European Journal of Economics, Law and Politics

(ELP)

2019 / March

Publisher:

European Scientific Institute, ESI

Reviewed by the "European Journal of Economics, Law and Politics" editorial board
2019

March 2019 edition vol. 6, no. 1

ISSN 2518-3761

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Sincerely,

Jose Noronha Rodrigues
ELP Editor in Chief

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"Everything for Sale!" Contract Law in the Context of the Moral Misery of the Modern West

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Doi: 10.19044/elp.v6no1a1 URL:http://dx.doi.org/10.19044/elp.v6no1a1

Abstract

The article contains a critical evaluation of the moral and social function of contract law. It shows the breaking of the principle of the equality of parties. Moreover, the examples of making contracts of what belongs to the fundamental human goods are also revealed. It presents violations of the principle of trust of parties that conclude contracts as a result of state intelligence operations. The paper exposes the use of electronic manipulation, because of which a weaker party of the contract is often helpless. Attention was also paid to the development of economic and commercial sanctions, which repeatedly frustrates the principle of freedom of economic activity.

Keywords: Contract law, morality, equality of subjects, freedom of contract, business intelligence, electronic manipulation, economic sanctions.

To Zosia[1]

Introduction

Concluding contracts is not only a legal and economic phenomenon. It is subject to multiple conditions, including political ones. My paper is an attempt to analyze the foundations of contract law in contracting practice. It

1 To Zosia Zaporowska who during the NATO assault on Yugoslavia was probably the youngest war correspondent in the world, because was then only 18-year-and-one and a half months-old war and obtained an accreditation by the Press Center of the Yugoslav Army (Ратна прес карта. War Press Card Бр. 1935). She is a lawyer with original achievements concerning primarily the situation of horses and their users under both private and public law. She publishes, together with sister Maria, the first inquisitive legal analysis of the institution of waqf in Poland and co-authored the most comprehensive monograph on Polish regulations concerning legal names. She has publisher not only in Polish legal journals as "Przegląd Sądowy", "Palestra", "Rejent", "Radca Prawny", "Prawo i Podatki", "Studia Prawnicze. Studia i Materiały", "Ochrona Środowiska. Prawo i Polityka", also in monographs, Festschrift and other than periodicals, including in Arab, Belarusian, Ukrainian and Hebrew. Moreover, she has been a freelance journalist, a globetrotter, a social activists, an animal protector, an artist, and an entrepreneur.

mainly concerns legal aspects, but it shows the *status quo* that goes beyond what is the subject of the main interest of contract law scholars.

I

The entry into force of the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*, ABGB) was accompanied by a conviction of its extraordinary value and role.[2]

It caused – it is hard to say that it resulted - the marginalization of ethical, philosophical and historical reflection on Austrian civil law.[3]

As an eminent Polish lawyer of the late nineteenth and the beginning of the twentieth century, Ignacy Koschembahr-Łyskowski, wrote, the Austrian "law faculties were only interested in «the production of officials»".[4]

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2 Cf. K. Sójka-Zielińska, *Wielkie kodyfikacje cywilne w XIX wieku*, Warszawa 1973, pp. 65–66; J. Mazurkiewicz, "Recenzja pracy K. Sójki-Zielińskiej pt. Wielkie kodyfikacje cywilne w XIX wieku", *Przegląd Prawa i Administracji*, 1976, Vol. VII, p. 266.

3 As E. Till pointed out, the legal scholars at the time, "saw nothing but the dead letter of the law given by «the supreme legislator», they limited themselves to the dry interpretation of the letter, considering all criticism and even the *de lege ferenda* conclusions as a mere insult to the majesty": E. Till, *J. Unger – Wpływ jego na naukę prawa prywatnego*, Lwów 1913, p. 5. Cf. K. Sójką-Zielińską, *Wielkie kodyfikacje*..., s. 66; zob. także K. Sojka-Zielińska, *Wielkie kodyfikacje*..., p. 156; I. Koschembahr-Łyskowski, "Pojęcie prawa". In *Księga pamiątkowa ku uczczeniu 250-tej rocznicy założenia Uniwersytetu Lwowskiego przez króla Jana Kazimierza r. 1661*, Vol. I, Lwów 1912, p. 63. Por. A. Stelmachowski, *Wstęp do teorii prawa cywilnego*, Warszawa 1969, pp. 116–117, (here about the views of C. Demolombe and the statement attributed to M. Buguet); A. Stelmachowski, *Wstęp do teorii prawa cywilnego*, Warszawa 1984, p. 144; cf. W. Wołodkiewicz, "Studia prawnicze – nauka przepisów czy nauka prawa". In P. Niczyporuk, A. Tarwacka (eds.), *Noctes iurisprudentiae. Scritti in onore di Jan Zabłocki*, Białystok 2015, pp. 310, 312 (I would like to thank A. A. Novikow from the Sankt-Petersburg State University for drawing my attention to this article and presenting me the book).

4 I. Koschembahr-Łyskowski, *O stanowisku prawa rzymskiego w powszechnej ustawie cywilnej dla cesarstwa austriackiego*, Lwów 1911, p. 161. During the 6th National Congress of Civil Lawyers in Międzyzdroje, in a discussion after my lecture, Professor Fryderyk Zoll referred to this in a friendly statement, but criticized my "too broad" perspective. I replied that I see the advantage of my paper in the attempt to raise the awareness of civil lawyers of the need to apply the Hegelian incentive to perceive the studied matter in all-encompassing connection of things and phenomena, although such a perspective is ridiculed today due to political correctness (moreover, I do not share the sympathetic criticism expressed by Professor Wojciech Popiołek that "civil law does not exist": I still think so). I did not share the opinion that the formation of "machines for subsuming" was mainly German specialty. Certainly, I do not question the value of the subsumption itself, although such an attitude was somewhat suggested to me. I see misery only in the dictatorship of subsumption... Professor Adam Olejniczak presented a friendly remark, that in addition to the Western misery, I should also the misery of East. I should answer that it will be a difficult to challenge my views, an esteem for the East has lasted for millennia: church altars, entrances to the cottages, the laying of corpses at cemeteries, and even – what is definitely incorrect today – the word "orientation" have, after all, non-incidental origins.

This led to the formation and, ultimately, spread of legal positivism, whose intellectually universal, the latest formulation was the view of Kelsen's Vienna Circle.

The revolutionary concepts of Rudolf von Jhering[5] and Léon Duguit[6] – although of almost archaic provenience – were the reaction to legal positivism. Moreover, not only shocking and fascinating, but absolutely critical analysis and assessment of English workers' legislation presented in the priceless work of Fryderyk Engels,[7] which an obvious complement to the

5 In particular, cf. R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Vol. III, Leipzig 1865, *passim*; R. von Jhering, *Der Kamp um's Recht*, Wien 1874, *passim*; R. von Jhering, *Der Zweck im Recht*, Leipzig 1893, *passim*. Cf. also: A. Stelmachowski, *Wstęp do teorii prawa cywilnego*, Warszawa 1969, p. 117. I would like to thank Basia Bernfeld from Vienna for German-language Internet queries and translations from German, above all for her advice, suggestions, critical remarks and assistance in proofreading and preparing the bibliography.

6 In particular, cf. L. Duguit, *L'état, le droit objectif et la loi positive*, Paris 1901, *passim*; L. Duguit, *Traité de droit constitutionel*, Vol. I, Paris 1921, *passim*; L. Duguit, *Kierunki rozwoju prawa cywilnego od początku XIX wieku*, translation by S. Sieczkowski, Warszawa–Kraków 1938, *passim*. Cf. A. Stelmachowski, *Wstęp do teorii*..., 1969, p. 118.

7 "But rightly to measure the hypocrisy of these promises, the practice of the bourgeoisie must be taken into account. We have seen in the course of our report how the bourgeoisie exploits the proletariat in every conceivable way for its own benefit! We have, however, hitherto seen only how the single bourgeois maltreats the proletariat upon his own account. Let us turn now to the manner in which the bourgeoisie as a party, as the power of the State, conducts itself towards the proletariat. Laws are necessary only because there are persons in existence who own nothing; and although this is directly expressed in but few laws, as, for instance, those against vagabonds and tramps, in which the proletariat as such is outlawed, yet enmity to the proletariat is so emphatically the basis of the law that the judges, and especially the Justices of the Peace, who are bourgeois themselves, and with whom the proletariat comes most in contact, find this meaning in the laws without further consideration. If a rich man is brought up, or rather summoned, to appear before the court, the judge regrets that he is obliged to impose so much trouble, treats the matter as favourably as possible, and, if he is forced to condemn the accused, does so with extreme regret, etc., etc., and the end of it all is a miserable fine, which the bourgeois throws upon the table with contempt and then departs. But if a poor devil gets into such a position as involves appearing before the Justice of the Peace – he has almost always spent the night in the stationhouse with a crowd of his peers – he is regarded from the beginning as guilty; his defence is set aside with a contemptuous "Oh! we know the excuse", and a fine imposed which he cannot pay and must work out with several months on the treadmill. And if nothing can be proved against him, he is sent to the treadmill, none the less, "as a rogue and a vagabond". The partisanship of the Justices of the Peace, especially in the country, surpasses all description, and it is so much the order of the day that all cases which are not too utterly flagrant are quietly reported by the newspapers, without comment. Nor is anything else to be expected. For on the one hand, these Dogberries do merely construe the law according to the intent of the farmers, and, on the other, they are themselves bourgeois, who see the foundation of all true order in the interests of their class. And the conduct of the police corresponds to that of the Justices of the Peace. The bourgeois may do what he will and the police remain ever polite, adhering strictly to the law, but the proletarian is roughly, brutally treated; his poverty both casts the suspicion of every sort of crime upon him and cuts

most important 19th-century opus, *Capital* of Karl Marx, should be seen in the same light. Despite these efforts of eminent intellectuals, was the depreciation of the moral and social context of law, including civil law, led to the abhorrent phenomenon which was the law of the Third Reich.

I was not saying this at the end of September 2016 during the 6th National Congress of Civil Lawyers in Międzyzdroje without a significant reason. Although I am completely aware of the obvious difference in proportions, I am anxiously looking at modern civil law which is increasingly losing its ethical and social dimension, losing its moral and social function.

II

The principle of equality of entities was pointed out among the foundations of civil law, and perhaps especially the basis of contract law.

him off from legal redress against any caprice of the administrators of the law; for him, therefore, the protecting forms of the law do not exist, the police force their way into his house without further ceremony, arrest and abuse him; and only when a working-men's association, such as the miners, engages a Roberts, does it become evident how little the protective side of the law exists for the working-man, how frequently he has to bear all the burdens of the law without enjoying its benefits": F. Engels, *Condition of the Working Class in England*, pp. 185–186; https://www.marxists.org/archive/marx/works/download/pdf/condition-working-class-england.pdf. How missing today is a scholar in Poland who would like to analyse the condition of the slaves of the early 21st century precariat. The examples of them could be my PhD student who for over a year of hard work did not get a penny from the law office in which he worked, and some others, about whom I heard from a reliable source, who have to pay the patron for the opportunity to work in the law office. Similarly missing is a scholar who would like to take the trouble to show the real roots of the jurisprudence of Polish courts approving the immoral interpretation of the easing of transmission (Article 305^1 of Polish Civil Code), which is in favour of large corporations. To show the state of freedom of research activity in Poland after 1989, I would add I did not find the 1952 Polish edition of Friedrich Engels' *Condition* of *the working class in England*. It is worth mentioning the story that I heard from an old librarian, that years ago, at the time of grotesque de-communization, the works of Marx and Engels were thrown through the window from the University Library in Wroclaw at Karol Szajnocha Street (I was surprised by the "publicity" of this practice, but I was later informed that this was a window not facing the street). Moreover, I was told by the late rector of the Wrocław University, Professor Józef Łukasiewicz, that many mathematical works in Russian were similarly thrown out, and lately university mathematicians asked about them. Similar attitudes were not something exceptional among librarians in these days. Cf. Z. Zaporowska, M. Matusiewicz, "Narodowcy z Narodowej", *Nie*, No. 2004/50, p. 3

Although it has always been a fiction from an economic point of view,[8] today it is also a fiction in the juridical dimension.[9]

What equality of entities could be observe between a consumer and a corporation, as a great supra-state organizational structure of the capitalists is called (because of not disinterested love for euphemisms)?10 Who today has the sensitivity of the Jewish grandfather of Antek Słonimski, who taught French to his grandson, in future a noted Polish poet, and said to him: "*société*: that means a gang!"?

