England has allowed flexibility in management of the government. This has helped establish a cooperative atmosphere between the local governments and the central government. It has also strengthened the initiatives of the local governments to adopt appropriate policies for their specific regions. The United Kingdom is a distinct nation where Scotland has its own systems of education, law and religion while Wales has its own language and culture traditions. The New Labor Party proposes the people of Scotland and Wales should vote in separate referendums, to create a Scottish parliament and to strengthen the Welsh assembly. Meanwhile, London mayor has been elected and a regional government in England has been set in the light of the guidance of the New Labor. Under such devolution, the local governments of Scotland, Wales and Regions of England are able to act according to their actual circumstances and adjust policies to local conditions. Once the local decision-making is less restrained by central government, it will be more responsible and beneficial to the local people. These democratic political reforms have attracted a great number of people who have got something for nothing from them become the Pro-New Labor.

Economically, the New Labor has encouraged employment opportunities, promised no increase in income tax rates in five years, controlled public spending and improved people's living standard. Nowadays, most people become political cynics. Few of them are interested in politics. Therefore, some people may hardly care about which party is in power. However, no one will turn a blind eye to his own interests. The New Labor offers people the specific interests they need. People get a job with satisfactory salaries and don't have to pay high income tax. The government is frugal in public spending. It saves to invest instead of taxing to invest. People vote for the one they benefit from, the New Labor has just reached their standard. In terms of employment policy, the New Labor has designed a welfare-to-work program. It provides training opportunities for the young unemployed rather than offers them forever welfare. For those who are in a state of underemployment, especially single parents, a proactive employment service has been utilized to supply them with advice on job searching. The New Labor tries to combine the available benefits to suit individual circumstances in the policy of employment which makes the unemployed feel obliged to make every effort to find a job. After procuring a job, people get to know that the New Labor has set national minimum wage to protect their rights and promised to maintain income tax in five years. All these have covered the basic elements of life among the poor and win the New Labor extra votes in election. Nevertheless, a country is not full of the poor, the middle class and the rich also takes a

large proportion in its population. Obtaining the support from them is equally important. The New Labor eliminated Clause IV to break its old socialistic policy of nationalization of industries and build a dynamic market economy. Tony Blair once said, "The old left would have sought state control of industry. The Conservative right is content to leave all to the market. We reject both approaches. Government and industry must work together to achieve key objectives aimed at enhancing the dynamism of the market, not undermining it (Blair 5,1997)." This is one of the positive points which helps the New Labor attain the support from most of the middle class and the rich.

Socially, the New Labor also does a good job in advancing the progress of the all. It holds the idea that more spending on education will reduce the cost of the unemployment. Therefore, education is the necessity for both the individual and the nation and should be the number one issue to be improved. Besides reforms from primary schools to universities, the New Labor advocates a life long learning program. As employment has to be maintained by up-to-date and highly developed skills, adult learning is recommended by the New Labor. The NHS system has been sustained well by the New Labor. Higher-quality services are provided for patients. The long-waiting lists are regulated and patients don't need to wait for cancer surgery. The New Labor has an environmental committee to make sure that economic and social progress go together with the development of a sustainable environment. It cares about road safety and makes cycling and walking safe, especially around schools. It also helps parents, particularly women to balance work and family in modern labor market by national childcare strategy. It is tough on Crime and concerns about the victims in crime. It seems that the New Labor is almost omnipotent in social management to give attention to all aspects of life.

In spite of attaining grassroots through all its successful reforms, the New Labor is skillful in reinforcing the solidarity towards the grassroots. As a party whose fundamental value is equality, the New Labor specifically emphasizes human rights. It tends to end discrimination that exists in Britain. For instance, they enforce civil rights for the disabled, value the positive contribution that the old have made to the society by offering real help to pensioners, and promoted new rights for gay people in the Civil Partnership Act 2004. As the aim is to gain the support from all walks of life, the New Labor has to ensure everybody fair rights. Fairness is the key for people to get themselves balanced. Human rights are rudimental human needs which refer to a variety of values and capabilities, with which people are able to live with ease. A journey of a thousand miles begins with a single step. Starting from maintaining every basic right of the people, the New Labor wins favor from its people. Therefore, it is wise for the New Labor to highlight human rights to improve its prestige and credibility. In addition, the New Labor has renovated its party organizations at a lower level to establish a sound environment for its members to join all its activities and raise their political awareness of the party. A lot of clubs which require its members to join are set with newspapers, magazines, TV shows and speech pools about its current politics (Zhenhua 168, 2003). Party activities are launched spontaneously together with social events. The New Labor attempts to make politics more appealing and fascinating to its people. The members of the New Labor become much more familiar with its proposals and layout. In this way, the New Labor obtains the accountability of its members. Besides paying attention to up building a nice political atmosphere for its members, the New Labor also makes efforts on absorbing new members. Its membership has doubled from 279,000 in 1992 to 400,000 in 1997(Zhenhua 168, 2003). It has adjusted its registration system to make the procedure of becoming its member simple and convenient. One just needs three steps to join the New Labor: logging on its home page, filling in a form of one's personal details and confirming the payment. Meanwhile, women are not left behind the political scenes as they're involved and respected in all levels of the labor party. In analyses of 1992's election, it showed that women who opposed to the New Labor were 9% more than men. The New Labor has tried every means to change this situation. There were 500 female representatives attended the party assembly in 1995 and the first chairwomen of the New Labor appeared in 1998. The women's organization has come into being to ensure that women are equally represented at all levels of the party and in all the party's decision-making bodies. As it is said that the New Labor is the pioneer of new things, it promotes "E-Democracy". It uses internet to spread its ideas and policies, at the same time, to learn about and exchange people's opinions and demands. In the New Labor's website, one may procure the latest news, email his/ her advice, requirements and comments to the exact organizations or sectors and make friends with its members. This is an effective mechanism for a higher level party organization to receive the authentic ideas from party members at the grass-roots. Such style of democracy also adds transparency to the government.

All this strategies enable the New Labor to solidify its party members and non party members to fight together for its bright future.

Unlike the Conservative Party who suffers from brain drain after several electoral defeats, a lot of political talents work for the New Labor. Besides, the New Labor pays attention to absorbing elites. Its leaders are legendarily capable in both election and government management. Tony Blair, the Labor Party's longest-serving Prime Minister and the only leader to have taken the party to three consecutive United Kingdom general elections victories has an extraordinary personal glamour and is quite proficient in election. He is creative in political outlook, intelligent in speech and sophisticated in using media. In order to display a brand new image of Labor as competent and modern, Blair coined the term "New Labor" to distinguish the party from its past, which successfully impressed the public. He changed Parliamentary procedures significantly. One of his first acts as Prime Minister was to replace the twice-weekly 15 minute sessions of

Prime Minister's Questions, held on a Tuesday and Thursday, with a single 30 minute session on a Wednesday. In addition, Blair held monthly press conferences, at which he fielded questions from journalists. Critics and admirers tend to agree that Blair's electoral success was based on his ability to occupy the centre ground and appeal to voters across the political spectrum. During his reign, he was broad-minded to pool talents from various fields to work for him. He had the insight to identify them, the resolve to use them, the temperament to respect them and the glamour to attract them. David Simon who was persuaded by Blair to resign from the British Petroleum as the Chairman of the Board became Minister of Trade and Competition. Martin Taylor, the CEO of Barclays Bank, was offered to be the leader of the Committee of Tax and Welfare. The Boss of Prudential Insurance Company, Peter Davies, was invited to be the organization of supporting hard-working families (Li 260, 1998). Tony Blair is good at using Medias to win him support. He owns a natural affinity to the people by behaving as a loving husband and responsible father in public. He made himself familiar to the populace like the boy next door and obtained a great popularity among women for his affection to Cherie Booth on the TV show made for election, which exhibited his blissful family life. Gordon Brown who was a capable Chancellor of the Exchequer during all Blair's ten years in office succeeded Blair as party leader on 24 June 2007, which refreshed the New Labor's gradually withering image after its policy of the middle east and Iraqi war.

There're three major reasons for the new labor's continuous success in elections. Firstly, the New Labor has implemented plenty of successful reforms, which have not only speeded the development of Britain's society but also helped it obtain a large number of grassroots. Secondly, the labor party has strengthened its solidarity towards the grassroots. Thirdly, the New Labor owns able leaders and political talents. It is a truth universally acknowledged that a party which is of the people, by the people and for the people must be wanted among its people. The New Labor is indeed the case. Its success has provided a good example for other parties to learn from.

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2004 Malaysian General Elections Winning Formula

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Abstract

This paper explores Malaysia's political culture emphasizing the political consensus achieved among various ethnic groups whose lifestyle, values and beliefs differ from one another. Given the Malaysian political culture which is very much fragmented, the forming of the Alliance, or National Front (NF), has not only helped reduce ethnic-based conflicts but also manage a government. Within 4 months of taking over the reins from Tun Dr. Mahathir Mohamad, Abdullah Ahmad Badawi has led the country into its 11th general election only to obtain a landslide victory and thus, a bigger mandate as Prime Minister. This provided him the legitimacy of forming a new cabinet along with members whose sole duty is to deliver the goods to a nation of 23.2 million people. What is Abdullah Ahmad Badawi's winning formula? This paper discusses the factors which have led to the NF's overwhelming victory against a setback of Malaysia's frayed political culture augmented by its various ethnic groups and societal values. Why has this multi-ethnic and multi-cultural society picked the NF above other political parties? A special focus is given to the sparkling performance of the NF in the recently concluded elections, which saw the defeat of Alternative Front (AF). Having made inroads into the country during the 1999 elections by posing an ideological confrontation, AF effort to end the coalition's hegemony failed given its poor performance in the last elections. The party failed badly to achieve a consistent change in the society's acceptance of AF. Using the winning formula as a basis of its study, this paper will give an insight into how the NF can maintain its role as a credible government administrator since its inception in the first 1959 post-independence elections.

Keywords: General Elections, Malaysian Politics, Electoral Behaviour, Voting Trends

1. Introduction

A surprised and unexpected victory. These are the words that best describe the 2004 Malaysian general elections. Even though the victories of National Front (NF) were indeed expected, but the extraordinary victory, in particular NF's performance in the East Coast states indicates the new direction in the country's political system. During the campaigning period, from the date of nomination of the candidates on March 21, 2004 and prior to that, everyone was indeed afraid of placing high hopes on NF's performance especially in the states of Terengganu, Kelantan, Kedah and Perlis whereas in other states, NF was expected to form a state government easily. Analysts and political observers following the election in these states have a different view and deemed it difficult to threaten the Pan-Malaysian Islamic Party (PAS) position in Terengganu and Kelantan. In fact it was foreseen that PAS will put up a strong fight in Kedah and Perlis. Changes have again occurred in the political culture, contrary to voting attitude and patterns as seen in 1999.

2. Election Results

NF for the first time successfully controlled almost 90% of the Parliamentary seats or 199 seats which is more than the two thirds majority (110 seats for simple majority and 146 for two thirds majority) needed to form a government and controlled all states with a big majority except Kelantan. However, NF showed an outstanding achievement in this state by winning 21 seats from 45 seats contested.

If the 1999 election results were taken into consideration, NF's victory is outstanding. Not a single cabinet member lost and also not one won with a slim majority. They won well. Terengganu was regained overwhelmingly with a large majority (NF-28, [PAS]-4) despite NF having only 4 representatives in the State Legislative Assembly (SLA) in the past election. In Kelantan, the 1999 election saw 2 NF representatives in comparison to 43 Opposition representatives at SLA level. Today, NF has 21 members at the SLA of the respective state. United Malays National Organization (UMNO) should be given due respect as during the period after 1999 until the general elections were held, they were in a *hostile environment*, and seemed to always be in a state of dissatisfaction in the eyes of the people. UMNO lost 16 seats of the 88 seats contested in the 1999 election. The assumption by various parties failed when they won 109 seats of the 117 Parliamentary seats contested. At the state level, NF seized 452 seats out of 505 contested. (Note 1)

3. Malaysia's Political Culture

Political culture is part of the various cultures existing in a particular community. Some see it as an attitude and the comprehensive view of an individual. For Almond and Verba, culture is a psychological orientation on a social object whereas political culture is an orientation on a political object (Almond, 1972).

According to the International Encyclopedia of Social Sciences, Political Culture is a:

“Set of attitudes, beliefs and sentiments which give order and meaning to a political process and which provide the underlying assumptions and rules that govern behaviour in the political system. It encompasses both the political ideals and the operating norms of a polity. Political culture is thus the manifestation in aggregate form of the psychological and subjective dimensions of politics” (Sills, 1979)

What is apparent is that political culture is used to portray internal factors or also known as ‘soft factors’ in politics such as belief, attitude and sentiments which portray a particular society. It should involve the collective action which is also emotional in nature or intellectually based and which differentiates it from other societies. According to Elazar, political culture is a combination of both, the individualistic and traditional elements. Traditional aspects refer to leadership history in a particular country, voting patterns and economic and social standing of the said country whereas individualistic elements are private business support and the initiative of an individual.

In a country like Malaysia which consists of various ethnic groups, its political culture is fragmented (Pye, 1985). It is difficult to ensure that the interests of a particular community are safeguarded while the rest are neglected. Some are even of the opinion that with the incident of the dismissal of Anwar Ibrahim, former Deputy Prime Minister, changes will occur in terms of accepting the opposition and non-governmental organization whereas upon looking at the question of the Malaysian political culture, two cultures seemed to dominate namely, the Malay and Chinese political cultures. This is due to the difference in living status, norms and practices; hence it is difficult to form assimilation between both parties. According to Almond:

“..... that the relation between political structure and culture is interactive, that one cannot explain cultural propensities without reference to historical experience and contemporary structural constraints and opportunities, and that, in turn, a prior set of attitudinal patterns will tend to persist in some form or degree and for a significant period of time, despite efforts to transform it” (Almond, 1983)

The political cultures in Malaysia are not perceived as being static but have undergone shifts in spectrum. During the colonial days, the Malaysian political culture may be deemed as being universalistic in nature, particularly with the presence of the British who gave priority to locals who want to work for them. Western Democracy was seen as a tool of the British which enabled several practices such as the Westminster model which was used for the election and the formation of a government. However, it did not last long due to the racial riot incident on May 13, 1969 which raised new challenges on the system that was being practiced. Post May 13, 1969 saw a new spectrum in the country’s political arena. It brought amendments to the economic policies and the country’s movement even though its basic structure remained. Political demography became important in the process of the distribution of votes and support for parties. Participation in politics and championing support for parties and public support increased. This shift in political culture in Malaysia is the main essence of this article. In 1998, changes in the political culture and spectrum occurred again, after the sacking of Anwar Ibrahim. This incident brought new directions to the course of the country’s politics. Its effects were immense, particularly on the support for UMNO. Results of the 1999 elections showed new expansion in voters’ voting patterns.

This new shift in the 1999 election did not occur again in the 2004 elections. Many thought that the 1999 election, the 10th election in the history of Malaysia was to be the most challenging during the leadership of the former Prime Minister, Tun Dr. Mahathir Mohamad. This was due to the internal and external challenges to his leadership. The economic crisis of 1997 and the dismissal of Anwar played a very important role as these issues were used by the opposition to form a coalition known as, Alternative Front (AF), the best during their involvement in the election in Malaysia. Externally, the West, in particular America, Canada and Australia and several Asian leaders such as the former Indonesian President, Habibie and the President of the Philippines, Estrada to Al Gore, the former deputy President of America who caused a controversy in his speech calling for reformation during the APEC meeting, all of which was deemed to have caused the NF and UMNO to be in an hostile environment.

However, NF retained its leadership in the Federal Government with the two thirds majority as stated above. Many were of the opinion that the ‘gerrymandering’ factor, manipulates the general election rules and 680,000 voters who were unable to vote due to technical factors had enabled BN to win the 1999 general elections. Several other factors such as the visit of the former Prime Minister of China, Zhu Rongji from 22 to 26 November 1999 which coincided with the general election campaign period from 21 to 28 November 1999 which was considered as an endorsement of the Chinese Leadership, on the leadership of Dr Mahathir, tolerance towards Chinese medium schools and the media agenda which stated that the Non-Malays would lose their rights if PAS were to rule and establish an Islamic nation had affected the credibility of the opposition. This seemed to be the political culture practiced in this nation which is in line with the question pertaining to ethnicity. The performance by AF did increase suddenly to the extent that they were confident of gaining power in several states in the 2004 general elections. This confidence dominated their strategy but this expectation saw a decline if reference is made to the achievement of the opposition in the said general election.

Why did this happen and what were the factors contributing to the victory of NF? This will be the focus of this article which sees the winning formula for NF as a part of the political culture in Malaysia.

4. National Front's Winning Formula

Malaysia's complex politics had apparently produced specific ideas and culture but pluralism remains in the country's mainstream. Many scholars held on to this principle including RK Vasil (1980), Alvin Rabushka (1973), Ismail Kassim (1979), Diane Mauzy (1983), Gordon Means (1991), and RS Milne (1978). In the establishment of the ruling party in Malaysia, the system may be divided into two, namely the birth of the Alliance (Perikatan) in 1955 until 1969 while NF dominated from 1972 to present. This is due to the independence requirements set out by the British that there should be co-operation between the various races in Malaysia and the Alliance formula deemed as the best in fulfilling the said pre-condition especially when the Municipal Council 1955 election was won by Alliance thereby allowing them to form Government.

This became a tradition and NF continues to win all elections held in Malaysia. For the purposes of this article, attention is given to the pulling factors that enabled NF to win the 2004 general election with a larger mandate which is indeed important for the future of the nation.

The most important and dominant factor that brought about NF's success is the Abdullah Badawi wave which is most conducive and fulfills the requirements of the people (Sivamurugan, 2004). The *'feel good'* syndrome helped to increase Abdullah's popularity in the entire nation. When he states that a Member of Parliament should be those who are ready to serve, this statement increased the people's confidence in his leadership and felt that his agenda will be fulfilled. In line with the manifesto *'Cemerlang, Gemilang dan Terbilang'* (*Glorious, Excellent, Distinct*), he is seen to be able to steer Malaysia toward prosperity. Under the Badawirism era, he focused on rooting out corruption, attaining a quality civil service, Islam Hadhari concept, agriculture as the vehicles toward a new economic drive, multilateral foreign relations and harmonious communal relations. These are the gist of his Malaysian agenda, the agenda to create an excellent society in a first-class nation (Sivamurugan, 2004). Badawirism gave importance to transparency, honesty and accountability to develop a glorious, excellent and distinct nation. This directly draws the attention of the majority of the voters who are between the age ranges 30 to 40 years old. This group wants a hardworking, trustworthy and responsible leader to bring the nation to greater heights not rhetorically but actually translated into performance. The elected representative performance index introduced by Abdullah also draws the interest of those in this group who are of the opinion that they have the right to their representative in the government. The people are confident of Abdullah and entrusts him to fully realize his ideals.

This is different with the opposition who did not choose a leader suitable to head the AF, what is more they selected a controversial leader that made it fragile. The demise of the late Fadzil Noor who successfully brought the opposition parties under the AF banner with a collective action also caused a bad performance by AF in the general election. In Kelantan, the Chief Minister who is the longest serving Chief Minister in the state's history, has been in service since 1990 and who had only reshuffled the exco members thrice, is seen as having administered for too long with no changes. The Chief Minister's capacity as Spiritual Leader (Tok Guru) is not at all questioned. Failure to maintain their performance in the 1999 election was deemed as "protest votes" of the people who are aware that the extreme politics of PAS did not bring progress to the country and frustrated the development of its people.

With no important and major issues as in the 1999 election which was dominated by the Anwar sacking issue, NF focused on issues such as clarifying, exhibiting and spreading Abdullah's leadership qualities of wanting to gear the nation to greater heights through his manifesto. Citizens are looked upon as assets whose interests are recognized and will be given due attention by the government. These values have drawn the attention of the public who are impressed with his ability to continue with the achievements of the nation and to bring Malaysia to greater heights (Noordin, 2004). This is contrary to the opposition who are still using their old ways which are no longer suitable with the current situation of the nation. They emphasized the same historic issues and these days voters are more rational and cannot be swayed easily. These include the action taken by the President of PAS, Datuk Seri Abdul Hadi Awang who made several controversial statements that were degrading and slanderous in nature, questioning the leadership credibility of Abdullah which were deemed by the people as an action under pressure to win the sympathy and support of voters. Abdullah's sincerity and nature was tested but he decided not to react to it. This is his strength which is most liked by the people.

The 1999 election brought the Anwar issue to light and was tainted with emotions, which PAS manipulated this issue for its own interest. Today's voters want changes that are appropriate to the turn of the century. It is especially so, when this party that fights for religious rights is not clean at all. The state government under the leadership of Hadi was also alleged to have misappropriated zakat funds and timber concessions (Massa, 2004). This caused them to be unable to face the blue wave campaign in Terengganu in year 2002 and their failure to defend the effectiveness of this campaign had trapped them and brought their failure in not winning any Parliamentary seats but only won 4 SLA seats. It is apparent that PAS is not strong on its own but the internal problems of UMNO had contributed in allowing them to

compete with UMNO all this while. They also shared KeADiLan's popularity of the 1999 election victory. The fact is PAS is unable to stand on its own and is seemed to have lost its direction when KeADiLan failed. Abdullah's ability to ensure UMNO's internal problems were overcome immediately had enabled him to win a large number of votes in this election and which saw the fall of PAS heavy weights and may bring about the end of KeADiLan who only won one Parliamentary seat through Datin Wan Azizah Wan Ismail at Permatang Pauh. DAP who lost heavily in the 1999 election won more seats this time. This is because they are no longer bound to the AF and had contested on their own which had enabled Lim Kit Siang and Karpal Singh to surface again in Parliament. This does not mean that this party is strong as depending on the popularity of these two names, DAP will not go any further.

Further, the rules of the Election Commission (EC) which did not allow for voter appeal had assisted the course of the election without the existence of a group that is able to vary the standing of voters at the very last stage. So were the various stringent rules by EC to ensure the non-occurrence of any untoward events again. Their strict rules have curbed excessive campaigns by contesting political parties and this has been fruitful. However, many disturbances occurred which included the voters list and more so, the changes in voting stations and printing errors until the general election in Sungai Lembing Constituency was postponed to March 28, 2004. This should be a lesson to the EC so that their ability is not questioned in future. However, the high percentage of voters, 80% in several states, showed that awareness has surfaced among the people that they have the power to ensure the leadership of today and the future.

Almost 40% of the candidates contesting under the NF party are new faces seen as being able to work together with the Prime Minister for the betterment of this country. These include people of various statuses and of varied backgrounds. This proves that NF is not lacking in new generation leaders who are able to join forces in ensuring that the nation continues to develop and be stable among the third world nations. In comparison to the scenario of the 1999 general election, the candidates that were selected and those dropped clearly shows maturity in conduct. There was evidence of sabotage in several places when the candidates of their choice were not selected. They threatened to stop the general election vehicle but as a result of the give-and-take attitude with all parties, this internal problem was solved although not fully. Candidates from other constituencies were placed in specific constituencies to avoid people of two different factions from disputing among themselves and being unpleasant with each other and this strategy has been successful. The acceptance of such candidates is better in comparison to the candidates chosen from X faction and seen disappointing by the Y faction. Strategic candidates were deemed to be among the factors contributing the NF's victory this time (Sivamurugan, 2004). The threat of the 1999 election failed in the election this time as they took the risk of placing a huge mandate in the hands of the Prime Minister including candidates who have at one time been put aside during the 1999 general election, have now made a come back to stand for election, this is seen as consequential strength to candidates from a varied background such as religious scholars, corporate figures, academicians and experienced leaders.

Economic factors also helped in NF's victory. These include the performance of the index composite which was above 900 points, among the highest and which reflects the economic standing of the nation. Second, non-Malay voters made the economy as their yardstick to decide on which party is to be chosen that will be able to ensure rapid growth. As under NF, the nation had continued to prosper and no serious economic crisis occurred during the transition of leadership, hence the community found the NF is the only party that will be able to ensure their living qualities will be better in the future. This is also the group of people who enjoyed the success of the New Economic Policy (NEP), the sharing of wealth of the country and also given the opportunity to develop the nation (Massa, 2004). As for the rural societies, they have given their trust to NF as it is the Prime Minister's own plan to use agriculture as the country's economic resources under his industrialization policies. This will directly upgrade the ability of those involved in the small and medium industry sector in the rural areas. The gap between the community and the government is brought closer through this strategy which had enabled NF to be recognized through the votes in this general election.

The number of 5, 114, 171 or 49.73% female voters should be given due recognition as they fall under the deciding group, as to which party qualifies in this general election. Government programs especially those under the Ministry of Women and Family Development carried out various programs that enhanced the presence of this group in any field executed by them.

In fact, Puteri UMNO is a new group in the country's political arena and that has played a very important role in the success of NF in this general election. They are the most energetic catalyst in contributing to NF's success in the areas contested with the use of various strategies and approaching various levels of the community who were happy with their presence. Puteri UMNO was also successful in approaching the young generation voters and convinced them into voting for the betterment and prosperity of the nation. This is what the new generation wanted, who are more sensitive to economical issues, social stability and peace and also the candidates contesting as they will be the voters representative later in the state and central governments. The voter percentage increased greatly this time as it was the efforts of these groups in appealing to the people to cast their votes so as to ensure the future of the nation (Sivamurugan, 2004). The victory of NF was due to the strategies of this group in calling young voters especially

during the last 48 hours before the commencement of the general election. This is the strength of NF who campaigned to ensure the continuity in leadership.

NF's victory was also due to the Islam Hadhari concept which is among Abdullah's main agenda and is being well received by the people as it is based on moderate Islamic teachings that have given due consideration to progressive development and tolerance. It does not raise any problems to the non-Muslim as discrimination does not exist in the said concept while it enhances the living standards of the society of this nation in its entirety. It practices good consideration among its people.

5. Conclusion

Generally, this election witnessed many shocking events and victories beyond expectations and a new shift in political culture of the country. It is also the people's support for Abdullah's political policies, which is a culture practiced all this while. Many voters who chose the opposition to show their dissatisfaction in the 1999 general election had now returned to NF. They do not share the ideologies of the opposition but are on-the-fence group which will generally vote NF. The other group is that of voters who are the new generation voters and are comfortable with the efforts by Abdullah as well as the female voters who have proven that their rights are guarded under the umbrella of NF administration. In five years, the opposition will strengthen their vehicle to face the challenge of this leadership. The scenario might be different with Anwar being freed on September 2, 2004, after a 6 year imprisonment. It depends on the role Anwar is going to play but at present, not much changes occurs because Anwar is still adjusting himself under the opposition platform which is ethnically divided too. Hence, the Malaysian political culture will remain based on the different practices and norms on the basis of pluralism capacity which have influenced NF's victory all this while.

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Notes

Note 1. In the Kuala Berang Constituency by-election on August 28, 2004, NF retained the seat with a bigger majority. In the previous election, NF won with 1,695 votes but in the by-election, they managed to get 2,059 majority. NF also retained the Ba'Kelalan seat in Sarawak.



Study on Obstacles to Policy Termination

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Abstract

The problem of how to terminate outdated or ineffective policies, programs or organizations is increasingly important. But the termination of public organizations, policies and programs has usually been neglected by policy researchers. This paper is intended to explore why the ending of policy is so tough that few case is reported in practice. The main reasons for the longevity of government organizations and policies are as follows: intellectual reluctance, institutional permanence, antitermination coalition, legal obstacle, high start-up costs, pressure from public opinion, influence of interest groups, incrementalism at work, dynamic conservatism and so on. In the second part, some general strategies for making the termination option more available are suggested.

Keywords: Policy termination, Obstacles, Countermeasures

1. Introduction

Just like person's life is destined to an end, so is public policy. However outdated or inefficient policy will not die automatically, it requires policy makers to abolish artificially. That is to say, policy termination must be enforced by man through certain procedure. There is no consensus of policy termination in theoretical circle. But we can understand it in the following way: policy termination is a kind of action that is taken to bring the outdated, redundant, unnecessary or inefficient policy to close by decision-makers after a careful policy evaluation. Before specific termination strategies devised, termination must be accepted as part of the policy process. (DeLeon, 1978) Policy termination is conducive to saving resources, improving policy performance, avoiding the rigid policy and optimizing effect, etc. Therefore it is ought to be a necessary and important process of government administration, but for various reasons, in practice there have much resistance in policy termination. As for theoretical research, much work should be done to convert negative cognition on it, enlarge case collection to generalize the measure and so on. Herbert Kaufman has written that one of the reasons for publishing his study of termination was to call attention to this gap.

Policy termination is a significant and unavoidable topic to the rulers in theory or in practice. Policy termination is an administrative process relating to a series of personnel, institutions, activities and systems and other complex factors. Thus, "it is hard to carry out policy termination. Government programs are rarely terminated, even when evaluative studies produce negative findings; even when policymakers themselves are fully aware of fraud, waste, and inefficiency; even when highly negative benefit-cost ratios are reported, government programs manage to survive. Once policy is institutionalized within a government, it is extraordinarily difficult to terminate." (Thomas, 2004, p.324) Why is it so difficult for governments to terminate failed programs and policies? The answer to this question varies from one policy to another, but a few generalizations are possible. Deleon's termination resistance model provides a vehicle for answer that question. He holds that at least six obstacles inhibit---if not virtually prohibit---the political act of termination: psychological reluctance; institutional permanence; dynamic conservatism; antitermination coalition; legal obstacles; and high start-up costs. (Deleon, 1978, p.379) These usually occur in combination, and bring about the particular difficulty of planning and executing policy termination. Now obstacles to policy termination are concluded in the following discussion.

2. Obstacles to policy termination

2.1 Intellectual Reluctance

The first obstacle is that people do not readily confront issues pertaining to death. This is also applicable to policy termination. Termination is rarely attempted is that political leaders are reluctant to admit or seem to admit past mistakes. Generally speaking, persons resist the end of the policy can be mainly classified into three groups: policy makers, policy executors and policy beneficiaries. For policy makers, on the one hand, they believe the existing policy is well thought and carefully drawn up; on the other hand, they assume that admission of policy failure is equal to acknowledging mistakes in job, and even may harm their own fame and wealth, thus they are against termination. For policy executor, if they are wanting in a high degree of consciousness, responsibility, and scientific attitude, they are usually reluctant to admit the failure of the policy because they has invested considerable energy and labor in the

process of enforcing the policies, especially when the end of the policy may be detrimental to their interest or development prospects, they tend to show a strong psychological and behavioral reject. Meanwhile after a period of implementation, policy executor has got into a work habit and mental set, which further consolidates their habits to maintain present state. In case policy termination is initiated, they will be unaccommodated. For policy beneficiary, policy termination means redistribution of interests. Thus, some are afraid to lose their own vested interests consisting of salary, bonus, benefits and the like due to policy termination. For instance, about the policies on streamlining government organs, those who believe that their power, status and prestige are impaired would be against it. Cognitive reluctance to realize policy shortcoming is reinforced for the analyst because policies typically are designed to solve, or at least to reduce, a specified problem; the options proposed and the programs chosen for not selected with the thought that they will prove deficient. For this reason, little serious attention is paid to the question of failure or the later need for policy termination.

In Thomas R. Dye's (2004) view, among the beneficiaries of any government program that are those who administer and supervise it. Bureaucratic jobs depend on a program's continuation. If the continuation is cut, "government positions with all of their benefits, pay, prerequisites, and prestige, are at stake. Strong incentives exist for bureaucrats to resist or undermine negative evaluations of their programs to respond to public criticism by making only marginal changes in their programs or even by claiming that their programs are failing because not enough is being spent on them." (Thomas, 2004, p.325)

2.2 Institutional Permanence

The second cause of public policy longevity concerns the tendency of all institutions to maintain themselves—to become immortal. (Frantz, 1992, p.181) A diverse body of literature testifies to this tendency (Kaufman, 1976) and to the fact that the longer an institution exists, the more resilient it becomes (Downs, 1967) Organizations are deliberately designed to perpetuate a service or a relationship whose demands are expected to outlive a single sponsor or bureaucrat. Biller (1976) holds that the adaptive nature of an organization further immunizes it from easy termination. Should discrepancies between the organization's objective and its environment arises, the organization is designed to recognize, act upon, and reduce the problem before it can attain a magnitude that would endanger the institution's very existence or, at least, its nominal jurisdiction in dealing with such problems. To a large degree, these tendencies are proper and justifiable institutional objectives: major policies and institutions should not be transitory, nor should they meekly collapse under the treat of a new problem or altered conditions. (Deleon, 1978, p.381)

This is not the place to debate the issues and values of organizational growth, adaptation, or permanence. The crucial point is not whether planned institutional longevity is good or bad but simply that it is a fact of political, bureaucratic life. (Deleon, 1978, p.381) Organizations, their policies, and many of their programs are intended devised for long life and possible permanence. If amendment or adjustment is wanted to be done to one of them, external forces must be turned to for help. As is the reason why that the inertia inherent in organizations makes it instinctively opposed to any change. In addition, organizations, like human beings, have a strong vitality, when the policy termination endangering the survival of the organization, and it will do everything possible to alleviate the pressure, or change strategies, or adjust the structure, and finally find ways to slow down the process of policy termination. All of these give policy termination a negative impact.

2.3 Antitermination coalition

Public programs become the stimuli for the development of coalitions of staff, constituents, and other groups who have common and intense interests in maintaining those programs according to DeLeon. (1978, p.290) These coalitions "may be strongly committed and may intensely resist change and ignore contrary evidence". (Anderson, 1984, p.255) Different political groups have its own strengths and tactics, but such groups are particularly successful when they form coalitions to block threatened acts of termination.

When the self-interest is threatened because of the upcoming termination of the policy, the power of coalitions struggling against policy termination is often consciously or unconsciously, to unite to make policy termination intractable. Organizations or groups that are against policy termination, on the one hand, will usually require its members to work together within a common resistance, on the other hand, will try every possible means including roping in or being close to the personage and policy supporter in order to form a powerful averse forces posing a threat to the end of the policy. The executive authorities' coalition is particularly active and influential; it is because it is more convenient than any other social organizations to conduct political activities for the executive organs. The power of these groups seems to have increased as the institution aged.

2.4 Legal obstacles

Legal obstacles, according to DeLeon (1978, p.291), relate to "constraints of 'due process' " and may prohibit the government from closing institutions. We know that any formulation, implementation of policy, and the establishment of organization must be carried out through certain legal procedures, so must policy termination and the withdrawal of

organizations. These must also be handled in accordance with statutory procedures. This process is not only time-consuming, but also complex. At times, it may even delay the timing of policy termination. In particular, it is arduous to terminate the policies that have risen to the level of law. Thus, legal troubles are, and continue to be, significant impediments to the closure of policy. Meanwhile, termination of dysfunctional policy for the legislature means that their legislative activity is devoid of the corresponding scientificity and effectiveness to some extent. Therefore, for the sake of their own interest, the legislature in considering the termination of a policy or law is often hesitated and scrupulous, so it will undoubtedly increase the difficulty of policy termination.

2.5 High start-up costs

DeLeon's model concludes the idea that there are considerable costs associated with terminations. "Whoever initiates a termination procedure must pay these costs convincing government to admit it made a mistake, finding an alternative solution to the problem, enduring the protests of those damaged by the termination, and accepting responsibility for the externalities of the closure." (Frantz, 1992, p.185) Few politicians are willing to admit that they have been made mistakes, and to call for the termination of a policy or program is tacit admission of such failure. DeLeon's fourth 'start-up cost' involves externalities such as the image government develops if it gives up its responsibility. Bardach (1976) refers to the 'moral repugnance' that people feel they are abandoned. Individual, groups, and whole societies frequently judge public policy in terms of its good intentions rather than tangible accomplishments. (Thomas, 2004, p.314)

Cost concerned with policy termination, from the perspective of its property, not only include political cost, but also economic and social cost. From the view of its course, it comprises direct and indirect cost. Generally speaking, cost of policy termination can be divided to two major parts: the sunk cost of existing policies and the price for the conduct of ending policies itself. Firstly, any extant policy has been occupying certain resources, and which would make persons who approve closure between the devil and the deep sea: on the one hand, the current policy has been proven to be ineffective or a failure, if additional investment is continued to put, this will certainly result in greater losses, and more input will surely bring about more loss; on the other hand, if no investment is added, investment of billions of dollars due to termination of the policy would be thoroughly frustrated and become sunk cost, which will never be drawn back. Secondly, the operation of termination needs large costs. Before ending, many resources must be collected for formulating new policy or institution so as to guarantee administrative continuance. Except that, in order to diminish resistance, certain compensation is necessary to provide for those individuals or organs suffer loss.