On the one side there is a helpless man,11 and an organization having the taboo of market psychologists, marketers ready for almost everything, for whom an ordinary customer is the target, informally known as a gull, is on the other side.[12]

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8 Several decades ago, Professor Andrzej Stelmachowski warned: "the legal principle of equality – specific to civil law – can give socially useful results only in the absence of significant economic differences. With existing inequalities, it only deepens the advantage of the stronger over the weaker. In the nineteenth century, this was expressed primarily in the exploitation of the workers' masses by capitalist entrepreneurs; the merits of the classics of Marxism were the unmasking, the disclosure of the operation of this mechanism": A. Stelmachowski, *Wstęp do teorii...*, 1969, p. 82.

9 As noted by A. Stelmachowski, "the equivalence of entities means in civil law only the lack of administrative («state») subordination": A. Stelmachowski, *Wstęp do teorii...*, 1969, p. 34. Cf. also: *ibid.*, p. 35, with an extensive, approving quotation from Marx' *The Critique of the Gotha Program* (*Kritik des Gothaer Programms*). Cf. K. Marks, "Krytyka Programu Gotajskiego". In K. Marks, F. Engels, *Dzieła*, Vol. 19, Warszawa 1972, pp. 36–38.

10 Professor Jerzy Poczobut approvingly referred to this during the 6th National Congress of Civil Lawyers in Międzyzdroje, in the discussion after my paper. Professor Poczobut mentioned about the related context of Stanisław Sołtysiński's publication, which, however, concerned the unequal situation of companies competing with the corporations which are supported by the state, and that the latter not infrequently effectively influence the shape of national legislation. Cf. S. Sołtysiński, "O potrzebie powstrzymania procesów nierównego traktowania podmiotów gospodarczych", *Kwartalnik Prawa Prywatnego* 2015, No. 3, pp. 493 fff; cf. also: S. Sołtysiński, "Ład korporacyjny w świetle lekcji kryzysu", *Kwartalnik Prawa Prywatnego* 2011, No. 1, pp. 47 ff..; "Uhonorowanie Profesora Stanisława Sołtysińskiego, streszczenie wykładu S. Sołtysińskiego pt. Ład korporacyjny w świetle lekcji kryzysu", *Przegląd Prawa Handlowego* 2010, No. 6, s. 4 ff. I knew this paper before; cf. P. Zaporowski, J. Mazurkiewicz (ed.), M. Zaporowska, Z. Zaporowska, *Polskie prawo firmowe. Zagadnienia wybrane*, Wrocław 2016, p. 340, footnote 1165; p. 700, footnote 2462; p. 884, footnote 3149; p. 921, footnote 3266; http://www.bibliotekacyfrowa.pl/dlibra/docmetadata?id=76594&from=publication.

11 It is obvious that this helplessness is our fate – not only and not primarily – in the sphere of contract law. Cf. J. Mazurkiewicz, "Co może obywatel w demokratycznym państwie prawnym?". In J. Mazurkiewicz, J. Mazurkiewicz, M. Zaporowska, Z. Zaporowska, "Wieniec laurowy dla Profesora Jerzego Ignatowicza (pięć prawniczych miniatur)". In M. Nazar (ed.), *Prawo cywilne – stanowienie, wykładnia i stosowanie. Księga pamiątkowa dla uczczenia setnej rocznicy urodzin Profesora Jerzego Ignatowicza*, Lublin 2015, pp. 239–240.

12 Cf. P. Reszka, *Chciwość. Jak nas oszukują wielkie firmy*, Warszawa 2016, *passim*. Cf. also: M. Zimmerman, "Być rekinem i zjadać frajerów, czyli jak nas oszukały wielkie firmy",

Abusive clauses turn out to be almost void of legal significance. In glory of respect for the law, a trash can be sold, and sometimes even really "nothing" can be sold with the benefit for corporations!

Who, among the normal buyers of an (alleged) insurance policy, is able to find out at the time of conclusion of the contract, that on the page 87 of booklet written in small print, containing the general terms and conditions of the insurance contract (although he confirmed with his own signature the he read them), there is a provision which makes this insurance is a fiction for him? This provision excludes responsibility in the case of chronic diseases, and someone who – like me – is 67 years old most often has some chronic disease.

An ordinary man cannot afford the commission of a legal expertise concerning a contract worth, let's say, 65 zlotys (15 euros), while a corporation is preparing for this contract for a long time and deadly seriously.

Many examples taken from the praxis of contract law show that the equality of entities is – even undisclosed – masquerade! And a chatter of some scholars about this equality reminds literally the beating of foam.[13]

III

The regulations that oblige the contracting parties to respect confidentiality or, more broadly, to respect for good manners can be pointed out. Such regulations are contained in the Polish Civil Code, in particular in Article 70^5, Article 72 § 2, whether art. 72^1. The effects provided for in art. 58 para. 2 of this Code[14] should be also mentioned.[15]

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http://biznes.onet.pl/wiadomosci/finanse/jak-oszukuja-wielkie-firmy-bankowcy-agenci-ubezpieczeniowi/q8v7m5.

13 In another area, Andrzej Stelmachowski wrote and unsuccessfully warned about similar objectification of the weaker subject of the employment relationship. Cf. A. Stelmachowski, *Kościół katolicki w Polsce wobec wyzwań liberalizmu*, Lublin 1996, p. 21.

14 "Legal action contrary to the principles of social coexistence is void".

15 Cf. A. Olejniczak, "O ochronie poufności negocjacji w świetle art. 721 Kodeksu cywilnego". In A. Brzozowski, W. Kocot, K. Michałowska (eds.), *W kierunku europeizacji prawa prywatnego. Księga pamiątkowa dedykowana profesorowi Jerzemu Rajskiemu*, Warszawa 2007, pp. 35 ff (particularly the conlusion on page 50); P. Machnikowski, *Prawne instrumenty ochrony zaufania przy zawieraniu umowy*, Wrocław 2010, pp. 185 ff.; K. Kopaczyńska-Pieczniak. In A. Kidyba (ed.), *Kodeks cywilny. Komentarz*, Vol. I, *Część ogólna*, Warszawa 2012, pp. 495 ff., 510 ff.; A. Janiak. In A. Kidyba (ed.), *Kodeks cywilny. Komentarz*, Vol. I, *Część ogólna*, Warszawa 2012, pp. 351 ff.; M. Safjan. In K. Pietrzykowski (ed.), *Kodeks cywilny*, Vol. I: *Art. 1–449[10]*, Warszawa 2013, pp. 255 ff.; A. Brzozowski. In M. Safjan. In K. Pietrzykowski (ed.), *Kodeks cywilny*, Vol. I: *Art. 1–449[10]*, Warszawa 2013, pp. 311–312, 314 ff.; P. Księżak. In M. Pyziak-Szafnicka, P. Księżak (eds.), *Kodeks cywilny. Część ogólna*, Warszawa 2014, pp. 661 ff.; W. Robaczyński In M. Pyziak-Szafnicka, P. Księżak (eds*.), Kodeks cywilny. Część ogólna*, Warszawa 2014, pp. 872 ff.; M. Pyziak-Szafnicka. In M. Pyziak-Szafnicka, P. Księżak (eds.), *Kodeks cywilny. Część ogólna*,

But how can protect herself the party when the other party obtains the support of the state which is an initiator, co-creator and user of the Echelon system?[16] And today undoubtedly better and more effective systems, not only Prism and Tempora.[17]

Every phone call, every text message, every fax and every e-mail, including every message spoken, written or sent by people who listened to me in Międzyzdroje, or anyway and anywhere (not only in Zielona Góra, Brno, Kiev, Poznań, Saint-Petersburg, Prague and Wroclaw), is checked and all information contained in them, which may be used by the Echelon system administrator, are collected and stored.

It has long been known that the pieces of information stolen by the Echelon system, which is the invention of our "beloved ally", are also used in business intelligence, including, and perhaps even above all, during the concluding of contracts.[18] The largest contracts.

Warszawa 2014, pp. 887 ff., 899 ff.; P. Machnikowski. In E. Gniewek, P. Machnikowski (eds.), *Kodeks cywilny. Komentarz*, Warszawa 2014, pp. 141–141, 201 ff.

16 See the first in the Polish professional literature attempt to analyse the legal spects of Echelon: M. Andreasik, D. Karkut, B. Mierzwiński, J. Mazurkiewicz, M. Popielas, K. Trzeciak, M. Zaporowska, Z. Zaporowska, "Orwell w realu, czyli o systemie Echelon z perspektywy polskiego prawa", *Studia Prawnicze. Rozprawy i Materiały* 2014, No. 2, pp. 55 ff. (this article waited several years and finally could appear in this journal). Cf. "Echelon", https://en.wikipedia.org/wiki/ECHELON ("In the early 1990s, the U.S. National Security Agency intercepted the communications between the European aerospace company Airbus and the Saudi Arabian national airline. In 1994, Airbus lost a $6 billion contract with Saudi Arabia after the NSA, acting as a whistleblower, reported that Airbus officials had been bribing Saudi officials to secure the contract. As a result, the American aerospace company McDonnell Douglas (now part of Boeing) won the multibillion-dollar contract instead of Airbus"); M. Simoner, *Die Allesfresser der Spionage*, http://derstandard.at/1369363266451/Die-Allesfresser-der-Spionage... And among *Koszmarny sen Snowdena: w Holandii opracowano własną wersję „pakietu Jarowej"*, https://pl.sputniknews.com/opinie/201611074198491-snowden-pakiet-jarowej-holandia/

17 Cf. dkl, DPA, NSA sorgte schon vor 9/11 für Ärger, http://www.n24.de/n24/Wissen/Technik/d/3070112/nsa-sorgte-schon-vor-9-11-fuer-aerger.html.

18 Cf. S. Schmitt, "Wirtschaftsspionage", http://www.sueddeutsche.de/digital/streit-um-echelon-wirtschaftsspionage-1.101852 ("1993 hatte US-Präsident Bill Clinton offiziell erklärt: CIA und NSA sollten amerikanischen Firmen bei internationalen Geschäften behilflich sein. Im «COMINT Auswirkungen auf den internationalen Handel» – Bericht an das Europäische Parlament wird auf diese US-Politik Bezug genommen: «Seit 1992 hat Europa wahrscheinlich merkliche Einbußen an Arbeitsplätzen und Einnahmen hinnehmen müssen.» Weiter heißt es: «Die Grenzen der Schätzungen liegen zwischen [einem Schaden von] 13 und 145 Milliarden US-Dollar.» Kritiker wenden ein, dass ein unanfechtbarer Fall aber bislang nicht nachgewiesen wurde. So resümmiert der EU-Bericht: «Die einzig sichere Beobachtung ist, dass man die genauen Zahlen niemals kennen wird. Aber es ist sehr wahrscheinlich, dass der wirtschaftliche Schaden für Europa bedeutend ist.»").

Thanks to the Echelon system, in an unverifiable way, one of the parties to the contract, breaking elementary ethical principles, becomes a de facto privileged entity, thus the rule of the equality of entities, not to mention confidentiality and good manners, completely fails!

What I am talking about has been the subject of many credible analyzes, including those of the European Parliament![19] But not of the Polish parliament!

IV

The fall of contract ethics, including contract law, is visible in what may be the subject of a contract.

I spoke about this in 2014 at the Fifth National Congress of Civil Lawyers in Poznań and grieved over the practice which has already spread.[20] Non-transferable personal rights has begun the subject of contracts! It concerns not only the right to image or name, but also to privacy, the secret of correspondence, good name, or honor, the right to intimacy, not excluding birth and death, and skin covering the human body on which you can tattoo an advertisement, even the right to freedom of conscience and religion. The specialists in copyright law, following the Yankee path, even justify the contracting of authorship, i.e. a thing which is impossible to contracted by nature![21]

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19 Cf. European Parliament's resolution on the US National Security Agency surveillance programme, surveillance bodies in various Member States and the impact on EU citizens' privacy (2013/2682(RSP), http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0322&language=EN&ring=B7-2013-0343. Cf. also: F. Patalong, "Echelon – Spionage unter Freunden", http://www.spiegel.de/netzwelt/web/grosse-ohren-echelon-spionage-unter-freunden-a-71135.html ("Dass die Vereinigten Staaten und Großbritannien mit ihrem Abhörsystem "Echelon" die eigenen Verbündeten ausschnüffeln, war ein offenes Geheimnis. Jetzt ist es gar keines mehr: Das EU-Parlament debattierte und nannte das Kind endlich beim Namen. Hoch schlagen die Wellen vor allem in Frankreich. Der Vorwurf: Echelon betrieb gezielt Wirtschaftsspionage").

20 Cf. J. Mazurkiewicz, "«Cześć, prywatność i zgon pilnie sprzedam!» Wokół dopuszczalności rozporządzania prawami osobistymi". In A. Olejniczak, J. Haberko, A. Pyrzyńska, D. Sokołowska (eds.), *Współczesne problemy prawa zobowiązań*, Warszawa 2015, pp. 432–456.

21 Cf. J. Mazurkiewicz, "O uprzedmiotowieniu autorów, wszechwładzy wydawców i nędzy prawa autorskiego. Prawo autorskie w czasach restauracji kapitalizmu w Polsce", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2015, No. 2, pp. 251–262. Cf. M.J. Sandel, *What Money Can't Buy. The Moral Limits of Markets*, New York: Farrar, Straus and Giroux, 2013; P. Ondřejek, "Recenze: M.J. Sandel, What Money Can't Buy. The Moral Limits of Markets", *Bulletin Advokacie* 2012, No. 11, pp. 56–57 (I would like to thank the author of this valuable review, of the kind which is not very often today in Polish legal literature, for his unprecedented kindness shown during my professor internship at the Charles University in Prague).

More and more "the market reduces everything, including human beings ... to the level of goods". [22] It concern also, but primarily, the Polish market. Not only certain religious leaders and wise men warn against the threats which result from this state.[23] Also a man, certainly "not from my story", George Soros – "the king of swindles of not only financial character" – does that. He reminds that "we can have a market economy, but we cannot have a market society"![24]

Without a doubt, it is not coquettish of me when I say that it is good for me to think that I will not live long enough to see the times when everything could be contracted!

V

I see particular threats to the foundations of contracting in the widespread use of electronic technologies. Today it is still only a fear, but I think that soon there will be times when finding a profitable or presenting an attractive offer will become impossible! And I do not think about the helplessness of both the entrepreneur and the consumer towards positioning.

The involvement of one of the most popular search engines in one of the US presidential candidates in 2016[25] revealed opportunities that may soon

22 G. Soros, "Globalne społeczeństwo otwarte", *Rzeczpospolita* 1997, No. 299, p. 8.

23 "An overturn is often understood as a positive change, for example the Copernican revolution. But there are also reverse, obscurantist revolutions. This is the case that Wojciech Sadurski tells me: things, phenomena, attitudes, formerly shamefully hidden, now are revealed willingly, even – with pride, they are displayed, eagerly, even with satisfaction! Ignorance, vulgarity, rudeness, brutality, lying – once condemned and embarrassing – now occur openly, nay, are considered a norm or even exalted. Jerzy Łoziński adds: yes, it's a Big Brother subculture, new pornography: show things formerly hidden. This is even emphasized as an advantage, as a new honesty. This is the highlight of the qualities that Ortega y Gasset saw in a man of mass culture – and that is complacency: look what I am! And I'm just great! I do not need to be different, better, wiser": R. Kapuściński, *Lapidarium VI*, Warszawa 2007, p. 92.

24 G. Soros, "Globalne społeczeństwo otwarte", *Rzeczpospolita* 1997, No. 299, p. 8. Cf. I. Wallerstein, R. Collins, M. Mann, G. Derluguian, C. Calhoun, *Does Capitalism Have a Future?*, Oxford – New York: Oxford University Press, 2013, pp. 71–98, 131–165.

25 M. Gavasheli, "Przełomowe odkrycie: Google jest kluczowym graczem w kampanii Clinton" (an interview with R. Epstein), http://pl.sputniknews.com/swiat/20160912/3853597/google-wybory-usa-clinton-trump.html; "Research Proves Google Manipulates Millions to Favor Clinton", https://sputniknews.com/us/201609121045214398-google-clinton-manipulation-election/; "Google manipuluje wynikami wyborów", http://www.prawica.net/comment/65902; "Google manipuluje opinią publiczną w USA?", http://m.chip.pl/news/internet-i-sieci/wyszukiwarki-internetowe/2016/06/google-manipuluje-opinia-publiczna-w-usa; IAR, "Google oskarżony o manipulowanie wynikami wyszukiwarki. Koncern odpowiada na zarzuty KE", http://www.polskieradio.pl/42/1699/Artykul/1643155,Google-oskarzony-o-manipulowanie-wynikami-wyszukiwarki-Koncern-odpowiada-na-zarzuty-KE; K. Majdan, "Google grozi

become a significant factor in the possibility of freedom of contract. Because of the fact that in the search engine you enter: "good and cheap light bulbs", when the search engine will be programmed so that you will never see the wanted offers, but those whose exposure depends on the search engine owner.

VI

The freedom of economic activity and – being a civil law necessity – the principle of freedom of contract are one of the pillars of market capitalism.

And yet, often announced economic and trade sanctions are breaking both principles in a way that is incomparable to anything else. They are used against small, medium, and recently also the largest states, that is, those in which several, a few dozen, even close to one hundred and fifty million people live! And often for a dozen or even several dozen years! After all, they strike not only those people, but also the residents and entrepreneurs of the state introducing sanctions. Therefore, they concern people in relation to whom any fault, even imaginary, can be attributed.

In several cases, it turns out after many years that the circumstances indicated as reasons of (so far exclusively Western!) economic sanctions were a forgery. As in the case of a significant part of sanctions against Iraq.[26] It was

rekordowa kara za manipulowanie wynikami wyszukiwania", http://businessinsider.com.pl/technologie/firmy/3-mld-euro-kary-dla-google-za-manipulowanie-wynikami-wyszukiwania/yz0ypbf; nab., "Manipuliert Google?", http://www.faz.net/aktuell/wirtschaft/netzwirtschaft/google/hillary-clinton-kampangne-manipuliert-google-14281390.html; C. Dobschat, "Manipuliert Google zugunsten von Hillary Clinton?", https://www.mobilegeeks.de/news/manipuliert-google-zugunsten-von-hillary-clinton/; E. Javers, "Clinton camp asked Apple, Google for opinion of Clinton encryption comments", http://www.cnbc.com/2016/10/20/clinton-camp-asked-apple-google-for-opinion-of-clinton-encryption-comments.html; R. Sasse, "Hillary Clinton: So manipuliert Google Suchergebnisse!", http://www.watergate.tv/2016/10/18/google-manipuliert-suchergebnisse-fuer-hillary-clinton/. Cf. also: D. Anderson, "Google Allegedly Manipulating Search Results Favoring Big Brands Over Small Businesses", http://www.infowars.com/google-allegedly-manipulating-search-results-favoring-big-brands-over-small-businesses/; "Ausweitung der Werbezone: So manipuliert Google", http://www.computerbild.de/artikel/cb-Aktuell-Internet-Google-Manipulation-Suchmaschine-Werbung-8234409.html; T. Kleinz, "Studie: Google manipuliert Suchergebnisse", http://www.heise.de/newsticker/meldung/Studie-Google-manipuliert-Suchergebnisse-2731456.html; "Wie Google bei der Suche manipuliert", https://www.welt.de/wirtschaft/webwelt/gallery115174683/Wie-Google-bei-der-Suche-manipuliert.html; M.J. Stern, "Yes, Google Manipulated Its Search Results. It's Probably Allowed To", http://www.slate.com/blogs/future_tense/2015/03/20/google_manipulated_its_search_results_the_first_amendment_protects_that.html.

26 The literature on this subject is enormous. Therefore, I will mention only one of the earliest and unique Polish publications: *Będziemy walczyć do ostatniego dziecka* ["We will fight to the last child"], an interview of Zofia Zaporowska and Michał Matusiewicz with Faisal B.

also indirectly, but clearly, said on 24 March 2016, when International Criminal Tribunal for the former Yugoslavia assessed the conditions for introducing sanctions against Yugoslavia. In the conviction concerning Radovan Karadžić, this tribunal could not acquit Slobodan Milošević who died in puzzling circumstances ten years ago in The Hugue's jail, so it only stated that no evidence was found confirming any of the 66 charges against Milošević, adding that charging him was a mistake.[27]

It is very difficult to find this information in the few Polish media,[28] although the above-mentioned Hague judgment can be found on the internet.[29]

Hussein, Wrocław 2003, pp. 3 ff.

27A. Kwaśniewski, "«Okazja do wojny» lub casus belli", https://pl.sputniknews.com/blogs/201611014169348-okazja-do-wojny-kwasniewski-blog/. Cf. M. Waldenberg, *Narody zależne i mniejszości narodowe w Europie Środkowo-Wschodniej. Dzieje konfliktów i idei*, Warszawa 2000, pp. 447–448.