In general, higher cost is invested, more painful termination is made. In face of high sunk cost and large amount of price paid for the action of termination itself, decision makers usually choose to persist in current policy and give up termination hesitatedly.

2.6 Pressure from public opinion

Social and public opinion is also a factor that influences and impedes in policy termination. James • E • Anderson said: "Public opinion establishes the basic scope and direction of public policy." (Anderson, 1984, p.63) Thus, whether in capitalist society or socialist society, public opinion all have an extremely important effect in political life. Many policy practices have shown that, home and abroad, when public opinion takes on a positive attitude towards the end of the policy, the policy termination becomes easier; on the contrary, when it presents a negative attitude, which will impede the conduct of policy termination. In the West, public opinion is often regarded as "the fourth power" besides legislature, administration and jurisdiction, due to its special role played in political life. Therefore, in order to promote the smooth ending of the policy, it is essential to steel and create a favorable public opinion environment for policy termination. If the policy or program is upheld by public communication media and mass opinion, any attempt to terminate it will encounter dramatic resistance.

2.7 Influence of interest groups

Public choice theory figures that interest groups play a powerful role in public policy. Interest groups, politicians and officials together make up of 'the iron triangle' through interaction, as exacerbates policy termination. In a plural-structure society, a variety of forces impact public policy process. Group theory model regards that public policy is the result of diverse political forces' interaction. Political life in reality is a course that all groups try to influence public policy. For the sake of their own interest, each group does their outmost to strengthen themselves so as to put more influence on public policy subject. To some extent, public policy is the outcome and manifestation of different groups' interest balance. Therefore, when ending policy threatens their current goodness, interest groups will try all means to reject it.

2.8 Incrementalism at Work

Complete program termination are very rare. Governments seldom undertake to ponder any program as a whole in any given year. Active consideration of policies is made at the margin—that is, "attention is focused on proposed changes in existing programs rather than on the value of programs in their entirety". (Thomas, 2004, p.325) This attention often

comes in the budgetary process, in the bureaucracy and legislature when proposed increases or decreases in funding are under discussion. Passive evaluative research can play a role in the budgetary course—limiting increases for failed programs or perhaps even identifying programs ripe for budget cutting. However focus is almost always put on changes or reforms, increases or decreases, rather than on the complete termination of policy. Failed programs can also be “repackaged”, that is to say, giving new names and agency titles, while keeping the same goals, the same bureaucracy, and the same policy prescriptions. Termination often generates a great deal of conflict and involve very special context. Marginal policy changes are much easier than policy termination to accomplish.

2.9 Dynamic Conservatism

Term of “Dynamic Conservatism” is put forward by Donald Schon, which means a facility that organization can move to alter its objectives or possibly its environment. Because they are dynamic entities with both the way and the incentives to recognize when targets are reached or when a great disparity exists between institutional policy and specific policy goals, organizations are extraordinarily resistant to termination.

According to Thomas R. Dye (2004), it is scarcely sufficient grounds for disbanding an organization regardless of the successful or the unable attainment of a policy objective. Obviously, if an organization or a policy is not running to expectations, it is a more likely candidate for termination than if it were achieving some worthwhile measure of its defined objectives. This is not to deny that ineffective performance may not lead to termination; surely ineffective performance increases the probability of termination, but the increase may not be significant. “The main point is that organizations and their policies are dynamic, not static. Both can be altered if need be, to increase the difficulty of terminating them.” (Thomas, 2004, p.383)

3. Countermeasures

From the discussion above, it is easy to find that it is not easy to execute policy termination. Detailed study of the obstacles to policy termination bears the aim to seek better strategies for closure of policy. If termination strategies are not carefully formulated and implemented, they can undermine their purpose

It appears that successful termination efforts are more likely under certain political and social conditions. Any strategy for terminating a given policy or program should obviously attempt to create, or at least await, these conditions: (1) A change in administration. This introduces—or at least has the potential for introducing—actors who are either not shackled to existing policies and programs or who have a positive incentive to dissociate themselves from the past; (2) Delegitimation of the ideological matrix in which the policy is embedded; (3) A period of turbulence in which many people’s optimistic expectations about their own life chances are shaken. This condition weakens the moral aversion to disrupting the life patterns of persons who have come to presume upon, and rely upon, the continuance of particular government activities; (4) Cushioning the blow. Policy termination strategies can be designed to partially ameliorate those injuries which will be suffered by interests to be adversely affected; (5) Finally Bardach Eugene mention again Biller’s admonition that designing policies for eventual termination would facilitate their transformation or even their complete destruction when the time was ripe. (Bardach, 1976, p.130)

Peter DeLeon takes for that a set of termination strategies to serve the dual function of not interfering with the ability of an organization or a policy to threat problem areas while making the termination option more available includes: firstly, the most important step toward termination opportunities is the recognition that termination is not a personal or institutional end of the world. Secondly, the analyst who develops termination contingencies must pay special attention to the evaluation stage, for it provides the measures that determine, relative to the objective, whether the termination option need be exercised, or whether partial termination can provide the necessary adjustments. A third consideration necessary before designing specific termination strategies is what we might call the “political context” and the “natural points” for termination. (DeLeon, 1978, p.388)

Due to the complexity, difficulty and contradiction of termination process, it is inevitable for the decision makers to make advantage of high intelligence and technique and take flexible tactic. Otherwise policy termination not only can not attain its goals, even make things worse and intrigue political crisis and conflict. So termination executors must avail themselves of driving force and clear up prohibitive force in ending policy at full steam. The main strategies we provide are as follows:

3.1 Put great emphasis on communication

The most important step toward improving termination opportunities is the recognition that termination is not a personal or institutional end of the world. Rather, termination can be viewed as an opportunity for improving a deficient condition or as the sign of a venture’s successful completion. (DeLeon, 1978, p.388) As mentioned above, policy makers, policy beneficiaries and policy executors are the major persons resist termination. So communication must be given particular attention in termination process in order to decrease their psychological pressure and eliminate resistant feeling. Termination executors should make the relative persons and organs, especially policy makers and executors, know the necessity, aims and methods of termination through passing enough related information in time. After those

know the original policy is outdated and if it lasts, more resources would be wasted and public interest would be damaged, then they may realize the positive values of termination and agree with it. One goal of communication is letting interrelated persons understand termination not certainly leading to loss of interest, but to change the weakness and search for advance. Termination is ultimately helpful for the state and its people. As long as they are aware of the meaning of termination, less resistance and more support are expected to be gotten.

3.2 Open results of policy evaluation

To a great degree, the attitude and magnitude of proponents is crucial to policy termination. Pioneers of policy termination is ought to enlarge the supportive force by all means to render termination a smooth run. The best way is to open the results of policy appraisal properly so as to strive for potential supporters. By opening outcome of evaluation to disclose the information on dysfunctional or ineffective policies, persons can further recognize the harm and loss brought about by them and change to the supportive one to termination from their resistant viewpoint and attitude. In addition, termination executors can set forward the reasons why they are for putting an end to certain policy, point out the original policy will never accommodate to the changing environment and relevant conditions. All of these are good for winning over more proponents.

3.3 Promulgate new policy when terminating old policy

Policy termination, in effect, is intended to break current interest allocation structure, and usually leads certain groups or persons to losing their intrinsic interests to different degree. Forasmuch they are often reluctant to accept closure of policy, but not be against the forthcoming of a new and better policy. So as to decrease the stress put by policy termination, it is of great significance to promulgate new policy while terminating outmoded one, and thus new policy can in time substitute the old.

Although people will lose their hope for the old policy, they are also about to get a new expectation. Such mental balance is good for diminishing enormously the controversy and resistance to the end of policy. However, this means requires a higher standard for legislature to carry out. It is because that terminating old policy is undertaken when coming up with the new one. These two conducts frequently struggle for limited time, energy, personnel, materials, information and so on. Any neglect or malpractice would harm policy termination. When utilizing this scheme, hereby, all kinds of preparation should be made carefully and skillfully so that old policy can be ended smoothly when the new one is brought into effect.

The above three strategies are the major but not the whole. Besides, other measures can also be gradually adopted, such as passing tentative information of termination to examine mass opinion, balancing policy termination, policy maintenance and policy development,.

4. Conclusion

In the current period of social transition, China is facing a number of adjustments in the political, economic and social areas, including the system and policy adjustments. In order to create a good social reform and development institutions and policy environment, we must perfect and clean up promptly the old system and policies. The success of this perfection and clean-up also depends on making use of the favorable factors concerned policy termination.

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Insurgency, Political Stability and Economic Performance in Post-Saddam Iraq: An Evaluation

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Abstract

On March 20, 2003, the coalition forces headed by the United States of America launched Operation Iraqi Freedom to remove the regime of Saddam Hussein. By mid-April, major fighting was essentially over, and on May 1, the United States declared an end to major combat operations. With that declaration, the coalition forces faced with a very serious challenge to ensure stability in the post-conflict period and a peaceful political transition to a new and democratic Iraqi government. However, despite the continuing power of insurgency and the sectarian violence, Iraq is gradually gearing into a kind of constitutional process and political development. The election of January 2005, the negotiation of the constitution in the summer of that year, the referendum of October 15, which ratified the constitution and the second general election in mid December, all is a sign of functioning of political and constitutional development. The new constitution was written with the hope that for the diverse groups in Iraq to run their mutual relations in such a way that the dialogue between fighting parties shifts from a battle field into a political settlement. However, such political settlement, in spite of the huge presence of US forces, has been extremely slow. Domestic political elites have shown very little concern to develop the nature of consensus while dealing with the issues of crucial importance for Iraq and its citizens.

Keywords: Insurgency, Political stability, Economic Performance, Consociational Democracy, Corruption.

Introduction

In this article we will analyze the nature and intensity of political stability and instability in the post-Saddam Iraq. Arend Lijphart defines political stability as the “system’s ability to survive intact” (Note 1) and “the one in which the capabilities of the system are sufficient to meet the demands placed upon it.” (Note 2) One of the important factors for a government to function in a multiethnic society is consensus and accommodation among the political elites who represent various segments of society. In the Iraqi context the segmented identity deepened in post Saddam-Iraq.

Admittedly the major elements of (consociational) or power sharing democracy such as suitable segment size, multiparty system and segmental isolation do exist in Iraq. Iraqi political elites, however, have not been able to reach political consensus on most of the things which are of the utmost importance for the normal functioning of the state. The absence of consensus about the state itself and absence of consensus regarding the political arrangement of the state are the two most important elements that obstruct political elites’ accommodative politics.

In April 20, 2005, a poll conducted by the International Republican Institute, revealed that over 50 percent of Arab Iraqis identified most strongly with the Iraqi identity, while only 20 percent and 12 percent most strongly identified with their religion and ethnic group, respectively. In the same poll, only 28 percent of the Kurdish respondents identified most strongly with the Iraqi identity, while 37 percent most strongly identified with their ethnic group. (Note 3) However, in October 2004 a poll conducted by the State Department Office of Research, over 50 percent of Kurds identified as either equally Iraqi and Kurdish or primarily Iraqi and then Kurdish. (Note 4)

Therefore, Iraq remains a state without a nation, as almost no progress has been made towards fostering a sense of ‘Iraqiness’ among the country’s divided ethnic and religious communities. The absence of any common attachment to the values, goals and symbols or any form of ‘social glue’ holding post-Saddam society together has serious implications for the consolidation of Iraqi statehood. (Note 5)

In such constellation of political events it is expected that Iraq will suffer from various forms of political instability such as sectarian violence, frequent demonstrations, strikes, and perhaps a civil war. By the fall of 2006, violence between Arab Sunnis and Shi’ites had dramatically increased. Between 110 and 130 people were killed every day in Iraq, and the vast majority were dying because of targeted sectarian attacks. (Note 6) All the ingredients for civil war existed in Iraq in 2003: Sunni Arabs were bitter at their ouster from positions of power and privileges, and fearful of the future; Shi’as insistent that Iraq will be ruled on their terms; an Arab Sunni belief that Shi’a are traitors bent not only on destroying the Iraq the Arab Sunnis had built, but also on handing the country over to a bitter national enemy; a Shi’a belief that many Sunni Arabs were unrepentant supporters of Saddam Hussein who would enthusiastically resume the killing of Shi’as if ever again given a chance at power. (Note 7)

Factionalism among the Arab Sunnis and the Shiite approaches levels seen in Somalia, and multiple armed groups on both sides appear to believe that they could wrest control of the government if U.S. forces left. (Note 8) However, despite all of these, the government has been functioning, regular elections have been held and despite a very high corruption in all governmental institutions, economic performance has been quite satisfactory taking into consideration the fact that the country had gone through occupation and a very severe sectarian brutal conflict.

The Iraqi Insurgencies

Opposition to the Coalition presence started in the months following the invasion of Iraq, and particularly from May 2003, and can be roughly divided into two categories. The first, geographically located in the 'Sunni Triangle' between Baghdad and Mosul, was, and remains, composed mainly of Sunni Arabs but also had Kurds and Turkmen within its ranks. Indeed, there are several insurgencies ongoing within Iraq that are associated with the Sunni Arab community, whether ex-Ba'thist, neo-Ba'thist, Arab nationalist, home-grown Islamist or al-Qaeda-associated factions. (Note 9)

The second opposition category has its strongholds in Baghdad and the Shi'i south, and is composed of radicalized Shi'is that have occasionally rebelled against the Iraqi government and the occupation forces.

As we have seen, SCIRI (Supreme Council for Islamic Revolution in Iraq) and Da'wa (Party of the Islamic Call) party assumed a prominent position early on following the fall of Baghdad. From being involved with the exiled Iraqi opposition movement, both parties were recognized as important actors by the US, and SCIRI also benefited from its close ties with the Iranian government. In addition to these political organizations, the Hawza al-Marja'iyya (Note 10) had emerged as a force capable of influencing popular sentiment, and Ayatollah al-Sistani came to the scene and he could act politically when he needed to.

There was, however, another force among the religiously minded Shi'i that did not fall under the control of SCIRI or Da'wa, and viewed Ayatollah al-Sistani with a certain degree of suspicion. To understand this force, we need to go back to the late 1990s. Saddam had been having particular trouble with the most prominent Shi'i cleric, Grand Ayatollah Mohammed Sadiq al-Sadr and so ordered his assassination. Along with his two eldest sons, the *marja'* was killed in a hail of bullets in Najaf in February 1999. (Note 11) Sadiq al-Sadr had been an immensely popular figure, and particularly among those youths who had been marginalized and dispossessed by the inequities of Saddam's regime. One concentration of the poorest of Shi'is in Iraq was in the rather inappropriately named Saddam City on the west bank of the Tigris next to Baghdad, where as many as two million people lived in appalling conditions. (Note 12) The killing of the Grand Ayatollah sparked off violent clashes between the followers of al-Sadr and Saddam's security forces. Hundreds died, but the fire of rebellion had been lit among these followers of Sadr, and would grow following Saddam's removal. In March 2003 Sadiq al-Sadr's surviving son Muqtada, emerged as the leader of the Sadr Movement (Note 13).

As the inheritor of a large and wealthy movement, Muqtada was well positioned to fill the administrative vacuum left behind by Saddam's defeat and Coalition mismanagement. Saddam City was quickly renamed Sadr City, and Muqtada and his movement organized local services, food distribution and security while the effect of Garner's actions remained unseen – indeed, it seemed that Muqtada's forces had expelled Iraqi forces from Sadr City before Saddam had even been defeated. As a figure who had stayed in Iraq and suffered under the dictatorship, Muqtada had little time for the returning exiled politicians and resolutely opposed the presence of foreign occupiers in his country. As a proud Iraqi nationalist, he also had viewed with contempt SCIRI and Da'wa, with their ties to Tehran. Finally, as a son who had lost his father, he also was critical of his father's successor, Sistani, due to the latter's unwillingness to air his views and criticize the atrocities committed by Saddam. With so many grievances, and with such a large and devoted following, it would only be a matter of time before Muqtada came into conflict with those around him.

Muqtada's rise was totally unpredicted by the US and the Iraqi government. But his heightened influence in, and even control over, large parts of northern Baghdad, combined with his attempts to spread his message of radical Shi'ism and anti-occupation rhetoric to other areas of the country on the run-up to the 28 June handover of sovereignty, meant that neither the CPA (Coalition Provisional Authority) nor the IGC (Iraqi Governing Council) could ignore him. Believing him to be little more than a young cleric with an obvious ability to rabble-rouse, the CPA attempted to intimidate Muqtada into compliance. His newspaper, *Al-Hawza*, was closed down on 28 March and one of his deputies, Sheikh Mustafa al-Yacoubi, was arrested in Najaf. (Note 14)

Within days, the Sadr Movement was revolting across the south of Iraq and in Baghdad. Rather than following the Sunni Arab insurgents' tactics of guerrilla attacks, the Mahdi Army (Note 15) was more brazen in its approach and attempted to fight US forces in the open. The plan was always destined to face militarily, as there was no way that the Mahdi Army could hope to defeat such a superior military force. But the plan succeeded for Muqtada in a political sense. His taking refuge in the holy city of Najaf meant that the US could not attack him in case it provoked a wider-scale Shi'i revolt, and Muqtada not only survived the fighting but also escaped arrest – in effect, he had stood up to the Americans. The Sadr Movement was weakened in the short term by picking a fight with the US military, but in the longer term its popularity

was on the rise as new supporters saw Muqtada as the one leader who would not bow down to the authority of the occupiers.

While Muqtada was organizing his followers in the Sadr City, Sunni Arab insurgent movements were beginning to coalesce in the days following the demise of Saddam's regime. Several different trends emerged but each was unified in its opposition to the occupiers and, to a greater or lesser degree, the Shi'i-dominated government.

The first of these groups was essentially the remnants of the deposed regime. As it became clear that the state had, for practical purpose, evaporated, and the Coalition had failed to replace it, the remnants of the deposed regime's security services, elite military outfits and paramilitary organizations regrouped. (Note 16) Initially, many of these insurgents did not take up arms against the Coalition forces. Rather, 'they wanted to see whether the Americans were going to be liberators or occupiers'. (Note 17) With the harder security line taken by the incoming CPA, many would soon see the occupying forces in the most possible light. Undoubtedly, with Bremer's demobilizing of the army, these groups benefited from the existence of stockpiles of weaponry across the country, and had access to the vast financial resources of the Ba'th Party. Former regime supporters and ex-military figures recommenced fighting the Americans in particular, unified in their aim to defend Iraq against an external aggressor.

The second set of Sunni Arab insurgencies had its origin within Islamist group in Iraq itself. But, rather than there being one root, there were in effect two trends that came together: a 'regular' religious network of charities, mosques and organization, and influx of militants. With regard to the former category, Iraq, along with all other Middle East countries, had experienced an upsurge in the growth of Islamist sentiment. One of the established Islamist political organizations was the Iraqi Islamist Party (IIP) led by Muhsin Abd al-Hamid. The party's history can be traced back to 1960 but, due to the potential threat it posed to the military regimes of the period, it was effectively banned and only appeared publicly following Saddam's downfall. (Note 18) A further group that would achieve considerable notoriety was the Association of Muslim Scholars (AMS) led by Dr. Harith al-Dhari. Both the AMS and IIP focused initially upon social and charitable works – essentially providing vital services for their communities. But the invasion of Iraq by non-Muslim forces and its subsequent occupation provided the spark which ignited this sentiment into a volatile opposition movement.

The elements of the 'home-grown' Islamist insurgency can be traced to the Kurdish mountains towards the end of the 1990s. Following splits in the most prominent Kurdish Islamist movement, the Islamic Movement of Kurdistan, a new group emerged from them known as Ansar al-Islam (the partisan of Islam), dedicated to the overthrowing of the secular KDP (Kurdistan Democratic Party) -and PUK (Patriotic Union of Kurdistan) dominated Kurdistan Regional Governments. The destruction of their bases in the Khormal region of Kurdistan by US bombers in 2003 served to change the focus of Ansar from their provincial concerns towards fighting the occupiers. The survivors ventured south to join forces with like-minded insurgents who were coalescing around the AMS and, to a lesser extent, the IIP. Together, these disparate groups formed the *Jaish Ansar al-Sunna* (Partisans of the Sunna Army). Other groups that managed to blend radical Islamism with nationalist sentiment also appeared, including the *al-Jaish Islami fil-Iraq* (Islamic Army in Iraq), which merged *salafi* discourse with patriotic ideals, perhaps indicating the involvement of former regime elements.

In addition to a home-grown set of Islamist insurgencies, the presence of US forces in Iraq and the lack of a state apparatus acted as a magnet for foreign fighter, commonly assumed to be members of al-Qaeda, travelling in from neighboring countries. The main 'foreign' insurgency group was dominated by the late Abu Musab al-Zarqawi and was called *Tandhim al-Qaeda fi Bilad al-Rafidain* (Al-Qaeda's Organization in the Land of the Two Rivers), formerly known as *Al-Tawhid wal-Jihad* (Monotheism and Jihad). This group gained infamy for undertaking the kidnapping and execution of Western contract workers, and was also blamed for suicide bombing attacks against Shi'i targets, particularly from 2004 onwards.

The reputation of this group would suggest that it remains the main opposition force in Iraq and it is primarily responsible for the majority of attacks that have taken place – and continue to take place – against Coalition forces and Iraqi government offices and individuals. This, however, would seem to be inaccurate and is perhaps a product of the focus placed upon this group by the US administration. Keen, indeed desperate, to show that Iraqis welcomed the Coalition as liberators, the US in fact benefited from the existence of a foreign Al-Qaeda-associated group, as it allowed blame for attacks to be attributed to 'non-Iraqis'. It would seem, however, that while Al-Zarqawi's group, even following his killing in June 2006, is powerful and effective, it is but one of many. Rather than being the core of the insurgency, the foreign element remains a small but deadly sideshow, with the most important component of the insurgency being indigenous Iraqi in origin.

The focus of the activities of the Sunni Arab insurgencies remained resolutely in the Sunni Triangle, until 2005. For the Coalition, there existed several troublesome towns and regions in the Triangle, including Ramadi, Balad, and Tikrit. However, it would be the town of Fallujah that would become the focal point of the world's media in 2004. After initially being relatively quiet town following Saddam's removal, confrontations between insurgents in Fallujah and US forces reached a climax with the killing and dismemberment of four contract workers in March 2004. Their particularly gruesome killing, and the broadcasting of pictures by the world's media, would see Fallujah made an example of by the

US military. But, after a month-long military assault, US forces could still not enter the city. It was only after a siege that US Marines entered Fallujah in November, claiming to kill as many as 100 insurgents, but, in reality, much of this number was more likely to have consisted of innocent civilians.

With Muqtada al-Sadr's followers already rising against US forces, the US military and CPA were faced with a perilous situation. Rather than seek the support of the IGC, which was already seen as ineffectual by the CPA due to the inability of representatives to find common agreement on issues of importance, it seems that the decision to invade Fallujah, and to attack Muqtada's forces in southern Iraq, was taken unilaterally by the US. (Note 19) By doing so, the US pushed those Iraqis still uncommitted to the insurgency into joining their countrymen in their struggle to expel what was now seen as a dangerous and brutal occupier. The insurgency spread rapidly across Al-Anbar governorate, and Fallujah became a symbol of the resistance to the continued foreign presence and, in the wider Arab and Islamic world, evidence of the level of brutality to which the US military would go in order to force its vision on the new Iraq down the barrel of a gun.

Political and Institutional Stability in Iraq

More than six years have now passed since the American invasion of Iraq and overthrow of Saddam Hussein, and what is most notable is how little has changed for the better and how much for the worse.

For the past six years the country has held series of regular elections, two for representatives of the National Assembly and the third a referendum on the newly drafted constitution. (Note 20) The elections of 2005 brought to power a government which could stay in power until now. Despite withdrawal of some parties from the coalition in some stages and coming back, there was no change of regime using violent means such as assassination, coups d'état, revolution, etc. Along this line there was no any structural change in the political system of the country from democratically elected regimes to dictatorship, authoritarianism or military government. Government representatives through the policies that they made and laws which they passed were able to maintain the belief that the present and existing political institutions are the best possible ones at the moment.

It can be said that since the fall of Saddam, the political progress being made by the domestic political elites has been slow and, Iraq does seem to have been stagnating. In spite of the fact that many reforms have been adopted in such areas as defense, the judicial system, public administration, yet, state-level structures such as council of ministers and parliament have remained so weak that most important decisions could not be reached by political representatives. The identity factor is evident in all areas of public life and the real reintegration of society is yet to begin. Inability to reach consensus on any major social issue has disappointed the public and affected the overall sense of political and institutional stability.

The poll by the BBC, ABC, ARD and NHK of more than 2,000 people suggests that a majority believe that security in their area has improved since 2007. (Note 21) And while most Iraqis still believe US troops are making things worse, the numbers who want the Americans to pull out immediately has fallen. But the poll also shows Iraq's main ethnic groups are deeply divided. While 55% of all Iraqis believe that their lives are good, only 33% of Arab Sunnis are happy with their lives, compared with 62% of Shias and 73% of Kurds. "In spite of all the improvements, the Arab Sunni population of Iraq clearly remains deeply alienated, and deeply hostile," the survey shows that Some 62% of those polled say security in their own area is good - up from 43% last year - but exactly half of all Iraqis still rate security as the biggest problem for the country overall. And Iraqis are still reporting problems with the provision of basic services. The poll also suggests that Iraqis are skeptical about political progress. Only 21% believe that the increase in US forces has made conditions for political dialogue in Iraq better, while 43% think the surge has made conditions worse. And 38% want American forces to leave immediately, compared with 35% who want the troops to remain until security has been restored. (Note 22)

The survey suggests that support for the Iraqi government is returning, after a drop-off in recent years. Just under 50% of Iraqis now have confidence in the government, up from 39% in March 2007. Overwhelming numbers of both Arab Sunnis and the Shias still want Iraq to remain a unified nation. By comparison the Kurds are the splitters. Only 10% of them want to keep the country together. Support for Iraqi security forces remains high, with 67% expressing confidence in the police and 65% in the army. In contrast, public confidence in local militias has fallen since last year. In March 2007 it stood at 36%, by August it was down to 24%, and it has fallen another 2% since then, to 22%. Within that, Shia feelings about local militias have fallen the most steeply. In March 2007, 51% of Shias had confidence in militias - now that figure has declined to 28%, the survey suggests. The poll is the fifth survey to be conducted since the beginning of the US-led invasion in 2003. (Note 23)

Since politicians tend to play by identity card, conflict between them has taken on an element of ethnic and religious disagreement. Therefore, any issue not being resolved using negotiation and consensus would eventually lead and result in a political crisis based on ethnic differentiation within the political elite. Unity behind ethnic and religious lines, disregarding political differences per se, has been very evident. This has had to negative impact on the relations among various Iraqi groups more generally and has contributed to a growing sense of insecurity and distrust. Therefore, it can be claimed that inter-ethnic instability in the country has to be primarily related to the political crises in the country which take place in a context of ethnicity.

Today, given the serious difficulty experienced in formulating political solutions in the post-Saddam Iraq supports the fact that change of the present system depends on achieving domestic consensus which has been lacking for the past six years.

The political system of Iraq suffers from a lack of consensus among the political elites that represent the three dominant ethnic groups and is kept stable only by the massive presence of the US forces in the country. Hence, despite considerable progress that has been achieved in the past few years, a complete withdrawal of US forces from Iraq would threaten the survival of the system and the state. The lack of the elite accommodation and the effect of elite confrontation are revealed in an extremely high level of distrust among the political elites and continuous imposition of laws by the international community due to inability of domestic political actors to reach consensus on almost all those issues pertaining to the state institutions.

Economic Performance in the Post-Saddam Era

By 2003, after two wars, many years of sanctions and increasing economic autonomy of Kurdistan, Iraq's economy was highly fragmented and there was little in the way of a national macroeconomic policy. Two wars and more than a decade of sanctions did not lead to reform or internal collapse. By 2003, however, Iraq's economy was severely weakened in every area; foreign reserves were depleted, development planning had virtually ceased, the infrastructure was severely damaged and a vast majority of the population was impoverished. (Note 24) In spite of the shattered economy and the weak institutional organization, the Iraqi regime as a state could function and could provide the basic service to the population prior to the invasion. However, after the fall of Saddam's regime, the Iraqi state collapsed, its power structures disintegrated and there was nothing to replace them. Basic services were halted, and the looting which followed sparked no bank, hospital, power station or government office. It was estimated that the cost to the economy was \$12 billion. (Note 25)

The CPA, under Ambassador L. Paul Bremer III, issued within a week of his arrival in Baghdad the decree of de-Ba'athification. Overnight almost 30,000 Iraqis- including middle management in economic ministers, teachers and doctors- were dismissed from their jobs. (Note 26) The senior management of the country either been arrested or fled the country and middle management were kicked out. The result was a huge vacuum which the Americans could not fill. Meanwhile, the CPA was dealing with one crisis after another (political and economic) and was trying to cope with a damaged economy plagued by price distortions and inefficiencies. The Americans were under pressure to show progress. This led to an emphasis on headline projects to deliver the basic services such as (oil, electricity, and clean water to the population, while long-term projects to improve agriculture and industry were pushed aside. (Note 27) Although U.S. Congress had allocated, by the end of 2005, aid totaling about \$21 billion, more than a third remained unspent. In fact, the failure to spend Iraq's reconstruction money, particularly in the first year of war, was a contributing factor to the increased violence and high unemployment. (Note 28)

Since the CPA was dissolved on 28 June 2004, 'militias appear to have carried out or co-opted their own areas of economic control and regulations'. (Note 29) Corruption and trade in smuggled oil became the cornerstones of the new economy of Iraq. It is essential to look at Iraq's economy and its major problems. The first economic issue facing Iraq is inflation, a recurrent problem for Iraq. As a result of the invasion of Kuwait and the subsequent sanctions, hyperinflation became a structural problem. (Note 30)

After the collapse of Saddam's regime, inflation stabilized at around 32 percent to 34 percent per annum. However, in late 2005 inflation began to rise sharply due to increased violence, the fallout from the state control, corruption, increasing wages increasing cost of house rentals and the rise of fuel price. (Note 31) By January 2007, inflation reached 66.5 percent reflecting shortages of key commodities, primarily fuel. (Note 32) Following an intensified policy effort by the Iraqi government to bring inflation under control, the annual inflation rate declined to 38 percent in May 2007 (Note 33), and to 15 percent by the end of that year. (Note 34) The Iraqi Central Bank has played an important role in combating inflation, and in fact, the establishment of a relatively independent Central Bank has been one of the achievements in post-war Iraq. By raising interest rates, the Central Bank forced the Iraqi dinar (ID) exchange rates to appreciate, thus reducing the imported inflation. (Note 35) The ID which, after its introduction in 2004, initially traded at around 1,450 to US dollar, reached 1,225 to the US dollar by the end of 2007, and further strengthened to 1,196 to the US dollar in June 2008 with the increase in oil prices. (Note 36)

The second issue facing Iraq from an economic point of view, and which had more severe consequences on Iraq's economy, was unemployment. Estimates for unemployment range from 25 percent to 40 percent, which even at the lower rate is socially and economically destabilizing. (Note 37) A UNDP survey in 2004 indicated that the labor force participation rate in Iraq is 40.9 percent, which was comparable to that in neighboring countries of 37 percent to 43 percent (Iran, Jordan), while Syria had a somewhat higher activity level of 53 percent. The main reason for the low participation rate is that most women are not economically active. (Note 38) The table below shows the rates of nationwide unemployment. The estimates of Iraq's unemployment rate vary, but as the table 1 indicates, unemployment rates varied between 25-40%. The CPA has referred to a 25% unemployment rate, the Iraqi Ministry of Planning mentioned a 30% unemployment rate, whereas the Iraqi Ministry of Social Affairs claims it to be 48%. There is an

inherent difficulty in measuring the Iraqi rate of unemployment over time. Considering the increase in entrepreneurial activity after the end of the war, we have for the purposes of this database assumed that there has been an improvement in unemployment levels, and hence weighted information supporting such a conclusion heavier than contradictory data reports.

The dissolution by Bremer of the Iraqi army which had employed between 400,000 and 500,000 people (estimated at 7 percent of the labor force), coupled with de-Ba'athification, added something like 8 percent to 10 percent to unemployment, especially among the Arab Sunnis. (Note 39) The Bremer's decisions proved to be costly mistakes. The point is not that these two institutions should have been allowed to carry on their business as usual. The consequential error lay in the timing. Looking over the horizon instead of just down the road, Bremer and the CPA forgot to ask themselves what might mean to turn thousands of military officers loose on the streets without even the promise of monetary compensation. (Note 40) Similarly, to proscribe all Ba'athists without exception from taking part in reconstruction was to exclude most of the very Iraqi professionals whose service will have proved crucial in rebuilding the country. (Note 41) Given the ideological decay that permeated the ranks of the Party in the late 1990s, the bulk of the Party's rank and file were nominal members at best, whose Party card simply meant better job prospects.

It would have been wiser for the CPA to have begun with wide-ranging investigations aimed at identifying human rights violators and active Saddamists among Party members and military officers before dismissing them without imbursement. (Note 42) Therefore, the combination of high inflation and unemployment as one member of Iraqi Council of Representatives said: (Inflation and unemployment led to a severe increase in poverty, forcing people to engage in murky business to make a quick buck (crime, arms sales and prostitution are all dramatically on the increase), and corruption became the norm in every facet of life). (Note 43) Other Iraqi officials considered the unemployment in Iraq as time bomb and that the major reason for its spread is the 'impairment to the economic basis' of the country following the invasion. (Note 44) Whatever the reasons and however strong the efforts were to resolve this crisis, the result was poor. Even three years after the UNDP survey, a poll by an independent opinion research company of 2,000 Iraqis across all 18 provinces clearly indicated that the quality of life in Iraq has further deteriorated in 2005 and 2006. More than three-quarters of respondents to the poll said that jobs were hard to find and that the availability of clean water, medical care and basic goods and services have, after some improvement in 2005, all deteriorated. (Note 45)

Corruption in Iraq

Corruption was already prevalent during Saddam's regime but the Oil-for-Food program which accompanied the sanctions in the 1990s almost institutionalized corruption. Different estimates of illicit Iraqi income from surcharges on oil sales ranged from \$300 million to \$7.5 billion. Saddam created a true patronage and reward system not only internally but also with foreign companies and influential individuals outside Iraq. (Note 46) Unfortunately, corruption and patronage system continued after the 2003 invasion. Philippe Le Billion describes dramatic transitions similar to what happened after the fall of Saddam (political and economic transitions are particularly prone to corruption and transitions in conflict-affected area are not exception. Corruption is often one of the key concerns of local population in conflict-affected areas during reconstruction, along with insecurity and unemployment). (Note 47)

Indeed, this general description fits Iraq: transition, reconstruction, insecurity and high unemployment. Ali Allawi, who served in the Iraqi government from the end of 2003 to mid 2006, described the explosion in corruption that took place in different ministries and the shocking methods of embezzlement by so many ministers and senior officials. (Note 48) He briefly described the country and its bureaucracy following the invasion: (the Iraqi state combined the worst features of a centralized bureaucracy with vestiges of the occupation, and a near collapse of the information, reporting and control mechanisms that underpin any functioning government authority. The legacy of corrupt practices, outdated management systems, incompetence and nepotism was neither seriously challenged nor bypassed). (Note 49)

One of the characteristic of Iraq's corruption is that insurgents, smugglers and corrupt officials collaborate at different levels, weaving an intricate web that makes it difficult to distinguish among them. The US embassy in Baghdad has argued that the Iraqi government 'is not capable of even rudimentary enforcement of anti-corruption laws' and the prime minister's office is openly hostile to the idea of an independent anti-corruption agency. (Note 50) A report by the Brookings Institution affirmed that 'corruption is probably the single greatest factor inhibiting the creation of a credible Iraqi political institution. Like the problem of insecurity, with which it is intertwined, corruption undermines nearly every aspect of reconstruction.' (Note 51)

One-third and possibly more, of the fuel from Iraq's largest refinery in Baiji, 208 kilometers (130 miles) north of Baghdad, on the main road to Mosul and in a Sunni Arab-dominated region, is diverted to the black market. 'Tankers are hijacked, drivers are bribed, papers are forged and meters are manipulated' (Note 52) to finance the insurgency, pay corrupt officials and reward the smugglers. Gas stations are often built to get fuel at subsidized government rates to be resold later onto black market at higher price.

Estimates for smuggling range from \$2.5 billion per year, (Note 53) and there are indications that 100,000 barrels of oil are being smuggled from Iraq on a daily basis. (Note 54) With oil prices reaching more than \$130 a barrel, Iraq's oil revenues in 2008 could have reached \$60 billion.

Thus corruption has dominated Iraq's economy, but this is, unfortunately, not limited to the central and southern governorates of Iraq. Kurdistan, which has enjoyed relative stability and safety and whose economy has prospered, is also suffering from wastefulness and corruption. Again, and in spite of lack of violence, cronyism and corruption have become integral to Kurdistan's economy.

Kurdistan, with population of about four million, has become an oasis in violent Iraq and enjoying an economic boom. It has two international airports (Arbil and Sulaimanya) and five universities operating in the area, which received many displaced academic and professionals from central and southern Iraq. The Kurdish government has promulgated a liberal investment law allowing foreign investors to own 100 per cent of the investment project capital, while giving them a ten-year tax holiday and a five-year exemption from customs and duties on the import. (Note 55)

However, Kurdistan's economy is also suffering from unemployment and inflation. School and university graduates competed for jobs in the government ministries and one report suggested that excess positions are created in the public sector, in order to reduce unemployment and provide jobs to these young people. (Note 56) Meanwhile, due to the construction boom, Asian and African labor is imported to do the manual work. (Note 57) Despite the flourishing of economy, the ordinary Kurds, who do not belong to any Kurdish political parties, are struggling to survive, while state money gets siphoned off into private pockets. (Note 58)

Two families control the political and economic activity of Kurdistan. The Kurdish Democratic Party (KDP), which controls Erbil and surrounding cities, is headed by Masoud Barzani, while the Patriotic Union of Kurdistan (PUK), which controls Sulaimanya and surrounding areas, is headed by Iraq's President, Jalal Talabani. Each party has its local government but more importantly each has its own economic arm. (Note 59) The Zagros group of companies is the KDP's economic arm in Erbil, and the Nokan group is the PUK's economic arm in Sulaimanya. These two families have direct control over, and involvement in, their two respective companies. Every member of the two families has a senior job either in the government, the security services or economic conglomerates which they control, while they are depriving the ordinary people. (Note 60)

Kurdistan sits on large oil reserves, explored and unexplored, and while there is still dispute between the Kurdistan and Baghdad governments about an oil law that would define Kurdistan's oil rights and resolve the conflicting interests among the Kurds, Shi'a and Arab Sunni, the Kurds receive 17 per cent of Iraq's oil revenues (in 2007 estimated to have been \$6.1 billion) from the central government. (Note 61)

The lack of transparency is remarkable. The budget of the Kurdish government based on the allocation from Baghdad is divided between the two parties-52 per cent to KDP and 48 per cent to PUK- but no fiscal data are published by the Kurdish Regional government. *Amer of AL-Jama' Islamiya*, (Head of Jama' Islamiya) Mr. Ali Baper, expressed his disappointment with the current Kurdish regional government, he said (The two leading parties in power have been running the country without any accountability and bookkeeping. This is a grave failure with serious implications and raises questions as to why there were not any records available for the last few years. The first thing that comes to mind when looking at the status quo is abuse of power and corruption) (Note 62).

In spite of the corruption, cronyism, and nepotism, there were some achievements in Iraq's economy. The question is, can these achievements pave the way in the future for a new economy with plentiful opportunities for the Iraqi people?

Setting up an independent central bank and issuing the new currency were both success stories in Iraq's economic management in the post-Saddam era. Reducing the external debt was another. In 2004, Iraq's external debt stood at about \$132 billion to countries and commercial creditors worldwide, but by 2008, the country's debt had dropped to about \$33 billion. (Note 63) It is interesting to note that Saudi Arabia and Kuwait, countries that benefited from the toppling of Saddam, refused to reduce or forgive the debt.

A senior Kurdish leader Dr. Mahmoud Othman during my interview with him, explained to me that the main reason for lack of progress, apart from violence, is that many Iraqi economic managers post-2003 are not equipped to run large concerns as they lack the ability to plan on a long-term basis; their focus is on short-term gains. He assured me, however, that Iraq is rich and everything has to change, change towards better, just like in post-war Germany and Japan. (Note 64)

Conclusion

The question is whether democracy is possible in Iraq? Or should the United States divide Iraq along ethnic or sectarian lines? There has been some progress on the democratization front. A series of elections have been held. Although it can be said that conducting largely free and fair elections is not sufficient evidence of democratization, however, it is necessary component of the process.

To explain the evolution of violent instability in the wake of regime change, the collapse of the state is of much greater significance than the supposedly trans-historical existence of communal antipathies or indeed the ineptitude of Iraq's new ruling elite. The entrance of US troops into Baghdad in the first weeks of April 2003 resulted in the death of the Iraqi state. Faced with the widespread lawlessness that is common after violent regime change, the US did not have the numbers of troops needed to control the situation. After three weeks of violence and looting the state's administrative capacity was destroyed. Seventeen of Baghdad's twenty-three ministry buildings were completely gutted.

Iraq today finds itself in a situation of state failure. Against this background instability is driven by two interlinked problems, which have caused the profound insecurity and violence that now dominates the country.

The complete collapse of state capacity and the US disbanding of the Iraqi army resulted in an acute security vacuum. This was seized upon by a myriad of groups deploying violence for their own gain. Organized crime became a dominant source of insecurity for ordinary Iraqis. For coalition and Iraqi security forces, it is the diffuse groups fighting the insurgency in the name of Iraqi nationalism, increasingly fused with a militant Islamism, that have caused the highest loss of life. But in early 2006, a new crisis arose with even greater potential for destabilization: civil war. The explosion that destroyed the al Askariyya Mosque in the Iraqi city of Samarra, on February 22 2006, marked a watershed, exacerbating already mounting sectarian violence and the resultant population transfers.

The second problem that has dominated the politics of the country since the fall of Saddam Hussein, is the question who should rule? How to find Iraqis who after thirty-five years of dictatorship have both the technical capacity and national legitimacy to rule over a country of 26 million people? 2005 was dominated by the struggle to build a representative government that could act as a rallying point for the country; allowing the population to invest hope and legitimacy in a new ruling elite that could stabilize the nation and move towards rebuilding the state. For Iraq to stabilize and regime change to be a success, sustained progress will have to be made in two areas, the building of countrywide state capacity and the growth of a legitimate and competent governing elite. Although economic recovery in Iraq has not yet met expectations, there have been positive developments worth noting. Thus, during its transitional period, the country has progressively moved from dependence upon US and International aids to a process of economic development. Iraq has begun to develop a legal and regulatory framework that may eventually promote a free market economy.

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Note 55. Written response by Mr.Ihsan Abdullah, on October 7,2008. Mr. Ihsan is a member of Parliament of Kurdish Regional Authority.

Note 56. Interview with Dr. Kamal Kerkuki, on August 24,2008. Dr. Kamal is a Vice President of Kurdistan Parliament.

Note 57. Ibid.

Note 58. Interview with Muhammad Haji Mahmud, on August 17, 2008, Sulaimanya, Iraq.

Note 59. Although there was a unification of ministries between the two parties, each party still has its independent ministries: finance, Militia (Peshmerga) , and the interior.

Note 60. Interview with Mr. Muhammad Haji Mahmud.

Note 61. Interview with Mr.Omar Hussein Ali, on October 2, 2008, Duhok, Iraq.

Note 62. Interview with Ali Baper, on August 12, 2008, Erbil, Iraq.

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Note 64. Interview with Dr. Mahmoud Othman, on August 11, 2008, Erbil, Iraq.

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2. Interview with Muhammad Haji Mahmud, on August 17, 2008, Sulaimanya, Iraq.

3. Interview with Mr.Omar Hussein Ali, on October 2, 2008, Duhok, Iraq.

4. Interview with Ali Baper, on August 12, 2008, Erbil, Iraq.

5. Interview with Dr. Humam Hamoudi, on 30-7-2008, Baghdad, Iraq.

6. Interview with Dr. Mahmoud Othman, on 11-8-2008, Salahadin, Erbil, Iraqi Kuridtan.

7. Interview with Iyad Samara'i. Mr Iyad is a speaker of Iraqi Parliament.

8. Written response by Mr.Ihsan Abdullah, on October 7,2008. Mr. Ihsan is a member of Parliament of Kurdish Regional Authority.

Table 1. Nationwide Unemployment Rate Since May, 2003

Month	Unemployment Rate Nation-wide
May 2003	N/A
June	50 – 60%
July	N/A
August	50-60%
September	N/A
October	40 – 50%
November	N/A
December	45-55%
January 2004	30 – 45%
February	30 – 45%
March	30- 45%
April	30 – 45%
May	30-45%
June	30-40%
July	30-40%
August	30-40%
September	30-40%
October	30-40%
November	30-40%
December	28-40%
January 2005	27-40%
February	27-40%
March	27-40%
April	27-40%
May	27-40%
June	27-40%
July	27-40%
August	27-40%
September	27-40%
October	27-40%
November	25-40%
December	25-40%
January 2006	25-40%
February	25-40%
March	25-40%
April	25-40%
May	25-40%
June	25-40%
July	25-40%
August	25-40%
September	25-40%
October	25-40%
November	25-40%
December	25-40%
January 2007	25-40%
February	25-40%
March	25-40%
April	25-40%
May	25-40%

Source: The Brookings Institution, *Iraq Index*, www.brookings.edu/iraqindex.



Villagers Participation in Rural Public Policy Making in China

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Abstract

Exploring in public policy making of villagers participation is the key point in the scientification and democratization of the policy. This paper takes the deliberative governance model in Zhejiang Province as example to study why and how villagers can participate in rural public policy making and how villagers' wills are taken into account in rural governance in China nowadays. And an effective policy making model of villagers participation in rural governance is set up and discussed at the end.

Keywords: Villagers participation, Rural public policy making, Democratic discussion, Deliberative governance model

1. Introduction

It is crucial for the scientification and democratization of rural public policy, which takes public interests as its goal, that there exists an efficient participation of villagers in the policy making process. Even more, the possibility of the delegitimation of state intervention in many spheres of public policy and the pursuing ultimate ends of survival and justice pose new possibilities for participation in advance societies all over the world. But in fact, as a result of the complexity of governance and the forceful power of the state, villagers always have no enough chance to take part in the policy making to express their reasonable appeals while the local government is beset with the hardness of getting the truth of the villagers' wills. This paper takes the deliberative governance model, which means the public policy is made only after the democratic deliberation between the villagers and local authority, in Wenling County, Zhejiang Province as example to study why and how villagers can participate in rural public policy making and how villagers' wills are taken into account in rural governance in China nowadays.

Before our analysis, two important assumption of the theory should be preinstalled. Firstly, public policy can not be independent of the existing political, economic and social environment and therefore the factors that influence the formulation of public policy is not only (in some time, not even mainly) the objectives of the policy itself. Secondly, in the public policy making process, the relevant participants are rational actors but only with limited ration. Due to the existence of the interests of social diversity, as well as cognitive and moral differences, the main different policy perspective on different issues of public policy may have different cognitive orientation, and may take different ways to influence the public policy process.

2. The two cases of deliberative governance model in Zhejiang Province in South-east of China

The democratic discussion in Wenling County, Zhejiang Province began in 1999 as an educational forum of rural agriculture modernization primarily which purpose is to adopt a kind of educational forms for the people to make face-to-face communication. After the promotion of the local government, the democratic discussion is widely practiced in the public policy process. Our analysis is based on two cases---Xinhe town's 2006 budget democratic discussion and Zeguo town's democratic discussion on urban construction.

On March 6-9th, 2006, in Xinhe Town, the budget democratic discussion was hold, in which 93 town NPCs and other 193 villagers attended to deliberate on the township-budget of the next year. The government has carried on many times the dialogue and discussion, puts forward 18 problems such as the administrative management, increase spending reduction education investment, etc. After the democratic discussion between government and the people, the presidium and budget review panel held a joint discussion meeting of National People's Congress, confirming the adjustment of 25 million yuan and 9 project total capital 237 million yuan which including the reduction of administrative fee. According to the report, and modify the government budgets in the second plenary meeting of the National People's Congress was approved by voting.

Zeguo Town's democratic discussion on urban construction project was held on March 20, 2006 in a middle school. This democratic discussion activities take "two rounds of grouping" discussion procedure, namely a meeting and group discussion, and the participators should finish two questionnaires before and after the discussion. The government, by surveying the questionnaire survey and statistics item, made an arrangement of all the project of urban construction from the most important to the most important sequence, and then, the government office conference was held, according to the survey results, to make construction project which would thereby be submitted to the local NPC for

deliberation and voting.

The two cases this paper selects are the most successful and most typical democratic discussions in Wenling County during the last few years so this paper can provide an analysis with more feasibility and persuasiveness. The method of collecting the materials mainly has four kinds: democratic discussion convened by the villagers in the two questionnaires, villagers and government workers in the interview process for the record, structured democratic discussion observation and relevant literature and audio-visual materials from government departments. These different aspects of the material, basically show us where a villagers participation in public policy formulation of the model. Based on this, we will firstly analyze the practice process of these two cases, and the public interest and the expression of the integration theory explanation. Then, on local villagers participation in public policy formulation and policy, the quality of policy with villagers participation and the legitimacy of relationship problems are discussed. In the end, based on the analysis of the above, the author puts forward a villagers-participation-model in place of public policy, in order to seek effective decision-making model of villagers participation in our reality with local public decision-making model.

3. The function and meaning of villagers participation in rural public policy making

3.1 Who are participating: the selection of civil representatives and the extensiveness

Being in a society of diversification, different social groups or persons always appreciate different social goods which cannot be substituted each other. Also, one researcher has recently warned that NGOs focusing on social services are sometimes viewed as a potential counterweight to state power, so they are in fact "largely an extension of state power because they are heavily funded by the regimes as well, and their members - such as trade unionists and professionals - rely on policies made at rulers' discretion." (Amy Hawthorne, 2005) As a result, direct and personal participation into the rural governance is especially essential for the villagers, and then, the selection of civil representative should be inclusive and extensive so as to everyone affected by the policy has a chance to voice their appeals. In the two cases discussed in this paper, random sampling and voluntary application are mainly introduced, of which the front one possesses more fairness and scientificness at the expenses of the intense of deliberation, while the latter one expands the extensiveness of participation but also with some negative effect on the objectiveness of the policy.

The representatives in Zeguo Town's democratic discussion were selected by draw. According to population of each village, 2 percent of the population would be produced to be representatives, in total of 240 representatives, by random sampling that all villagers who are over 18 were recorded to reprogramming. From the results of sampling, the proportion of the representatives mainly account for its location in the total population, which means that this way of selection represents more accurately the the situation of local population distribution. In addition, 12 representatives were generated randomly from foreign employees in the large-scale enterprise, and five people supervisor were recommended by the National People's Congress presidium. And more, 32 young teachers in local middle schools, after related training, participated as directors and reporters in the democratic discussion groups.

By the way of the random sampling, all the delegates were strictly selected objectively and justly, but at the same time, it also may result in low levels of democratic discussion issues just as representatives of low visibility, lack of interests, etc. We shall come to this latter. Therefore, just as Chen Yimin, the chief of Theory Section of Propaganda Department of Municipal Party Committee, has said, if that the topic of democratic discussion is concerned with all the people, the way of random sampling would be just, but if only a few people were involved, such as a specific issues, the crowd was not suitable for sampling method. Participators in Xinhe Town's deliberative discussion were selected basically in two ways: voluntary application of the villagers and representatives from National People's Congress. Because of the professional government budget review, all the participators, including the National People's Congress and the representatives of villagers in democratic discussion, were got full training to ensure the quality of deliberation.

The voluntary application beside the NPC in Xinhe Town expanded largely the inclusiveness of decision-making process, while in Zeguo Town the deliberation by random sampling took the form to achieve the universality and representatives of fairness of principle. Here, there is a concern about the political participation of the floating population in rural public policy making. In some economically developed township, especially in the east coast of China nowadays, many of the floating population have been living there for a long time, basically in the local social life, and have a higher sense and belonging to the local economic and social development. But with regard to their political rights there, they are still marginal groups. In Zeguo Town's democratic discussion about 2006 town-construction project, it was obviously impartial that 237 representatives were selected from 120 thousand local permanent population while only 12 from 150 thousand floating population. Even in some other democratic discussion in many villages and towns, none of the floating population represented, and the huge contrast of the representative case of local population and floating population proportion in Zeguo Town is only an epitome of this phenomenon. Of course, the political participation of floating population problem is beyond the scope of this issue, not for further discussion.

3.2 Villagers participation and the conformity of multi-interests

The program of democratic discussion held by the protagonist is usually as follows: firstly, participants are informed of

the democratic discussion content and some other information; and then, all participants take action of free group-dialogue, free discussion and random speech about the democratic discussion topics while all opinions are recorded. Also in Zeguo case, all participants were randomly assigned to 16 teams so that all villagers can transcend the social limits by open environment of mutual understanding and communication. In the morning group discussion, a foreign representative was warmly applauded for his insightful opinion about the way of urban greening financial arrangements. Some villagers have later said: "I've been feeling that the migrant workers would only pay attention to themselves, but actually they are also so enthusiastic about Zeguo Town development." Some others said "What they said is fairly reasonable." This kind of face-to-face contact and communication had obviously changed the villagers' prejudice against floating population.

Villagers participation in the two cases shows that the public deliberation is a process in which the multi-interests accommodate, adjust and compromise. After rational deliberative discussion, villagers, with their free and equal status, can reach the final toleration and understanding of each other, instead of escalation of the conflicts (Shengyong Chen, Xingzhi Wu, 2007). Of course, the deliberation is efficient only on the premise that people who are affected by the policy have enough representatives to participate the discussion otherwise their interest is likely to be deprived by majority.

Considering the possibility of interest dispute and possible existence of some important projects that government had not listed, Zeguo Town government fund 50 million in a 5-10% of the reserve fund in the urban construction, with representatives of strong demand for construction project, prevent huge interest differences and upgrade of conflicts. In the construction of industrial capital investment and supporting for urban reconstruction funds, partial delegates to reach a consensus. Some villagers think need to increase the transformation and road with other villagers Zeguo Town industrial output in the financial revenue accounts based on high proportion of industry, supporting the importance of building. After several rounds of negotiations, most of the villagers paid more recognition and interests on road reconstruction investment.

In the case of Xinhe Town, representatives focused on the higher people's livelihood issues. With the appeals and importunities of most of the representatives, township government had had to reduce the amount of travel infrastructure spending from 200 million to 150 million, and raise the spending of drainage pipeline construction in residential area from 50 thousand yuan to 150 thousand yuan, while at the same time, 500 thousand yuan had been augmented to the renovation of old streets. With regard to budget of "500 thousand yuan of personnel training and visiting fee" project protested by almost all the village representatives for the government's neglect to training of National People's Congress and the villages, the government, after several exchanges of opinions and a hot debate, decided to revise this project and take up the training fee of National People's Congress and the villages.

Democracy is the various interest continuously game, adjustment, the process and mechanism of compromise. In this paper, the two cases of public consultation process is actually society benefit mutual adaptation and compromise in the process, on the basis of mutual respect, equality, freedom, and the rational consultation between villagers can effectively achieve mutual understanding and tolerant, rather than the conflict and upgrades. Of course, the effectiveness of the public consultation, when an important premise is the theme democratic discussion involves some specific interest groups, the group should have enough delegates, and otherwise it prone to most people deprived of minority interests. If the real stakeholder not only, or stakeholder participants, lack of third-party, objective neutral could lead to negotiate the bias results and injustice.

3.3 The interaction of villagers participation with quality of policy making and the political legitimacy

A perfect policy must be a combination of the quality of policy and a good consideration of villagers interests. That means the government should step back to make more participation of the citizens to improve the quality of policy while pushing forward the development of democratic process. Ironically, as Francis Fukuyama has recently reminded us, democracy is undermined when the state is too weak (Francis Fukuyama, 2004). When the government's capacity to enforce its will does not extend to substantial parts of a country, democracy is somehow undermined. Although villagers participation contributes to the quality of policy making at some extent by affording more information and intellectual insight, the case studied in this paper also shows that, the meaning of villagers participation in rural governance is somewhat closely related with political legitimacy. As a result, the ways and effects of this participation should be re-evaluated and reconstructed.

Any public decision-makings are a series of related policies and the essence of management, including technical constraints, rules, constraints, and budget constraints, etc, has some limits on the quality of villagers' participation. But on the other hand, in order to improve the quality of decisions, policy makers need more information about the real needs of the public. As the government is also limited rational actor in their knowledge, information and intelligent, and permitted by the various restrictions, villagers participation in public policy process, through various ways to deal directly with decision makers, will undoubtedly help decision-makers to obtain a more comprehensive search of the information resources in order to improve the quality of decisions.

Urban construction fund, which is used to arrange the relationship between economic development and people's livings, is an important public policy. In order to understand the true opinion, Zeguo Town democratic discussion to choose, on behalf of the experts, representative of the democratic discussion content, speaker opportunities and policymakers to represent the five aspects of opinions about the system design, thus make public the representativeness, authenticity, make decision-making more accord with public opinion. And the survey results democratic discussion compared before and after two rounds of discussion, the second survey of the villagers' opinions. The disposal of concern, "Dan-ya Waste Transfer, Lan-tau Waste Transfer project in two questionnaires are listed first program" is a waste transfer station tree in the second questionnaire by 6th rise to second place.

Extensive information source is the government, but the important guarantee of the breadth and depth of the villagers participation is often reverse effect, especially for some more formal, large and some special participation form. The urban construction democratic discussion democracy Zeguo Town negotiations issues, though the government budget, but part of the government's elaborate organization and better ensure the information sources of universality and democratic consultation, guarantee the quality of the authenticity of public opinion. Xinhe budget democratic discussion practice shows that, by the democratic congress before democratic discussion instead of the role of democratic discussion, now can use to activate the township's role, make it play their important matters of supervision and local authority. In the process of interest game is discussed in many consultations and communication, various other adjustment, and the profit on the basis of interest demand and villagers will transfer to decision-making system, helps to reduce the distortion of information policy, reduce and twisted by searching information of government policy, to help the government cost rationally set place quickly, public policy.

Public policy is committed to the realization of social public interests, or just for a few people, a group of special interests and service; this is the legitimacy of the government and its policy evaluation of basic standards(Tan Huo-sheng, 2007). Only let the public participation in government management and fully exert on the government's decision to ensure the effective, truly representative government. But in reality, the public debate on government policy effect is very limited; they lack of effective means for the government's behavior, especially effective in the National People's Congress system remains to be perfect. So, why should the government in public places in the policy in the democratic discussion this policy tool? Studies have shown that the government in the decision-making process of the choice of policy tools, policy tool attribute often is the main factor. Wesley M. Cohen and in Daniel A. Levintha have had good attribute generalization: (1) Resources, including concentration of administrative cost and operation simple; (2) Goals, including accuracy and selective; (3) Political risk, including support and opposition, public awareness and the probability of failure; (4) Of the constraints, including national behavior of the difficulties and force to restrict government behavior principle of ideology(Michael Howlett, M Ramesh, 1995).

Traditional Chinese government decision-making model can be favored by first-line managers, partly because the traditional arrangement system is a simple and safe rule for it costs less and has been a more convenient policy tool for grassroots governments to reduce their political risks. In the current social transition period, and the differentiation in social subject of interest differentiation between the polls also obvious, there is an obvious diversification, the government in the process of formulating public policies will inevitably produce deviation between the public. But this deviation caused by villagers often struggle with even. In recent years, in Zhejiang, enjoys and the farmers and Chang-xing struggle can be regarded as the events from the typical example. democratic discussion for government decision making and it provides a new way to satisfy basically in the current social transformation of government under the background of the requirement of policy tool to attribute the feasibility and operating on the goal of innovation and control, and the political benefit of government itself is the essence of smaller binding, etc. In the middle of cases, we can find that, let the villagers participation in the decision-making process is an important goal is to widely to express, on the basis of the high degree of villagers to accept the policy. Especially when the decision of executive process needs villagers of understanding and cooperation, absorb villagers participation in order to improve the decision-making of decision-making acceptable degrees appear particularly important.

4. Effective policy making model of villagers participation in rural governance in China

By probing into the deliberative governance model in Zhejiang Province, an effective policy making model of villagers participation in rural governance can be proposed and discussed. Based on the case of Zhejiang possessing democratic discussion, we believe, in the contemporary Chinese villages in the context of the development of democratic politics, the villagers participation in rural public policy making has revealed us a way of thinking of, also a framework for analysis, how to realize the villagers participation in government decision making and make a balance between the villagers interests and the quality of public policy.

First, due to the lack of effective monitoring and restriction mechanism on the public administration, villagers participation in the rural policy making implies, in fact, an administration of process-regulation, in which the improvement of the quality, at some extent, has been the byproduct of villagers' deliberation in their participation. At that, restricting the centralized power and expressing their requirement have mainly rooted in the villagers participation.

In the policy of quality requirements and villagers participation in relation to the government, due to the lack of effective supervision and restriction mechanism, the villagers to participate in more rural public policy to reflect a kind of "process for the administrative pattern in regulation", the higher the quality of decisions, to some extent, become villagers to participate in discussions of the rational byproduct. Therefore, the local government policy on quality requirements often not decide whether the villagers participation in the key factors. Restrict the government too centralized power and realize the interests of villagers of expression, is a villagers participation in government decision making process requirements, and most major civic participation depends on the final realization of the requirements of the response.

Secondly, as the rural public policy is often an integrated embodiment of multiple targets, the acceptability of the policy, with regard to more and more social confliction and intense appeals, makes a priority over the quality of the policy. This has largely affected the function of villagers participation. In rural areas of public policy is often the integrated embodiment of multiple targets, the most important is, it in the current political system for realizing the legitimacy of the government in the task to a certain extent, plays an "administrative absorption of politics"(Yeo-Chi King, 1997). In the case of democracy, democratic discussion contradiction with NPC session, promoted the political effect; assembly while in middle cases of public opinion survey for the final decision is more focused on the acceptability of the policy and government behavior. So, contrary to Thomas model is, in our local public policy formulation, considering villagers is more and more intense interest conflicts and acceptable degrees of policy focus more than likely to the quality policy.

Thirdly, the policy making model of villagers participation in rural governance in largely still has been enslaved to the already authority structure of government, and its validity remains greater uncertainty. This calls for further system reform and institution innovation to improve villagers participation and public reason in the decision-making process. Possessing democratic discussion is mainly in the field of state administrative villages by redesign of corporate governance structure, and can produce to make positive changes in the institutional environment, thus expanded response to the village management, public participation in the field of civil rights, expand space, is a public power continuously to return the society. Therefore, our country rural area public policy formulation process is a kind of villagers participates in activities of face, not simply for government decision making process to obtain information on the policy, strengthen the understanding or establish cooperative relations.

Some other innovative ways of policy making, which share some common merits with the Zhejiang cases, have been investigated and practiced in many countries, such as "collaborative policy making" which was proposed by Center for Collaborative Policy Research in California University, focusing on the deliberative process of policy making between different sectors and the collaboration of multi-interests (Clare M Ryan, 2001). All of those innovations show that it is not only possible but also imperative to take an effective policy making model of villagers participation in rural governance.

5. Conclusions

This paper defends the possibility of villagers participatory in rural areas by presenting a revised process analysis of participatory to explain the theory of participatory democracy which was developed in the work of Rousseau, J.S. Mill, and some other classical theorists, and proposes that participation produces popular control of the issue-agenda, decision-making, and implementation (Joel D. Wolfe, 1985). It does work nowadays in most countries of the world, as Carole Pateman asserts, "participation develops and fosters the very qualities necessary for it; the more individuals participate the better able they become to do so"(Carole Pateman, 1970). Our research has shown that villagers participation is possible and necessary in rural public policy making in China nowadays, and the good governance in rural results from villagers offering their support to leaders in return for leaders' advocacy of villagers' self-defined interests.

Villagers participation, usually meant programs only contrived by government to provide opportunities for those masterful citizens, in Zhejiang rural public policy making has manifested that there is more initiative of innovation from the grassroots and more attention should be paid to collaboration and deliberation. Although the relationship between villagers participation and the good governance of the countryside in China has not been clear thorough, at the very least, the good governance is one instance of much larger process of villagers participation, and villagers participation unquestionably involves both the development of civic identity and participation in good governance. In summary, by offering an explanation of these processes of villagers participation in Zhejiang rural areas, this revised model of villagers participation will hopefully contribute to a greater realization of the ideals of harmonious society and new development of the rural areas.

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Necessity as the Mother of Trail Blazing: Applying Alternative Dispute Resolution Mechanisms to Political Party Disputes in Africa

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Abstract

To be able to continue working together for the interest of their political party or country, persons involved in a political dispute need to have the root cause of the dispute removed and their pre-dispute relationship restored. The declaration of rights and liabilities – which is the only thing a Court can do in trying to resolve any dispute - is ineffective for such disputes. It is particularly so where there is case congestion and the attendant serious delay in the hearing and determination of cases in the Courts as is the case in practically all African countries. The alternative dispute resolution mechanisms can become the panacea for all such problems and the ideal way of resolving political disputes. This article considers these issues.

Keywords: Alternative dispute resolution methods (ADRs), Political disputes

1. Introduction

This article seeks to show how practically all political disputes, intra and inter party disputes with the exception of election petitions, may be resolved through arbitration and the Alternative Dispute Resolution Mechanisms (ADRs) (Note 1) in Africa, using Nigeria as a case study. It shows that it will be for the general good of all political parties, politicians and indeed all African countries for the necessary legal structures to be erected for the formal adoption of those mechanisms for the resolution of such disputes. It is part of the article's thesis that in formalising such a practice, African countries may well be blazing a trail and that the fact that it has not been done elsewhere before, especially in the Western world, is not a reason why it should not be done in Africa and soon too. It is also hoped that the discussion will provide a guide post for those other countries and regions and other countries or regions of the world that are also enmeshed in difficulties with respect to the handling of political disputes in their Court systems. It is hoped that the discussion will enable those countries and regions to chart this new course and reap the benefits thereof.

We first examine the different types of political disputes that occur in African countries which we propose can be appropriately dealt with through the ADRs. We then show that litigation, which most Africans (including politicians and political parties) have normally generally resorted to for the adjudication of disputes, is incapable of actually resolving disputes. We shall see that the ADRs, are more consistent with the African culture of everyone being the brother's keeper and a generally communal lifestyle (Note 2) and have over the ages been very effective in the resolution of African political disputes. As a way of more clearly showing that the ADRs actually have the capacity to properly and thoroughly resolve political disputes even in the future, we examine some of the several advantages which they enjoy over litigation, that are relevant to this discussion. The legal and other challenges against the resolution of political disputes through the ADRs are discussed together with their solutions.

For convenience, we shall in this discussion classify arbitration and the conventional Alternative Dispute Resolution Mechanisms (the ADRs) together as ADRs. Otherwise, arbitration is no longer so classified. Though it is an alternative to litigation in the general sense, it is no longer regarded as an ADR in the technical sense. Experts have since come to accept it as a different dispute resolution mechanism from both litigation and the ADRs. Dispute resolution media are therefore generally classified as litigation, arbitration and the ADRs. The ADRs consist of early neutral evaluation, conciliation, mediation, negotiation, rent-a-judge, med-arb, arb-med and other modes and combinations of modes that have been fashioned out or are being fashioned out by commercial men, their legal advisers and ADR practitioners in response to practical needs in the market place of life.

The reference to ADRs here in the sense already explained is their Western style forms, not customary law equivalents. This writer has shown in a number of other works that in all pre-colonial African traditional societies (including the ones that eventually made up the present day Nigeria), arbitration and such ADRs as conciliation, mediation and negotiation were in constant employment to resolve disputes. It has also been shown that in their employment and use Africa, at least in some areas, has normally been ahead of the rest of the world. For instance, though in Europe and the Americas, those mechanisms have over the ages been used for mainly commercial disputes, Africans did in the ancient and immediate past use them for the resolution of practically all sorts of disputes including public sector disputes such as tortuous human rights infringements and disputes most of which (in Africa) often have their roots in political differences and disagreements. This article demonstrates that even in the present times most of Africa's troublesome political disputes have been resolved not through the Courts but the ADRs. It canvasses that by formally recognising and providing for the resolution of political disputes through the ADRs, modern African legal systems shall only be effecting a return to what their predecessor native societies had always done but which was cut off from the laws and norms of Africa's modern States by the interregnum of the colonial process. It further contends that in so doing African States shall blaze a trail for the modern world and once more show direction to the world in a new use of the ADRs.(Note 3)

2. Political Disputes in View

Political parties and politicking, being avenues for the pursuit of power, disputes are inevitable amongst them. In every age and clime, the pursuit and maintenance of power and influence amongst persons and nations/peoples has been the source of most of mankind's wars and conflicts.(Note 4) In partisan politics, it is particularly so in an environment like Africa's where selfless service does not always seem to be the primary motive for seeking political power.(Note 5) Again, internal democracy and fairness to all members also do not always seem to constitute the hallmark of political party administration. Inter and intra party disputes arise out of those situations. In addition to such inter and intra party disputes, other forms of political disputes afflict African nations. They include politically inspired disputes between regions and blocks.

It is necessary to state at this point that the disputes for discussion in this work are domestic disputes i.e. political disputes occurring within a country, not inter state disputes.

2.1 Intra and Inter Party Disputes

More than anything else, intra party disputes have the capacity to seriously weaken a political party. It is also particularly so in a setting like contemporary African politics in which, with the exception of a few places like South Africa, party supremacy and discipline often seem to be rather low.(Note 6) The disputes easily develop and fester. They include disagreements over elections or appointments into party offices; the choice of party flag bearers for municipal, state and national elections; the sharing of appointive offices after a party has won elections or been invited to join a government by a winning party; the handling of party funds; recognition of particular members' importance in the party; the godfather syndrome(Note 7); deep seated sectional/tribal sentiments and rivalry etc. They lead to further disputes and eventually to formation of camps (real camps or mere propaganda camps), decamping of members and in some cases the actual demise of the party in question. The recent difficulties in Niger Republic arose out of the tenure elongation efforts of President Tanja Mamodu leading him to dissolve Parliament, toy with the nation's judiciary and alter the Constitution. Squabbles for position in a party led to the initial parting of ways between President Robert Mugabe of Zimbabwe and his long time ally, Mr. Morgan Tsvangirira and their eventual contest for the Presidency which, but for the successes of the ADRs, could have torn the country apart.

Inter party disputes are mostly rooted in deep seated controversies over whether or not a particular candidate (belonging to a particular party) has been properly elected and declared, and press wars (sometimes characterised by incorrect assertions) between parties in power and the opposition. The dispute between Robert Mugabe and Morgan Tsvangirira after the Zimbabwean elections in 2008 also exemplifies this.