28 Cf. A. Wilcoxson, "The Exoneration of Milosevic: the ICTY's Surprise Ruling", http://www.counterpunch.org/2016/08/01/the-exoneration-of-milosevic-the-ictys-surprise-ruling/ ("The International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague has determined that the late Serbian president Slobodan Milosevic was not responsible for war crimes committed during the 1992–95 Bosnian war ... The Tribunal's determination that Slobodan Milosevic was not part of a joint criminal enterprise, and that on the contrary he «condemned ethnic cleansing» is of tremendous significance because he got blamed for all of the bloodshed in Bosnia, and harsh economic sanctions were imposed on Serbia as a result. Wrongfully accusing Milosevic ranks right up there with invading Iraq only to find that there weren't any weapons of mass destruction after all. Slobodan Milosevic was vilified by the entire western press corps and virtually every politician in every NATO country. They called him «the Butcher of the Balkans.» They compared him to Hitler and accused him of genocide. They demonized him and made him out to be a bloodthirsty monster, and they used that false image to justify not only economic sanctions against Serbia, but also the 1999 NATO bombing of Serbia and the Kosovo war. Slobodan Milosevic had to spend the last five years of his life in prison defending himself and Serbia from bogus war crimes allegations over a war that they now admit he was trying to stop. The most serious charges that Milosevic faced, including the charge of genocide, were all in relation to Bosnia. Now, ten years after his death, they admit that he wasn't guilty after all – oops"); A. Wilcoxson, "Hague Tribunal Exonerates Slobodan Milosevic for Bosnia War Crimes Ten Years Too Late", http://www.slobodan-milosevic.org/news/smorg-aw071816.htm; "Milošević offiziell nicht für Kriegsverbrechen schuld", http://www.kosmo.at/milosevic-offiziell-nicht-fuer-kriegsverbrechen-schuld/ ("Der Westen schweigt darüber, dass Den Haag Milošević vom Verdacht auf Kriegsvebrechen und ethnische Säuberung freigesprochen wurde, aber Serbien darf nicht schweigen", so der serbische Außenminister und Vize-Regierungschef Serbiens Ivica Dačić ... Gleichzeitig veröffentlichte der amerikanische Publizist Andy Wilcoxon eine Analyse über die Verurteilung von Radovan Karadžić und unterstreicht mit diesem Artikel, dass der Den Haager Richter mit der Urteilsverkündung bestätigte, dass Milošević nicht in die Kriegsverbrechen, welche Karadžić begangen hat, involviert war").

29 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Case No.: IT-95-5/18-T, Prosecutor v. Radovan Karadžić, public redacted version of judgement issued on 24 March 2016, volume I of IV,

I mention this because almost no one in the EU and NATO, including Poland, thinks today about what justified the unprecedented violation of not only the freedom of economic activity and the freedom of contract that affected millions of people in the former Yugoslavia and elsewhere.[30]

At the end I will present a digression. The adherent of sanctions, some Junckers[31] *et consortes*, continue to spice up a dish that would be the Transatlantic Trade and Investment Partnership (TTIP)[32] or an appetizer before it, i.e. the Comprehensive Economic and Trade Agreement (CETA),[33] thanks to which you and I will not have the right – just one example[34] – to learn how undesirable is the food which we buy and eat in our own country.[35]

For this company ethics means less than a fake address!

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http://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf.

30 Cf. also: M. Waldenberg, *Rozbicie Jugosławii. Od separacji Słowenii do wojny kosowskiej*, Warszawa 2003, pp. 97–98; M. Waldenberg, *Rozbicie Jugosławii – jugosłowiańskie lustro międzynarodowej polityki*, Vol. I: 1991–2002, Vol. II: 2002–2004, Warszawa 2005, p. 102; *Лавров назвал агрессией бомбардировки Югославии войсками НАТО*, https://ria.ru/world/20161031/1480323318.html.

31 Cf. K. Strzępka, "CETA wisi na włosku: Juncker zapowiada kolejne negocjacje na piątek", http://wiadomosci.onet.pl/swiat/ceta-wisi-na-wlosku-juncker-zapowiada-kolejne-negocjacje-na-piatek/zmmkwd

32 Cf. "Stany Zjednoczone nie cofną się przed niczym, żeby osłabić gospodarkę UE", http://pl.sputniknews.com/gospodarka/20160122/1897030/USA-Europa-TTIP.html.

33 "CETA: Wie die Europäische Union (EU) trickst + Anti-CETA-Volksbegehren in Österreich", http://www.euaustrittspartei.at/eu-nein-danke/ceta/; "Der Begriff Freihandelsabkommen ist ein Lügenwort", http://www.deutschlandfunk.de/sahra-wagenknecht-zu-ceta-der-begriff-freihandelsabkommen.694.de.html?dram:article_id=368352; M. Krukowska, "Tajemnicza umowa z USA. Co nas czeka po jej podpisaniu?", http://csr.forbes.pl/ttip-co-dla-nas-oznacza-umowa-handlowa-z-usa,artykuly,203543,1,1.html; J. Augustyniak, "Nie udało się im TTIP. Będzie CETA", https://pl.sputniknews.com/opinie/201610124042528-Nie-udalo-sie-im-TTIP-Bedzie-CETA-Jaroslaw-Augustyniak/; J. Ceglarz, "W Warszawie protesty przeciwko CETA. Czy polski rząd się ugnie?", http://agrobiznes.money.pl/artykul/ceta-ttip-protest-isds-kary,113,0,2170481.html; "CETA zostanie podpisana", https://pl.sputniknews.com/gospodarka/201610304160048-ceta-zostanie-podpisana/.

34 "McDonald's pozwał Florencję. Chce 20 mld dolarów", http://wiadomosci.onet.pl/swiat/mcdonalds-pozwala-wloskie-miasto-chce-20-mld-dolarow-od-florencji/jvj6v7.

35 Cf., e.g., L. Sigan, "CETA: boimy się o zdrowie i bezpieczeństwo konsumentów", https://pl.sputniknews.com/polska/201610314167091-ceta-unia-europejska-kanada/; "CETA – czy już czas się bać?", http://krytykkulinarny.pl/2016/10/ceta-czy-juz-czas-sie-bac/.

VII

I said what I said, out of concern, which – as you can see – cannot be hidden by me, even if it could unreasonable.

I have presented this concern with a hope that among young scholars there are those who will make significant research on subjects mentioned here. Those who will look at the law of contracts wider than it used to be done so far! Maybe they will have enough courage to deal with these topics from a Marxian perspective. Not only because it is an intriguing area of research, but also because in the face of injustice, harm and evil, one cannot remain silent, and keep at the same time dignity and a good name.

Conclusions

Contemporary contract law loses its moral and social function. The fundamental principle of the equality of parties often turns out to be fiction in practice of contract law. Goods which should be contracted on moral grounds are now becoming the object of contracts. The trust of parties that conclude contracts sometimes is undermined by economic intelligence organized by some countries. The widespread use of electronic technologies sometimes exposes a weaker party to the contract on fraudulent manipulations by a stronger party. The principle of freedom of economic activity is often ostentatiously violated due to announced economic and commercial sanctions.

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Rationality and Bounded Rationality in Decision Making

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Doi: 10.19044/elp.v6no1a2 URL:http://dx.doi.org/10.19044/elp.v6no1a2

Abstract

Every day people are faced with decisions because of the various issues that are inevitable in day-to-day life. In the same breath, during the choices, there is numerous information on a given phenomenon; information that cannot be comprehended in full and used in making the decisions. This paper seeks to look at the limitations of the market and how they have influences on the different choices that humans make. Moreover, the first part of the paper will address behaviour science and the concept of bounded rationality. The next phase will offer a theoretical glimpse and by so doing compare rationality theory and the critique offered through bounded rationality. Based on the above understanding the paper will then go into detail and look at different concepts related to the subject matters of this paper. The concepts will be decision making in times of uncertainty and risk, the responses of humans when faced with different alternatives and what shapes the choices and how they are shaped.

Keywords: Rationality, decision making, bounded rationality, risk and uncertainty.

Introduction

The limitations that cloud individuals while tackling uncertainties and must make certain rational choices is well spelt out in bounded rationality. Bounded rationality refers to the different constraints that normally impede decision making. They come in various forms most notably cognitive limitations, time available and other environmental factors. Herbert Simon is considered as the pioneer of this school of thought. Bounded rationality views rationality as being because of the need for satisfaction as opposed to optimisation. In this regard, unlike in the case of optimisation, rationality is hinged on the availability of simple choices that are used to make the most satisfactory choices and options other than the most optimal choice. The constraints come in different forms and have an impact on the rational choices

that are made to counter the challenges. This paper affirms that the operating environment and human reactions to the environment have an impact on the rationality of decision making.

Additionally, bounded rationality aims to set a limit to some assumptions associated with economics and at the same time explain how one's behaviour is influenced by important factors. Particularly, one's judgement is influenced by personality, the capability to think rationally, knowledge, one's access to needed information and one's biases and prejudices. This only indicates that economics assumes that humans always act or come up with a rational decision for self-interest. Bounded rationality asserts that such an assumption is not always correct as different factors may influence one's willingness to take the risk, decide on various issues such as insurance, prepare financial forecasts and make a wild guess at the future.

Behavioural Science and Bounded Rationality

Bendor (2010) views bounded rationality as a function of human behaviour and look at the way people make rational decisions during uncertainties. The pioneers of economic including Adam Smith, considered as the father of economics, while making their points noted that a man is economical and normally makes certain decisions because of self-interest motivation. The decisions are made about all things that touch on the lives of people. In that regard, while making decisions regarding other people or property, people would only look at what they stand to gain in those circumstances (Pack & Schliesser, 2018).

As Eusepi and Hamlin (2006) and Vlaev (2018) noted bounded rationality narrows down the different things that are assumed to influence the behaviour of people. Faced with uncertainties and decision making, people normally make a decision based on their personality, and this may be either their level of optimism or negativism. On the same note, decisions are made by the available knowledge on the matter, logic, individual biases and stereotype and other personal understandings on the given matter. The whole point is that the decisions are normally hinged on the available information on the matter and as such is limited to the available know-how on the given phenomenon under scrutiny. In a nutshell, an economic man normally makes rational decisions that are biased toward self-interest. Bounded rationality, therefore, argues that there normally exists no justification as well as any different considerations that affect people's tendencies to incur the risk, make decisions on insurance and make economic predictions about the expectations.

Farina et al. (2006) says that full rationality implies the possession of unlimited cognitive abilities; something that is not common to humanity. Human beings are different and have limited cognitive abilities. This explains why Bayesian maximisation subjectivity is valid in explaining utility.

However, even, with the Bayesian explanations, there is a tendency for deviation amongst many consumers, and this explains why some quarters fail to use the theorem and stick fully to it while making choices and decisions.

About rationality, there is a possibility of one knowing that a certain choice is the only rational one and still fail to take it. For example, one may believe that stopping smoking is the best thing to do and yet fail to stop smoking. This means that the conclusions made may be surpassed by strong emotional urges. The inability to have full control over behaviour is overridden by behaviour constraints rather than cognitive constraints.

According to He et al. (2014) and Kahneman (2003a, 2003b), bounded rationality refers to rationality that is pegged on the non-optimizing adaptive behaviour of real humans. It, however, does not refer to irrationality. Most of the time, human behaviour is not based on any conscious considerations, and this explains why people may not have to deliberate on which foot to place first while walking.

Phillips and Pohl (2014) note it is axiomatic that biological and cultural factors have a big role in human behaviour. As construed by its pioneers, people are only partly rational and have a big part which is irrational. This means that people normally have limitations while making the right choices to solve different challenges that may arise. In that regard, the economic cost involved in the acquisition of real information and processing it may inhibit the potential of people while making numerous choices and decisions. Simon suggested that people normally employ heuristics while making decisions. The use of heuristic is justified by the inability of people to know the outcome and the potential utility of all the available choices.

Rationality Theory Vs Bounded Rationality Theory

According to Gigerenzer and Gaissmaier (2011), rationality theory affirms the essence of economics as a subject since it forms the basis through which different economic principles are based. It argues that the economic man normally makes decisions that are realistic and logical and that such decisions are made on matters that would offer the individual the greatest utility. Moreover, individuals normally make those decisions with their self-interest as a key point. The rational theory is a fundamental principle that most economic concepts and understanding are based on.

As noted by Weyland (2006) Hebert Simon through the theory of bounded rationality argued that people might have a desire to get all the relevant information on a given phenomenon before making decisions, but that is not normally the case. As such, people end up making decisions on limited know how on given phenomenon. On the same note, Richard Thaler through mental accounting proved that in some cases, people behave irrationally, and that is evident in their preference for certain dollars over others.