2.2 Other Political or Pseudo Disputes

Some inter party disputes sometimes touch on and include the bodies or organisations responsible for organising elections, which in Nigeria is the Independent National Electoral Commission (INEC). They are mainly disagreements between parties over how a certain thing has allegedly been done or not done to favour or disfavour one party or the other. Often, however, a party or the other makes such matters take on the nature of a new kind of dispute between it and the electoral body. In Nigeria, for instance, some political parties recently established a very sharp disagreement with INEC and threatened to sue it for its perceived silence over the launching by the ruling People's Democratic Party (PDP) for funds with which to build the party's national Headquarters which those parties claim INEC should have intervened with respect to.(Note 8) Again, whether such disputes are properly resolved or not goes to affect the confidence or otherwise with which the parties, especially those in the opposition, behold the electoral body and its activities. It also affects how the electoral body perceives such parties, the sincerity of their opposition and issues that

they may subsequently raise against it and its activities. Those disputes also need to be properly resolved through the ADRs.

In some African countries, political parties also seem to be developing a new genre of political disputes in the country – a rather surprising one sided kind of dispute between any party that loses a Court case and the judiciary. Though the judiciary is by no means a disputant with any political party (or any litigant for that matter), in recent times in countries like Nigeria any party that loses a case in Court (particularly an election petition) sees the judiciary as an opponent that is bedevilled with all sorts of vices and deserving of nothing but the harshest forms of criticism. Meanwhile, when the same party wins a case the same judiciary is declared upright, courageous and the last hope of the common man indeed. (Note 9) Such ‘disputes’ or pseudo disputes are beyond the scope of this discussion and indeed are not actually disputes properly so called since they are *inter alia*, one sided. The silence with which the judiciary treats such unfair criticisms whilst continuing in its rigorous self assessments and improvement is an ample response to or settlement of such ‘disputes’.

These different types of disputes referred to above can be pre or post an election. The discussion shall cover all of them except election petitions. We shall see that under the law as it presently stands, election petitions cannot be settled through the ADRs and that there may not be any need indeed for a change of legal policy on the point.

3. Past and Present Use of ADRs for Political Disputes

As already indicated, in the past the African kingdoms and societies resorted to customary law arbitration, conciliation, mediation and negotiation for the settlement of all sorts of disputes. Recourse to them was not hampered by any principle of arbitrability or otherwise of any particular dispute or indeed any such thing. Though these mechanisms were not called these English names and might in some societies not have been clearly differentiated one from the other, (Note 10) they were in constant use by the people.

Though these mechanisms were used to settle disputes arising out of commercial transactions, they were not restricted to such disputes but were used for all sorts of disputes including political disputes, matrimonial matters and sometimes even criminal cases. Thus if there was a chieftaincy struggle between two or more ruling houses, chiefs and elders would be called in. If there was a misunderstanding between close relations, an elder or elders of the family would intervene. If it was between couples, one or some of their parents, brothers and, or sisters or friends would intervene. In Igboland in Nigeria, if it was between members of a village who were members of the same age grade, the age grade could be invited into the matter. If two villages or communities were involved in a dispute, the chiefs and leaders of thought of the larger kindred would be invited into the matter. Each of these interveners or invited adjudicators would consider the case with a view to doing justice between the contesting parties or families by declaring what was the right thing to do following the ancient customs and laws of the land. In thus declaring the law, they would also pay due attention to what would preserve the social relationships, the cohesion and virtues of the family or community as the case may be. If one of the parties had instituted the proceedings in a manner which required that whichever party was eventually found to be wrong should be sanctioned, it was customary law litigation and would be conducted as such. If he did it in a manner that he did not necessarily seek vengeance or sanction, it would be an ADR proceeding – which could be arbitration, conciliation, mediation etc. The character of the proceeding and the end result determined which ADR it was. These mechanisms and their employment for the effective resolution of these and all other kinds of disputes have since time immemorial been recognised for instance in Nigeria and Ghana in a long stream of judicial decisions. (Note 11)

In the past as well as the present African traditional societies, litigation in the sense of mere declaration of right and wrong and award of compensation or imposition of sanctions was and is far less employed than the ADRs. The traditional Africans have always found the ADRs more akin to their philosophy and life style. The ADRs, even in Western societies, are geared towards the administration of enduring - not just technical - justice and the restoration of pre-dispute relationships. As a commentator has noted of the African system,

“The quintessence of the African jurisprudence is that in a dispute, no party is totally at fault or completely blameless. As such, a high value is placed on reconciliation and everything possible is done to avoid the severance of social relationships. Where men must live together in a communistic environment, they must be prepared for give and take relationship and the zero sum, winner-takes-all model of justice is inappropriate in their circumstances.” (Note 12)

Even in the present day Africa, the ADRs have proved more effective in the resolution of thorny political disputes. It has almost always turned out that when political disputes (such as who has been duly elected or returned in an election) are settled through the Courts, the parties may accept the verdict and the declared winner forms the government, but the parties would go on in residual disputes. It would be very difficult for them to come together and work together for the interest of the country. This has happened at one point in time or the other in Nigeria, Ghana, Liberia, Egypt, Madagascar and in countries outside Africa such as Chile and Sri Lanka. This would make room for unhealthy political rivalry most of the times. It has become a reoccurring event in Africa however that even when a political dispute has

become so deep-set that it is insoluble through the Courts or any other medium, it can be sorted out through the ADRs. Examples abound but two recent and prominent ones should suffice. The nearly intractable post-election dispute in Kenya between President Mwai Kibaki and Mr. Raila Odinga was eventually resolved through mediation by another African, Mr. Kofi Annan the immediate past UN Secretary-General. This was after so much life and property as well as national reputation had been lost. Following the Zimbabwean national elections of 2008-9, the equally destructive and intractable dispute between President Robert Mugabe and Morgan Tsvangirira was eventually settled through the mediatory efforts of the then President Thabo Mbeki of South Africa. Despite Mugabe's unnecessarily hard stance, the mediation worked and was able to bring the parties to a point where they could negotiate their way out of the problem and proceed to form a unity government for the good of the country.

Probably in realisation of the effectiveness of the ADRs – formally or informally undertaken – in the African society, the African Union has prescribed and implemented in a fairly faithful manner the idea of peer review and mediatory interventions in intra and inter State conflicts on the continent. This article simply canvasses that this wonderful practice be formalised in the domestic law of each country so that the benefits of effective resolution of political disputes will avail each African nation and its people.

4. Effective Dispute Resolution: Litigation v. the ADRs

Most African countries provide for the resolution of disputes, including political disputes, through the Courts.(Note 13) Sometimes the provision is crafted in a manner that is so firm in favour of the Courts that other dispute resolution mechanisms are seemingly excluded.(Note 14) In addition, most of the countries that practice multiparty democracy have provisions for the resolution of election related disputes through the Courts or such other equivalents as Election Petition Tribunals. In Nigeria, s. 285 of the 1999 Constitution prescribes for the determination of election petitions by Election Petition Tribunals though appeals lie to the Courts, to the Court of Appeal with respect to governorship election etc disputes and up to the Supreme Court with respect to presidential election disputes.

The meaning of all these is that law and policy makers seem to have made litigation the preferred medium of attempting the resolution of political disputes on the continent. This legal regime was put in place by each African country unmindful of the fact that litigation is not an effective medium for dispute resolution, much less so political disputes and even much less so in Africa. It is also partly traceable to the effects of the colonial process. It was the colonial interregnum that disrupted the warm recourse to the ADRs for resolution of disputes in the traditional African societies. To worsen things, whilst Western style ADRs were developing in the West they (the Western style ADRs) were in stifle in Africa. They were no efforts by the colonial governments to encourage the use of those processes in the general body of the law outside the customary law. The French colonial system even discouraged their use by not providing for them at all. When resort to them was to be rejuvenated, educated Africans were already seeing them as parts of the detested colonial process.(Note 15) The perception was worsened by the repulsive bias and seeming stereotype with which several Western arbitrators on the international circuit were already treating Third World interests to the knowledge of Africans and other Third World elite.(Note 16)

In consequence of those legal regimes, political disputes have normally been taken to litigation fora when the disputes arise. Now and again they are insoluble through litigation with attendant resort to violence and other forms of self help. In fact, many times even before or without attempting a resort to litigation, a residual apprehension that the Courts may not render justice at all or timeously pushes political gladiators into resort to rigging of elections, political violence and other unlawful actions in the bid to protect their interests. In most of the cases in which the ADRs had been resorted to on the continent it was when the frustration of settlement failure had led to loss of lives and property due to violence. This happened in Kenya and Zimbabwe. It need not be so. If the suggestion in this article is implemented it will no longer be necessary to wait for lives and property to be lost before resort to the ADRs for effective resolution of the disputes is made.

We shall now consider the different challenges and difficulties encountered in Africa in attempts to resolve political disputes through litigation. We shall be seeing how the ADRs can and in fact do take care of all those difficulties and frustrations. They constitute more reasons why African countries and indeed all other countries – particularly those with similar challenges in their legal systems as African countries have – should provide legal regimes for the resolution of at least some political disputes through the ADRs in their shores.

4.1 The Need for Actual Dispute Resolution

The first need for the embrace of the ADRs is the need for the disputes to be actually settled or resolved. As already indicated, though most African politicians and political parties resort to the Courts the resort to Court does not achieve effective or actual resolution of the disputes. In Nigeria, the other alternative adopted with some level of regularity is settlement through “the party's instructions”.(Note 17) “Party's instructions” is a euphemism for hardly objective and often very unfair orders arrived at through influence peddling by party “big men” and then handed down to disputing party men through the party's officials for willy nilly obedience.

Properly resolving a dispute means settling it i.e. removing the misunderstanding and, if possible, the source of misunderstanding and returning the parties to their pre-dispute relationship or situation. Such a resolution engenders the removal of hurts and offences, healing of the mind and ego of the disputants. It invigorates them for continued (and possibly greater) productivity. In a political party setting, it works needed unity ensuring that every one continues to put in his best for the party rather than engaging in anti-party activities or just lying low waiting for the appropriate time to decamp from the party or “revenge” within the party by hurting it in one way or the other.

If a misunderstanding is not so dealt with, it has not been resolved. There may have been a dispute management effort but not a dispute resolution. It is such dispute management without resolution that happens ever so often in litigation. Traditionally, what a Court does over a dispute that comes before it is to deliver a judgement based on the parties’ legal rights and liabilities. The Court is ill-equipped to, and indeed does not, concern itself with whether or not the judgement achieves peace amongst the parties. Practically every judgement is therefore an imposed term for the cessation of combat. Just as happens in every other war, if parties desire to achieve peace they will have to go beyond the judgement. They have to negotiate amongst themselves expressly or otherwise or settle by some other means.(Note 18) Therefore, when a dispute develops between party members on election into a party office, nomination of a candidate for an election, the contribution or management of election funds etc and it is taken to Court, the Court can only deliver a judgement which judgement can only, at best, compel cessation of open combat but does not secure peace. In fact, it sometimes leads a deepening of the dispute. It is the same when all that the political party does is to hand down an instruction “from above” to the disputing parties or sides without necessarily hearing them out.(Note 19) A grave yard ‘settlement’ is achieved in each case. The parties may “accept” the judgement or the party’s decision. In the latter case, they may even physically embrace themselves or vigorously shake hands as if they have mended fences but the real dispute remains. At the least opportunity, the parties react to the perceived injustice.

4.2 Quality of the Resolution

In more ways than one, the ADRs avail political disputants an opportunity for very qualitative or very effective resolution of their dispute more than any other dispute resolution mechanism can avail them. In effect, it is not only that the disputes are actually resolved; a quality of resolution that may not be available in any other forum is achievable.

4.2.1 Quality of Dispute Resolvers

The ADRs afford disputants the opportunity to stipulate the quality of their would-be dispute resolvers and to in fact choose those dispute resolvers by themselves. Traditionally, therefore, arbitration and conciliation legislations preserve the parties’ rights to determine the number, quality/qualifications and mode of appointment of arbitrators or conciliators to hear and determine their matter.(Note 20) The parties are thus able to insist on persons with requisite knowledge not just of the relevant area of law but also of the dynamics of the area of human endeavour from which the dispute has arisen. Sometimes, pragmatism necessitates the choice of dispute resolvers who may have no knowledge of the law but have a deep knowledge of the dynamics of the relevant area of endeavour. Thus if a political dispute is to be arbitrated or mediated, for instance, the parties should be able to choose as arbitrators or mediators etc persons who have knowledge of the relevant areas including the principles of decent politicking. In a dispute over an elective office such as the Presidency of a country, for instance, a sitting or former President or other high office holder will more easily understand the issues at stake – the compromises that need to be made, the bluffs that need to be called etc – than a judge given to declarations of right and wrong. The choice of such an arbitrator, mediator etc, particularly when made by the disputants themselves, will go a long way to create a “we-we” atmosphere in the proceedings and enhance the acceptability of the award or other end result.

Such things are not possible in Court litigation or when the political party simply hands down an instruction crafted by persons with vested interests or who may not even be imbued with the skills for effective resolution of the dispute in question. In litigation and the party instructions approach, the disputants, their political party or political relation as well as the citizenry are the losers.

4.2.2 Informality and Quality of Proceedings

Each of the ADRs is normally conducted in a relaxed and more or less informal atmosphere. The arbitrators, mediators etc deliberately create a genial and conducive atmosphere for hate free interaction between the parties. This is done with a view to engendering the discovery of the real facts of the dispute and eventually restoring old relationships as much as possible. This ensures that the parties and their witnesses are not hampered or hindered by the frightening rigidity and formality of the Courts. It also disposes the witnesses to being truthful in their testimony, which in turn engenders the achievement of quality justice based on the true facts. It also helps to heal the parties’ hurts and offences thereby disposing them to amicable settlement and speedy restoration of pre-dispute relationships. The informality of the ADR processes is infinitely invaluable.(Note 21)

For a political dispute, mediation is often the most appropriate mechanism. One of its core strategies consists of helping the parties identify their interest as against their wants or the dictates of their egos. Once politicians and political

disputants are brought to this point in the course of a settlement and ego is dealt with, things would normally run in a quick succession to settlement. The oft repeated quib amongst politicians that there are no permanent friends or enemies but interests becomes helpful. Save for the very self centred ones, a sprinkling of whom can often be seen in Nigerian nay African politics, it is often not very difficult to show in an intra party dispute that the interests of the two sides are the same. It is particularly so if it is a politician of equal or higher hue that is doing the pointing out of interests to them. They feel proud that they have “disagreed to agree”.

4.3 Speed of Dispute Resolution

One of the problems bedevilling the political process in Nigeria nay Africa is the delay in the resolution of political disputes. A party conducts primaries for the selection of its candidates for an election slated to hold 6 months thereafter or less. A dispute arises as to whether or not the preferred candidate was properly chosen. One of the unsuccessful contestants insists on testing the selection process in a Court proceeding. In Nigeria and probably all of Africa there is as yet no way the Courts can determine the question within the 6 months. This is attributable to the high level of congestion and delay in the Courts. Even though such disputes are often given priority attention – to the detriment of other pending cases – experience shows that since the judges have to write in long hand and work under very difficult infrastructural and other difficulties, such time frames are so short.

The scenario has often engendered a situation where a political party gets into an election with unresolved disputes over who has been chosen in the primaries as its candidate. The Courts are completely unable to do anything effective with such time bound matters. The party machineries are often under pressure at such times and too encumbered by deference to party men in government and to other vested interests to be fair, just and effective in resolving such disputes. On the other hand, each of the ADRs – being much faster than litigation and far more effective than the party machinery – can very quickly and effectively handle such disputes. Time frames can be met. Even if parties themselves, or any of them, becomes dilatory, structures exist (or can be erected) with which the dispute can still be timeously handled. For instance, s. 21 of Nigeria’s Arbitration and Conciliation Act (Note 22) (ACA) enables arbitrators to proceed to conclusion even if a Claimant or Respondent fails to appear to present its/his case.

4.4 Cost Effectiveness of Resolution

All things considered, the ADRs are cheaper means of dispute resolution in the long run. Because litigation is relatively quite cheap on the continent, the ADRs may be dearer in the short run than litigation. The parties have to pay the arbitrators, mediators etc and bear other overhead costs in addition to paying their own lawyers, which is not the case in litigation. However, the ADRs are still relatively cheap in the continent even if not as cheap as litigation. When the overall financial and other costs of delay – including the frustrations, loss of lives and property – are taken into consideration it is easy to see that indeed the ADRs are far cheaper than litigation. It is far cheaper for a country, the political parties and individuals involved that the issue of who has been properly nominated for an office is properly rested before elections hold than to go into elections with uncertainty on the point with attendant possible upsets as have happened in Nigeria before. (Note 23)

In addition, the parties to a political dispute are not normally hampered by costs. Political parties always seem to have enough to spend to prosecute or defend claims in Court or anywhere else. What is more, it is far more cost effective for their disputes to be resolved timeously than to have the disputes prolonged on account of very little money to be saved otherwise.

4.5 Confidentiality and Protection of Party/Personal Secrets

The ADRs are purely private proceedings to which members of the public are not admissible except with the consent of the parties. The dispute resolvers, arbitrators for instance, are also forbidden from divulging information gathered in the course of the proceedings to other people. Even a Court of law is disentitled from requiring them to testify on such matters. (Note 24)

Political parties and politicians are therefore able to testify on their secrets in the proceedings and same will still remain secrets. On the other hand, any thing that transpires in Court becomes a matter for public knowledge. A party or politician with sensitive personal or legitimate secret information will often not want the secrets divulged in, or on account of, any proceedings. Very often, political disputes are complicated and founded as much on ego, wheeling dealing for power, cold self interest calculations and sometimes even deliberate mischief as on noble facts and considerations. Unless those issues of ego, wheeling dealing and improper motives etc are brought to the fore, no settlement can be achieved. Those factors may never be given in evidence in any public Court or other proceeding. They can very safely be divulged in a private proceeding leading to proper resolution. As a result of these things, the ADRs are the most suitable for the resolution of political disputes.

4.6 Absence of Corruption, Declining Erudition and Deference to Power

We have been able to show elsewhere that there may indeed be a few corrupt and lazy persons in the Nigerian nay African judiciary. We also pointed out the infinitesimal existence of judicial pandering to executive wishes in far in

between cases. We equally argued that the insufficiency of facilities like well stocked libraries hardly promote continued enhancement of quality of output on the Bench but may well in extreme cases tend to lower it. Though extremely few, the corrupt or lazy judicial officers create the false impression that a sizeable fraction of the judiciary may be corrupt or not continuously improving in erudition. (Note 25) Of course, undue deference to executive power by some Courts is neither an African thing nor is it new. (Note 26) It is equally true however, and particularly worrisome, that in the adjudication of political disputes in an African environment, the possibility of deference to power and corruption is more real than with respect to other kinds of cases that come before the Courts.

As argued in the work under reference, corruption is able to occur at all in the Courts because they are public institutions. The presiding judge as it were owes no direct duty of care to the individual litigants. His allegiance is to the State - that abstract normally simply referred to as "the government" in many African countries. On the other hand, in the ADRs the parties or their agents appoint the arbitrator, conciliator etc. The arbitrator, conciliator etc owes the parties a direct responsibility or account as it were on how professionally and diligently he goes about his work. If he gets corrupt, he can be far more easily challenged and removed than a judge can be challenged. He is a private man who does not wield coercive powers that a Court wields and whose level of respect depends on his personal quality not his office.

The ADRs are private sector trades plied by people who would normally not be cajoled into corruption or wrongdoing by money however huge. At the risk of repetition, Nigerian judges are, mainly upright, courageous learned gentlemen who eschew bribery and corruption. Be that as it may, a private plier of a lucrative trade like arbitration is more likely to absolutely shun every shade of corruption, monetary or otherwise, than a salary earner even if the salary earner is on the Bench. The often touted few cases of corruption in the judicial handling of disputes is likely to be completely erased with respect to political disputes if they are handled by arbitrators, conciliators etc.

Just as in the case of corruption, declining erudition and competence on the Bench, if any, may be tolerated and endured because the judge is a public officer serving the State and not particular parties. Even if the parties were to be aware from the outset that the erudition and competence of a particular judge to which their case has been assigned are in decline, they can hardly do anything about it. It will be a really strong-willed set of parties advised by lawyers of their kind that would ask for a transfer of their case on the basis of an allegation that the judge is declining in learning and competence. Such an allegation could border on contempt.

In arbitration, conciliation etc declining learning and competence cannot be tolerated or endured. Such an arbitrator, conciliator etc would not be patronised by anyone. He would fall into disuse and go out of business. What is more, even for the few cases he may handle before going out of business, this writer has consistently maintained that he is liable in negligence for any injury occasioned by his lack of skill or delay unlike the judge who enjoys judicial immunity whether or not he is sound in learning. (Note 27)

5. Legal and Other Challenges

In this part of the work, we shall be considering if there is anything in the Nigerian law for instance that forbids recourse to any of the ADRs for the resolution of a political dispute. We shall be seeing that indeed there is no such thing. We shall canvass however that, for the avoidance of unnecessary arguments and controversies it will be necessary for laws to be enacted to very explicitly enable the resolution of political disputes through those media. It is hoped that other African countries (and indeed all other countries anywhere that have similar legal regimes with Nigeria on the point) will find guidance in the discussion.

5.1 Public Policy/ Constitutional and Other Legal Considerations

In Africa, the major challenge concerning the settlement of disputes outside the customary law and other than by litigation is the question whether or not public policy permits the employment of the particular dispute resolution mechanism in question. (Note 28)

That notwithstanding, the question does not seem to have received serious attention in connection with the traditional ADRs i.e. outside arbitration. It is in arbitration that the issue of arbitrability is a notorious one to which many a mind will normally be addressed. Outside the customary law, a dispute is generally not arbitrable if it cannot be the subject of accord and satisfaction or if by specific legal prescription it is exempted from arbitration. Examples are crimes and matrimonial causes. It has not been seriously considered in legal doctrine whether for being unarbitrable a dispute is excluded from settlement through conciliation, mediation and negotiation. It seems to follow however that if a matter is not a proper subject of accord and satisfaction, it cannot be subjected to those dispute resolution media. They are, like arbitration, based on accord and satisfaction. (Note 29) Be that as it may, if any dispute is not excluded from arbitrability by public policy there is nothing in law and practice that excludes it from resolution through any of the traditional ADRs.

In the light of the foregoing, once we determine that any political dispute is not excluded from arbitrability in Nigerian law, it will follow that public policy does not exclude it from being subjected to any of the traditional ADR mechanisms.

The common law, as a part reflection of the Nigerian public policy on the point, restricts only very few disputes from arbitrability – such disputes as crimes and matrimonial causes. (Note 30) Statutes exclude only disputes on copyrights under the Copyright Act (Note 32) and patents under the Patents and Designs Act. (Note 33) All other disputes including political party disputes are arbitrable. (Note 31) Surprising yes, but true! We will now see how.

The other Nigerian legislations, including the Constitution, concern themselves with jurisdiction as between the Courts and do not tamper with the arbitrability of disputes. For instance, s. 251(1)(n) of the 1999 Constitution confers jurisdiction on the Federal High Court “to the exclusion of any other court” on civil causes and matters relating to mines and minerals including oil fields, oil mining, geological surveys and natural gas. That the Court’s exclusive jurisdiction is only as between Courts is made clearer when the provision is read together with the Petroleum Act. (Note 34) Under art. 41 of its First Schedule the Act requires any question or dispute arising in connection with any licence or lease to which the Schedule applies (i.e. an Oil Exploration Licence, Oil Prospecting Licence and Oil Mining Lease) to be “settled by arbitration unless it relates to a matter expressly excluded from arbitration or expressed to be at the discretion of the Minister”. Nothing in the Nigerian Oil and Gas sector is expressly excluded from arbitration by any law. The legal position is therefore that any dispute with respect to any of those licences or leases will be arbitrated. (Note 35) However, if any other matter that concerns oil fields, oil mining etc (and indeed if any of the matters covered under the Act and its First Schedule by virtue of the Minister’s discretion for instance) is to be taken to Court, it must be the Federal High Court. Therefore, the fact that the Federal High Court has exclusive jurisdiction *if or when the matter gets to Court* does not mean that such a matter may not be adjudicated or settled any how else. Otherwise, it would mean that once a dispute arises over any matter covered by the subsection (and indeed every thing under s. 251), the parties must go to Court (the Federal High Court) and may not settle the matter by any other means whatsoever before or after going to Court. The Nigerian Constitution definitely did not intend to institute such a drastic and unrealistic legal regime. No known legal system imposes on parties to a civil dispute a duty to go to Court willy nilly.

In the same way, up to June 13, 2006 the Trade Disputes Act, (Note 36) at s. 21 conferred jurisdiction on the National Industrial Court “to the exclusion of any court” on trade disputes as outlined in the section. The same Act at ss. 8 and 9 endow a conciliator appointed for the purpose as well as the Industrial Arbitration Panel (IAP) with jurisdiction to entertain a matter and settle it if they can before even the matter gets to the National Industrial Court. In fact, it even imposes a duty on the parties to have a resort to a conciliator and the IAP before approaching that Court. If the conciliator or the IAP is able to settle the matter, it does not get to the Court at all and its “exclusive jurisdiction” is otiose. (Note 37) Since June 14, 2006, the conferment of jurisdiction on the National Industrial Court has been enshrined at ss. 7 and 11 of the National Industrial Court Act. (Note 38)

In the same way, apart from with respect to election petitions, neither the Constitution nor the Electoral Act excludes any intra party or inter party dispute from arbitration, conciliation, mediation, negotiation or indeed any other dispute resolution mechanism. (Note 39) There is no specific mandatory provision on how political party disputes other than election petitions may be settled. They are therefore covered, with respect to adjudication by Courts and public tribunals, by the general provisions of ss. 6 and 36 of the Constitution. Section 6 vests the “judicial powers” of the Federation and federating states in the Courts. “Judicial” simply means “of, relating to, or by the court” and “judicial power” means, the “... authority vested in courts and judges to hear and decide cases and to make binding judgements on them ...”. Therefore, the section covers only litigation and does not touch the powers of dispute resolution through the private dispute resolution mechanisms.

In complimenting s. 6, s. 36(1) provides that in the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time “*by a Court or other tribunal established by law* and constituted in such manner as to secure its independence and impartiality”. (Note 40) Subsection (3) requires the proceedings (including the announcement of decisions) of a Court or a tribunal relating to the matters mentioned in subsection (1) to be held *in public*. We have since shown elsewhere that an arbitration tribunal falls outside the “other tribunal established by law”, which are rather public tribunals. The section does not pretend, for instance, that from the date it came into force all arbitral tribunals in Nigeria must now hold public hearings and render their awards in public. Such a position would have made them public rather than private proceedings and effectively destroyed confidentiality which is one of their attractive hallmarks. (Note 41) In that case, any arbitration conducted in private would amount to a breach of the parties’ right to public hearing and public pronouncement of decision.

Such a legal regime would hardly be consistent with the country’s deliberate and concerted efforts (already made through modern and progressive arbitration statutes) to attract direct foreign investment and to make her shores an attractive venue for transnational arbitrations. (Note 42) It is inconceivable that the country would in 1999 want to

remove or destroy the prime characteristics and advantages of arbitration over litigation (privacy etc) by requiring all arbitral proceedings to be held in public.

It should also be noted that despite such efforts, Western style ADRs are in Nigeria, nay Africa and the Third World, relatively new and not as known as litigation though their customary law equivalents are in upbeat prosperity. As already stated in this work, until recently, many African minds conceived of dispute resolution outside the customary law simply as Court litigation. Even as lately as 1998/99 when the 1999 Constitution was fashioned, the ADRs were not as popular with most of the military personnel and few civilians who made the Constitution as much as litigation had always been. In consequence, arbitral tribunals and the conventional ADRs were not had in view or contemplation when the Constitution was being drafted. The words “other tribunal” was therefore not a reference to arbitral tribunals but to official or public quasi-judicial tribunals such as tribunals of inquiry set up by government.

Again, the requirement of **both** independence and impartiality of an arbitration tribunal and its duty to treat the parties equally consistent with the strict principles of fair hearing is firmly provided for at ss. 7 and 8 of the ACA. It is not normally so with the Courts and official or public tribunals as such provisions are missing from their constituting statutes. (Note 43) The provision is missing because the Constitutional provisions on fair and public hearing unflinchingly bind those Courts and public tribunals. The provision appears in the ACA because the draftsmen, knowing that the Constitutional provisions do not apply to arbitral tribunals, had to make the provisions for arbitral tribunals. If such provisions were not made in the ACA or in other arbitration statutes, arbitral tribunals would infringe no statutory law if they did not observe fair hearing!

Article 7(a) of the African Charter grants every individual the right of access to “competent national organs” and art. 7(d) grants him “the right to be tried within a reasonable time *by an impartial Court or tribunal*” (Note 44). The phrases do not seem to have come up for interpretation by the African Commission or an African Court. However, a jurisprudence which supports our view has been developed around art. 6 of the European Convention on Human Rights which has a similar provision – for determination of civil rights and obligations by “by an independent and impartial tribunal established by law”. It has been held repeatedly, *inter alia*, that “tribunal established by law” in that provision does not include an arbitral tribunal in a voluntary arbitration. (Note 45) It has equally been held that for a tribunal to be a “tribunal established by law” it needs to, amongst other things, exercise judicial functions, be independent of the executive arm of government and the parties, have a duration of its members’ term of office and have guarantees afforded as to its procedure. (Note 46) These are persuasive decisions to guide our thoughts.

The International Covenant on Civil and Political Rights, of which Nigeria is a member, provides at art. 14, *inter alia*, that in the determination of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing “by a competent, independent and impartial tribunal established by law”. In addition, “any judgement rendered ... in a suit at law shall be made public” except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. Though the General Comment 13 of the UN Human Rights Committee, (Note 47) which has no binding effect on any country, suggests that the article applies to all courts and tribunals within the scope of that article whether ordinary or specialised, different countries such as Hong Kong/China have interpreted it as exclusive of arbitral tribunals. (Note 48)

In the light of all the foregoing, it can confidently be asserted that all political disputes – intra and inter party disputes and non-party based political disputes - are resolvable through the ADRs. There is nothing in the law or public policy against it. It is not just so; even disputes that are more in the public domain such as human rights violations are, as already indicated, capable of being settled through arbitration and the conventional ADRs. (Note 49)

Though election petitions are not our core concern in this paper, it is apposite at this point to briefly examine the law on their resolution through the ADRs. The Constitution and the Electoral Act, 2006 (Note 50) have conferred exclusive jurisdiction on the Court of Appeal and Election Tribunals to the exclusion of other modes of dispute settlement. Though s. 239 of the Constitution confers jurisdiction on the Court of Appeal for presidential elections only “to the exclusion of any court of law in Nigeria”, s. 285(1) and (2) confer jurisdiction on the National Assembly Election Tribunals and the Governorship and Legislative Houses Election Tribunals “to the exclusion of any court or tribunal” with respect to National Assembly, Governorship and House of Assembly election matters. It is arguable that “tribunal” in the provision is also a reference to a public tribunal; so that the jurisdiction conferred is not exclusive of arbitral tribunals for instance. Be that as it may, s. 140 of the Electoral Act prescribes an election petition filed at a competent tribunal or Court as the only way of challenging the election and return at an election. In the light of such a clear provision, no other dispute resolver other than an Election Tribunal as constituted under s. 285 of the Constitution or the Court of Appeal acting as such under s. 239 can entertain an election petition as a Court or tribunal of first instance. There is therefore no room in the present legal regime for an election petition (or dispute over the propriety or otherwise of the conduct of an election or declaration of a particular candidate as winner) to be taken to arbitration or any of the conventional ADRs.

Whether or not such disputes (election petitions) should be resolvable by arbitration or any of the conventional ADRs is highly debatable. The desperate winner takes-all-disposition of many a politician when it comes to election results is by no means consistent with the cordial, informal truth based environment within which the ADRs are normally best conducted. For such politicians (who clearly seem to be in the majority) the stakes may well be considered so high as to accept anything not backed by the fierce coercive powers of the State. The Courts and election tribunals operate with such coercive powers but which arbitrators, mediators and conciliators clearly lack. Many politicians still find it difficult to accept the judgements of Courts and election tribunals without unnecessarily abusing or harshly criticising the judge(s) however clearly rooted in law and justice the judgement may be. They are not likely to accept the awards of arbitrators, much less so the opinions of mediators etc. Secondly, there may be much room for abuse of the system if ADRs are used for election petitions. The number of competent arbitrators, mediators etc that will be needed for such volume of work is presently not available in the country. The effect will be that the all comers syndrome with which very successful ventures are often greeted in the country in recent times will set in and ruin the system. (Note 51)

With respect to other political disputes other than election petitions, a major problem with the employment of the ADRs for their settlement is that though there is no law against it, there is as yet no law specifically enabling it or governing the procedure. The ACA covers only the arbitration and conciliation of commercial disputes. Though “commercial” is very liberally defined, (Note 52) it does not cover political disputes. There is no statute at all on mediation and negotiation. With respect to political disputes, there is need for clear provisions covering these media of dispute resolution and the procedure that may be adopted. In the absence of that, some recalcitrant parties may, through Court Suits and interlocutory injunctions, frustrate any resort to those dispute resolution media.

The greater difficulty is even the fact that arbitration, mediation etc are not in the Exclusive Legislative List over which the National Assembly can legislate for the entire country. (Note 53) Though the regulation of political parties is on that List (item 56), not all issues in political disputes can come under that. Some of the disputes will directly touch on the rights of members as individuals/citizens. What is more, election issues are on the Concurrent List over which the Federation and the states share legislative competence. Even the departmentalisation or division of competence between the Federation and states attempted by clauses 11 and 12 of the List is not helpful in this matter.

As a result of these things, even if a model statute is agreed on and drafted for the regulation of the settlement of political disputes through the ADRs, it will have to be enacted by the different state Houses of Assembly. Experience with the Child Rights Bill (Note 54) and such other model Bills suggests that unless strong political will and influence are exercised “from above” it may well take a long time before all the states or even a majority of them will enact such a statute.

5.2 The Do or Die Attitude of Some Politicians

As already indicated, one problem that may militate against the effective resolution of political party disputes through the ADRs is the desperate, do or die attitude with which some politicians seem to approach politics, power and influence. The violence that attends some (few) political campaigns, monitoring of the voting process on election days and in some cases the declaration of results is very surprising. Unless there are express legislative prescriptions requiring such politicians to submit to the ADRs, they are not likely to do so. Even after being compelled to so submit, some of them may still explore every possible avenue to scuttle the process.

The attitude also manifests in a winner-takes-all disposition. Dispute resolution media like mediation are completely inconsistent with such dispositions and results. A mediator will seek a win-win situation for both sides and such a politician, particularly when he perceives himself as holding the longer end of the stick than the other party, may not be amenable to such a resolution. He may only accept the result of mediation, for instance, if legislation compels him to accept whatever the mediator’s eventual opinion is i.e. making his consent irrelevant. Such a process would no longer be mediation properly so called. It would be lacking in the very thing that makes mediation an effective medium of dispute resolution – mutuality of the end product. Any such mediation may have the same problem of judgment without settlement which litigation presently has. It may not be a solution to the present problem but a replacement of one problematic mode of dispute resolution with another.

5.3 Fight-to-Finish Attitude of Party Legal Advisers and Lawyers

A major problem with the ADRs in a developing common law country is the unduly adversarial disposition of many a lawyer. Some such lawyers, living in deference to the illiterate or semi literate gallery, take on a fight-to-finish attitude so as to show that they are “tough lawyers”. They erroneously behold such theatrics as synonymous with effective lawyering. They therefore often advise their clients against amicable settlement of matters. Desperate politicians often seem to find soul mates in such lawyers and hire them. Such lawyers may do any thing they can to frustrate the resolution of political disputes through the ADRs which they may consider ‘weak’ means of sorting out political differences. Happily, such lawyers are getting more and more into the minority in the country and even for that minority there is a solution as we shall see shortly.

5.4 The Nature of Some Outcomes

Another major challenge to the use of the conventional ADRs for the resolution of disputes is the fact that their outcomes are at best in the nature of an agreement or contract. If a party defaults in executing the terms, the other party may only resort to litigation or arbitration to enforce compliance. As a result, they are ordinarily not effective with high stake disputes. In the present Nigerian political terrain, almost every political dispute is made out as a high stake dispute.

It must be noted however that arbitration does not have that kind of difficulty though it is not free of difficulties with respect to enforceability. An award is immediately enforceable. It is also not appealable. However, a Court order of enforcement, an order of denial of enforcement or a setting aside order is appealable. As a result, an application for enforcement, denial of enforcement or a setting aside order can sometimes snake all the way from the High Court to the Supreme Court, wasting time and resources.

6. The Way Forward

Obviously, the major challenges against using ADRs for political disputes resolution are the absence of a legal framework for their use, difficulties with the enforceability of the outcomes/decisions of most of them, and the possible absence of requisite co-operation on the part of some disputants. Those problems can be easily dealt with by an Act of the National Assembly and Laws of the State legislatures, as we shall see *anon*.

6.1 Enactment of Enabling Statutes and Provisions in Parties' Constitutions

It is quite possible for a model Bill to be drafted for enactment by the National Assembly and the different State Houses of Assembly to govern the resolution of political disputes (possibly with the exception of election petitions) through the ADRs. The statutes would provide for reference of intra and inter party disputes other than election petitions to the ADRs in the manners to be provided also. INEC or relevant Committees of the National Assembly can start the preliminary work by gathering experts in the fields of arbitration and the conventional ADRs as well as draftsmen to craft a Bill. (Note 55)

Though delays have been encountered in enacting other model statutes in the states, this one can have a different experience. If the political parties that control the National Assembly and the states (the Executive and, or the Houses of Assembly) see the need for the statute, they can simply convince (instruct?) their members in those legislatures to ensure speedy passage and it will be done.

There may also be a need for political parties to insert into their Constitutions a provision requiring such disputes to be referred to any of the ADRs as may be appropriate. The enabling statutes and parties' Constitutions may prescribe minimum qualifications and experience for would be arbitrators etc in political disputes. The power to make original or default appointments of arbitrators etc could also be vested in a trusted institution such as the Chief Justice of Nigeria or the President of the Court of Appeal.

INEC can sponsor the Model Bill about which we speak or require political parties to insert an ADR facilitating provision in their Constitutions by virtue of its general powers and duty of supervision over political parties under s. 86 of the Electoral Act. (Note 56)

6.2 Immediate Enforceability of Decisions/Outcomes

Despite the problems already pointed out hereinbefore about enforceability of the outcomes of ADRs, let it be noted that flexibility and creativity are hallmarks of those dispute resolution media. This ensures that they can always be adapted to suit various circumstances. Thus it is possible to work out a situation in which their end products can become immediately enforceable as has been done in the Mutlidoor Court houses in the country. In Lagos State, for instance, there is an ADR judge. Once he appends his signature on a settlement reached in an ADR proceeding in the Multidoor Courthouse, the terms of the settlement become enforceable as a Court judgement. The same arrangement can be worked out for settlements reached in ADR proceedings over political disputes of the genre discussed in this article.

With respect to arbitration and other end results, the Act and state Laws that we canvass for can also remove the enforceability of political disputes awards from the regular Courts and vest same in the Supreme Court or Court of Appeal or at least in particular Divisions of the High Courts. It can also be provided that the decision of the Court of Appeal on such applications is final in these ways, delay attendant to the enforcement and challenge of awards etc will be erased.

6.3 Non Co-operation by Parties and, or their Lawyers

In view of the great virtues of flexibility and adaptability which the ADRs have, the statutes which this article canvasses for can prescribe ways and means by which proceedings can go on in spite of any party's recalcitrance or non co-operation. Section 21 of the ACA is already a good example in this regard. In a situation where the Claimant fails to attend proceedings or to present its case, the tribunal can dismiss the case. If it is the Respondent that so fails, an award

can be made against it as well, provided that its absence or failure to present its case is not taken as an automatic proof of its liability. A similar provision could be made with respect to the settlement of political disputes through the ADRs.

It also very often happens now that when fight-to-finish parties or lawyers appear before arbitrators who know their onions, those parties and lawyers quickly learn to abandon their unhelpful traits and embrace needful culture. It can happen with respect to political disputes when they are processed through arbitration and the conventional ADRs.

Conclusion

Using Nigeria as a case study, but with ample examples from and references to developments in other African countries, this article has tried to show that in Nigeria nay Africa, all political disputes except election petitions are resolvable through the ADRs. It has also demonstrated that with the exception of election petitions, it is better for African countries to resort to the ADRs for the resolution of political disputes.

In Africa, political disputes can be quite damaging both to the political parties and the countries themselves. Because of the total absence of, or low observance of, the principle of party supremacy, intra party disputes easily fester and weaken the political parties in question. In some cases, they develop into the kind of situation that arose in Zimbabwe, Niger Republic and Sierra Leone in recent years. Inter party disputes also often lead to dire consequences for the countries where they occur. Ordinarily, persons involved in a political dispute normally need have the dispute and its root causes removed or properly resolved. This is so as to enable them get back together to work for the interests of their political party and country. Incidentally, Court litigation – which is the mode of resolution that the disputants almost routinely resort to in the continent for the resolution of political disputes – is unsuitable for the resolution of those disputes. In the first place, a Court can only declare rights and liabilities for the disputing parties and cannot really resolve disputes in the sense of removing a dispute and its causes. Secondly, even if it could ordinarily have been an actual dispute resolution medium, litigation in Africa is bedevilled with some serious difficulties such as case congestion and its attendant delay in the conclusion of cases. Again, even if litigation was an actual dispute resolution mechanism and even if those peculiar difficulties were not there in Africa, the ADRs are still far better means of dispute resolution. For instance, the ADRs allow disputants to set standards or qualifications for their own adjudicators or dispute resolvers. The disputants also have the option of directly appointing those dispute resolvers themselves or by persons they (the disputants) have authorised to do so following some pre-set conditions and modalities. These things in turn ensure a far higher quality of resolution than litigation often offers.

Dispute resolution through the ADRs is also more consistent with the African doctrine and practice of each person being the brother's keeper. The doctrine has ensured that in dispute resolution in the traditional sense in Africa, reconciliation is seriously pursued; no party is totally at fault or completely blameless and everyone is expected to adopt the give and take approach. As a result, Africans used the ADRs to effectively resolve all sorts of disputes – including political disputes – before the advent of colonialism. Even now, each time the ADRs – which have been adopted in the NEPAD documents – are resorted to in the resolution of political disputes very good results have been achieved even when those disputes had clearly been insoluble through other means of dispute resolution. This recently happened concerning the disputes in Kenya and Zimbabwe which nearly dissolved those countries.

Though in the present legal settings in most African countries the use of the ADRs for the resolution of political disputes may have some challenges stemming from the do-or-die attitude of some politicians etc, those challenges are clearly surmountable. Structures such as the Multidoor Courthouse scheme are already in place in some African countries to take care of those challenges. Statutes can also be enacted to take care of those challenges as is already being considered in the case of Nigeria. Again, though there may be challenges with the enactment of such laws at the federal and state levels in Nigeria, the challenges are also by all means surmountable as has been shown in this work. It is equally most gratifying in this connection that most African countries are not federations and are therefore not likely to encounter such challenges should they choose to enact similar statutes.

Considering that dispute resolution is more effective through the ADRs even in Western and other developed countries that may not have the level of Court congestion and delay that occurs now in African and similar jurisdictions, it will still be good for those developed countries – and indeed all other kinds of countries – to adopt the ADRs for the resolution of some political disputes.

It is hoped that the suggestions made in the article, such as the initiation of efforts for the enactment of enabling laws, will be taken seriously by all relevant countries. If they do and resort is soon had to the ADRs for the resolution of most political disputes within their shores, it will further engender political maturity and deeper civility in the political process.

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Notes

Note 1. All hereinafter grouped together as the ADRs for explanations given shortly

Note 2. This is not a reference to communism but to the general love-informed communal African lifestyle of interdependence where the collective is superior to the individualistic, where the common good/interests overrides individual rights and interests, where in a dispute no one person is seen as completely right or completely wrong and reconciliation with a view to restoring social harmony is the aim of every dispute resolution effort, where unnecessary levels of individualism or selfishness are extremely strange deviant behaviours that attract serious public opprobrium.

Note 3. This writer has also shown that by the adoption and domestication of such international arbitration legal materials as the UNCITRAL Model Law on International Commercial Arbitration and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Africa has worked out a completely novel concept and practice in arbitration namely, international customary law arbitration which is now obtainable in Africa and the Caribbeans and can be borrowed and adapted by peoples elsewhere who have similar legal milieu in their environments. See *The Internationalisation of African Customary Law Arbitration* note 5 *supra*.

Note 4. This is true whether it is the home, the larger family, association, even a company involved principally in commercial enterprise, a community, a nation or a country that is under consideration. See, for instance, Robert Greene, *The 48 Laws of Power*, Profile Books, London, 2000.

Note 5. In the ancient pre-colonial traditional African societies regulated by laws of very high ethical content, social taboos etc, rulers etc acquired power and generally used it for the good of their community. Of course, there were some deviants just as is normally the case in any age and clime. However, those deviants were clearly in the minority. Again, the harshness and oppressive tendencies of rulers were directed at outsiders, not members of the domestic community or kingdom.

Note 6. Definitely lower than what it was in the First and Second Republics. Political scientists may vary in their assessment of the causes but it seems rather clear that desperation on the part of some political actors (rooted in unbridled selfishness, unnecessary sectionalism/tribalism etc) makes it difficult for them to submit to the party or to allow fairness to have a free reign in every matter.

Note 7. In Nigeria, the godfather syndrome is a euphemism for the practice by which some influential persons in a political party select candidates for elections and party offices rather than have such positions filled through the due process of election. The persons so chosen are expected to function in their office as mere rubber stamps of the influential men who selected them.

Note 8. Even though those electoral bodies are human institutions which could be expected to sometimes sincerely err, they often operate in ways and manners that create residual worries about their independence. Normally appointed or constituted by the government in power, they often tend to overly show favour towards the party in power. Such things and the worries they create further engender suspicions in the minds of the opposition parties.

Note 9. Such things only show how mature or sportsmanly some of the politicians are not. All impartial observers agree that the judiciary has creditably acquitted itself in the country in the past decade and has indeed been the strongest chord that has held the country together in the face of several acts of political carelessness and developments since 1999.

Note 10. For instance, in some communities there was a thin line of distinction between conciliation and mediation such that they may have been used so interchangeably as to create the impression that they are the same. As a matter of fact

they share several characteristics such that even in the borrowed English law version they are often confused by some persons. Some people even refer to mediation as reconciliation and use it to indicate that the two are the same.

Note 11. See, as examples, *Kobina Foli v. Akese* (1930) 1 WACA 1; *Assampong v. Amaku & Ors* (1932) 1 WACA 192; *Inyang v. Essien* (1957) 2 FSC 39; *Obodo v. Oline* (1958) SCNLR 298; *Ahiwe Okere & 2 Ors v. Marcus Nwoke & 4 Ors* (1994) 5 NWLR (pt. 343) 159.

Note 12. O. Adigun, *The Equity in Nigerian Customary Law* in Y Osinbajo and A. Kalu (eds) *Towards a Restatement of Nigerian Customary Laws*, Federal Ministry of Justice Nigeria, 1991 pp. 11 – 12.

Note 13. See, as examples, chapter 5 of the Ghanaian Constitution, 1992; chapter 4 of the Constitution of the Federal Republic of Nigeria, 1999; art. 7 of the Constitution of Benin Republic.

Note 14. For instance, art. 37 of the 1994 Ethiopian Constitution provides that every person has the right to “justiciable disputes to, and obtain a decision or judgement by a court of law or, where appropriate, by another body with judicial power”. Art. 68 of the Egyptian Constitution prescribes that “the right to litigation is inalienable for all, and every citizen has the right to refer to his competent judge”.

Note 15. For these things see this writer in (2001) *Enhancing the Implementation of Economic Projects in the Third World through Arbitration* 67 *JCI Arb*, 240

Note 16. Per Jan Paulsson, a prominent international arbitrator “It may be true that in the beginning of this century, and until the 1950s, arbitrations conducted by various international tribunals or commissions evidenced bias against developing countries.”: (1987) *Third World Participation in International Investment Arbitration* 2 *ICSID Rev.* 1, 19

Note 17. Though the Constitutions of the different parties contain provisions for internal settlement of disputes, what happens most of the times is that party big wigs, godfathers or ‘elders’ take a position and instruct the party accordingly. It is particularly so with dispute on party elections and nomination of candidates

Note 18. This very often includes, not by any design of the parties or the Court, the forgiveness and healing engendered by the passage of time.

Note 19. Considering the vast membership and geographical spread/stretch of a party properly so called, it can hardly hope to hear out details of even a fraction of the disputes that arise within it. Even concerning those that it attempts to hear out the disputants, very often what happens is that it hands the dispute over to some of its members to handle and report – persons who may well handle the matter under the influence of some vested interests often unknown to party authorities. Even when there are no such interests, those persons are not likely to be skilled in dispute resolution. Dispute resolution is undoubtedly an art. Either way, the dispute is not really resolved.

Note 20. In Africa, see as examples, ss. 11 – 13 of the Kenyan Arbitration Act, 1995; ss. 10 – 12 of the Ugandan Arbitration and Conciliation Act, 2000; s. 12, *Zambian Arbitration Act*, 2000; ss. 11 – 13, *International Arbitration Act*, 2008 of Mauritius; ss. 10 – 12, *Zimbabwe’s Arbitration Act*, 1996; articles 15 and 17 of Egypt’s Law No. 27/1994 promulgating the Law Concerning Arbitration in Civil and Commercial Matters ss. 6 – 8 of Nigeria’s ACA.

Note 21. For more on these from different perspectives matters which space and time constraints do not permit examination of here see this writer in (1998) *Commercial Arbitration as the Most Effective Dispute Resolution Method: Still a Fact or Now a Myth?* 15 *J. Int. Arb* 4, 81; (2005) *Arbitration and the ADRs as Panacea for the Ills in the Administration of Justice in the Third World* 1 *EBSU LJ*, 102; (1997) *The UNCITRAL Model Law and the Problem of Delay in International Commercial Arbitration* 14 *J. Int. Arb* 1 125

Note 22. Cap. A18, LFN 2004; s. 26, *Kenya’s Arbitration Act*; s. 25, *Uganda’s Arbitration and Conciliation Act*; s. 15, *Zambian Arbitration Act*, 2000.

Note 23. In the 2007 general elections in Nigeria, some governorship elections held without a certainty as to who had been nominated by particular parties. In Rivers State and Imo States, the nomination of the ruling Peoples Democratic Party remained uncertain as the party went into the elections. A rerun election had to be organised in Imo State when after the elections the Supreme Court overturned the candidature of the person who flew the party’s flag during the election. In Rivers State, the party won the election whilst its flag was flown by a person other the properly chosen candidate. After that wrong candidate had been in office for well over a year, the Supreme Court restored the candidature of the duly chosen candidate and returned him as Governor of the State: *Rt. Hon. Rotimi Amaechi v. INEC & Ors* [2007] All FWLR (Pt.407) 1.

Note 24. For the critical nature of confidentiality, which imposes such obligations of non-disclosure on arbitrators, see as examples the English cases of *Dolling-Baker v. Marrett & Anor* (1991) 2 All ER 890 and *Hassney Insurance Co. of Israel v. Mew* (1993) 2 Lloyd’s Rep 243

Note 25. (2007) A Synergy of Opposites: Effective Commercial Justice, Rights and Liberties in African Jurisprudence chapter 6 in *Growing the Law, Nurturing Justice: Essays in Honour of Niki Tobi, JSC*, Lawhouse Books, Port Harcourt, Nigeria.

Note 26. In England of the 1940s it was so disturbing in manifestation that Lord Atkin had to issue his eternally refreshing rebuke to his Learned Brothers in *Liversidge v. Anderson* (1942) AC 206, 240 (“I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive.”)

Note 27. See this writer in (1998) The Parties’ Rights Against a Dilatory or Unskilled Arbitrator: New Possible Approaches 15 *J. Int. Arb* 129 – arguing that even when an arbitrator has not acted out of malice or *mala fide* if it can be shown that he was at the time of his appointment insufficiently knowledgeable for the arbitration in question but deliberately gave himself out as being knowledgeable and failed to point out that deficiency to the parties when approached for appointment but went on to accept the appointment, he would be liable for any injury caused any party by such deficiency in knowledge. The parties should not have the principle of *volenti non fit injuria* raised against them.

Note 28. It is beyond the scope of this paper to examine the position of the customary law on this matter. It is enough to state here that the problem of unarbitrability hardly exists in the customary law save and except to the extent to which statutory law has affected the customary law.

Note 29. For instance, parties to a statutory marriage should be unable to award divorce and maintenance orders to themselves through conciliation, mediation or even a negotiation between them however mutually acceptable the terms may be. The public interest in the maintenance of the marriage institution is so high for all about the legal dissolution a marriage to be left to the idiosyncrasies of parties, particularly estranged spouses.

Note 30. *United World Ltd Inc v. MTS Ltd* (1998) 10 NWLR (pt. 586) 106, 116

Note 31. Cap C28 LFN 2004. Section 46 provides “The Federal High Court shall have exclusive jurisdiction for the trial of ... disputes under this Act.” Unlike most other Nigerian statutes that concern themselves with jurisdiction as amongst Courts, this provision reserves the trial of all disputes under the Act for the Federal High Court alone not just as amongst Courts but as amongst all processes of dispute resolution.

Note 32. Cap P2 LFN, 2004. Section 26 vests “jurisdiction to hear and dispose of legal proceedings under this Act ... in the Federal High Court”. Though it may be arguable that “legal proceedings” in the provision simply means “Suits” and so does not include arbitral proceedings or proceedings in other dispute resolution mechanisms, it is this writer’s considered view that the draftsman meant to include such proceedings in his usage “legal proceedings” thereby vesting only the Federal High Court with jurisdiction over patent disputes. That position is also consistent with the favoured position of most nations that, for obvious economic and security considerations, would rather have disputes in that important area of the economy under the firm control of their Courts and not other private sector dispute resolution mechanisms – the US for instance.

Note 33. For a closer examination of the role of public policy in arbitrability of disputes in Nigeria and other UNCITRAL Model Law jurisdictions see this writer in (1999) Public Policy and Arbitrability under the UNCITRAL Model Law *Int. Arb LR* 70.

Note 34. Cap P10, LFN 2004

Note 35. This is also the general position under the International Convention for the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) 1965 of which Nigeria is a member sequel to which she enacted the ICSID (Enforcement of Awards) Act cap I20, LFN 2004 in 1967.

Note 36. Cap T8, LFN 2004.

Note 37. It is in the same manner, and no other, that the exclusive jurisdictions of the Supreme Court (s. 232 on inter state and Federal v. State disputes, s. 233 on appeals from the Court of Appeal, which section even says “to the exclusion of any other court of law”), the Court of Appeal (s. 239 on presidential elections, s. 240 on appeals from High Courts and their equivalents) must be understood. Therefore, States A and B that have any arbitrable dispute may decide not to go to the Supreme Court but to arbitration or to a mediator. It is only if they decide to go to Court at all that the exclusive jurisdiction of the Supreme Court becomes relevant. *A fortiori*, 2 parties may after the Court of Appeal has delivered judgement on their matter decide to go to arbitration, a mediator or even a conciliator and not the Supreme Court. The arbitrator(s), for instance, definitely can render an award different from the Court judgement, which would also be binding on the parties. However, the Courts need not be worried whether or not the arbitrator is sitting on appeal over the Court of Appeal judgement. No, he would be incompetent to do so. But it can deliver an award which the parties may decide to obey or enforce in abandonment of the Court judgement. The analogies can further be drawn with respect to the exclusive jurisdiction of the Court of Appeal and lower Courts. It is simply amazing how creative the

Nigerian law can be used in these matters for the effective resolution of disputes and achievement of enduring justice, not just technical justice.

Note 38. Act No. 1 of 2006. The Act went into operation on June 14, 2006.

Note 39. In addition to what has been said in the immediate foregoing footnote, it should be clearly noted that no Court in Nigeria presently enjoys the kind of unlimited jurisdiction which the State High Courts enjoyed under s. 236 of the 1979 Constitution. A combination of the jurisdictions of the Federal High Court under s. 251 and the State High Courts as well as the High Court of the Federal Capital Territory under ss. 270 and 257 respectively does not even amount to an unlimited jurisdiction even if they were vested in one Court, which is not the case. Since every Court now has a circumscribed jurisdiction, the country has moved from presumptive jurisdiction to specifically prescriptive conferment of jurisdiction. Thus, no Court or other tribunal can claim to have a jurisdiction that is exclusive to not only other Courts but also all the other dispute resolution mechanisms unless there is a statute specifically (not impliedly) conferring same. What is more, even the unlimited jurisdiction of a State High Court under the 1979 Constitution was also as between Courts and did not exclude other dispute resolution mechanisms from validity or effectiveness.

Note 40. Italics supplied.

Note 41. The essence and bedrock of the ADRs rests in extensive party autonomy, private hearing and declaration of award, and confidentiality. Without those things the ADRs can hardly be preferred over and above litigation.

Note 42. Such statutes as the Arbitration and Conciliation Act which was enacted in 1988 as one of the earliest arbitration statutes to be enacted across the world based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 soon after the Model Law was made and indeed the first in Africa; the ICSID (Enforcement of Awards) Act note 35 *supra*. For further elaboration of the point see generally Andrew Chukwuemerie, (2003) Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector 4 *Journal of World Investment*, 828; *Africa and the UNCITRAL Model Law on Arbitration: Winning and Losing to Win* (forthcoming); (2006) Salient Issues in the Law and Practice of Arbitration in Nigeria 14 (1) *RADIC*, 1.

Note 43. The High Court Laws of Eastern, Northern and Western Regions which apply in all the State High Courts in the country contain no such provision. So also the Court of Appeal Act and Supreme Court caps C36 and S15 respectively LFN, 2004. Nor does the Tribunals of Enquiry Act cap T21 contain any such provision.

Note 44. Emphasis is this writer's

Note 45. See *Deweere v. Belgium* (1980) 2 EHRR 439; *KR v. Switzerland*, Application No.10881/84, Decision of March 4, 1987.

Note 46. *Le Compte, Van Leuven & De Meyere v. Belgium*, Decision of the European Human Rights Court of May 27, 1981.

Note 47. Adopted by the Committee on April 12, 1983 at its 516th meeting.

Note 48. In *R v. Town Planning Board ex parte Kwan Kong Co. Ltd* (1995) 3 HKC 254 Wang, J held *inter alia*,

"Suit at law' therefore means very clearly a legal proceeding in a Court of law. I do not believe that when reference is made to a suit at law, any lawyer or layman will have any doubt that the words can have one meaning, namely, a legal court proceeding... The usage of the words in a suit at law' in connection with judgement delivered in public can leave no doubt that the reference there is unmistakably to a formal judgement in legal court proceedings delivered in public, something familiar to everyone brought up under the common law system of Hong Kong. The 'suit at law' can therefore only mean a formal suit, action or proceeding brought in court by one party against another party."

See also *MA Wan Farming Ltd v. Chief Executive in Council* (No. 1) (1998) HKC 190

Note 49. See Arbitration and Human Rights in Africa note 6 *supra*.

Note 50. Act No. 2 of 2006

Note 51. For an examination of how that is already creeping into arbitration in the country (a practice whereby many persons who have not had any training whatsoever in arbitration pass themselves off as arbitrators) see this writer in (2005) Preliminary Meetings, Preliminary and Interlocutory Orders in Secured Credit Arbitrations *Nig. Bar Jnl*, 108

Note 52. At s. 57 which simply copied the footnote to the Model Law. For its examination see Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, Thompson Sweet & Maxwell, London 2005 and this writer in (2004) New Hopes and Responsibilities in the Maturing Process of Arbitration Law and Practice in Africa: Nigeria as a Case Study *Nig. Bar Jnl*, 55

Note 53. The 2nd Schedule to the 1999 Nigerian Constitution creates 3 lists of items and subjects over which the Federal and State legislatures have legislative competence. Whilst the Exclusive Legislative List is for only the Federal

Legislature, the Concurrent Legislative List is for both and the Residuary List - an unwritten list of things not covered by any of the first 2 lists – is for the State governments alone.

Note 54. A Bill drafted in Nigeria since about the late 1990s meant for enactment by the Federal legislature but which very many state legislatures still not been able to enact in their states.

Note 55. This writer is already working together with INEC on a model Bill to tackle these matters.

Note 56. Note 50 *supra*



Political Intervention and Class Control in the Medium Term of Chinese Feudal Society: Analysis of Political and Social Ideas of Reforms of Wang An-shi

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Abstract

Starting from the political ideas of the reforms of Wang An-shi, the political and social ideas of the medium term of Chinese feudal society are studied in the article. The political ideas of the reforms of Wang An-shi contained the political meanings such as the humanism and the pragmatism, which paid attention to the public feelings and opinions, and alleged putting them into social practice. The reforms of Wang An-shi presented the ideas of political intervention surrounding the economic control in the medium term of Chinese feudal society and establishing economic entities to strengthening the national management. In addition, the strategy of political intervention in the reforms of Wang An-shi largely influenced the macro social stratification in the medium term of Chinese feudal society, and it emphasized to restrain the declining tendency of the high class expanding, the middle class shrinking and the low class collapsing, and kept the stable social structure by recovering the basically harmonious proportion of these three hierarchies.

Keywords: Political meanings, Government intervention, Stratification control, Social structure

The reforms of Wang An-shi happened in the medium term of Chinese feudal society, and this term was stable on the surface, but in crisis in deed. Wang An-shi was called as "the reformer in the 11th century" by Lenin, because he saw the crisis hiding in the stable society, and started and charged comprehensive reform with drastic and deep influences, and his many ideas with insights were on strategic layer, so he deserved that reputation. To reasonably evaluate the social ideas needs certain judgment standards. Any social idea was the product of certain social and historical conditions, and it was influenced by the material production level, the economic base, the superstructure and even the situation of the society. The reforms of Wang An-shi happened in the stable term of Chinese feudal society, so its basic spirit was certainly to maintain the feudal system of the time and adapt the development of the social situation. Reasonable social ideas have common characters or common measurement standards, i.e. they should accord with the social and historical conditions and the tendency of social development and advancement of the time. Only according with the social and historical conditions of the time, they could be implemented in the practice, which is called as the standard of feasibility. And only according with the tendency of social development and advancement of the time, they can suit with the tide of historical development, which is called as the standard of advancement. Here, the historical scene and field of "of the time" is particularly emphasized, because the feasibility and advancement are relative, and they are meaningful only relating with the social and historical situation of the time, because the concrete tendencies of social status and development in different historical terms are different. To study the political and social ideas of the ancient time, the thinking mode of "historical standard" is necessary, only the feasibility and advancement in concrete scene and field are meaningful for the present society.

Starting from the political ideas of the reforms of Wang An-shi, taking the feasibility and advancement as the standards, the reform ideas including the spirit, methods and measures of managing state affairs, and the influences on the society of the time are main analyzed. There are many researches about its limitations, so they are not mainly discussed in the article. Though the reforms of Wang An-shi included the political measures, but they were very limited, such as to

strengthen the centralized state power and the absolute monarchy, centralizing the local powers to the central government, and decentralizing the power of the central government to balance each other. That was the main rhythm of that times, though this system brought many malpractices, but Wang An-shi only adjusted the local parts a little. Though Wang An-shi had not broken the instinct feudal system, but he had implemented maximum reforms under the premise of keeping the basic system, which largely and deeply influenced the whole social structure and the social status.

1. Political meanings of humanism and pragmatism

Wang An-shi lived in the times of Song Ren Zong, Song Ying Zong and Song Shen Zong, and the Song Dynasty at that time accumulated poorness and weakness, and “can not but worry about the society in the interior of the empire, and foreign aggressions in the exterior (Wang, 1974)”, and the accumulated abuses of the society had not been neglected, so the voices of reforms ran up increasingly, and occupied the windward. However, the opinions how to reform were different, for example, Ou Yangxiu emphasized the “official governing” in his “New Deal of Qing Li”, and Li Gou claimed to recover the Jing Tian system, and Su Shi claimed savings, averaging registered permanent residence and checking the farmland contracts. Being different with others’ reforms, Wang An-shi’s reform ideas had significant self-characters, and it embodied the simple and unsophisticated political ideas of humanism and pragmatism.

Wang An-shi first demonstrated the idea of “everything can change it in ten thousands forms”, and obtained the conclusion, i.e. the social development was new things replaced old things, so the reforms were imperative under the situation. For the problem how to reform, he claimed respecting but not recovering the ancient system, which could not only achieve the intention of the reforms, but try to obtain the supports of the ancient-recovering group and the reform group. He pointed out that the cause that Song dynasty was poor and weak was that the laws and systems were neglected, and further emphasized that “the present laws and systems have not accorded with the laws and systems of ancient emperors (Wang, 1974)”, so it was necessary to reform the present laws and systems. And he confirmed the direction and principals of the reforms, i.e. “even the stupid persons who want to change the laws of ancient emperor a little will fell very difficult”, and “the reform needs only imitating the ideas of the ancient laws and systems (Wang, 1974)”. That means the reforms were not to recover the concrete laws and systems of ancient emperors, but imitate and follow the ideas of the ancient laws and systems, because the ancient situation was different with the present problems. As for who was the ancient emperor and what were the ideas of ancient emperors’ ideas, he didn’t point out, but that was tacit. To enrich the country and strengthen arms, relax conflicts and maintain the social order and feudal governance was the laws and systems of ancient emperor in fact. Actually, that was a kind of ideal spirit with strong power in people’s heart. The reform opinion of “imitating the ideas of the ancient laws and systems” made the reforms to possess large space. On the one hand, the camouflage of “imitating the ideas of the ancient laws and systems” could deal with the ancient-recovering group and the old school to reduce the resistance of reforms, and on the other hand, it could eliminate the worries of recovering ancient laws and systems, and give the green light to the reforms. Though the function of the camouflage is very limited, but it embodied the flexibility of the reforms of Wang An-shi, i.e. it was good at striving for supports and reducing resistances as possible.

The ideas of the reforms of Wang An-shi had not possessed the creative epoch-making meanings, which might be related with the times that Wang An-shi lived. But he absolutely didn’t copy the ideas and opinions of the ancient people, and “claim his opinions based on others”, and extensively absorbed and flexibly utilized the ideas and experiences in former reform practices to make his reform idea possess the characters of humanism and pragmatism particularly.

1.1 Humanism

Wang An-shi’s political philosophical ideas emphasized the factor of human being, artificial power, acquired learning and the function of human subjective initiative, which is the philosophical base of his humanism. In the “*Ten Thousands Words Submitting to the Emperor*”, he spent large numbers of length to discuss his ideas of “teaching, cultivating, allowing and adopting”, which could indicate his emphasis of talents. For the reforms, “proper talents will help to implement it, and improper talents will harm it largely (Wang, 1974)”. In fact, the reforms failed then, and except for the reforms offended the benefits of big landholders and big bureaucrats, improper bureaucracy was an important factor. His humanism was mainly embodied in the talents construction and the official governance, but it over emphasized the function of the emperor, but neglected the function of common people, which was decided by the benefit group which he was in. Though his ideas of humanism is widely divergent with modern people-oriented ideas, but following characters still have important values.

(1) Emphasizing officials’ benefits and individual characters. “The ancient emperors must appoint officials according to their talents and the actual situation (Wang, 1974)”. Though he didn’t deny the obligation between emperor and officials, but affirm the necessity and rationality of the obligation between emperor and officials, but he opposed to blindly enslave officials by virtue of the obligation between emperor and officials. Wang An-shi had assumed the office of local government for long, and he deeply felt the difficulties and abuses of officials under the obligation of emperor and officials under absolute allegiance. Only the emperor considered officials individuality, talents and the situation which they were in to appoint officials and properly cared their benefits and demands, he could obtain the optimal effects. Or

else, “officials will overtly agree but covertly oppose (Wang, 1974)”. Wang An-shi also thought that over low salaries would increase the corruptions. Therefore, he claimed to increase salaries to make it form a system, and punish the luxury behaviors and malfasants at the same time. Though the increase of salaries could not solve the problem in deed, but to change the situation that middle and low-class officials’ too low incomes, increase the incomes in the system, and try to reduce the incomes out of the system as possible, and restrain the luxury tide, still has important practical meanings.

(2) Emphasizing the exertion of officials’ subjective initiative. He said that “doesn’t worry about officials don’t do it, but worry about they can not do it, and doesn’t worry about officials can not do it, but worry about they can not make great efforts (Wang, 1974)”. He emphasized to encourage officials, and though the measure had deep color of material gains, but the idea to inspire officials’ enthusiasms was feasible. In addition, he opposed that “the emperor limits officials by laws for all things (Wang, 1974)”, and too many controls would limit officials’ talents. He thought the post of officials should be professional, and the term of officials should be long, which could exert and identify officials’ real talents. Short term and unprofessional post would induce many abuses, for example, the official who just understood the situation and his work only entered into the route was transferred to another post, so his talents would not be embodied, and the normal development of work would be interrupted. In the Northern Song Dynasty that the social division was not developed, he had put forward that the post should be professional and the term should be long, which was still very important in modern society. Wang An-shi dared to emphasize officials’ benefits, demands and personality, and though he could not awake the people under the absolute regality, but his opinions had infused fresh air into the feudal times with secret authority, though that was not his original idea.

(3) Emphasizing the public feelings and public opinions. For the talent selection, he required considering the public evaluation, and he agreed to “the ancient selected talents from in the public, and certainly considered the public’s opinions (Wang, 1974)”. And he was good at experiencing and observing public opinions and he liked to survey in the public among women, farmers and artisans who other scholar-bureaucrats neglected in the reforms. Wang An-shi thought that the political reform should take improving people’s survival situation as one of starts, i.e. “reforming according to the situation and human troubles (Ma, 1984, P.100)”, and the situation was to consider the feasibility of the reforms, and the human troubles could be regarded as the advancement standard of the reforms.

In human society, the human being is the principal part which is the most active power. In the human-governed society, the factor of human is the extreme important, and the talents are related with the stability of the society and the country, and the public feelings and opinions are also should be considered by the governor, and “waters can carry the boat and cover the boat”, which is the basic cause that Wang An-shi generated his ideas. Even in the days emphasizing the legal governance, the factor of human still is one of central factors, and the establishment and implementation of all laws and systems can not leave human being, and human is the software which has infinite flexibility. In the human-governed society without complete laws, there were many abuses, but in the legal governance society where the factor of human is neglected and human benefits and common demands can not be fulfilled, there are many abuses too. In different times, the humanisms of different hierarchies would be different, but they have common characters, so Wang An-shi’s ideas of humanism might contain many bureaucratic components of the time, but they still can be used as references.

1.2 Pragmatism

The other political philosophical idea of Wang An-shi is the pragmatism. Wang An-shi gave emphasis to solve the problems from the sources, and the working style dealing with concrete matters relating to works. This kind of idea is very rare in the feudal society, and it is active for the development of economy, the flourish of the society and the improvement of people’s life, and to emphasize the sources and pursuing long-term strategy is also the principles which should be followed.

(1) Giving emphasis to solve problems from sources. Wang An-shi was a far-sighted ideologist and politician in feudal scholar-bureaucrats. In his poem, he said that “the person who is on the top position will be shaded by could drifts”. In his youth, he traveled with his farther who assumed the office of the local government, and he subsequently assumed local official, and he cared about people, and deeply saw the social abuses. “The person who is good at governing the whole country must establish long-term strategies and future achievements (Wang, 1974)”, that was consistent with his idea solving problems from sources. To solve problems from sources needs foresights and long term, not narrow and shallow sights. He emphasized expanding financial sources, rising productions, and developing natural resources, and he opposed blindly clawing, and he thought that saving expenses was not the real method to solve the financial problem, though he also opposed wastes. “The person who is rich will support his country, and the country which is rich will support the society, and who want to enrich the society will support the nature (Wang, 1974)”, which undoubtedly knocked the alarm to the cruel officials, and expostulated with the emperor to give emphasis to production and solve problems from sources, and offered new ideas for enriching the country. In the reforms, the Qing Miao Laws, the Recruiting Laws and the Farmland Water Conservancy Laws all directly or indirectly embodied the idea of emphasizing sources and production.