As noted by Vlaev (2018) the through bounded rationality concept, it is evident that it is not realistic for people to have all the information and process it before making choices. In that regard, people devise means of coping and choosing certain things. For example, they have practice, methods and standard operating procedure (SOP) that help in the process of picking alternatives to make decisions. An example of habit/process is making the bed in the morning after waking up. Reading news on available products before making purchases is an example of method or technique. SOP could be represented by rules governing the interaction of different individuals in an organisation.

Bounded rationality postulates that even if people were given all the information about a given phenomenon, they would not be able to act on all the information and use them in making choices. In this regard, to predict the likely approach that would be used to make a decision, it would not be enough to know the quality of data used, but rather the cognitive approach used.

In this view decision making as presented by the bounded rationality principle implies that people are influenced by their operating environment. On the same note, they react given the situation they face within their environment, and their reactions determine the rationality they apply to a given matter and, by extension, the decision-making process.

The same theory affirms why people are likely to give different responses and thoughts on certain issues due to their different conception and internalisation of the facts of the case. While making decisions, errors may arise because the decisions so given would hinge on the understanding of people. On the same note, they would only go for those choices that would give them the best satisfaction. While picking the different choices, people normally have a bias by self-satisfaction Vlaev (2018).

Nature of the Environment

It is suggested by the supporters of limited rationality that primarily environment is highly uncertain than comprehended in prevailing choice models. Regarding rational choice models, uncertainty is described as unaware of the possibility of the consequences of decisions. Various ill-structured problems exist within limited-rationality models, in which high uncertainty arises due to the presence of inadequate knowledge of the features illustrating the problem. This also incorporates ambiguity which has two meanings. Firstly, it includes those states in which attribute are clear, but not their comparative significance. Secondly, a major ambiguity involves those unclear alternatives which offer several meanings, having opposite explanations (Smithson, 2015; Walker et al., 2017). Resultantly, an ambiguous and uncertain environment affects the characteristics of the decision maker. It must not be forgotten that the desired end state is the outcome of preferences.

Rationally, people set the highest possibility of achieving the desired end state; however, if it appears ambiguous, then preferences would be ambiguous also. This eventually contradicts the basis of rational choice, i.e. fixed transitive preferences (Wu et al., 2017).

People prefer to make decisions through mutual interaction, by employing decision strategies proposed by them. Thus, they must perform modification of the goals based on the social environment in which they exist. It is also proposed by various political analysts who claim that preferences are not static, but dynamic, and thus must be flexible to cope with changing environments (Bloom, 2014). It is a common practice that decisions exist in difficult ends-means causal chains. While finding a solution, we look toward new opportunities by excluding the irrelevant or undesired options. In short, the on-going process of problem-solving is based on interacting with the environment under dynamic constraints and opportunities.

Decision Making Under Risk and Uncertainty

Giang (2015) say decision making refers to the mental, cognitive processes that give rise to the selection of a certain choice during others in each circumstance or circumstances. It is common to experience inconsistency while choosing between or among many different alternatives. The above reality could also mar the anticipation of future events. There are various explanations for that background, as shall be elaborated upon in this section. There are cultural influences and the emotional state of the mind that may alter understanding. There could also be group thinking such as peer pressure. On the same note education and understanding of various issues may change over time and influence decisions and choices made.

In other cases, some people may be overconfident while others rely on a certain understanding and information while making their decisions. Others, still, may reject the views and opinions given by other people. In other instances, people make decisions based on the advice given to them by an adviser who may give information based on what the recipients would love to hear. Koleczko (2012) points out that in certain market conditions, trading may be influenced by automated trading systems which may in turn influence the decision-making process. The risk is a big player while making a decision, but its dynamic attribute normally influences decision making. This means that decisions about the future may be altered since the risks involved may change during time, and that may necessitate real valuation of the mitigating factors put in place to counter the expected risks in business.

Giang (2015) argues that businesses usually face different types of risks as discussed in this section. The first type of risk is legal risks. This type of risk refers to those risks that are related to the compliance level that a given business has about the prevailing laws that govern the operation of those kinds

of business within the region. Strategic risks refer to the strategic realignment that a business would put in place to counter the competition that may arise within the industry under which a given business operates. Operational risks that refer to the types of risks that a business may face during operations are also imminent in the daily operation of a business. A business may also face financial risks. These types of risks account for the potential losses that may occur a business in its books of accounts. They, for example, imply the risks that are associated with investment decisions, risk on interest as well as risks incurred during daily operations of the financial capacity of the business.

Organisations must quantify the risks by the impact they may have on the business. In this regard, the cost implications of the risks must be tabulated to get the cost that the organisation may incur if the risks strike the organisation. The credibility of management relies on its ability to identify and deal with the risks in the most amicable manner.

Evaluation of the risk implies that the management or those in charge must look at the different choices they are faced with and decide on the best way forward in handling the risk. The first step is to define the current problems and identify the alternative, ways of solving the problem. In this regard, while looking at the alternatives, it is important to look at their cost and their likely outcomes. The outcome, in this case, means the monetary value attached to every outcome. The money value may be again or cost. The next step implies the grouping of different uncertainties that may crop up. Their potentials are gauged regarding probabilities.

According to Stingl and Geraldi (2017), the choice of the best alternative is based on judgment. The judgement means a look at the different alternatives on an individual level. The scrutiny of the alternatives gives the manager the best position for judgement because all the alternatives are looked at, and the one that offers the best deal is selected. Crucial factors must be analysed while making a decision. The risks could then be subjected to subjective probability. This means that the decision maker subjects the risk to the probability of occurrence or subjective probability.

Empirical research shows that human sometimes systematically select certain choices. Further, there is evidence that in some cases humans run away from the normally expected utility maximisation maxim that would be an expectation of humanity at any given time. Research in this area has it that humans have certain characteristics while faced with different choices. On the same note, there are certain principles identified: there is a higher likelihood of losses than gains. Secondly, people are more concerned about the variations in their satisfaction (utility) rather than in utter utility. Thirdly, the subjective utility is, as a result, of biases that people possess due to different factors in their daily lives and during deciding to come up with different alternatives and pick the one that best suits (Koleczko, 2012).

According to Rubinstein (2008), there are different choices. In some cases, certain choices normally give rise to different actions, and the actions have different results at different, give, times. For example, if someone wins the lottery, going on holiday may be one choice, and this would give immediate satisfaction, or one could spend in it on the stock market and have some earnings at a later stage. The question, then, would be; what is the best option of the two. The answer would depend on various factors that are intertwined. For before making a choice, the person would, for example, look at the inflation rates, the expected return from investments, and the level of trust in the stock market and life expectancy of the person. Similarly, while making decisions, sometimes the decisions makers are faced with tough calls because the decisions they make must encompass the likely choices that other people would have made when faced with similar conditions. That gives the basis for the game theory.

In game theory, a single player is pitted against nature. The beliefs that a person has on numerous issues normally indicate and dictate the preferences that one would have given a certain situation. The utility that one derives from various alternatives governs the likelihood of choices being picked. Probability is the most viable root in the determination of chance. New information through Bayes theorem is used to determine the incorporation of new ideas into beliefs. The same theory can be used to elaborate on why and how new belief systems could rise. For example, one's views and attitudes towards a given phenomenon may change over time and shift from the previous position. That change or shift is explained numerous factors that humans encounter in their daily lives.

Stingl and Geraldi (2017) argue that behavioural economics entails the study of how psychological process, social attributes and cognitive realities, and how they influence the economic decisions, in as far as rationality is concerned market conditions are analysed and how people make various decisions. About this school of thought, people have tendencies to behave in certain ways. The first set is framing in, which stereotypes that from the imagination of different people is used to gauge the likely way and manner they would behave, given certain conditions. Heuristics is another understanding in which people make decisions and base them on "rule of thumb" and not on the stern judgment. Market inefficiency is another theme that affects behaviour. In this case, non-rational decision-making processes are discussed together with mispricing (Gigerenzer & Gaissmaier, 2011).

Human Response and Decision Making

In most cases, decisions are made based on the conviction of certain events taking place. For example, the winner of an election, the financial market position in the future or the guilt of a suspect in court. The convictions

arise from subjective probabilities that people attach to them. Research has shown that people base their beliefs on heuristics. However, the reliance on heuristics to form a belief in the occurrence of certain things which normally have realistic explanations can sometimes be compromised since they are vulnerable to error.

According to Bloom (2014), subjective assessment or probability has limited data attached and as such cannot be relied on as having sufficient realistic, tangible backing. An example of subjective probability is the distance of an object from a certain point through the eye of an individual. The individual normally uses the judgement of the eye to approximate and determine the likely position of the distance of the object from the person. In this regard, different individuals looking at the same object from the same vantage point are likely to give different distance measurements. This is because they will use a subjective approach while analysing and ascertaining the reasonable distance of the object from where they are. The data used in the decisions to give direction and distances are based on a heuristic approach and have a great deal of limitation invalidity. For example, different individuals may give different distances based on the clarity of the object to their eyes. Whereas the clarity of the objects may be valid as a means of gauging the distance of the object from the person, it would present error because it could rely on other things as sharpness which may be different among different people. Similarly, while using probability in the case of different judgements, the same levels and kinds of errors could also take place.

Smithson (2015) says different heuristic conditions can be used to describe the different means and ways through which people make judgements. Representativeness is the first example. In this case, people make a judgement in uncertainties by analysing whether certain a variable belongs to another larger group. For example, does Q belong to the class of C. Availability is another example of heuristic. In this case, the frequencies of certain variables are used to determine the probability of resurfacing in the future.

Conclusion

This paper has conclusively elaborated that rationality is critical in times of decision making and that rationality is determined by the operating environment and human responses. To prove its case, the paper has described the different concepts that are critical to the subject matter. Furthermore, the paper has used different theories to illustrate its point. The paper has described both rationality theory and the bounded rationality theory. In this regard, the paper has demonstrated that bounded rationality theory offered a fundamental critique of rationality theory. The paper has shown that bounded rationality theory holds that individuals normally have different information on certain

things; information that should help in formulating responses and decisions. However, in most cases, they may not use all the information to make decisions. In that regard, therefore, heuristics can help in the formulation of the best strategies. For example, the paper has demonstrated that people have habits and methods that they use to do their thing and as such help in the formulation of decisions in their lives.

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Probing into Copyright Infringement by Sampling: from USA to EU

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Doi: 10.19044/elp.v6no1a3 URL:http://dx.doi.org/10.19044/elp.v6no1a3

Abstract

Sampling has become a part and parcel of the musical industry in the postmodern culture. With the booming of the hip-hop and electronic genre of music, sampling revolution has been brought to the industry which is responsible for the emergence of copyright infringement issues in both alleged and substantiated forms. Sampling founded its origin in the United States, where the legal system seemed to be efficient in dealing with the balancing of competing rights between the intellectual property right holders and the users of those respective properties. It took almost three decades to the US legal system to develop a cross and check mechanism or licensing model which checks the permissibility of sampling through its own established rules comprised of law, doctrines and case laws. Now, similar issues have been referred to the European Court of Justice by the German Federal Supreme Court to determine the probability of EU copyright law's allowing sampling. The question urges the enthusiasm of investigating the existing legal framework of the EU, *prima facie*, sought strong protection against the right holders to leave any room for permitting sampling. This paper particularly focused to show how the US Fair Use and *de minimis* fits to the EU legal frame to answer the derived questions asked by the German court to the ECJ which will pave the way of licensing mechanism for sampling in the EU.

Keywords: Sampling, fair use, *de minimis*, United States, Germany.