(2) Doing concrete matters. The spirit of doing concrete matters was widely embodied in the reform ideas and behaviors of Wang An-shi. The governmental institution had not be reformed largely, and old institutions had not be abolished for a great lot, and many of them were endowed new functions, and the powers of various departments were adjusted properly to make them serve for the reforms, at least they would not block the implementations of new laws. Though that way was not thorough and optimal for the push of the new laws, but it was the feasible method when the conservative group strongly opposed the reforms, which had embodied the uniform of the spirit of doing concrete matters and the flexibility. For the education, Wang An-shi thought that the education contents should include shooting, defending and other military items, and the education should cultivate the talents who governed the country, not those bookworms without strategies. Though he completely politicized the educational functions, and his cognitions of education was partial and limited in times and class, but it was still advanced to sustain that the education should do concrete matters. In the style of writing, he thought that the articles should contain thinking contents and reasons, and accord with the practice, and he opposed and hated the style of writing that “the phraseologies don’t accord with the ration, and the rations don’t accord with matters. The literates take rare accumulation and old stories as the knowledge, and take the elaborated sentences as the fresh and extractive learning (Wang, 1974)”. As a feudal scholar-bureaucrat, Wang An-shi could do concrete matters, the present people should more get rid of floating style, and the society should establish the mechanism to encourage doing concrete matters and limiting floating behaviors.

2. Political intervention in the economic control

Feudal countries had adjusted and controlled the economy from the ancient times, such as encouraging the farming and fighting, reducing taxes and establishing monopolization system. Wang An-shi’s ideas of economic control combined with restraining merger and adjusting interior benefits in the landed class. The economic control idea in the feudal times is different with modern idea whether from intention to content, or from width to depth, but it is worthy to analysis. Wang An-shi’s economic control idea represented the political intervention in the medium term of Chinese feudal society.

Merger was the necessary product of the feudal society, and this problem could not be solved essentially in the stage of the feudal society and in the feudal system. So any reform and measurement could only release the merger, and there were better projects in various projects, but there was not the best method. The feudal government could publicly forbid the merger, but this method was difficult to be implemented, and it was opposed largely because it tried to recover the past systems before Song Dynasty, and the history facts also proved that this method was not feasible, especially when the influence of big landowners expanded, and the decree of forbidding merger would be blank. Wang An-shi adopted the indirect merger restraining method to weaken the economic strength of big landowners, and break the monopolization of big landowners and gamblers, and make farmers to avoid abnormal production or minatory poor status. This method could more approach the sources, and the resistances were relatively small, which was smarter than simple forbidding decree.

The Recruiting Laws and the Farmland Averaging Tax Laws were to restrain the merger and increase the incomes of the government by the tax reforms, and their starts were advanced undoubtedly. These two laws took the property and the lands as main taxing standard to increase big bureaucrats and big landowners’ tax burdens, and reduce middle and small landowners and kulaks’ burdens and increase national financial incomes, and adjust the redistribution of national incomes. The essential of this idea was to reform the past unreasonable tax system, and reconfirm the taxation standard and the assuming proportion of various classes. Though farmers’ burden was still heavy, but the government incomes still increased largely when the farmer’s tax burden had achieved the limit, and most of increases came from landowners, so the reforms successfully restrain big landowners and big bureaucrats, which was marvelous in that times.

As to the Qing Miao Laws and the Market Trading Laws, in the Song Dynasty, the dear money was rampant, and the gambles prevailed, and the governments, farms and hucksters were casualties. The dear money happened when farmers’ survival was threatened seriously, and the debtors adhered with big landowners, big bureaucrats and big businessmen, so this trading behavior happened under the unequal and involuntary conditions, and farmers paid heavy costs which didn’t accord with economic rules, and bankrupted finally. Bid businessmen monopolized the market by virtue of their own economic strength and privilege to obtain large profits and strike small businessmen. Under this situation, the governmental intervention on the dear money and gamble behaviors was very necessary. In the reforms, the government implemented the Qing Miao Laws and the Market Trading Laws and established corresponding institutions such as the market trading department. But these institutions were not only the management institutions but economic entities, and they not only managed the economy but engaged concrete economic affairs. This system discounted the implementation effects of the Qing Miao Laws and the Market Trading Laws, and when the relative officials were not proper, the implementations even would break the initial intention, for example, some officials made bold to increase interests when the government provided loans or forced to trade and gain private benefits by virtue of the Market Trading Laws. In the middle term of the Song Dynasty, though the commercial economy developed to some extent, but it had not

formed complete market mechanism, and it was impossible to cultivate economic entities and strengths outside the government to restrain the dear money and gamblers. The simply compulsory management of the government could only obtain a few effects, and the costs were large. So it was a mode to establish the economic entity by the government, and if the economic management function could be divided with the economic entity, the effect would be better when the supervision mechanism was perfect. However, the costs of political intervention always exist, and the cost of good political intervention would be relatively small.

The economic control is the idea and strategy to discuss the political intervention from measures and modes. But at that time, the political intervention in the economic control would largely influence the social stratification in the middle term of Chinese feudal society. To some extent, Wang An-shi's ideas about the reforms made epochal contributions to the class control and harmony of the time, which were analyzed and discussed as follows.

3. Social stratification and class control

The feudal society possesses the pyramid stratification of the society with strict classes, and the populations in various classes increase with the decrease of statuses, i.e. the class in the bottom layer has more population, so under low social productivity, the luxury life of the high class can be sustained and the social could be basically stable. In Max Weber's stratification standard, according to three standards such as economy (including the occupation of production materials, the distribution of property, and the market opportunity), reputation (the immaterial influences confirmed by the evaluation mode cognized by the public), and power (the ability to dominant others for realizing his own wills and neglecting others' wills) (Max, 2005, P.108), the whole society could be divided into three classes, i.e. the high class, the middle class and the low class. In the Song Dynasty which was in the middle term of Chinese feudal society, the social structure and the system arrangement were basically stable, and these three standards were highly superposed, and one person was basically consistent in economy, reputation and power, and various standards could be translated each other. Rich persons could buy the position of officer and obtain power and reputation, and officials could have privilege and strength to buy lands and obtain economic incomes and reputation.

In the society of North Song Dynasty, the high class included big bureaucrats, big landowners and big businessmen, and the relationships among these people were very close, and some people possessed these three identifications together. The middle class included middle and small landowners, rich dirt farmers, and officials on the bottom layer, and the relationships among them were loose, and the low class included poor farmers, and when the class conflict was very acute and the insurgence happened, they would be united because of common benefits. In the system of absolute monarchy, the emperor grasped all political powers and represented the country in honor, and he should adjust the relationships among various classes, maintain the feudal system and governance order, and he should be treated specially. In the term of Song Shen Zong, the high class expanded increasingly, the middle class shrunk seriously and the survival situation of the low class was very bad, which made the hierarchical structure present thick top part, thin middle part and powerless low class, and the original stable structure of the society had be broken, which directly threatened the social stability and the governance of Song Dynasty (Ye, 1996).

The idea of the reforms of Wang An-shi was to maintain the feudal governance and social stability, and to strive for the support of Song Shen Zong, the tendency of the declining tendency of the high class expanding, the middle class shrinking and the low class collapsing should be restrained, and the basic harmonious proportions among three classes should be gradually recovered to keep stable social stratification structure. The reforms were to restrain the merger, strengthen the strengths of middle and small landowners, and properly improve farmers' economic and living status by various economic strategies and political intervention, which could make the social resources to be allocated reasonably in the feudal system and keep the normal operation of the social production. In another words, the government should ensure the stability of the social structure by rationalizing social stratification structure.

Because economy, reputation and power were highly superposed and easily translated each other, so the relative occupation of any of them changed by the reforms, the stratification structure of whole society would change. The reputation was the feudal grading consciousness, which could not be changed. The core of the economy was the landlordism of production materials, and the power was the basic political system of the feudal society essentially, such as the centralized state power and the absolute monarchy, which could not be changed too. But for the economy and power distribution, some of them could be changed, i.e. under the premise that the feudal political and economic system was invariable, the distributions of the economic benefits and political power of various classes in the society changed a little by the reforms. The Land Tax Averaging Laws and the Qing Miao Laws adjusted the beneficial relationships among three classes by using of taxation system and financial intervention from property distribution to change the relative occupations of various classes for the property. The Market Trading Laws and the Qing Miao Laws could change the trading opportunities in the market, establish economic entities by administrative power, limit and break the monopolization opportunity of usurers and big businessmen, enhance the market opportunities of the government and middle and small businessmen, and make the debtors, i.e. the farmers, to benefit.

In addition, he also opposed the Guan Yin theory (it emphasizes the inheritance and transfer of nobles and officials) and

denied the grading theory of humanity (it emphasized that the born gentle and simple and unequal concepts among peoples), and he thought that individual endeavors and morality culture could change the fate, that opinions could help to break rigescent social structure, promote the flow of the society, strengthen the social energy, and influence the interiors of various classes, but it could not change the power proportion and the social hierarchy structure of all classes. That would certainly weaken the economic powers of big landowners, big bureaucrats and big businessmen, and improve the economic status of middle and small landowners and farmers to some extent, change the proportion of economy, power and reputation of three classes more or less, and change the stratification of the whole society to recover the stable status, so the intention of the reforms would be achieved. Though the reforms failed, and his ideas and measures in the reforms had not change the situation that the farmers were exploited and were in the bottom layer of the society, but the ideas of adjusting the unreasonable social stratification structure and affirming the reasonable social flow would be valuable in the feudal society.

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Good Governance in Bangladesh: *A Quest for a Non-Political Party*

Approach

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Abstract

This paper discusses the problems and issues on the political failures in Bangladesh and seeks to suggest some possible solutions. The approach here is analytical mostly reviewing current news, reports and other related materials. A comparative study is also carried out between the present and proposed system to get a quick glimpse on the overall situation. The idea here is to identify reasonable and practical solutions that would yield better result for Bangladesh and bring about positive changes in the political scenario that would allow the country to move forward as a successful and dignified nation. The author has kept the scope of this paper limited to political party, elections, governance and constitutional reforms.

A great deal of references is used in the thesis from the Constitution of Bangladesh as it is the highest source of guidance for our government. While doing so, some weaknesses of the constitution have been detected and some corrections are suggested where deemed appropriate. Examples of some gross violation of the constitution by the political party based government have also been discussed.

Keywords: Politics, Good Governance, Economics, Bureaucracy, Corruption

1. Introduction

Since its emergence as an independent state, Bangladesh has not been very successful with democracy. The nation have repeatedly stumbled with the political system and had to confront chaos at different intervals. This gives us an indication that we must be doing something very wrong for which we continue to fail in our struggle to achieve a peaceful democracy.

The government is expected to be good. But now a day we have a buzz word “Good Governance” to separate the “Bad Governance” under some criteria. So what is “Good Governance”? The terms “governance” and “good governance” are increasingly being used in development literature. According to Wikipedia – the free online encyclopedia, governance is described as the process of decision-making and the process by which decisions are implemented (or not implemented). Hereby, public institutions conduct public affairs, manage public resources, and guarantee the realization of human rights. Good governance accomplishes this in a manner essentially free of abuse and corruption, and with due regard for the rule of law.

As per United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), good governance has eight major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.

This thesis is the ultimate outcome of the understanding of the problem resulted in an attempt to show a way out from this political mess. According to author’s judgment, the root cause of this problem is the “Political Parties”, and the author attempted to show and prove the direct link to bad governance to political party based governments. Therefore, the author’s attempt here is to justify the points through sound arguments and on the basis of evidence that is available on hand.

2. The Constitution as a Foundation

Since the constitution is important for our government as a guiding force, it is therefore important to analyze this document to determine what guidance is there for us to achieve good governance in Bangladesh and what tools and mechanism is advised. This a readily available document but not widely read and very much neglected by the political

party members, as a result we notice random violations once in a while in the daily politics making local news headlines often.

The constitution is a very simple to read document and the concepts are quite clear and straightforward. The preamble of the Constitution of Bangladesh begins with the proclamation of independence to establish the independent, sovereign People's Republic of Bangladesh; pledging that the high ideals of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice shall be fundamental principles of the Constitution.

The fundamental aim of the State is to realize through the democratic process to socialist society, free from exploitation-a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens and affirming that it is our sacred duty to safeguard, protect and defend this Constitution and to maintain its supremacy as the embodiment of the will of the people of Bangladesh so that we may prosper in freedom and may make our full contribution towards international peace and co-operation in keeping with the progressive aspirations of mankind.

Although all are written in fine prints and the constitution has been there in vogue since 1972, but as a citizen of the country this is the first time researcher read the document. In other words, our educational, political and social systems do not give our citizens and students to familiarize themselves with this valuable document at any stage of their academic life; whereas, in reality, this constitution is the prime source of guidance for leading the nation. It is a duty of every citizen to know what is in the constitution. Unaware citizens are unable to monitor the activities of a political party based government.

Fortunately, the researcher for the sake of thesis, reading of the constitution was taken up voluntarily. For clarity, let us review some of the passages from the constitution to understand the importance of this document and what it really contains.

“21. Duties of citizens and of public servants.

(1) It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property.

(2) Every person in the service of the Republic has a duty to strive at all times to serve the people...”

“Supremacy of the Constitution.

(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.

(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution and other law shall, to the extent of the inconsistency, be void.”

From the above passages we can see that the constitution is regarded as the source of laws and the civil servants are instructed to strive to serve the people. The constitution acknowledges that the people (which include the politicians) are the source of all powers in a republic through solemn expression of the will of people. And any contradictions with the constitution are void and not to be tolerated.

Strangely enough, the existence of this foundational document is little known to the citizens and is kept hidden by not promoting the document and the message in it. Even many members of the rank and file of the government are no better than the common citizens as they too do not know what is in the constitution for the same reason as they too are the product of the same educational system. They run the government without knowing the constitution. It says further -

“11. Democracy and human rights.

The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured...”

Unfortunately, the process of electing the representatives in the administration is questionable as the people elected do not always represent the people's desires and expectation at all levels as it is hoped for in the constitution. As a result, fundamental human rights, freedom and respect of the human person are not properly upheld. The people in power no longer consider themselves as the “representatives” of the people, rather they begin to think and act like owners of the people and the government resources.

The constitution covers and addresses the areas of exploitation of general workers, provision of basic necessities, right to guaranteed employment, right to reasonable rest, right to social security, etc. But the ruling power in the successive governments seem to hide all these matters from the citizenry as if they do not want the citizens to know what their government is obligated to do and what they do instead. Is it not the political party based government that deprives the citizens of knowing their rights and duties towards their nation so that they could take advantage of citizen's ignorance? Otherwise, why are we not introduced to the constitution at our educational institutions during our school years?

According to Sami (Note 1), the constitution of Bangladesh provides for a parliamentary system of government with a unicameral legislature on a modified Westminster model (i.e., the British model). The members of the legislature (the Jatiyo Sangsad or the National Parliament) - are elected by universal adult suffrage. A member who the President feels commands the confidence of the majority in the parliament is invited to be the Prime Minister. The cabinet is headed by the Prime Minister who selects the ministers to be appointed by the President. The President is the head of the state and 'executive actions' of the state are taken in 'the name of the President'. But 'all executive powers' are vested in the Prime Minister. The constitution provides for a powerful and strong Prime Minister and the presidency is largely a ceremonial office. In the exercise of 'all his functions' except for the appointment of the Prime Minister and the Chief Justice of the Supreme Court, the President is obliged to act in accordance with the 'advice of the Prime Minister'. The President can not dismiss the Prime Minister; he does not have the powers to dissolve the parliament, except on the advice the Prime Minister. The President is the Supreme Commander of the Armed Forces. He also has the prerogative of mercy and can grant pardon, remit, suspend or commute any sentence. In these areas too he acts on the advice of the Prime Minister.

President's service is limited to two five year terms, but in case of the Prime Minister (PM) there is no limit to service, whereas the Prime Minister is more powerful than the President. Therefore, the PM ought to be a person of dignity and honor to be able to ensure good governance. But unfortunately, no qualifying criteria are laid down in the constitution for this post.

3. The Structure of Government of Bangladesh (GoB)

Every modern state or a nation has a government. A state is a politically unified people occupying a definite territory. The elements of the State are: Population; Territory; Government; and Sovereignty.

Government is the political direction and control exercised over the actions of the members, citizens, or inhabitants of communities, societies, and states; direction of the affairs of a state, community, etc. Government is necessary to the existence of civilized society. Without government the people will be just in a situation of a babel with no cohesion and means of collective action. Every modern state or a nation has a government. A state is a politically unified people occupying a definite territory.

The government of Bangladesh is setup following the western model of democracy. Modern government may broadly be classified into two types: Despotic and Democratic. Bangladesh is a democratic government with a Federal - Parliamentary system under the dominance of the Prime Minister. However, the practice of this parliamentary democracy is questionable in Bangladesh as the so called "checks and balance" is next to nil in a political party based government as we will see as our discussion progresses.

The Legislature, Judiciary and the Executive are the three major power structures in Bangladesh government system. They are independent from one another and supposed to function independently without any political influence. But in reality we find a lot of interferences by the political party based governments in these governmental organs influencing the decisions and policies by political interest groups.

Similarly, in all the power organs of the government is influenced by the political groups taking advantage of the system exploiting the national resources to their advantage. The so called "Separation of Power" doesn't really work in Bangladesh as the appointments at the top levels are given by the party in power positioning the candidates of their likings as we have seen and discussed earlier.

Discussion on different power organs of the government is done below to understand how they were meant to work and what the situation actually is. The comparison of "theory and practice" will continue throughout this paper.

The theoretical diagram (Figure 1) gives us a neat image of the governance, but the reality is every sector of the power separations are influenced by the political party in power. No matter which party comes into power the scenario is the same.

Since the Ministers of each ministry are appointed by the political government in power, they tend to empower their best men in political connection regardless of their background and qualifications. All the high level appointments like the Chief Justice of the Supreme Court as done on political influence. Therefore, neutrality of the government is grossly compromised from the very beginning of the governmental setup after each election by the winning party without any exception.

The lower level elections (i.e., Parishad, Upazila, etc.) are also largely influenced by the government in power favoring their own party member so that they get to get elected. The purpose behind this is to have a group of people in the government who are like minded and who would not oppose to any decisions the government makes regarding policies and developments. Under this setup, all decisions taken and passed by the government in power would look like democratic and as if they are supported by the people; whereas in actuality it is done by their closed knit network.

The overwhelming power control from the top to bottom disallows the middle bureaucrats to function independently and neutrally as they were supposed to. Moreover, to minimize resistance at the bureaucratic level the civil service recruitments are also politicized favoring party supporting candidates to come and work for the government; thus destroying the core concept of checks and balances in the government organs. These gross manipulations of power gives the party based government a supreme authority in every sector totally unchallenged by anyone. Even the opposition political parties become victim to this power setup and fail to operate democratically and cannot raise voice of any opposition. Now the scenario is such that even in a redefined state system the matter is unresolved where the Local Government, Private Sector and the Civil Societies are considered active partners in power checks and balances.

The local governments are mostly elected under the favored umbrella of the political party in power. Similarly, the private sector people are also greatly influenced by the political parties as many development projects done by the government is used as a bait to keep the business people under their dominance. It is very common in Bangladesh to see the business people belonging to political party influence taking the major share of the tender based development project allocations. In return, they are loyal to the political parties in power by offering generous donations and handouts at the time of elections and power struggle. This is how the looting of the state takes place. Finally, the Civil Societies are the only opposing group that remains in a position to oppose the government, but they are so small compared to the whole picture that they hardly have any impact in any decision making process.

3.1. The Executive

Part IV of the Constitution deals with “The Executive” where the powers and duties of the President, Prime Minister and Ministers are outlined (Figure 2). One point worth analyzing that in the Constitution, the masculine gender is used for the President and the Prime Minister, which is considered a “sexist expression” today but it was not in those days. The masculine expressions are shown in the passage below quoted from the constitution with an emphasis by the author -

“48. The President

- (1) There shall be a President of Bangladesh who shall be elected by members of Parliament in accordance with law.*
- (2) The President shall as Head of State, take precedence over all other persons in the State, and shall exercise the powers and perform the duties conferred and imposed on **him** by this Constitution and by any other law...*
- (4) A person shall not be qualified for election as President if **he**-*
 - 1. is less than thirty-five years of age; or...*

57. Tenure of office of Prime Minister

- (1) The office of the Prime Minister shall be vacant -*
 - 1. if **he** resigns from office at any time by placing **his** resignation in the hands of the President; or*
 - 2. if **he** ceases to be a member of Parliament...”*

In other words, a female candidate is barred from being the President and Prime Minister of Bangladesh. Therefore, Khaleda Zia and Sheikh Hasina are illegal Prime Ministers and unconstitutional. In order to legitimize their presence in the government we must rewrite the constitution and neutralize the “sexist expressions”. When the constitution was written the word “he” meant a male and “she” meant a female. And during those days no one anticipated that Bangladesh would ever have a female President or Prime Minister. Therefore, it is no mistake from the part of the authors of the constitution. They acted upon what was prevalent and acceptable in those days. Only in our modern times due to power sharing struggle between the male and female, we are facing problems with these words when dealing with women empowerment. Traditionally, women were seen as the home makers not competing with men in power struggle. Eliminating the gender based terms would not eliminate the universal truth and natural biological differences between a man and a woman.

The President is the supreme leader the Executive organ, but still according to the constitution the PM enjoys most of the power and is allowed to act in reference to the President if needed. The President on the other hand does not normally take any decision without consulting with the PM. Having so much of power for a select position that normally comes from a political background is a question of debate, which in turn selects or recommends other ministers in the Executive organ. The process leaves ample room for the political parties to position the people of their

liking without being challenged. It is a serious blow to accomplishing a government with expected checks and balance in power.

3.2. The Judiciary

Part VI of the Constitution explains how the Judiciary should be setup. The diagram (Figure 3) briefly describes the structure of judiciary and its functions. The constitution envisages the separation of the judiciary from other organs and this is important to make a nation functional. The clause no. 22 of the constitution sums this as -

22. Separation of Judiciary from the executive.

The State shall ensure the separation of the judiciary from the executive organs of the State."

The past successive governments have demonstrated how the political party-based governments ignored this constitutional mandate and openly violated it without any opposition. Only during the Care Taker Government (CTG) the judiciary has again been separated from the influences of the other organs.

"The notion of separate and independent judiciary is one of the cornerstones of our Constitution. The separation of judiciary from the executive became finally operative from 1st November, 2007 when care-taker government formulated relevant rules and made amendment to the Code of Criminal Procedure (Amendment) Ordinance, 2007 is a response to apex court's twelve directives in the historic Masdar Hossain case. The implementation of separation of judiciary is fulfillment of a constitutional obligation that was a long overdue and is largely seen as outcome of our judiciary's proactive stand as successive political governments failed to realise this much needed constitutional mandate..." (Note 2).

This example shows how vulnerable we are as a nation where we are not even aware of the governmental activities and how they manipulate the citizens in the name of 'democracy'. The political governments always try to keep all the power control to themselves for easy manipulations without being subjected to any suspicion. For instance, the Chief Justice is an appointed position by the elected government, which is one of the steps to control the Judiciary indirectly. There is no guarantee that the appointed person would not be politically biased and be neutral. Through these positioning in the power structure the political government manages to give a blind eye to the constitution knowing very well the common citizens are ignorant about the constitution and their nominated Chief Justice is there to shield them. This message is reflected on the quotation below:

"The existence of a judicial system as the ultimate interpreter of the Constitution and the Law is an indispensable feature of a democracy governed by Rule of Law and not by Rule of Power. Judiciary, therefore, operates through Rule of Law for protecting legal and Fundamental Rights...It is neither the Cabinet nor the party in power but the uniform policy expressed in form of well deliberated laws and regulations made in a transparent manner should decide the issue in resolving those conflicting interests so that the entire community can pursue a common goal, despite their competing interests and values. The only safeguard for democracy is therefore the Rule of Law. It is the judiciary which is the final arbiter in enforcing the Rule of Law. When the government of the day tends to break or bend the law breaking its oath, causing imbalance in the system of governance. If the executive and the political power wants to wield its absolute power, it can push it as far as it can go by neutralizing the judiciary through allurements or intimidation or packing the court with nominees of one's own choice. Once they are allowed to do so this becomes not only the end of democracy but also likely to result in the break down of all institutions leading the country towards a chaos and anarchy." (Note 3).

3.3. The Legislature

By definition, the Legislature (Figure 4) is deliberative bodies of persons, usually elective, who are empowered to make, change, or repeal the laws of a country or state. It is the branch of government having the power to make laws, as distinguished from the executive and judicial branches of government. This is the hub of the political majority where most of the positions are held by the political party selections disguised in elections.

The Parliament is one of the important components of the legislating body in the government. The Constitution says the followings about the Parliament:

"65. Establishment of Parliament

(1) There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic: Provided that nothing in this clause shall prevent Parliament from delegating to any person or authority, by Act of Parliament, power to make orders, rules, regulations, bye-laws or other instruments having legislative effect.

(2) Parliament shall consist of three hundred members to be elected in accordance with law from single territorial constituencies by direct election and, for so long as clause (3) is effective, the members provided for in that clause; the member shall be designated as Members of Parliament.

(3) *Until the dissolution of Parliament occurring next after the expiration of the period of ten years beginning from the date of the first meeting of the Parliament next after the Parliament in existence at the time of the commencement of the Constitution (Fourteenth Amendment) Act, 2004, there shall be reserved forty five seats exclusively for women members and they will be elected by the aforesaid members in accordance with law on the basis of procedure of proportional representation in the Parliament through single transferable vote :Provided, that nothing in this clause shall be deemed to prevent a woman from being elected to any of the seats provided for in clause (2) of this article.*

(4) *The seat of Parliament shall be in the capital."*

Since this is the main power hub in the government, a fierce competition of power struggle between the political parties is witnessed at this phase of the election. The political government in power tries their best to remain in power by hook or by crook. A similar situation was witnessed during the end of last political tenure where the power struggle between the parties became so immense that the Armed Forces had to intervene to install the CTG. Eventually, a relatively fair election was held under the CTG in 2008, but the result was somewhat disappointing, it was the Awami League (AL) that came to power with a majority in the parliament taking up almost 250 seats out of 300! This means, AL will always be the majority there free to do pretty much anything; and this is not desirable in a democratic scenario. Because, making laws (Figure 5) is an area of the legislature is fulfilled through the parliament (Figure 6). Therefore, any negative influence would have dire consequences for the nation.

It is important to evaluate the laws that were passed during the political party based governments to see how many of them are at par with the constitution and how many of them are violated. But the question is, if the governments is not balanced, and if no one is there to cross check it then who is going to do it?

3.4. *The Ministry and the Bureaucracy*

A Constitutional Body is there to ensure the functionality of the constitution and to protect it from any violations. But what we have seen in the past governments that they are neutralized through politicization by installing their politically influenced employees who give a blind eye to the constitutional violations by the government. During the CTG we have seen that the government tried hard and soul to empower the Election Commission as an independent entity the way it should be under which the election was finally held.

Similar situation was noticed at the Bangladesh Public Service Commission (BPSC) where civil service recruitment was put on hold for unfair recruitment processes on political influence. In a class room discussion meeting with the Chairman of the BPSC revealed that how notorious the government could be at times to force them to give in into their wishes under unfair pressures.

The Bureaucratic structure shown in figure 7 shows the hierarchy and chain of command. This chain of command is pretty much ineffective if the people of political influence are positioned there. Among the political group even if there are some neutral officers, they would not be allowed to function independently. In other words, good and fair officers would be forced to bow down to the political will and influence with an option to face consequences otherwise.

4. **Possible Solutions and Recommendations**

The objective of this paper is not just to talk about the problems, but also to seek out solutions. Focusing on and considering the present scenario of Bangladesh, we now find ourselves in a position where we are no longer sure which path to choose. We have pretty much tried out all the known political systems and have failed miserably with all of them. On the other hand, we do not have much time to invent something absolutely new either. Instead, what we can do is identify the major problems and modify or patch here and there to get our country up and running with a democratic government that would function properly, the way we want it. Some such clues are discussed below.

4.1. *Democracy and the Political Parties*

"Politics" today is just a business. In this business, one just uses the connections through abuse of power to achieve one's goal. Ethics and morality are underrated. As a result we witness the reality of tremendous decline of our ethics and morality in our social, corporate and civic life.

Our policy makers are no longer in a position to offer and maintain a good government as they themselves is no longer good. Therefore, we are now dreaming about "Good Governance" without any clue on how to achieve it. In most cases, we talk about good governance but we do not really mean it or want it. Because a notion has now developed in our minds that "goodness" does not pay. The reason for this change in our mindset is mainly due to absence of "reward and recognition" for goodness and fairness in our performance and absence of proper accountability toward the criminal activities. The famous saying of Martin Luther King Jr. (Note 4)., "*Injustice anywhere is a threat to justice everywhere*" is a blatant truth one can realize and conclude upon. In absence of justice, injustice is now prevailing everywhere. The local newspapers are reporting such news on a daily basis.

We have become so greedy that we do not mind selling our values and morals for a cheap price. We have sacrificed our principles and personalities for material gain hoping to live better. Forgetting totally that none of it would remain if we

lose our precious independence and freedom. What good is wealth when there is famine and starvation all around? How well off are the crooks and criminals who so dedicatedly used their mind and soul for illegal hoarding of wealth? What good is their wealth to them now when they are locked up in jails?

Good governance is not something that could be done quickly as we see in a magic. It takes a lot to achieve the objectives. It takes strong patriotism. This is a realistic dream that could only be fulfilled if certain conditions are met. "Goodness" is a primary requirement before anything good can happen. If we are untrue to ourselves then we are just faking our intentions. Thus the result is "hypocrisy".

Nothing good can be expected out of a bunch of fowls. Their greed has led them to be subservient to foreign preys. We make unfair deals with foreign subjects without even understanding the consequences. Let us take Niko incident for example, where our nation ended up in major loss of natural gas resources for their inexperienced technical faults.

Where do they expect to go when their freedom is curtailed? What good is freedom if we can't do anything? Are they planning to be "refugees" and seek refuge and shelter in a foreign land living like a traitor betraying his or her own nation?

It is now evident that the political parties in Bangladesh are motivated by greed and lust for power and nothing else. Their prime objectives are ascending to power by hook or by crook and then loot the nation left and right. And this process has been going on for decades. According to Choudhury (Note 5), silent majority reckon that our politicians' culture of corruption mainly imprison vast majority of our people into poverty. Our maverick politicians preach moral and democratic values; constantly speak for greater rights for ethnic and religious minorities. They also speak about protecting human rights, reducing corruption and increasing the quality of governance, yet they practice antithesis of these values. In public speeches, they call on the people to practice benevolence, justice and brotherhood, yet they routinely violate these ideals themselves. Political parties are unused to the idea of sharing power and working together.

Following quote from a letter of a fellow citizen by the name Ekram Belal was published on the Daily Star on February 13, 2008 that reflects a dire concern,

"My worry is one of Newton's law of physics which is also applicable to our corrupt politicians and the democratically elected governments. Forces of change will be gone with the departure of this current CTG and the evil forces of inertia will be back and will try to take the country and run it their old way..."

While doing literature review for this thesis work, the author came across with another good article written by Dr. Kamal Hossain (Note 6) under the title "Making democracy work: What we need to do", where he depicted the ugly picture of the political party based democratic system. He admits that we have bitter experiences of how the fruits of victory of our struggle have been lost due to the selfish pursuit of power by the predators. For people to become empowered, and to remain empowered, and to enjoy the fruits of victory, institutions need to be built, and checks and balances established in order to prevent usurpation of power by the predators, leading to disempowerment of people and their continuing dependence. A free and fair election is essential if we are to enable our people to choose honest and competent representatives who would genuinely represent them. But elections alone cannot ensure a working democracy, unless democratic institutions are strengthened and function effectively. A democratic culture enabling active participation by people, tolerance and mutual respect, must be nurtured. Candidates who are put forward by large parties, which are afflicted by the practice of selling nominations to corrupt persons, who see their election to public office as an investment, through which to earn huge dividends. They showed little interest in people's concerns, or in the strengthening or proper functioning of democratic institutions.

The systemic crisis of development of a working democracy has been caused by the injection into politics of arms, money and extremism, thus making politics sick. Sick politics did not feel the need to retain the confidence of the people by fulfilling election promises. Instead they manipulated elections with money and armed groups as reported in the local newspapers, even co-opting election officials and law-enforcement agencies. Political parties became centralized and their process of nomination of candidates degenerated into a form of auction or selling of nominations to the highest bidder. Potential candidates were questioned not about their qualifications or how they were equipped to serve the people but on how much money they could spend in the elections. This is how people became disempowered and growth of democracy was stunted. Political patronage of mafias made violence endemic. Armed cadres imposing their reign of terror in different locations became another ugly symptom of sick politics. Mafia-like structures spread through the country and the word 'godfather' found its place in common parlance even in the countryside as small arms continued to proliferate, with the connivance and protection of powerful coteries.

The police were prevented from taking action against such protected armed cadres in campuses and other arenas, as they were compelled to enforce law in a partisan manner, harassing and persecuting the poor and vulnerable and the political opponents of the predators in power while extending impunity to their protégés. Land grabbers who enjoyed political patronage deployed police to forcibly occupy lands and also to evict poor slum dwellers who comprise some forty per cent of our capital city's population.

The law-enforcing agencies were also misused by those who practiced sick politics to patronize and protect extremist elements. Acts of terrorism were routinely covered up, investigations delayed and effective law-enforcement obstructed. There can be no rule of law where there is selective enforcement of law and the injection of the virus of “dolliokoron” (meaning grouping) into national institutions responsible for law enforcement and national security.

Armed cadres and private bahinis (meaning forces) controlled by godfathers, patronized and protected by “political parties” strike at the root of democracy. Democracy cannot work, nor can the rule of law assure security of life, person or property, unless there is comprehensive de-commissioning and disbanding of private bahinis and armed cadres.

Parliament did not develop into a forum for debating and adopting national policies on major subjects, ranging from education and energy to industry and agriculture, nor did it exercise accountability. With a dysfunctional Parliament and a non-accountable government, social and economic change which was a basic national goal, remained neglected.

The time has come to abolish all political parties and ban all party based political activities in Bangladesh. We should accept and move forward with a new concept of democracy that is plain and simple. All we should care about is “One nation, one goal”. Banning of political parties would resolve 80% of our political problems; the remaining 20% can be handled by amending the constitution to accommodate the new system.

In absence of political parties, there will be no political candidates. Therefore, there will be no need for any political elections for candidates. Chowdhury (Note 7) wrote in an important article with the title “Blueprint for democracy” appeared on the Daily Star on February 15, 2008 where he said that the success of democracy depends on various factors. Education is perhaps number one on the list; then comes human rights. This would include freedom of expression, right to information, tolerance for each other's philosophies, and rule of law. All these factors have to come together to bring success to democracy.

Having an elected parliament and a cabinet does not mean democracy. Democracy has to be established at every level. It is not possible to discuss and solve all problems in a national assembly or parliament. Some of them must be dealt with at local level. This is what we call “local government.” Besides, the essence of democracy cannot be practiced by those who do not follow democratic principles within their own parties.

The civil service is not the government. In a democratic society, the government is elected by the people (government of the people, by the people, for the people), and the civil service provides support and assistance to the government in the implementation of policies.

The civil servants at local levels must provide service to local governments in the same way that the Bangladesh Secretariat at Dhaka provides the support service to the national government. In this article we shall discuss two issues -- democracy within political parties and democracy at local government level.

The events of 1/11 have taught us a lot. We do not want to go back there. God has given us an opportunity and we must make best use of it. We must achieve fundamental changes and put democracy on track so that it does not get derailed again.

It is true that there is no democracy within the political parties themselves and their activities. Therefore, how can they advocate ‘democracy’ when they do not practice it themselves? Thus Chowdhury continues saying,

“First, let us talk about reform in political parties. We do not want political parties to be headed by hereditary leaders. Let not political parties be used as family property...The parties must remain committed to resolving all matters through democratic means. Finally, they must also spell out as to who can or cannot contest an election. Any criminal record should automatically disqualify a person, and the person must also meet some minimum criteria in respect of age, education, etc.”.

At this point, by disagreeing with Chowdhury here, the author likes to advocate for abolishing of all political party activities in Bangladesh. It is clear that the political parties are undemocratic; instead of hoping that they would become democratic and passing laws to make them or force them to behave let's just say ‘no’ to that failed concept. We have done enough experimentation with “democracy” already and it is just a waste of time and effort.

4.2. The Proposed Model

Considering the nature and situation of people of Bangladesh, the best workable solution would be a “Council Based Democratic System”. It means that, instead of elected officials in the government all we need is a group or council of “experts” independently formed to head the respected ministry. For instance, “The Economic Council” will run and monitor the affairs of concerned governmental ministry. “The Agricultural Council” would look after the affairs of the Ministry of Agriculture, and so on.

The graduates of all the universities would automatically become members of the respective councils and they would have their own elected or mutually selected or nominated board members for a term, say five years. Non graduates or

graduates of other disciplines who are interested in becoming a member could be allowed membership to ensure participation and contribution in the area.

The routine council sessions will be held at the parliament house in regular intervals and will be broadcasted through our media of all kinds, so that the members' at large or distant members could also participate in decision making process for the nation.

The idea is similar to the "Citizen Council" suggested below, but only better -

"To counter a single party or a powerful leader from monopolising power, a modified form of Athens Council may be in order. Besides voting for the candidates of different parties, a Citizen Council composed of prominent citizens may be formed. This will include civil society members -- academics, lawyers, journalists, business people, union members, and other citizens who want to contribute to public life..." (Note 8).

Under this system, there would be no need for wasteful nation wide elections, and all decisions would be taken in broad daylight through open sessions; meeting agendas and minutes and will be passed on to the concerned ministry for execution or implementation. Figure 8 shows a format of a Council Board that is recommended.

This system would not allow Tom, Dick and Harry to intervene in any democratic processes. Nor will they ever get a chance to hold positions for which they are not qualified. All things will be governed by experts in respective areas in a democratic way. All decisions will be taken on the basis for what is good for the nation. No personal interests would get preference at any point as a parliamentary system will be in place.

The good thing about his system is that the process would be constant and the vision of the nation will be long term and effective. There will be no chance for any interference in long term projects and national strategies, as there will be no change in government, ever. The whole nation will be focused into one single direction and follow a track smoothly without any distraction. This process will replace the Parliamentary Elections.

4.3. The President

We need a national leader or a president. The leader who would be representing the nation could be an elected one, elected by the citizens in open competition. The criterion will be to elect the best among the candidates based on his or her academics, personalities, and other competitive edge they hold and offer. This position could be for a five year term, but would not hold much power in reality. Because, in a council based democratic system, the country is actually run by the citizens behind the scene. A decision of the president would not be required. In fact, the country would function even if we do not have a president! But still, we should have one, who would be our ambassador to the world community.

4.4. Presidential Election

Every five year, there will a presidential election nationwide in an open competition among the interested and independent candidates whose candidature would be approved by the security council of the country after all background check and managed and organized by the Election Commission. This would prevent the crooks and criminals in becoming a candidate. It will be a daylong election day when the eligible voter citizens would cast their votes. The majority vote would bring the successful presidential candidate to take oath ceremoniously.

There will be no other national elections besides this presidential election. All other elections will be held internally within the council members of the respective councils.

4.5. The National Security Council

Under this setup the author suggest for existence of a National Security Council (NSC). An increasing threat of global terrorism as well as from home grown terrorists is now on the horizon that did not exist before. Recently we have witnessed one such incident at the Pilkhana Bangladesh Rifles (BDR) Head Quarters on 25 – 26 February 2009 where almost hundred military officers were murdered in a mutiny. On 29th of May 2009 Prothom Alo reported on the first page that during the period of 2001 -7 about 1300 BDR soldiers were recruited under the political backing. Therefore, can we conclude that the mutiny at BDR was politically triggered to seek revenge on the officers who harassed the politicians during the CTG? If that is really the case, then we are all in tremendous hate crime and the whole country is in terrible danger.

Many countries are now adapting the concept of NSC. Bangladesh too needs to adopt one -

"It is argued that if some institutional structure like National Security Council consisting of civilian and military leaders is constituted, military leaders could have some say in the running of the state power and military officers would be less prone to take over political power directly...It must be mentioned here that General Ershad established a National Security Council consisting of a few senior ministers of his government and three chiefs of armed forces. But Ershad had no commitment to the cause of national security. Ershad's NSC atrophied and soon died...The defense of

the country against direct and indirect international and national forces may be better managed by the establishment of civilian dominated NSC...” (Note 9).

It is recommended that the NSC is formed with the following leaders according to the protocol below:

- 1) The President.
- 2) Chairman, Co-chairman and the Secretary of the Defense Council
- 3) The Chiefs of the Armed Forces.
- 4) The Chiefs of the Law and Enforcement Agencies (i.e, BDR, RAB, Police, National Guard, CID, etc.)

4.6. The Parliament

The Parliament House will be used for regular National Council assemblies. There will be no more fixed or permanent parliamentary committees as we have today. A special committee will be formed at the time of National Council Sessions on ad hoc basis by the respective ministries holding the sessions. In other words, all the entry doors for crooks, criminals and ineligible candidates will be closed for good. Only the competent candidates with proven track records will take office. The President could preside over the meetings or sessions.

4.7. The Local Government

There will be no election at the local level. A government office will be there to handle all activities at the local level where all the citizen / voters living within that area will be members. Any member moving from one location to another must do so by notifying the local government office so that his or her membership could be transferred to new location or jurisdiction of his or her new residency. This way the mobility of a citizen could be tracked, which would eventually help the government in implementing social safety net programs effectively. Now that we have already created a national database of our citizens in order to prepare and issue the voter registration card (which is also our national ID card), through this mechanism the information on the database could be constantly updated.

On February 15, 2008 news appeared on the Daily Star newspaper on local government matter where the speakers at a view exchange meeting said that transparency, accountability and citizens' participation in different development works and in formulation of budgets have become essential for good local governance as well as poverty reduction. They also stressed that self-reliance is needed to strengthen local government and this becomes possible when citizens are sure of good returns. The views were exchanged at the meeting for sharing achievement of Sharique, a local governance program with Inter Cooperation of Care Bangladesh at Nanking Darbar Hall. Sharique program is helping union parishads manage public affairs in a more effective said several union parishad chairmen and members in a special discussion arranged for sharing their experience.

Citizens' participation at the local government level is crucial in national decision making process. Attempts have been made at the root level to motivate and encourage citizens to participate without much success. But in the newly proposed model citizens' participation is a must to run a government. According to standard rule of thumb, for a valid quorum, one third of the total members would be required to validate a meeting or session. Now here we are talking about direct democracy.

The concept of “Direct Democracy” is taking shape around the world. The author has come across with one such website that advocates this concept at <http://www.freewebs.com/platoxxi/index.htm>. It talks about the direct representation of the people through the use of modern technologies that would eliminate use of ‘representatives’ at the local level. We could make this idea a reality. The idea is not really new,

“In addition to challenges to traditional patterns of governance arising from globalization and from the power of networks, there is yet another set of challenges that would produce very different styles of governing. This collection of related challenges all endeavor to deinstitutionalize governance and to more directly involve citizens in making binding policy decisions. The assumption undergirding these ideas is that the public can – and more especially should – have more direct influence over decisions than they can exercise in respective democracy...to focus on citizens themselves as the principal source of governance.” (Note10).

Let the people who knows and understands the issues deeply should be allowed to have their say in policy devising in the council meetings at the parliament. This is one of the ways to go for digital Bangladesh.

5. Comparison of the Two Systems

For simplicity, the author felt the necessity to compare the existing and the proposed systems of governance to get better understanding of the two models. Therefore, table 2 is a given below to understand the difference between the existing system and the proposed one.

6. Conclusion

One may wonder why a system based on the ‘Council of Experts’ is advocated. What is the big deal with ‘experts’? To understand, we need to first understand what the experts do.

Star Weekend Magazine published an article entitled, “Developing Bangladesh through Research” on January 11, 2008 where it is acknowledged that for a developing country research is probably the single-most important tool in keeping a pace with the rest of the world. It's certainly not the most glamorous work in the world, requiring hours of sifting through miles of data and information, making comparisons and coming to conclusions, but at the end of the day, without such research from as varying topics as agriculture, health and migration, all development work would simply fall apart. One organization that has been consistently doing this tedious, and often unrecognized, job for the last 50 years is Bangladesh Institute of Development Studies (BIDS). It is mandated to function as an agency for initiating and conducting study, research and dissemination of knowledge in the fields of economic development, population studies and human resources and other social issues related to planning for national development. BIDS serves as a conduit for dissemination of research findings through its library, publications, website and seminar programs, conducting training and workshops and generally engaging proactively with the broader national and international communities. BIDS researchers also directly contribute to formulation of development policies through participation in government committees and task forces. In short, BIDS serves as a resource centre for the community at large.

BIDS appears to be the ‘one organization’ that carries out research activities on real life issues faced by the nation. But ideally, not just BIDS, the higher learning institutions like the public and private universities were also supposed to carry out research activities and publish them in local and international journals for peer review and use that research outcome in national development. But in reality, we hardly see any research outcome from the teachers and researchers of our universities, which is reflected by Rahman (Note 11) when he said that unless we generate enough indigenous knowledge capital which is also globally competitive, it may be very difficult for us to face this onslaught of global policy intervention. This local knowledge generation has also to be further refined at a higher level called research. Research is one area which has been thoroughly neglected in Bangladesh. The universities in Bangladesh are producing too many artificially intelligent young persons who are not interested in questioning the world around them. They do not abstract theoretical ideas from the reality and apply the theory in explaining the reality.

Very few of our qualified academicians and researchers participate in international symposium, workshops, seminars and conferences. Part of the reason could be that not much of opportunities and financial help are offered in that area. Besides, under a political based government system most of the international participation invitations are passed to the party members who just attend those programs with an empty head and bring back nothing for the nation. They see those as an “opportunity for foreign trips” missing the actual point for the visits. In other words, under a political party based government system true and qualified people are left out of these opportunities, which is a matter of great shame and loss for the nation.

Many of the foreign PhD scholarships are given to civil servants where as they were mainly intended for the university teachers. PhD track is normally an academic track to prepare a academician or an educator to officially prepare for a research work that normally spans for anywhere from two years to six years attempting to contribute to knowledge in a area that has not been addressed before. It is a serious commitment and requires full focus and attention. Therefore, these scholarships should go to the college and university teachers who are appointed and hired to do research work and develop effective teaching methodologies.

A PhD degree would not make an administrator to perform better in civil service. However, if the civil servants are engaged in research and development works in a governmental college or institutes then they should go for PhD's to better prepare them in their research work.

A research takes time, energy and resources. If the country does not support or backup our potential researchers, then the interest would not develop in the minds of our promising citizens. The developed countries spend a huge amount of their financial budget in research activities. And that is how they maintain their competitive edge in the world competition not only resolving their own problem, but also the problems of other countries.

No one would understand and address our problems any better than we would. Therefore, it is important to engage our own researchers in resolving our own problems. A local consultant would be the best consultant. Rahman expresses the same view when he goes on saying that with changing economic and social conditions, the focus gradually moved to many areas relating to globalization, macroeconomic issues, agriculture and rural development, water resources management, poverty and inequality, food security, microcredit, health, nutrition, education, energy, environment, gender, empowerment, migration, urbanization and other development issues. BIDS with a Parliamentary Charter which gives it wide and effective autonomy in the choice of research issues can make important contribution to the national policy agenda. The research output of BIDS provides valuable input to the policy makers and development practitioners for designing appropriate development interventions. The contribution of BIDS to the country's development process, however, remains contingent upon the choice of relevant agenda and proper use of its research output by the end-users. The gap between research and policy making has historically remained quite significant in Bangladesh.

The idea is to spread the research activities under the control of all councils and ministries for various fields instead of centralizing it under BIDS alone. Different councils will publish their own journals (e.g., The National Journal of the

Economic Council) consisting of the best research outcome that could be considered in the council sessions for policy making. We could use the information technology to make the research outcome available for the public to see and review them online. BIDS along with the Public Libraries and universities could play an important role of facilitating the researchers by arranging and supplying reference materials through their existing library facilities on membership basis.

This arrangement would eliminate any possibility of influence in research and idea generation. In absence of political influence, there will be no secret or unwanted interference.

G.M. Quader was a Member of the Parliament who wrote on the actual scenario of the political party based democracy system under the title "Dilemma of democracy" where he said that, since independence, the people of Bangladesh had always held the aspiration of practicing democracy. The country started with parliamentary or ministerial form, changed to presidential form, to one party rule, to extra-constitutional rule through proclamation of martial law, to multi-party presidential form again, to extra-constitutional rule through proclamation of martial law again and finally to parliamentary or ministerial form. National election for the 9th Parliament was scheduled for January 22, 2007, to be conducted under a caretaker government (CTG) formed for that purpose. But, before the election date, it became obvious to all that the BNP-led four party's alliance in power had set the stage for a manipulated election to come back to power through fraudulent practice. Nationwide protest continued under the leadership of the combined opposition parties (all parties other than parties in the ruling alliance in 8th Parliament), with widespread violence for stoppage of that election.

Ultimately, the armed forces had to intervene, and that election had to be postponed, on January 11, 2007. The question is, why, and under what circumstances, did democracy fail? Judging from different political activities during the period from 1991 till postponement of election for the 9th Parliament on January 11, 2007, it became obvious that there had been a continuous downslide of values in our political culture.

An ever-increasing gap was created between political parties and the people. Political parties, instead of becoming the people's property, became the property of an individual or a group of individuals. The parties, instead of working for the people, were devoted more towards personal and group interest, even in most cases at the cost of public interest.

In a way, it might have been termed as corporate culture in politics. Political parties took on the hue of a business enterprise, with ownership of a person or a group of persons. Offspring or family members could inherit the ownership of the party. The situation in some political parties was such that the ownership could be sold. Different positions, including policy-making positions, of a party could also be purchased.

Like a business house, the party used to be run by the party chief as chief executive, with the rank and file as employees. The aim of politics became financial profit. Winning an election by hook or by crook to go to power and earn money through corruption and by abusing official authority became the natural consequence of the said corporate political culture.

Power oriented politics led political parties to a rush for grabbing state power, where the interest of the people and future of the nation bore no consequence at all. All mechanisms for manipulation of election results by use of money, muscle, official authority, bribe, politicization of administration etc., became part of the game of politics. The other consequence was refusal to accept defeat in the election because of irregularity, as that was more or less there in almost all cases.

One of the prime causes for existence of corporate political culture in our political system is the election and, to be precise, the way it is conducted in Bangladesh. There are sufficient election laws, regulations, codes of conduct etc. for conduct of a free and fair election. But, unfortunately, in reality, there are no effective means for implementation of those laws. There exists enough scope to influence election results with use of money and muscle power.

The majority of the population is poor and still illiterate. Moreover, there are lapses in providing security to the lives and property of common people. This added to inefficiency, corruption, and partisan attitude of the conducting officials made it possible for people with big money and muscle power to snatch the result in their favor by influencing through fear and favor.

If a person having muscle power could earn enough money using the same, he could become a potential candidate with high prospect of success. So could corrupt businessmen and corrupt bureaucrats with sufficient money. Violent and corrupt criminals became the target for recruitment by the political parties, as they were good at winning elections.

When they were recruited in a party in key positions, they took control of the party in time. It was they who inducted corporate political culture in parties, with an aim to gain financial profit. Ascending to power is, for them, creation of scope to achieve that goal. These people never had any scruples, so they did not see reason not to use illegal or unethical means to win election for going to power. They also see no reason not to abuse state power, once acquired, to earn personal profit through corruption and irregularities.

This new breed of so-called politicians may be good in winning elections, but lack background and education to perform as good parliamentarians. They could never be expected to perform in government positions to serve the people properly with honesty and dedication.

So, the dilemma of our democracy at the moment is that the person who manages to be elected to parliament is not fit to perform in parliament or in government. On the other hand, a person who is capable of becoming a good parliamentarian and could serve the government efficiently is not good at winning elections. To have sustainable practice of democracy associated with good governance a solution must be found to break the deadlock created by the said dilemma, points out Quader (Note 12).

The democratic systems we have today are actually a “deception” and are meant to cause fractions in a nation, not unify it. Besides, different countries have different kind of democratic systems anyway! So, we should have it our way.

“Bangladesh's political scene has been tumultuous since independence. Periods of democratic rule have been interrupted by coups, martial law, and states of emergency.

There is a proverb in Bangla which loosely translates into: If you have two Bengali's you will have three political parties. This is kind of evidenced in the existence of over 100 political parties. Most of these are small, fringe parties formed mostly by a small coterie of like minded intellectuals or politicians who usually have broken away from larger groupings...” (Source: http://www.virtualbangladesh.com/bd_politics.html).

The idea of “grouping” is fatal for us. Grouping divides and leads to conflicts. As a single nation of Bangladesh, we should do away with all the groupings and unite under a single philosophy, which is best for all of us.

The Awami League (AL) party has won the Members of Parliament (MP) elections overwhelmingly taking up almost 250 seats out of 300, which means there will be an imbalance in the Parliament as the opposition parties will have no power to exercise there anymore. The session quorum will not be affected and any decision taken by the majority vote by AL will pass even if the whole opposition walks out of the Parliament, which is not good.

We are already witnessing the power play of the AL government where they are attacking the opponent party members killing and looting their houses in the rage of revenge for the past incidents. We have also seen the attempt of the AL supporters to influence the local government elections. More and more power play will be seen almost in every sector of the government and business as the time passes. This is inevitable under a political party based government system.

It is very common to see the winning party when they ascend to power tries to nullify many decisions taken by the earlier government. This rivalry attitude in the political party based government takes the nation backward instead of taking it forward.

In order for Bangladesh to accommodate the suggested changes, the Constitution would have to be modified. A thorough exposure and propaganda of this concept would have to be done to earn peoples support as this concept will face fierce resistance from the political parties. They would not want to accept this change. Some bold step may have to be taken to get this implemented as H. M. Ershad did. Sami (Note 13) reminds us by saying that in 1991, when the presidential system was discarded, it was incongruously decided to retain for the Prime Minister some executive powers and establishments of the Presidential system as well as some trappings of the presidency. Some of these measures were innovative creations of President Ershad to perpetuate his dictatorial strangle hold on the civil and military establishment at the expense of the powers of other ministries. Most of these are not compatible with the temperament of traditional parliamentary system and are unfriendly to the concept of joint cabinet responsibility and authority.

There have been calls for the “Review of the Constitution” by many. One such editorial was published by Rashid (Note 14) who said that Chapter IIA of the constitution, that envisages a non-party caretaker government between the elected outgoing and the incoming governments, was incorporated in the Constitution in 1996 because the political parties could not trust the ruling party to hold parliamentary elections.

The functions of the caretaker government are enumerated in Article 58D where, in case of necessity, the government can make policy decisions. Furthermore, since this caretaker government was installed under unusual circumstances during political turmoil, chaos and lawlessness, it has to fight against what the government has recently described as the 3 Ms -- Money, Muscle and Misuse of power. The Constitution had undergone 14 amendments as of today, and these amendments have changed the Constitution of 1972 so much that it has lost the substance, spirit and character of the Constitution of the founding fathers.

The first severe knocking-blow to the Constitution came in 1975 when the system of government was turned into presidential from parliamentary. This constitutional change from parliamentary to presidential, and making a one party-state, destroyed the fundamentals of the 1972 Constitution.

Successive military regimes under martial law had also amended constitutional provisions as they wished through Presidential Orders or Proclamations. The Constitution is based on certain expected assumptions and conduct from office holders. Those expectations had been totally ignored in practice in the past. The ruling party leaders did not

interpret or use the provisions of the Constitution in good faith. The 37 years of governance has demonstrated the pitfalls and deficits of the provisions of the Constitution. Some of the amended provisions are totally against the democratic norms of the Constitution and need to be deleted. What is imperative is that provisions of the Constitution must be made explicitly clear, with checks and balances on the separation of powers among the organs of the state executive, legislative and judiciary.

Simply said, the government runs the administration, parliament enacts laws and judiciary interprets the laws. Each organ has its own limits of power enumerated under the constitution, and that is the essence of constitutional democracy in a Republic.

Everyone agrees that the present Constitution needs drastic revision in the light of our past experience, and should take into account the political, social and cultural environment of the country. A Constitution is not a "one size fits all" phenomenon, which can be transplanted in the country from another country. In this context, the setting up of a Constitution Review Commission calls for urgent attention for national interest.

Bangladesh simply does not meet the basic criteria for a political party based democratic system for many different reasons as discussed above. Therefore, this concept should be totally abandoned. To ensure Good Governance in Bangladesh, we must take the non-political party approach. The idea here is, if the echelon is cleaned and remains stable then the remaining branches would also enjoy a better outcome. Elimination of party based politics would yield multi-dimensional benefits for the country and its people as discussed above. The main objective is to give something useful and meaningful to the nation that could be seriously considered for implementation at a turmoil situation as we are facing today.

The author fears that Bangladesh is going to make the same mistake again if no new directions are shown. Therefore, this paper is intended to serve that purpose. Further research and a dissertation at the PhD level can be undertaken on this subject. But at the master degree level thesis the author could only have the liberty to venture up to this level. Finally, the author intends to end this thesis with a quote from Groucho Marx (Note 15) –

"Politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly and applying the wrong remedies."

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Notes

- Note 1. C M Shafi Sami, The author is former adviser, caretaker government and former secretary and ambassador.
- Note 2. Dr. Abdullah Al Faruque & ABM Abu Noman, Authors are members of faculty of law, University of Chittagong.
- Note 3. M. Amir-Ul Islam, The author is senior advocate Bangladesh Supreme Court.
- Note 4. Martin Luther King, Jr. (January 15, 1929 – April 4, 1968) was an American clergyman, activist and prominent leader in the African-American civil rights movement.
- Note 5. Anam A Choudhury is a former investment banker.
- Note 6. Dr. Kamal Hossain is President Gonoforum and legal luminary.
- Note 7. Fazlur R. Chowdhury is a freelance contributor to The Daily Star.
- Note 8. Mahmood Elahi is a freelance contributor to The Daily Star.
- Note 9. Talukder Maniruzzaman, the author is National Professor specializing in military and security affairs.
- Note 10. Pierre, Jon and Peters, B.Guy. *Governance, Politics and the State*. Macmillan Press Ltd. UK. 2000. 157.
- Note 11. Dr. Atiur Rahman, the writer is Professor, Department of Development Studies, University of Dhaka, and Chairman, Unnayan Shamannay.
- Note 12. G.M. Quader is a former Member of Parliament.
- Note 13. C M Shafi Sami, the author is former adviser, caretaker government and former secretary and ambassador.
- Note 14. Barrister Harun ur Rashid is a former Bangladesh Ambassador to the UN, Geneva.
- Note 15. Julius Henry "Groucho" Marx (October 2, 1891 – August 19, 1977) was a Jewish American comedian and film star famed as a master of wit.

Table 1. Position equivalency.

Sl.#	New position	Equivalent to
1	Council Chairman	Minister
2	Co-Chairman	Deputy Minister
3	Secretary	Secretary of the Ministry
4	Directors	Member of Parliament

Table 2. The comparison list.

Sl.#	Present	Proposed
1	There is a president with limited power.	Here too will be a president with limited powers.
2	There is a powerful prime minister	Prime minister not required.
3	There are bunch of “ministers” for different ministries.	There will be “Chairmen” (in plural terms) for different councils heading a ministry.
4	There is a presidential election and the prime minister is appointed by the president.	There will be a presidential election and there will also be independent council elections for chairmanship and formation of Council Boards..
5	The president is the Chancellor of all the universities of Bangladesh.	There will be Chancellors for each university. The president would not be the Chancellor anymore.
6	The ministers are appointed by the prime ministers who are not necessarily qualified to hold the positions	Here the chairman will be of the same discipline and would be pre-qualified by his council members with complete background check by the security council.
7	The chairmen of the local government are selected through elections.	There will be no election or chairman at the local government level.
8	The civil servants enjoy a sense of permanency in job.	No such notion will be there. Incompetents will be removed from positions.
9	There is unrest in normal public lifestyle due to strikes (hartals).	There will be no need for any strikes or hartals as there will be no political parties to call for unrest.
10	There are foreign interferences through political parties.	There won't be any. All the people would develop a patriotic feeling.
11	There is open and hidden competition among the political parties to gain and stay in power.	There will be no such “power” to fight for as all citizens would participate in political and democratic process at will.
12	Bangladeshis shows disunity on political grounds due to their personal affiliations with a party even in foreign lands.	Bangladeshis will stay united regardless of their background in foreign lands upholding the dignity and good image of the nation.
13	Every five year before the new election, a caretaker government intervenes and cleans the mess of the earlier party government.	There will be no need for the caretaker government to intervene as only the president will change in every five year term through national elections.
14	When things deteriorate badly politically, the military jumps in to take control and declare martial laws.	Since the system will be run by the citizens without any political party influence, our military would not have to go out of their way to enter into political rescue.
15	There is uncontrolled corruption without any scope for any check to it. Political parties use their power and influence to rescue the criminals belonging to their parties.	There will be no corruption as all appointments will be on the basis of fair competition and on merit. Besides, there will be no permanency of jobs anymore. There will be no political party influence to rescue the criminals.
16	Due to five year term of party based government, many long term projects and plans go wasted when a new government takes over resulting in financial losses when such a project is halted or cancelled.	Since there will be no political motive at any time on any decision taken at the council by the council members; therefore, all projects would get implemented and completed even when the chairman or the board members changes.

Separation of Power: Bangladesh

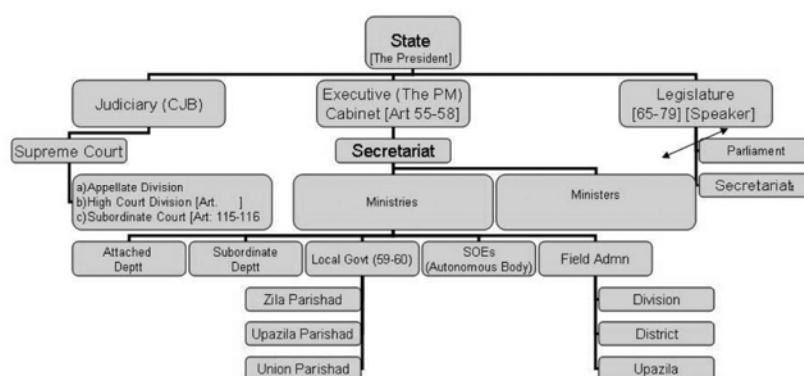
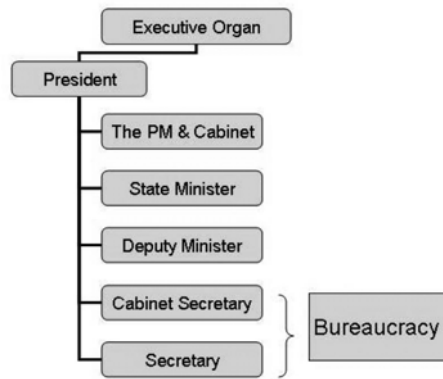
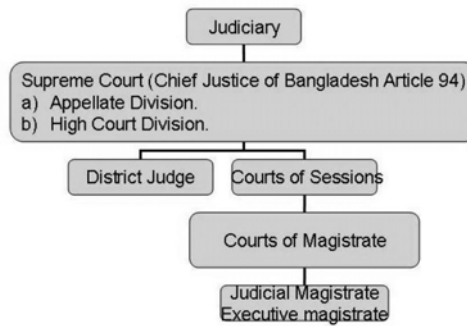


Figure 1. Separation of power between the three organs.



Executive Organ

Figure 2. The Executive Body.



Judiciary

Figure 3. The Judiciary.

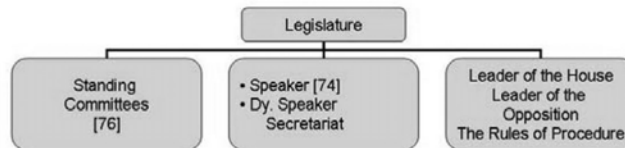


Figure 4. The Legislature.

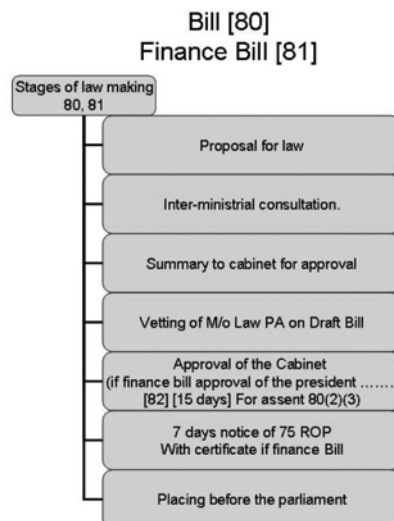


Figure 5. The law making process.

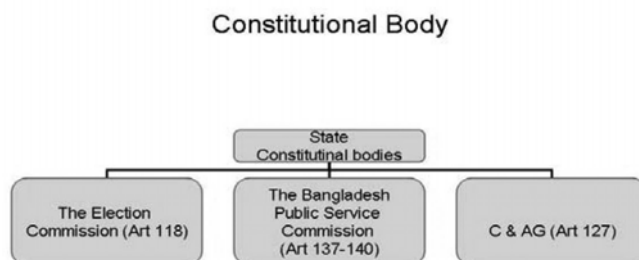


Figure 6. The Constitutional Bodies.

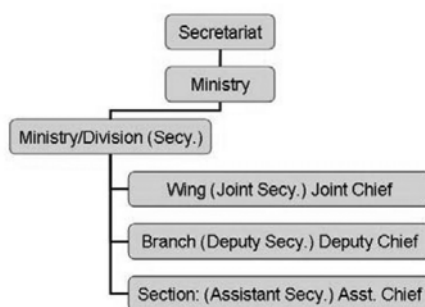


Figure 7. The Bureaucratic structure.

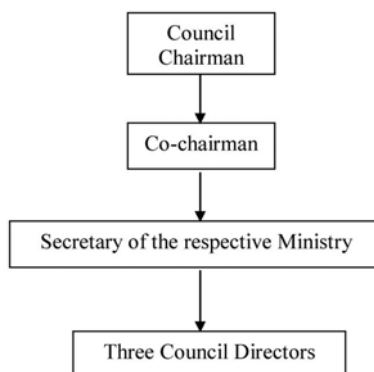


Figure 8. Proposed Council Structure.



Human Nature: the Foundation of Politics and Law

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Abstract

To study the human nature is the most important project for human knowing themselves. Human being has thought and probed into the problem of human nature since the naissance. Unfortunately, although modern human has already achieved great processes and marvelous successes in natural science, the recognition to human nature is superficial. All descriptions about human nature past and now focus on the surface of the problem instead of the essence. This paper points out the puzzle of human nature. By analyzing and illustrating the characteristics of human nature, this paper chiefly discusses the social effect of human nature in perspective of politics and laws. Finally, this paper examines the real world with defects, where the common human nature is ignorant.

Keywords: Human nature, Politics, Law, Humanities and social sciences

To study the human nature is the most important project for human knowing themselves. Human being has thought and probed into the problem of human nature since the naissance. Unfortunately, although modern human has already achieved great processes and marvelous successes in natural science, the recognition to human nature is superficial. All descriptions about human nature past and now focus on the surface of the problem instead of the essence. For human being, "to know self" is the most difficult problem. "Human nature is an unsolvable project. Human nature is fixed in a sense. There is certain law. However, it is complex and changeable and hard to be known. (Lixun Xie, 2006, p1)" Individuals and human do not recognize the self really. Human social progresses need to find and improve human nature. Human social progresses are based on human nature's discovery and improvement.

The potential and unknown meaning is that human nature is the most essential factor in all humanism and social phenomena. "In order to understand problems of human, we must know the human nature exactly and comprehensively. (Xiongshan Tang, 2007, p1)" Without human nature, there is no human society. Without human nature, earth will be an animal world forever. Human nature is a unique and special flag for human society in the universe. Human nature and politics, human nature and law, human nature and economy, human nature and education, human nature and science, human nature and culture, human nature and ethics, human nature and groups (families, parties, and nations), human nature and war, human nature and history, human nature is the key for opening the door of all humanism and social knowledge. All humanism knowledge is about human nature in essence. All social problems are about human nature in nature.

1. The puzzle of human nature

Although humanization has turned into a fashionable slogan and even become a universal world value standard for dealing with humanism and social affairs, nobody know what human nature is exactly. In contrast to human's recognition to the nature, the recognition to human nature is still in a puzzle. In the humanism social science field, human nature does not attract sufficient attentions now. In history, almost no famous thinker or theorist takes human nature as an independent and important project in research. Thinkers and theorists who probe into the essence and laws of human society do not constitute a special and mature branch of human nature. In the ocean of knowledge, there is no widely accepted and influencing theoretical system concerning human nature. The top special research on human nature is that David Hume combines human nature and ethical morals together: "No matter how dull and unpleasant the abstract discussions over human nature are, they benefit practical ethics science. Besides, they can make practical ethics science be more exacter and convincible. (David Hume, ?, p1267)"

Limited recognitions to human nature are full of rooted misunderstandings and bias. From the past to now, the most popular view is on good and evil of human nature. "On Good and Evil" does not offer a detailed, specific, and clear description of human nature. The truth of human nature is not only either good or evil. "On Good and Evil" is limited in reflecting human nature. It does not grasp the essence of human nature. To classify human into the good and the evil according to the standards for good or evil of human nature is naive. Even if we use the standards to evaluate human, seldom people are either the good or the evil. Most are medium. Social conflicts and contradictions are not simply caused by the conflicts and contradictions between the good and the evil. Real conditions are more complicated. Conflicts and contradictions happen between the good and the evil, the good and the medium, the medium and the evil, the good and the good, the evil and the evil, the medium and the medium. Therefore, we can conclude that social

conflicts and contradictions are not caused by the opposite of the good and the evil to a great degree.

From another angle, "On Good and Evil" takes human nature as simple. It agrees that human nature is composed by pure good and pure evil. As a matter of fact, similar to plants' resistance and toxicity, human nature's good and evil is complex and comprehensive and not simple. Plants' resistance and toxicity is determined by complicated chemical components and molecular structure. Human nature's good and evil is determined by complex psychological components and quality structure.

2. The characteristics of human nature

Characteristics of human nature are special marks that distinguishing human from other things. Human being is the most complicated system in the universe. Human is composed of two parts: physiological part as hardware attribute, namely the constitution; psychological part as software attribute, namely the human nature. Therefore, human nature is a systematic attribute of human. Human nature has a systematic level structure. It is in a dynamic and systematic evolvement process.

Human nature has certain structure and special mechanism. We can study human nature by anatomy. To describe the human nature is necessary but it is insufficient. To study and recognize human nature is beyond descriptions, even it is a vivid description. It needs fundamental abstract and analysis. Only by abstract and analysis, we can touch the essence and the truth of human nature.

The basic characteristics of human nature include: according to the evolvement process, human nature is sorted into primary human nature and senior human nature; according to the components and structure, human nature is sorted into basic human nature and complex human nature; the basic dimension of human nature is: reason attribute, will attribute, and affection attribute; the basic internal relationship of human nature is: the relationship between reason and affection, the relationship between reason and will, and the relationship between will and affection. More specific characteristics of human nature are displayed as follow.

Reason ----- Human nature takes reason as the core component. Reason is a belief of exploring, holding, and following the truth and the thinking based on scientific analysis, recognition, and decision. Human evolvement is the next step of biological evolvement. Its core is an evolvement of reason, from primary human nature to senior human nature, from free human nature to self-conscious human nature, from animal wild nature to human reason.