1. Introduction:

Sampling is a process through which the music composer derives one or more musical component from any pre-existing work and incorporates those with his own music creation and thus forms another musical work. The easiest way to explain music sampling is when a producer/musician uses a part of an already recorded song to make a new piece of music.[36] Samples can be

36 See Wilson, S. R. (2002).

of different forms such as instrument samples such as guitars, violin, piano and some others and also can be made through various means such as taking only bits, altering the sequences of the original work in accordance with the taste of the sampler.

The genre that is most well-known for using samples is Hip-Hop. It is also Hip-Hop that originally introduced the public to sampling.[37] It all started in New York in the late 70's when DJ's started to mix songs during live performances.[38] They isolated "breaks" which they supplied with talked over, transformed in rapping for the first time which occupies a specific portion of today's music market. However, this was not limited to live performances anymore as they started recorded it and used in different songs. One of the most famous and earliest is the song "Rapper's Delight" by the Sugarhill Gang who sampled Chic's song called "Le Freak". This song set the bar for the future of Hip-Hop and the way sampling became a large part of it.[39]

The reason of sampling might be to exercise free expression, show cultural diversity or laziness, reduction of costs, lack of resources. From commercial perspective it can be argued that there is a market which attracts this particular genre of music where customers are satisfied in what they hear rather to think how that has been produced.[40]

Sampling has become a phenomenon, subject to copyright disputes, especially in America where several cases have been ruled in court.[41] American courts were sufficiently diligent to form a foundation for dealing these alleged copyright infringement issues. Ultimately, courts relied on different principles: substantial similarity, fair use, free use, bright line, *de minimis* and some others. Fortunately, German Federal Constitutional Court also came up with rationale judgment through correcting Federal Supreme Court's judgment in *Metall auf Metall, Kraftwerk, et al. v. Moses Pelham, et al.*.[42] Scarcity of proper and exact legislation made the situation of every case more complicated and of course unpredictable since different copyright holders fight against each other for their lawful interest.

37 See Lessig, L. (2008).
38 Christiansson, Upphovsrätt och närliggande aspekter musiksamling cit., p. 14.
39 Johnson, Music Copyrights, cit., p. 137.
40 http://smallbusiness.chron.com/sampling-important-business-80416.html
41 For example, those that will be brought up in the thesis: Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 798 (6th Cir. 2005), Jarvis v. A & M Records 827 F.Supp. 282 D.N.J.,1993. April 27, 1993 and Saregama India Ltd. v. Timothy Mosley et al., 687 F.Supp 2d 1325, (S.D.Fla 2009) [2009 BL 276875]Case No. 08-20373.
42 Decision of the German Supreme Court, 20th of November 2008, No. I ZR 112/06.

1.1. Purpose of the Study

The paper tended to assess the applicability of the US Fair Use and *de minimis* in EU by the ECJ.

1.2. Literature Review

The very basics relating to the foundations of copyright law and limitations such as works in public domain, one-bit protection, protection excluded by statutes were not covered due to having limited space. Important laws: constitutional & statutory provisions of both the US and Germany along with core case laws had been discussed for understanding the development and values of the court decisions.

Besides, books, online and offline journal articles, online newspapers specified in bibliography were reviewed.

1.3. Methodology

Interdisciplinary legal research, doctrinal research and comparative method were made to assess how different jurisdictions have taken the opportunity and tackled the threats imposed by technological advancement. It will evaluate the past, the present and the future regulatory framework assessing the scope and structure from the US to the EU legal framework.

2. Conceptual Issues

2.1. Writer of a Composition, Publisher[43], Sound Recording and Mechanical license

A composition has two sets of rights: the writer's share and the publisher's share. As a songwriter, one own both writing and publishing shares, but can transfer rights in the publisher share through a publishing deal. Under a publishing deal, the publisher of the composition is granted certain rights, and is then authorized to issue licenses and collect royalties in respect of that composition.

For example, the Ed Sheeran song "Thinking *Out Loud"*, was co-written by Ed Sheeran. Ed Sheeran has entered into a publishing deal with Sony/ATV Music Publishing. Because of this, Sony/ATV is responsible for license and collect royalties and fees due in respect of your compositions and then account these royalties to you on a regular basis whether for film use, TV use, cover versions, etc.

A sound recording is the actual final recording of a song, a fixation of sound. It often goes by the name of 'master' from the old 'master tape' expression. The authors are the performing artist and record producer, who in

43 https://support.tunecore.com/hc/en-us/articles/115006689148-What-is-the-difference-between-the-Publisher-and-Writer-of-a-composition-

essence are therefore the owners. However, recordings are typically made in assignment of record labels, whom have negotiated deals with both the artist and producer in which they transfer ownership by **mechanical license** of their copyright to the label in exchange for royalty payments.

2.2. Copyright in Music

The first step is to understand the relevant copyright issues. There are generally three copyrights in a musical recording:[44]

1. Copyright in the musical work. This is generally owned by the musician who composed the song, or their music publisher;
2. Copyright in any lyrics. This may or may not be owned by the same person who owns the copyright in the musical works; and
3. Copyright in the sound recording of the musical work. This is generally owned by the person or company who paid for the recording, often the record company that released the sound recording.

In order to use legally use a copyrighted sample, you need to get permission from the copyright holders of that sample which depends on what you are sampling.

- If you're sampling a composition, then you solely need permission from the copyright holder of the composition (probably a publisher on behalf of the writers).
- If you're sampling a master, then you need permission from both the copyright holder of the composition (publisher on behalf of writer) and the sound recording (label or performing artist).

2.3. Doctrines evolved to justify sampling from case laws

In order to counter claims of copyright infringement, a sampling artist who is being confronted by the legitimate copyright holder can claim the sample is an independent fixation of music, that it is small enough to be *de minimis*, that the original artist does not "own" the sampled section, that the digital sampling constitutes a Fair Use of the original, or that the digital sampling was done in parody and therefore is a Fair Use.[45]

Fair use

The five exclusive rights of a copyrighted work are stated in the United States Federal Copyright Act of 1976.[46] It states that apart from the copyright rules, fair use of a copyright protected work is allowed if it is for the purpose

44 https://cyber.harvard.edu/fallsem98/final_papers/Tada.html

45 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). Hampel, S. (1992). "Note: Are Samplers Getting a Bum Rap?: Copyright Infringement of Technological Creativity?" 559 *University of Illinois Law Review.*

46 Section 106, The United States Federal Copyright Act of 1976 (17 U.S.C).

of comment or criticize the original work, news reporting, teaching, scholarship or research.[47] Fair use is a judge made doctrine and the determination of fair use is done by a test. To determine fair use, one should consider the factors: if the purpose of the use is either commercial or nonprofit educational purpose, the nature of the copyrighted work, the amount and substantiality of the work used in relation to the copyrighted work as a whole, how the use effects the potential market or the value of the copyrighted work.[48]

Free use

Similar to fair use, free use is the translation used in the above-mentioned Kraftwerk-case. The free use is stated in section 24 of the German Copyright Act, UrhG. The German free use allows a third party to use a protected work without prior consent by the creator.[49] It "allows the creation of an independent work using someone else's creation without permission"[50.] Hence it is very similar to the American fair use since it is an exception or defence for a copyright infringement, but it is a narrower doctrine since it only allows transformative use of the protected work.[51] Free use shall be determined ad hoc on a case-by-case basis.[52]

De minimis

De minimis is Latin for "of minimal things".[53] It is a doctrine stating that the court shall not care for too small a matter. This means matter at hand is so insignificant that acknowledging it would lack legal consequence. In a case of music sampling, *de minimis* is no infringement since it fails to reach the level of infringement at all.[54] This doctrine had been used for decades as a justification of music samplings before different courts in both the United States and in Europe. In fact, it proved to one of the stable practices in the US for decades and already survived several generations.

2.4. The Current System of Licensing for Samples

Licenses for samples are needed from both the owners of the sound recording copyright and the owner of the copyright for the underlying musical work.[55] The mechanical licensing for entire songs, which involves paying the

47 Section 107, 17 U.S.C.
48 Section 107 (1-4), 17 U.S.C.
49 Tracy, Reilly (2012).
50 Neimann, F and Mackert, L. (2013).
51 Tracy, Reilly (2012).
52 Tracy, Reilly (2012).
53 Fellmeth, A and Horwitz, M. (2009).
54 Blessing, D. S. (2004) and Sykes, J. (2006).
55 Website, http://www.demouniverse.com/osu/papers/sampling.htm.

composition copyright owners for the right to re-record a song, is mostly handled by the Harry Fox Agency in the United States.[56] The Harry Fox Agency keeps a small percentage and distributes the rest to the music publishers, who pay about half of their receipts to the songwriters.[57] There is no compulsory system for sound recordings and no universal system for licensing the composition copyright for a song that is sampled. ASCAP, BMI and SESAC, the performance rights societies, collect fees from all the radio stations, television stations and nightclubs that play the song and divide the sum among the artists.[58] Again, only the underlying composition copyright holders receive income from performance rights societies. Most artists who use a noticeable sample license the sample by paying either a flat fee or a royalty calculation based on the number of copies sold of the new work.[59] A more popular song or artist demands a higher licensing fee, as when Puff Daddy sampled the Police's "Every Breath You Take" for his "I'll Be Missing You." Fear of litigation substantiated by the case history makes this practice a necessity for most sampling artists. The artists shoulder almost all of the cost of this system, since record labels pass the cost of licensing on to the artist. This is peculiar because in effect, the record company is making the sampling artist pay to protect the record company from being sued. Furthermore, because the record company of the original artist almost always has the copyright, the original artist does not receive most of the licensing fee.[60]

3. Copyright Laws Relating to Music and Case Laws

3.1. U.S. Copyright Legislation for Music

U.S. copyright law has its origin in Article I Section 8 of the Constitution:

The Congress shall have the power...to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries.[61]

The 1910 U.S. Copyright Law did not sufficiently anticipate technological inventions like the jukebox, this early law did allow the copyright owner of a nondramatic musical composition to demand fees from

56 Passman, Donald S. (1997).

57 http:www.mp3.com/news/073.html

58 In 1998, The Supreme Court decided that the Kingsmen should receive the royalties from their 1963 recording of the song "Louie Louie" that Gusto Records and GML had been withholding. These were not royalties for the written song, but rather the accumulation performance royalties garnered from radio airplay and the use of the Kingsmen version in movies and commercials. Paul Farhi, "'Louie, Louie'; Kingsmen Awarded Royalties," Washington Post, November 10, 1998.

59 "Sample Licensing in the Music Industry," Chaos Webpage, http://www.cmm.com.au/legal/sample.htm.

60 Ibid

61 U.S. Constitution, Article I Section 8.

others who wish to perform it publicly.[62] The Copyright Act of 1976, a rewriting of the original Act, was written to promote "the broad public availability of literature, music, and the other arts."[63] It gave holders of musical composition copyrights the exclusive right to reproduce the music, make a derivative work based on the copyrighted music, distribute the work publicly, perform the music publicly and display the work publicly.[64] In 1989, the U.S. joined the Berne Convention for the Protection of Literary and Artistic Works, which allowed works to be legally copyrighted without explicit notice on each copy.

3.2. German Copyright Legislation for Music

Artistic freedom[65] and guarantee on property & the right of inheritance[66] are enshrined in German Basic Law (*Grundgesetz, GG*). According to German Copyright Act 1965, Article 85, 'the producer of an audio recording shall have the exclusive right to reproduce and distribute the recording. If the audio recording has been produced by an enterprise, the owner of the enterprise shall be deemed the producer. Article 24, of the same Act says that 'An independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work but shall not apply to the use of a musical work where a melody has been recognizably borrowed from the work and used as a basis for a new work.'

3.3. The Core U.S. Cases

The U.S., the cradle of sampling, also saw the birth of the first music sampling litigation cases. The mentioned cases in this sub chapter is very important to understand the gradual development of the US law of sampling. Only the most important cases are discussed here which played the role to formulate the sampling legal system in the US. Through evaluating the facts in issue and the norms formulated by the US courts, a stable and efficient picture of confronting sampling can be drawn. In addition, this can be a tool of comparison for a better understanding of the issue.

In 1991, federal court case *Grand Upright Music Ltd v. Warner Bros. Records*[67], the judge began his sentence with a biblical quote – "thou shalt not steal." He then granted an injunction to Grand Upright Music to prevent

62 William H. O'Dowd, "Note: The Need For a Public Performance Right in Sound Recordings," 31 Harvard Journal on Legislation 249.
63 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). Hampel, S. (1992).
64 gopher://wiretap.spies.com/00/Library/Article/Rights/copyrigh.mus.
65 Art. 5 para. 3, Basic Law for the Federal Republic of Germany
66 Article 14 (1), Ibid
67 780 F. Supp. 182 (SDNY 1991)

further copyright infringement of the Gilbert O'Sullivan song "Alone Again" by Warner Bros. The quote was symbolic of the way in which U.S. courts would thereafter deal with sampling. The decision changed the *modus operandi* of the hip-hop music industry which, from then on, had to ensure all music sampling was preapproved by copyright owners.

2005 changed all the plots dramatically with the emergence of Bright Line rule prejudicing more stable and friendly practices of sampling by the courts. The court prohibited sampling without the consent of the right holder at all. According to the academicians, lawyers and the critics of the US, the ruling in *Bridgeport Music, Inc. v. Dimension Films*,[68] was one of the mistakes of the court. In fact, different courts in many states including the ninth circuit rejected the decision explicitly or declined to apply it.[69]

Fortunately, in *TufAmerica* ruling of 2014,[70] erudite ruling again found its track back. The plaintiff in the case was the rights holder of the sound recording and musical work entitled '*Hook & Sling Part I'*, which was recorded by Eddie Bo and the Soul Finders. The defendant was a company that produced a sound recording called '*Run This Town'*, which was performed by Jay-Z, Rihanna and Kanye West. The plaintiff alleged an unauthorized sampling of the succinct exclamation "oh" of Eddie Bo by the defendant, who subsequently looped[71] it 42 times in its own sound recording.

Plaintiff failed to qualify both qualitative and quantitative test of sampling.[72] The court said, the *sample* was restricted to the background of the song *Run This Town* and an untrained ear would have found it difficult to detect.[73] So the district court founded the sampled snippet as merely *de minimis*, therefore, any further examination would render the qualitative significance of the sample meaningless.[74]

In *VMG Salsoul*, case of 2016[75], the plaintiff alleged that Shep Pettibone, the producer of the song '*Vogue'*, performed by Louise Ciccone a.k.a. Madonna, sampled without authorization two horn hits, totaling a sample of less than a second, from the song '*Love Break'* also produced by him. The defendant sampled the "single" horn hit once, the "double" horn hit

68 410 F.3d 792 (6th Cir. 2005)

69 See string-cite in *VMG Salsoul v. Ciccone*, 9th Circuit June 2, 2016, at p.30 of the PDF slip opinion.

70 TufAmerica, Inc., v. WB Music Corp., et. al., 67 F.Supp.3d 590 (2014).

71 Looping means the repetition (and in various instances the production of a musical base) of a sampled portion in the derivative works by way of alteration, if any. See Amanda Webber: Digital Sampling and the Legal Implications of its Use after Bridgeport, Saint John's Journal of Legal Commentary, 2007: p. 380-382.

72 Ibid. at 597.

73 Ibid. at 598.

74 Ibid.

75 824 F.3d 871 (2016)

three times and the "breakdown" version once in his own work.[76] While rejecting this argument the *Ninth Circuit* reasoned that no infringement had occurred due to the *de minimis* use. Applying this to the *VMG Salsoul* case, it seems highly unlikely that an average audience would be able to discern the part of the horn hit of '*Love Break'* in '*Vogue'*.77 As such, the court followed the same reasoning as *Newton*[78] and described the sample used from the original sound recording as minimal.[79] The court departed from *Bridgeport*[80] by implementing a multi-faceted argument. It highlighted that the *de minimis* rule has its roots in decisions dating back to the mid-19th century, thus it is unassailably embedded in the system of U.S. copyright law.[81]

Concerning Fair Use disposal case[82], Drake, along with various associated record labels and music publishers, pulled off an impressive achievement by convincing a judge that his song "Pound Cake/Paris Morton Music," off the 2013 album *Nothing Was the Same*, fairly sampled a 1982 spoken-word recording, "Jimmy Smith Rap," and that there is no liability for copyright infringement. When it comes to documentaries and less abstract art forms, judges can parse meaning and figure out whether use of copyrighted material is transformative. This "Pound Cake" case did not have the element but U.S. District Court judge William H. Pauley III has taken the unusual step of addressing Drake's purpose in sampling in 2017.

The conclusion is that the US has undergone through generations of music sampling. At first, it dealt issues with the substantial similarity, the *de minimis* rule and the fair use doctrine. However, the practice was dropped in 2005 by bright line ruling though the court tried to simplify the then present and the future situation. The existing last generation got its probity back by justifying sampling in various means.

3.4. German cases and reference to ECJ

German copyright law also proved sufficient in terms of overcoming situation. In reality, German copyright legislation is a clear reflection of EU treaties which deals with strong protection of copyright law and the fundamental freedoms which are enshrined in the Charter of Fundamental Rights. But the real dispute is between protection and freedom, especially

76 For the fact of the case see VMG Salsoul, LLC, v. Madonna Louise Ciccone, et. al., 824 F.3d 871 (2016), p. 875-876.
77 VMG Salsoul v. Madonna (2016), p. 878-879.
78 Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003)
79 Ibid to 37 at 879-880.
80 Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005)
81 Ibid to 43 at 880-881.
82 Estate of James Oscar Smith, et ano. vs. Cash Money Records, Inc., et all. 1:14-cv-02703-WHP, 30.05.2017

when both have been argued against each other in the same lawsuit while the same instrument confirms these rights to different parties. Now it is the challenge for the ECJ to prioritise them, to put it differently, which right should prevail over the other.

In the *Goldrapper* case83, the *BGH* partly overruled its own decision rendered in the earlier *Metall auf Metall II*[84] case. In this case, the German rapper Bushido sampled portions totaling approximately 10 seconds of the French gothic metal group, Dark Sanctuary. He then used and looped them in 13 of his own sound recordings as background music.[85] There the *BGH* held that sampling musical snippets („*Tonfetzen*") is subject to authorization. In *Goldrapper*, however, the *BGH* held that infringement may occur only if the music sample is the result of a creative activity and that the used portion reaches the minimum threshold relating to the protection of intellectual creations.[86]

In 1977, the German band Kraftwerk released a song called "*Metall auf Metall*," which they also produced. The defendants sampled a sequence of two seconds from "*Metall auf Metall*," put the sample on a loop and used it as the continuous rhythmic layer for a rap song. The Federal Supreme Court ruled that this act constituted an infringement of Kraftwerk's copyright-related right as producers of the original sound recording (sec. 85 para. 1 of the German Copyright Act). The "free use" exception (sec. 24 para. 1 of the German Copyright Act) was not considered applicable in this case because, essentially, it would not have been unreasonably cumbersome for the defendants to produce a "sound-alike" rhythm sequence.

The Federal Constitutional Court held that where the act of sampling only slightly limited the possibilities of exploitation, the interests of the holder of a copyright (or a related right of the phonogram producer) may have to cede in favour of artistic freedom.[87] "The economic value of the original sound was therefore not diminished," the court said, adding that banning sampling would in effect spell the end of some music styles.[88] "The hip-hop music style lives by using such sound sequences and would not survive if it were banned."[89]

83 BGH Urt. v. 16.04.2015 (I ZR 225/12) - Goldrapper, *Gewerblicher Rechtsschutz und Urheberrecht*, Issue No. 12/2015: 1189-1198. See further Clark, Birgit (2015).
84 IZR 182/11
85 Mezei, Péter (2017)
86 BGH Urt. v. 16.04.2015 (I ZR 225/12) - Goldrapper, *Gewerblicher Rechtsschutz und Urheberrecht*, Issue No. 12/2015: 1189-1198. See further Clark, Birgit (2015).
87 https://www.lexology.com/library/detail.aspx?g=21e269d8-dab0-431e-97b1-3a8493b507cc
88 https://www.theguardian.com/music/2016/may/31/kraftwerk-lose-legal-battle-over-their-music-being-sampled
89https://uk.reuters.com/article/us-germany-music-sampling/german-court-allows-music-sampling-for-hip-hop-producer-idUKKCN0YM1JQ

Only in cases of a high degree of similarity between the songs at issue could one actually presume that the new work will compete with the original work.

Reference to ECJ

Whilst German law acknowledges the economic rights of sound recording producers, they cannot result in the creation of monopolies. This means on the one hand, that rights holders are granted every possible means of utilization.[90] Yet, on the other hand, these rights may be restricted by the legislator at any time.[91] The question of which rights and interests take priority in an actual case is subject to a court's discretion.[92] The German Federal Supreme Court (BGH) asks CJEU for guidance respectively, on:

- To what extent EU copyright allows sampling,

What role the rights granted by the Charter of Fundamental Rights of the European Union plays: in particular, what is the relationship between copyright protection (Article 17(2)) and freedom of the arts (Article 13)?[93]

The CJEU's decision will be eagerly anticipated as it is not only relevant for the present case at hand; furthermore, it will affect the entire music industry and determine to what extent sample-based music is still possible in the future. If protection of copyright wins then of course, sampling would be impossible in the future without permission. Oppositely, if artistic freedom wins then the law might tolerate sampling to reasonable extent.

4. Analysis and Conclusion

4.1. Comparative Analysis of US and German Approach

Both U.S. and German courts have applied this potential opportunity for exemption in a restrictive way.[94] The U.S. Court of Appeals for the Sixth Circuit in Nashville held that a two-second sample infringed the sound recordings copyright. The three-judge panel in *Bridgeport Music Inc. et al. v. Dimension Films et al.*[95] created a "new rule" in federal copyright law which was criticized heavily by lawyers and other industries including the RIAA.[96]

In light of the most recent developments, it is plausible that the Supreme Court ruled against *Bridgeport* for several reasons. First, the validity

90 Fabian Böttger - Birgit Clark: German Constitutional Court decides that artistic freedom may prevail over copyright expolitation rights ('Metall auf Metall'), Journal of Intellectual Property Law & Practice, Issue No. 11/2016: p. 813; Mimler, supra note 10 at 123.
91 Metall auf Metall III (2016), *1 BvR 1585/13,* p. 691-692.
92 Ibid. at 692.
93 https://www.techdirt.com/articles/20170606/06084737524/two-big-copyright-cases-sent-to-top-eu-court-one-sampling-other-freedom-press.html
94 Simon, Apel (2010).
95 410 F.3d 792 (6th Cir. 2005)
96 https://en.wikipedia.org/wiki/Legal_issues_surrounding_music_sampling

and importance of the *de minimis* standard is unquestionable and it has been used by the U.S. judiciary for decades.[97] Second, the U.S. Supreme Court does not favour the application of bright line rules in intellectual property law. Daniel J. Gervais noted that "at least five times in recent years, the Supreme Court has told the Federal Circuit not to adopt bright line tests. So that's probably a sign the Supreme Court would support the 9th Circuit's interpretation".[98] The *Ninth Circuit* emphasized that Section 114(b) of the *USCA* is the explicit limit of the copyright holder's exclusive rights. Therefore, extending the rule in an implicit way for the benefit of the copyright holder is rather inappropriate[99] and it is not even supported by the preparatory documents of the *USCA*.[100]

To determine between fair use and actual copyright infringement, judges and juries look at a variety of factors, such as: the length of the use, the purpose of the use, and more generally, whether the use is "transformative." A transformative use basically refers to a quotation in which you've changed the context or altered the original sufficiently to transform it into something new. This concept has played an increasingly important role in fair use decisions of the past 20 years by courts. However, German courts only used this transformative use in the name of free use principle which consists only a portion of the US fair use.