Non-reason ----- impurities of human nature, such as blindness, prejudice, violence, self-indulgence, peremptoriness, sinner, jealousy, suspicious, and cruel.

Knowability ----- Human nature is knowable. It can be observed and known. Although it is unclear, we can make abstract and analyze it as an object, and get useful knowledge.

Hierarchy ----- Human nature has two levels, namely the natural attribute and the social attribute. For human being, the natural attribute is the primary and initial human nature. The social attribute is an advanced human nature. For individuals, the natural attribute is inborn and intrinsic human nature. The social attribute is based on acquired and learning human nature.

Polarization ----- Human nature has two opposite directions. For example, two poles with valuation: the positive human nature is rational, active, healthy, true, good, beautiful, and laborious; the negative human nature is irrational, negative, ill, false, evil, ugly, and lazy. Two poles without valuation: domination and execution, guidance and submissiveness.

Dualism ----- Human nature is different due various roles and situations. In social affairs, human is the participator and the bystander. In psychological activities, human is the subject and the object. It means a dual human nature.

Diversity ----- Human nature is diversified and not single. Human nature may be noble or inferior, pure or dirty, sincere or mean, laborious or lazy, genuine or false, kind or evil, beautiful or ugly,

Asymmetry ----- Every individual and group, as the participator or the bystander, the subject or the object, has different human nature in perspective of sensitivity and intensity. Human nature's asymmetry is similar to the asymmetric input and output of semiconductor. In many circumstances, the asymmetry of human nature is the root for interpersonal conflicts.

Complexity ----- Human nature is composed of multi-dimensional elements by following certain structure, which gives human nature different forms.

Changeability ----- Human nature can be changed. Two ways can change human nature. One is natural evolvement. The other is self-shaping. Changes of human nature follow two mechanisms. One is dependent mechanism, in which human nature changes due to exterior influences and effects. The other is independent mechanism, in which human nature changes due to internal influences and effects.

Interactivity ----- Mutual effects happen in interpersonal interaction, which serve as the base for mutual relationship of

human. Human nature's interactivity is sorted into positive interactivity and negative interactivity.

Consciousness ----- Under the effect of reason, human nature can achieve self consciousness and self awareness, which signalizes the evolvement and progress of human nature. The consciousness degree of human nature is one of factors determining human civilization.

From a wider point of view, we can identify some healthy characteristics of human nature, such as coordination, tolerance, politeness, dominance (include self dominance and other dominance), sincerity, honesty, coziness, restraint, independence, competitiveness, and subjective relativity, and some ill characteristics of human nature, such as cruelty, cheat, false, blindness, lazy, sinner, narrowness, cruelty, adherence, and parasitic. All these characteristics deserve to be studied further.

3. Appearances of human nature

No matter what it is domestic politics or international politics, domestic law or international law, the definition of relationship and right or wrong depend on human nature. Human nature covers the whole human behavioral cycle. Human behavioral cycle includes target → perception → judge → decision → activity → feedback. To enhance and maintain interests is the main principle of establishing the target. Interpersonal relationship concerns all participators' behavioral cycles. Whether targets are in coordination and other rings are in coordination determine whether the interpersonal relationship is in harmony. The divergence of targets mainly reflects people's competition for interests. In political affairs and legal businesses, people usually think that interpersonal conflicts and contradictions are caused by competition for interests, which mainly concerns the occupation of resources and the distribution of rights and wealth. As a matter of fact, except for that point, amounts of interpersonal contradictions and conflicts are not caused by interest-related factors but non-interest-related factors. In human behavioral cycle, the appearances of human nature are multi-dimensional. Any dimension may turn into the inducement of interpersonal contradictions and conflicts, such as suspicious, misunderstanding, illusion, bias, prejudice, peacockery, jealousy, sinner, and ignorance. All these dimensions may cause or deepen interpersonal contradictions and conflicts. Differences in some good aspects, such as habit, tradition, interest, opinion, and hobby, also play roles of arousing interpersonal contradictions and conflicts in colorful social life.

Social contradiction and social conflict are not completely, sometimes are not mainly interest contradiction and interest conflict. As interests are in consistent, lots of contradictions and conflicts, and even serious ones happen among people. In families, nations and sorts of social units, family members and national parties have common interests. All members may hope to maintain and strengthen the common interests. Unfortunately, facts are on the opposite. People who try to sustain and strengthen the common interests fall in conflicts frequently. As a result, all kinds of tragedies are popular in the world from the past to now. Surely, some social members may position self interests at the opposite of others and even give self interests higher priorities. This kind of pure interest conflicts and contradictions are common. However, people may neglect the contradictions and conflicts caused by common interests. This phenomenon should be noticed to a great degree. Parties that fall in conflicts and contradictions for common interests claim that they are representatives of common interests. They have the just reason, the right motive, and the unchangeable will. Therefore, this kind of conflicts and contradictions can not be solved by balancing interests.

For some contradictions and conflicts, things go contrary to wishes. In the society, social members have the same interests with others. Subjectively, they would not like to benefit themselves by hurting others. In fact, they want to benefit both themselves and others. One social member always thinks for others, makes decision for others, orders others, and directs others. In his or her mind, he or she is for others' interests. However, in practical life, contradictions and conflicts between he or she with others happen frequently. They can not live in harmony. The negative effect of mutual relationship is accumulated gradually. For certain serious circumstance, it may hurt oneself and some people for the sake of the other's interests. Even if he or she has the kind motive and even if he or she has the right, the responsibility, and the obligation to help others, he or she should impose self wills and wishes on others. People with high human nature qualities and consciousness can care for others and respect others' wills at the same time. Then, they can get others' understandings and cooperation, avoiding contradictions and conflicts with others.

Individuals' human nature appearances are similar to nations' human nature appearances. To analyze the non-interest factors of interpersonal contradictions and conflicts, we should emphasize on improving the non-interest factors' human nature appearances, preventing, avoiding, and excluding suspicious, misunderstanding, illusion, bias, prejudice, peacockery, jealousy, lazy, sinner, and ignorance. Tolerant and respect others' habits, traditions, interests, opinions, and hobbies, which can help to adjust and dissolve interpersonal contradictions and conflicts in a social micro aspect and national contradictions and conflicts in a social macro aspect.

4. Effects of human nature

All beautiful things and affairs are originated from effects of human nature. So do all ugly things and affairs. Human nature is the ultimate root of all social contradictions and conflicts. Politics and law are results from social

contradictions on one hand. On the other hand, as basic institutions, they are used to adjust social contradictions and stabilize social orders by taking powers and rules as methods. Therefore, according to the progressive relationship from human nature to social contradictions to politics and law, social contradictions are nothing but a medium. Human nature is the logic starting point of politics and law. Human nature needs are the basis for the construction of politics and law. Politics and law are results of human rationality. But they also have irrational components. Fair and just politics and law have restraint effects, adjustment effects, buffer effects, transmission effect, and chain effects on social relationship based on human nature. The ideal goal of politics and law reflects human nature's desire. The essence of equality is the equality of human nature. The essence of freedom is also the freedom of human nature. Originally, the evolvement of human nature determines the civilizing progress of politics and law.

Human nature is the ring of all social relationship. Political relationship and legal relationship are also knitted by human nature. Every political relationship maintains the human nature of people's political status. Every legal relationship maintains the human nature of people's legal status. Therefore, the essence and the core of social relationship is the relation of human nature. The social relationship between one person with another person, one group with another group is the relationship between one person's human nature with another's, and one group's human nature with another's.

Interpersonal relationship, in content or in form, is the contact reflection and the mutual effect of human nature. It is maybe compatible or repellent. Under the common circumstance, the compatible effect merely accounts for one fourth. Only when A's positive human nature contacts with B's positive human nature, can it exert compatible effects. For other three conditions, A's positive human nature and B's negative human nature, B's positive human nature and A's negative human nature, A's negative human nature and B's negative human nature, repellent effects happen. From another angle, the contact effect of human nature is maybe communication or impact. Human nature's repellent effect and impact are causes for kinds of social contradictions and conflicts. Conflicts of human nature are the essence of all political and legal disputes.

The adjustment of politics and laws for social relationship finally result in human nature. Consequently, it benefits some people's human nature and restricts others'; indulges some people's human nature and suppresses others'; protects some people's human nature and reshape others'. In perspective of human nature, the social system has two extreme modes. In one mode, the mechanism of politics and law is based on social common interests. Meanwhile, politics and law are used to regulate and restrict personalities, which may suppress and kill personalities. In the other mode, the mechanism of politics and law is based on social members' free personalities. Meanwhile, politics and law are used to pursue for social common interests. Sometimes, it may hurt social common interests.

There are three kinds of mutual effects among human nature, politics, and law. Human nature has a unidirectional effect on politics and law. Politics and law have a unidirectional reaction on human nature. There is a bilateral alternate effect between human nature and politics and law. In practice, human nature is the backbone of politics and law. In academy, the position and effect of the science of human nature in humanism and social sciences is similar to the position and effect of physics and chemistry in natural sciences. The science of human nature should be the fundamental subject in humanism and social sciences. Therefore, studies of political and legal issues should be combined with researches on human nature. The perfection of political system and legal system should integrate with the perfection of human nature.

5. Conclusion

In the evolvement of human nature, what observers see from the past to now is: the ignorance, disability, and shortcomings of human nature are world-wide and global. The imperfection and insufficiency of human civilization are also world-wide and global. The shortcomings and defects of social politics and legal system are more world-wide and global. The so-called civilization and culture differences between the west and the east are superficial but not in nature. So do the differences of social politics and legal system.

The most sensitive political and legal issue is about democracy and human right. Conditions of democracy and human right are terrible globally. Parties in disputing for democracy or pseudo democracy are in an imperfect democratic system. In countries that claim for democracy, the illusion of democracy is more than practice. Similarly, in countries that claim for human right, phenomena of invading human rights are popular. No country supports anti-democracy or anti-human right in the flag. No country carries out pure democracy and respects human right really. In the uncertain future, "as the development of sciences of human nature and human relationships catches up with the development of sciences of nature and materials, what they care about will be how to change human nature effectively. (John Dewey, 2006, p164)" Only when substantial progresses have been achieved in fields of recognizing and improving human nature, can an ideal society for human spiritual life be actualized, just as human being step into an ideal material society after realizing the substantial progresses in recognizing and changing the nature. In the future, the hope lies in recognizing and changing human nature, similar to recognizing and changing the nature.

In rationality, people who are pursuing for and dedicated to the ideal society are living at a wrong time. If human being

has a common ideal society, we can get this conclusion: today the distance from the ideal society in recognition is infinite (∞), and the distance from the ideal society in practice is two times of infinity (2∞). Therefore, today the world is still in a lagged-behind civilization and low development. It is the common dilemma and tragedy of human being. In the world, although few people feel happy and lucky, it is based on most people's pains, unhappiness, and sadness. The process of human identifying and overcoming negative human nature, understanding and cultivating positive human nature is maybe as long as the geological age and the astronomical distance.

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Historical Dynamics of the Development of the Corporate Governance in Japan

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Abstract

Japan has developed a unique corporate governance structure over centuries, often in response to changes or crises in history. Recently, the loss and scandals have pushed the defects of the existing corporate governance mechanism into the spotlight. To answer whether the Japanese model will and should change, I need to understand how this system came into being and what has made a great impact on its development. Arguably, legal, political and cultural systems have promoted and shaped the Japanese model of corporate governance in particular ways. First, this essay finds that the Japanese corporate governance was historically heavily influenced by its legal origin, which has not been taken as a direct reason but an indirect reason. The courts in Civil Law countries could not resist governments' power and therefore gave politics opportunities to influence the development of the Japanese corporate governance directly. Second, the strong political forces favored financial institutions in corporate governance finance and employees during the war years and occupation but currently, these political influences are weak or have disappeared and central planning structure is discredited. It is time for Japan to make certain changes. Third, Japan has undertaken massive reforms of the corporate governance mechanism from the 1990s but it could not drop everything that is deeply rooted in its traditional culture. Hence, it is proposed that the keiretsu system and the lifetime employment should not disappear in the future albeit certain reforms are necessary in Japan.

Keywords: Collectivism, Corporate governance, Culture, Keiretsu, Legal origin, Long-term employment, Politics, Relationship banking system, Zaibatsu

I Introduction

The corporate governance system in Japan has evolved over centuries, often in response to changes or crises in history. The first well-known change is World War II. Prior to the militarization of Japan in the 1930s, there were different patterns of corporate governance including broadly-held joint-stock companies, the state ownership of enterprise and a limited partnership holding company structure where family owners controlled diversified networks of publicly-quoted enterprises, run by professional management known as *zaibasu*. As Japan rebuilt its economy in the years following World War II, it developed a unique corporate governance structure. The Japanese model was quite distinct from the German model and the U.S. model and led to Japan becoming the second largest economy in the world by the 1980s. It was thus fashionable to ask whether other countries should be adopting Japan's model. Despite the Japanese model of corporate governance enjoyed a reputation for serving the needs in the 1980s, this ran into trouble in the early 1990s. The second important change that influenced the evolution of Japanese model of corporate governance was the economic crisis in the 1990s arising from globalization. Japan is no longer a developing country, so the old model no longer fits with environmental conditions and many of its strengths have become weaknesses in the face of global competition. The resulting loss and scandals push the defects of the existing corporate governance mechanism into the spotlight. To some observers, Japan should drop everything that characterized its unique corporate governance so that the Japanese corporate governance could become more international. The arguments advanced by these scholars and the debates they have generated are highly simulating but are largely unresolved.

To answer whether the Japanese model will and should change, I need to understand how this system came into being and what has made a great impact on its development. Arguably, there are several institutional factors behind the evolution, such as legal, political and cultural systems. These historical dynamics account for the emergence and evolution of the corporate governance in Japan over time. First, LLSV (Note 1)'s argument does a good of job of establishing a correlation between legal traditions and the development of the corporate governance regime, albeit their argument becomes questionable in light of the historical evolution of corporate governance (Note 2) in Japan. Second, Mark Roe argues most prominently for the importance of political factors in the emergence of distinctive corporate governance regimes. At last but not the least, the social embeddedness (i.e. culture) is a third factor in path dependence, which determines the development of the corporate governance. In short, these historical factors are constraints, which promote or shape the corporate governance in particular ways.

This essay, in its brief compass, emphasizes the importance of history in the shaping of corporate governance. Section II begins by briefly introducing the main characteristics of corporate governance in Japan. Section III, Section IV and Section V form the heart of this essay. They sketch legal, political and cultural forces determining that particular type of corporate governance system in historical perspective respectively. Finally, the arguments on such issues will lead to a conclusion in Section VI.

II Characteristics of the Japanese Model of Corporate Governance

According to Cadbury Report, corporate governance is the system by which companies are directed and controlled (Note 3). In other words, corporate governance deals with the relationships among the board of directors, management, shareholders and other stakeholders with respect to the control of corporations. Currently, the major new phenomenon is the new 'hybrid' pattern of corporate governance that involves a mix of elements from the 'old' Japanese model and 'new' more the Anglo-American practices (Note 4). The notable features of the symbiotic Japanese model can be listed as follows.

A. Ownership Structure

While the wider dispersion of ownership is characterized by the U.S. model, the Japanese model of corporate governance has been described as the *keiretsu* model (Note 5), because it contains a high degree of cross-shareholdings. In Japan, shareholdings are often not held by individuals or institutional investors who have no relationship to the company, but rather by dominant shareholders, such as main bank or a *keiretsu* partner which form part of a group of companies. Corporate governance in Japan is characterized by cross-shareholding, albeit there is a reduction from 50% of total market capitalization in 1990 to 20% in 2006 (Note 6)

Fiduciary duty of management exists (Note 7) in both the Japanese model and the U.S. model that involve different mechanisms. In theory, the board of directors represents the interests of the owners (shareholders) and is intended to control the management. The management is accountable to the general meeting of shareholders. In the U.S., the critical problem of the modern corporate governance is the principle-agent problem arising from the separation of ownership and control in that sometimes the managers may ignore the profits of the numerous and dispersed shareholders and breach their fiduciary duties. As a result, the owners of the company may lose money that they have invested at the hands of dishonest or reckless managers. In order to control this agency problem, the strong stock market and the takeover mechanism are used as instruments for aligning the benefits of shareholders with managerial interests. Conversely, Japan has developed an alternative governance mechanism. Since the ownership is concentrated in the hands of a *keiretsu* partner or main bank, who plays a more important role in monitoring the management, most companies in Japan are shield from takeovers and both ownerships and the control of the management are fused in practice.

B. Relationship Banking System

Banks in Japan can play a more prominent role in corporate governance than those in other countries-not only do they allocate the pool of available savings to the most productive projects (Note 8), but also monitor the management within corporations.

'In any economy banks serve as intermediaries in channeling savings into spending (investment and consumption). Indirect finance is ubiquitous across the world, although in the advanced capitalist countries such as the U.S., direct finance (stocks and bonds) plays a proportionately more important role in corporate finance.' (Note 9) Hence direct or indirect finance itself is nothing unique about Japan's heavy reliance on bank loans. But one key feature of the Japanese model of corporate governance is the concentration of shareholdings or loans from main banks that are characterized as long-term and stable creditors.

The other feature of the Japanese model is that the main bank system has supplemented Japanese-style management as an instrument of corporate governance. First, as noted, the Japanese model of corporate governance can mitigate the principle-agent problem by introducing relationship banking. This is because of the special nature of ties between firms and banks in Japan. A main bank has especially close ties to its customers through lending, shareholdings, and the board representation and other personal placement. This can give main banks relative easy access to the same information about the firm's opportunities upon which managers rely to make investment decisions. 'Several aspects of the *keiretsu* financing can help overcome problems with asymmetric information that contribute to adverse selection.' (Note 10) Thus, main banks can intervene in the management of firms, especially in times of financial distress. They can dispatch representatives to the board of directors and initiate restructuring activities.

C. Employment System

In Japan, the employment system is founded on two main elements: first, lifetime employment, in which workers spend their entire career at the same firm, slowly working their way up the ranks; second, seniority-based pay (age-based pay), which links wages to length of tenure rather than ability. According to Table 1, the Ministry of Finance survey finds that

more than half of the sample companies maintain long-term employment and age-based pay (54% in 2002). Compared to other models of corporate governance, lifetime employment and age-based pay have been viewed as two symbols of the unique employment system in Japan. Besides, most major firms have boards of 10-20 executives arranged in a strict hierarchy, based mainly on length of company service supplemented by personal achievement. At this level, the employees are involved with the management and therefore corporations cannot ignore the interests of employees.

Insert Table 1 Here

Source: Survey by Ministry of Finance, Policy Research Institute (PRI 2003)

All in all, the Japanese model of corporate governance is a set of economic, legal, political, and cultural institutions that protect the interests of shareholders, the creditors, and the employees as a whole. In this regard, the health and growth of the company is the corporation's first priority rather than the return of shareholders since the interests of other stakeholders such as banks and employees are not tied tightly to profits. Growth is the most important goal because it maximizes the welfare of shareholders (through capital gains), creditors (through loan security) and employees (through job security and wage growth). Have these characteristics of the current corporate governance been fostered by legal, political and cultural dynamics in the history of Japan? How and to what extent have historical changes influenced the Japanese model? These are the main questions addressed in the following parts of this essay.

III Legal Origins

As noted, LLSV does a good job of establishing a correlation between the legal tradition and the characteristics of the corporate governance regime. They examine the variation of legal rules across countries deprived from different legal origins. The results are summarized in Table 2, which represents the percentage of countries in each legal family origin with respect to a number of indicators of investor rights. In conclusion, LLSV argue that there is a legal element to explain the differences in ownership concentration. The lack of minority shareholders' protection is the primary reason of the high degree of the concentration of ownership. If you protect shareholder better from expropriation, you will get more dispersed ownership. Generally, Common law countries have the strongest protection of shareholders, which leads to a dispersed ownership and the strong stock market. But the lack of minority shareholders' protection especially in Civil Law countries has been an obstacle to the emergence of dispersed ownership.

Insert Table 2 Here

Yet is the protection of minority shareholders the precondition to the emergence of dispersed ownership? Which is cause, which is effect? Japan is one of Civil Law countries. LLSV's argument becomes questionable in light of the historical evolution of corporate governance in Japan.

Examining the origins of corporate governance in Japan during the early nineteenth century, this essay finds that the lack of the protection of minority shareholders is not the primary reason. Prior to the militarization of Japan in the 1930s, there were three patterns of corporate governance. First, the dominant pattern involved broadly-held joint-stock companies, supported by highly liquid securities markets, and headed by professional management directing their companies in the interests of shareholders. Second, another pattern involved state ownership of enterprise where professional bureaucratic managers pursued public economic development goals. The third pattern is 'a European-style insider system with families controlling vast corporate empires called *zaibatsu*, which resembled some of the pyramidal empires found in continental Europe.' (Note 11) Interestingly, the Japanese corporate law did not contain as many measures to provide minority shareholders as LLSV identified (i.e. proxy votes, cumulative voting redemption rights for oppressed minorities and so on). The dispersed ownership structure was dominant while the Japanese law was not protective of minority shareholders. Hence, it is worth remembering that the protection of minority shareholders is not the primary cause or precondition to the dispersed ownership.

Admittedly, however, the Japanese corporate governance was historically heavily influenced by its legal origin that has not been taken as a direct reason but an indirect reason. It is pointed out that the courts of common law countries play a more prominent role by dealing with everyday situations as they occur, and that judges play an essential part in making law within reality on the basis of judiciary reasoning. More importantly, Coke justified the King 'does not have the privilege to personally decide a case at law.' (Note 12) In other words, courts could be of outstanding significance to resist governments' power in Common Law countries. With respect to the legal origin of Japan, judicial organs were restricted to apply rather than make law. Unlike the role of the courts of western countries, the courts in Japan could not have the authority to resist government's intervention. At this level, the Japanese civil origins gave politics opportunities to influence the development of the Japanese corporate governance directly.

IV Politics

In Japan, the development of corporate structure has been affected more closely by the politics from the early of the 20th century into the 21st century. The strong political forces favored financial institutions in corporate governance finance and employees during the war years and occupation but the pressure from the globalization especially in the 1990s

called for the corporate governance reform in Japan. In the following parts, I will focus on the role of politics in the Japanese corporate governance by examining the development of relationship banking system and employment system.

A. Political Influence on the Development of the Relationship Banking System

Prior to the 1930s, the professional managers in most firms directed enterprises in shareholders' interests rather than the banks' interests and the ownership structure remained diversified and securities market far outweighed bank lending as a source for industrial finance.

In 1936, the military had the power to control the whole country and to bring down any cabinet it disapproved of. The military aimed to limit domestic competition and centralized capital allocation and investment decisions in the context of restricted capital and trade flows. 'The Temporary Funds Adjustment Act (IFAA), passed in September 1937, was the first important step. It sought to control long-term funds and preferentially allocate funds for war-related industries. Operationally this meant that each industry was classified by the Ministry of Finance (MOF) by its essentiality into one of three categories based on its importance to arm production, exports, and industrial expansion.' (Note 13) As firms came to rely on banks for funding, it became increasingly common for banks and firms to develop special relationships. There were *zaibatsu* banks with very close relationships to corporations that became the primary sources of corporate finance. As a result, bank lending outweighed the securities market. Generally, the decay of the securities market, the concentration of ownership and the main bank system emerged between the 1930s and 1950s from efforts by the Japanese state and strong incumbent banking and industrial firms (Note 14).

Centralized relationship banking system was also used for postwar recovery. After Japan's defeat, 'the occupation authorities forced the titular new Japanese government to pass a series of laws disbanding the *zaibatsu*, expropriating their family owners, outlawing holding companies, protecting minority stockholders, and establishing guidelines for accounting transparency, auditing and depreciation.' Therefore, the price of shares declined over the 1950s and 1960s, which created an initiative for relationship banks or *keiretsu* partners to buy more shares. As shown in Table 3, there was a sharp increase of the percentage of financial institutions that held the shares of corporations (from 9.9% in 1949 to 42.5% in 1988). The main banks played a more important role in making the inter-corporate shareholding as an effective defence against takeovers. Besides, main banks also monitor the management of corporations. What is distinctive is that once the relationship bank system was strategically controlled and micro-managed by the Japanese government (that is by the MOF which kept the Central Bank of Japan in its bailiwick), it would serve as a policy tool to channel funds into target industries (Note 15).

Insert Table 3 Here

The ongoing reforms, which started in the 1990s, aimed at an improvement in corporate governance in substance along the lines of globalization. Japan was no longer a developing country and central planning structure was discredited. As is shown by in Table 3, there is a decline of the percentage of financial institutions (from 42.5% in 1990 to 39.3% in 1996).

B. Political Influence on the Development of the Employment System

Similarly, the employment system of Japan has been influenced by politics in the history. With regard to other models, employees have no guarantee of permanent employment. The Lifetime employment system – employees can have their jobs until they retire - has been taken as the one feature of the Japanese model of corporate governance. After the World War II, 'lifetime employment has been a key institution, one developed to support social peace.' (Note 16) Japanese courts would penalize large corporation on the condition that they attempted to fire 'regular' employees, which brought enough peace to the corporations to allow production to go forward. At roughly the same time, as a consequence, enterprise managers were practically compelled, to manage their firms in the interests of employees who were acknowledged stakeholders. In some circumstances, managers followed employee's interests more than shareholders.

In globalization, the intensification of corporate competition of world market shares between governments tends to enhance the significance of policies strengthening efficiency. The employment system in Japan came under pressure from the 1990s, due to the globalization of financial markets and international distress in the Japanese economy. For one thing, 'Japan's average labor productivity in services fell from 88% of the American level in 1993 to 84% in 2003.' (Note 17) For another, Japan also risks losing its edge in innovation since 'entrepreneurial start-ups account for only around 4% of firms in Japan, compared with 10% in Europe and over 14% in America and Japan comes bottom in several rankings of entrepreneurship. Despite the might of its big exporters, Japan is also a laggard in globalization, with the lowest levels of foreign direct investment, imports and foreign workers in the OECD.' (Note 18) In recent years, as a result, performance-related pay has become a greater emphasis on meritocratic than seniority-based promotion in some Japanese corporations.

V Culture

Facing rapid globalization, it becomes evident that the old Japanese model of corporate governance is challenged.

Looking at the history of Japan, laws could not be the primary reason behind the change of the corporate governance but civil law origins gave politics opportunities to influence the development of the Japanese corporate governance directly. Currently, some political influences are weak or have disappeared and it is time for Japan to make certain changes. From the 1990s, Japan has undertaken massive reforms of the corporate governance mechanism but it could not drop everything that is deeply rooted in its traditional culture.

Culture is a set of attitudes, values and beliefs shared by unified group with a common language. The Japanese culture is a strong constraint, which promotes or shapes the Japanese corporate governance in a particular way. First, Japanese culture traditionally emphasized collectivism. The members emphasize in group-harmony very much (Note 19) and work together. Consequently, 'Japan's emergence from feudalism naturally has evolved into the *keiretsu* system of related party transaction, reinforced by cross-shareholdings.' (Note 20) Second, 'Japan is basically an egalitarian society, and Japanese businessmen have been traditionally beholden, with a strong sense of loyalty and obligation, to their own group and subordinates.' Employees in a large number of Japanese companies are respected and their jobs are secured. Japanese culture is something that is as difficult to change as the core personality of an individual. Thus, it is proposed that the *keiretsu* system lifetime employment should still exist in the future.

VI Conclusion

The corporate governance system in Japan has evolved over centuries. After World War II, the Japan rebuilt its economy and developed a unique corporate governance structure. The Japanese model was quite distinct from the German model and the U.S. model and led to Japan becoming the second largest economy in the world by the 1980s. It was thus fashionable to ask whether other countries should be adopting Japan's model. But the old model was challenged by the development of globalization and the economic crisis. Actually, the Japanese government has taken actions to impose corporate governance reforms in recent years.

Currently, there are three notable characteristics of the Japanese model of corporate governance. With regard to the ownership structure, first, shareholdings are often held by a main bank or a *keiretsu* partner in order to avoid the principle-agent problem. Second, relationship banks in Japan can play a more prominent role in the management within corporations. They can intervene in the management of firms especially in times of financial distress, dispatch representatives to the board of directors and initiate restructuring activities. Third, the employment system is founded on two main elements: first, lifetime employment, in which workers spend their entire career at the same firm, slowly working their way up the ranks; second, seniority-based pay (age-based pay), which links wages to length of tenure rather than ability. To protect the interests of shareholders, creditors and the employees as a whole, the Japanese model of corporate governance 'is focused on growth and market share.' (Note 21)

Arguably, these characteristics of the current corporate governance have been fostered by legal, political and cultural dynamics in the history of Japan. In the first place, this essay finds that the lack of the protection of minority shareholders is not the primary reason by examining the origins of corporate governance in Japan during the early twentieth century. Admittedly, however, the Japanese corporate governance was historically heavily influenced by its legal origin, which has not been taken as a direct reason but an indirect reason. The courts in Civil Law countries could not resist governments' power and therefore gave politics opportunities to influence the development of the Japanese corporate governance directly. In the second place, the strong political forces favored financial institutions in corporate governance finance and employees during the war years and occupation, but the pressure from the globalization especially in the 1990s called for the corporate governance reforms. Currently, some political influences are weak or have disappeared and central planning structure is discredited. It is time for Japan to make certain changes. In the third place, Japan has undertaken massive reforms of the corporate governance mechanism from the 1990s but it could not drop everything that is deeply rooted in its traditional culture. Hence, it is proposed that the *keiretsu* system and the lifetime employment should not disappear in the future albeit certain reforms are necessary in Japan.

In summary, all of these historical dynamics including legal, political and cultural systems have promoted and shaped the Japanese model of corporate governance in particular ways.

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Notes

Note 1. Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny focus on classification by

legal origins to understand corporate governance. Please see Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny, 'Investor Protection and Corporate Governance' (2000) 58 JFE 3.

Note 2. Gary Herrigel, 'Corporate Governance' in Geoffrey Jones and Jonathan Zeitlin (eds), *Handbook of Business History* (Oxford University Press, Oxford 2006) 17.

Note 3. The committee on the Financial Aspects of Corporate Governance, 'Cadbury Report' (released in December 1992 and then applied to listed companies reporting their accounts after 30th June 1993) <<http://www.ecgi.org/codes/documents/cadbury.pdf>> accessed 5 November 2007.

Note 4. Yasuhiro Arikawa and Hideaki Miyajima, 'Relationship Banks in Post-Bubble Japan: Coexistence of Soft-and Hard-Budget Constraints' in Masahiko Aoki, Gregory Jackson and Hideaki Miyajima (eds), *Corporate Governance in Japan: Institutional Change and Organizational Diversity* (Oxford University Press, Oxford 2008) 39.

Note 5. Hideaki Miyajima, 'The Performance Effects and Determinants of Corporate Governance Reform' in Masahiko Aoki, Gregory Jackson and Hideaki Miyajima (eds), *Corporate Governance in Japan*. (Oxford University Press, Oxford 2008) 357.

Note 6. Dragneva-Lewers Rilka, 'Corporate Governance in Japan' (Lecture in 2009), 8.

Note 7. John F. Northey, Leonard H. Leigh and David Goldberg, *Introduction to Company Law* (Butterworth, London 1971).

Note 8. Robert H. Frank and Ben Bernanke, *Principles of Macroeconomics* (2nd edn Tsinghua University Press, Beijing 2003).

Note 9. Terutomo Ozawa, 'Japanese Firms in Deepening Integration: Evolving Corporate Governance' in Stephen S. Cohen and Gavin Boyd (eds), *Corporate Governance and Globalization: Long Range Planning Issues* (Edward Elgar Publishing Limited, Cheltenham, UK and Northampton, MA, USA 2000) 218.

Note 10. Takeo Hoshi and Anil K Kashyap, *Corporate Financing and Governance in Japan: The Road to the Future* (The MIT Press, Cambridge, Massachusetts, London, England 2001) 190.

Note 11. Dennis C. Mueller, 'Corporate Governance and Economic Performance' (2006) 20 IRAE 623, 628.

Note 12. Sir Edward Coke, *The Selected Writings of Sir Edward Coke* (Liberal Fund, Indianapolis 2003) No.5.

Note 13. Cf. *Ashworth* (n4) 54.

Note 14. Cf. *Ashworth* (n2) 20.

Note 15. Terutomo Ozawa, 'Japanese Firms in Deepening Integration: Evolving Corporate Governance' in Stephen S. Cohen and Gavin Boyd (eds), *Corporate Governance and Globalization: Long Range Planning Issues* (Edward Elgar Publishing Limited, Cheltenham, UK and Northampton, MA, USA 2000) 218.

Note 16. Ronald J. Gilson & Mark J. Roe, 'Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance' (1999) 99 COLUM. L. REV, 508.

Note 17. The Economist, 'Japan's hybrid model of capitalism' (2007). <http://www.economist.com/specialreports/displayStory.cfm?story_id=10169956> accessed 15 April, 2009.

Note 18. *Ibid.*

Note 19. Theodore M. Singelis, Harry C. Triandis, Dharm P. S. Bhawuk, Michele J. Gelfand 'Horizontal and Vertical Dimensions of Individualism and Collectivism: A Theoretical and Measurement Refinement' (1995) 29 CR 240, 244.

Note 20. Ray Ball, 'Stakeholder toward a shareholder value model' in Christian Leuz, Dieter Pfaff, and Athony Hopwood (eds), *The Economics and Politics of Accounting: International Perspectives on Research Trends, Policy, and Practice* (Oxford University Press, Oxford 2005) 113.

Note 21. Robert A.G. Monks and Nell Minow, *Corporate Governance* (2nd edn Blackwell Publishers Ltd, Oxford 2001) 264.

Table 1. Employment system

Type	Long-term Employment and Age-Based Pay		Long-term Employment and Adoption of Ability-Based Pay		Limited-term Employment and Adoption of Ability-Based Pay		Total	
Research Point	# of Companies (%)		# of Companies (%)		# of Companies (%)		# of Companies (%)	
Dec-02	467	54.3	256	29.8	137	15.9	860	100.0

Note: Hideaki Miyajima, 'The Performance Effects and Determinants of Corporate Governance Reform' in Masahiko Aoki, Gregory Jackson and Hideaki Miyajima (eds), *Corporate Governance in Japan* (Oxford University Press, Oxford 2008) 357.

Table 2. Legal Origins

Legal Origin					
Variables	Common Law (18 countries)	French Civil Law (21 Countries)	German Civil Law (6 countries)	Scandinavian Civil Law (4 countries)	World Average (49 countries)
Anti-director rights index	4.00	2.33	2.33	3.00	3.00
Proxy by mail	39%	5%	0%	25%	18%
Shares not blocked before meeting	100%	57%	17%	100%	71%
Cumulative voting	28%	29%	33%	0%	27%
Oppressed minority	94%	29%	50%	0%	53%
Preemptive right to new issues	44%	62%	33%	75%	53%
% share of capital to call and ESM ≤ 10%	94%	52%	0%	0%	78%

Note: Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny, 'Investor Protection: Origin, Consequences, Reform' (Working Paper No. W7428 1999) <<http://ssrn.com/abstract=227587>> accessed 15 April 2009.

Table 3. Share Distribution by Ownership Type in Japan (%)

Ownership type	1949	1988	1990	1993	1994	1995	1996
Financial institutions	9.9	42.5	41.6	40.8	40.9	39.3	39.3
Private Companies	5.6	24.9	25.2	23.9	23.8	23.6	23.8
Individuals	69.1	22.4	23.1	23.7	23.5	23.6	23.6
Foreigners	n.a.	4.0	4.2	6.7	7.4	9.4	9.8
Investment trust	n.a.	3.1	3.6	3.0	2.6	2.1	2.0
Securities companies	12.6	2.5	1.7	1.3	1.1	1.4	1.1
Government	2.8	0.6	0.6	0.6	0.7	0.6	0.5

Note: Kyoko Sakuma, 'Japan' in Klaus Gugler (eds), *Corporate Governance and Economic Performance* (Oxford University Press, Oxford 2001) 140.

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