4.2. Applicability of *de minimis* and Fair Use in the EU

Predicting the ECJ's ruling is far from straightforward. On the one hand, the ECJ is faced with the need to balance fundamental rights in numerous cases.[101] It cannot be said that the US fair use and *de minimis* are revolutionary reformatories but at least they have been proved to be efficacious. German courts have already shown the functionality of the US fair use in the name of free use and *de minimis* within the scope of European legal framework. If the ECJ tries to implement these, there are already room for application. Indeed, the need for such balance is indirectly confirmed by the Charter of Fundamental Rights of the European Union. According to Article 52 on the principle of proportionality "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law

97 Inest, Andrew (2006).

98 Seidenberg, Steven (2016).

99 "The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording". See the third phrase of §114(b) of the USCA.

100 Ibid. at 883-884.

101 available via http://ec.europa.eu/justice/fundamental-rights/charter/application/index_en.htm.

and respect the essence of those rights and freedoms. Subject to the principle, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

Again, intellectual property rights deserve protection under Article 17(2) of the Charter of Fundamental Rights of the European Union. This form of protection is clearly codified by the *InfoSoc Directive* that speaks of the high level of protection of copyrights.[102] At the same time, intellectual property rights are not absolute, and their exercise should be subject to the effective functioning of other fundamental rights. For example, in the two *SABAM* preliminary rulings the ECJ stressed that striking a balance between the different fundamental rights is a priority of EU law.[103] Should the ECJ decide not to dig into a fundamental rights discourse, the *InfoSoc Directive* still offers enough space to treat sampling as an acceptable practice under EU law. Undoubtedly, sampling is a form of reproduction and that right has been harmonized by the EU.[104] Further, no specific limitation or exception has been dedicated to sampling in the *InfoSoc Directive*[105] and any new limitation or exception would be solely acceptable under the "*grandfather clause*" if its significance and economic impact is negligible.[106]

However, it would be highly problematic for the freedom of the arts, if minimal uses of samples were foreclosed by the ECJ. As freedom of the arts is equally protected by the Charter of Fundamental Rights of the European Union, the above syllogism along with *de minimis* and Fair Use of US courts, seems to be fully applicable, in balancing the competing interests between composers, sound recording producers and secondary creators of samples.

Duhanic's thoughts may serve as an apt conclusion to the aforementioned analysis. She noted that "the historical development of the German Copyright Act has proven that were always new techniques that appeared, and the Copyright Act had to keep up with the *zeitgeist*".[107] In the past thirty or forty years, sampling has become part of the *zeitgeist*.[108]

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102 See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, recital 9.

103 Case C-70/10, ECLI:EU:C:2011:771, para. 46; Case C-360/10, ECLI:EU:C:2012:85, para. 44.

104 Article 2, InfoSoc Directive.

105 Compare to ibid. Article 5.

106 "Use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article." See InfoSoc Directive Article 5(3)(o).

107 Duhanic, supra note 7 at 1016.

108 Ibid

4.3. Conclusion

Digital sampling is a good example for technological progress that does not fit into the traditional European author's rights regimes. That is because firstly, the Continental European countries rarely have any *copyright clause* in their constitutions (contrary to the US Constitution, Art.1. par. 8. cl. 8.); secondly, no stable practice regarding the "*de minimis*" standards, however, InfoSoc Directive Recital 35 says: in certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise. The *BVerfG* ruling enjoyed a positive reception from German academia.[109] Commentators agreed that the *BVerfG* may aid the survival of sampling[110], a specific manifestation of postmodern culture, which has become indispensable in various musical genres, and through this has promoted creativity and genre diversity, which arguably helps indirectly safeguard the jobs of numerous artists.[111] Observers also claimed that the decision may help steer the legal qualification of other manifestations of postmodern culture or pop-art (collage, appropriation of art, mash-up, fan-fiction, etc.) towards a more positive direction.[112] The defenses are important indicators that sampling is not specifically prohibited nor embraced in the Constitution, Copyright Act and court decisions, but rather could be allowed or restricted with full legal legitimacy depending on whether it is found to be consistent with the underlying purposes of the Constitutional clause and the implementing legislation.

Sampling is particularly common in modern hip-hop and electronic music. The *BVerfG* held that the case giving rise to the aforementioned judgment was about a clash between legal provisions concerning sound recording producers pursuant to the first sentence of Section 85(1) of the *UhrG* and the right for free use under Section 24 of the *UhrG*. Nevertheless, these rights are based on Article 14(1) of the German Constitution on property interests and on the first sentence of Article 5(3) on the fundamental right of artistic expression, respectively.[113] It is even more concerning when the clash is between two provisions of the CFR and the ECJ has been tasked to prioritize among copyright protection and freedom of art within the same charter. Lights have been shaded on some approaches taken by the US which seems to be most balanced until now specially when the task is to draw a balance between

109 Ibid. at 606-612; Leistner, supra note 40 at 772-777; Sven Schonhofen: Sechs Urteile über zwei Sekunden, und kein Ende in Sicht: Die 'Sampling'-Entscheidung des BVerfG, Gewerblicher Rechtsschutz und Urheberrecht-Praxis, Issue No. 13/2016: p. 277-280. 277-280; Duhanic, supra note 7 at 1013-1016.

110 Podszun, supra note 46 at 608.

111 Duhanic, supra note 7 at 1011.

112 Podszun, supra note 46 at 609; Böttger - Clark, supra note 42 at 813.

113 Metall auf Metall III (2016), p. 691. See also Duhanic, supra note 7 at 1011.

right and lawful use. It is undoubtful that the EU legal system provides enough room to apply the US fair use and *de minimis,* evolved in the US court rooms, which proved to not only serve the US legal system for more than 20 years but also, they became the tool of striking the balance which might be applied by the judges of the ECJ too.

One thing is sure regardless of the outcome: Kraftwerk, the pioneer of modern electronic music, will again have a huge impact on the music industry.[114]

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The Trilemma of the Nation-State in the Middle East: Diversity, Terrorism and Islamic Constitutionalism

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Doi: 10.19044/elp.v6no1a4 URL:http://dx.doi.org/10.19044/elp.v6no1a4

Abstract

The European modern nation-state model was imported to the Middle-East as a readymade form of governance. Yet, since its adoption the region has witnessed three unprecedented phenomena. First, a rise of Islamic movements some of which peacefully while others violently challenge the premises of the nation-state. Second, an eruption of sectarian violence to unprecedented level in the region's history. Third, a glaring paradox evidenced through a bloody division caused by a call of Islamic unity in addition to religious radicalization triggered by secularization. As an alternative path, the paper ponders on the promises and pitfalls of supplementing the existing nation-states with a multilevel constitutional system.

Keywords: Multilevel Governance; Diversity; Sharia; Terrorism; Nation-state.

Introduction:

Following the institutional and intellectual collapse of what Feldman terms "the classical Islamic constitutional order" (Feldman, 2012), the nation-state model was imported from Europe as a readymade form of governance (Hallaq, 2014). However, it soon appeared that there exists an irreconcilable "discord" between the conceptual and institutional foundation of the indigenous Islamic law and the nation-state and its concomitant modern legal system (Hallaq, 2014). A discord that still affects rule of law, peaceful co-existence (Gurtman, 2015) and more importantly the public's collective memory on what represents justice (Feldman, 2012). This makes the public more vulnerable to radical propaganda that exploits their romanticized memories about the past leading the region into a vicious circle of intolerance and violence.

I.:

As the nation-state was making its way through the newly decolonized world, Muslim majority countries witnessed a rise of various Islamic movements (Esposito, 2007). Despite the vastly divergent ideologies of these movements, they share a common objective; a call for return to Islamic law and united government; a call that challenges the premises of nation state. Alarmingly, this call is increasingly gaining grassroots popularity. A number of recent polls show that majorities in Muslim countries favor political unification on Islamic basis (Pankhurst, 2007). At the same time, they show deep affinity for democracy (Pankhurst, 2007).

At the heart of these grassroots calls lies a three-prong trilemma which is closely intertwined:

First, a subtle connection is traceable between official response to these calls and growth of terrorism. A number of scholars have illustrated how terrorism is a radical form of protest when people "*lack the usual outlets for registering their protests*" (Sunstein, 2014). Therefore, suppressing or ignoring these grassroots calls instead of, either refuting their conceptual foundation or taming them into a more acceptable paradigm, creates an underground market to channel them (Tomass, 2012). Unfortunately, underground networks tend to, as Sunstein argues, constitute a" *breeding ground for extreme movement*" (2014). Additionally, a relationship exists between public opinion on terrorism causes and the growth of its recruitment appeal (Gurr, 1998). A common denominator for radicalized individuals is sympathy toward the terrorist group's cause (Maeghin, 2016) and that terrorist groups use propaganda to draw in these vulnerable individuals (Berger and Morgan, 2015). Unsurprisingly then, statistics indicate that the dream of a united Islamic government has been extensively fantasized by terrorist Islamic movements and, thus, has become a key factor in terrorism recruitment (NATO, 2016).

Second, a principal reason for the invention of the nation-state in the modern era was to create ethno-culturally homogenous societies as a means to reinforce peaceful co-existence (Elazar, 2014). Yet, since its adoption in the Middle-East sectarian violence has erupted and religious conflicts continue to tear down the region in an unprecedented level in its history (Elazar, 2014). While this might be equally applicable to many parts of the developing world that adopted the nation-state (Elazar, 2011), a unique trait is peculiar to the Middle-East. Historically the region prior to the nation-state has managed to accommodate religious diversity in universal states (Elazar, 2011). Muslims, Christians, Jews as well others have co-existed for several centuries in Iraq, Egypt and Jerusalem with almost incomparable violent incidents. The unfortunate outcome the region is presently facing leads people to comparison

with the past which fuels the disdain of nation-state and paves the way for more calls of reclaiming the old forms of governance.

Third, is what should be termed " Muslims' modern double paradox". While Islam is the driving force of calls for unification, it is at the same time a key reason of division. Islam has no monolithic clerical authority; Muslims hold widely contradicting views of Sharia. In the absence of an effective constitutional framework for religious diversity, Muslims have fallen in a "perennial state of disunity" (Opwis, 2005) which has often led to sectarian violence and civil war (Owen, 2006). **Worse still,** while disagreement on Sharia should make legal secularism a logical option, judging from the overwhelming evidence of the past century shows otherwise (Hashemi, 2009). Secular and quasi-secular MENA regimes did not fare better in diluting the intensity of these calls. Worse still, government imposed secularism often produced more radicalism (Feldman, 2007). Evidence includes the subsequent rise of Islamic revolution in Pahlavis Iran; rise of Qutbism in Nasser's Egypt; and Tunisia, a pioneer in Arab legal secularism, tops the world in ISIS recruits (Benmelech and Klor, 2016). Even in Turkey, sizable number of citizens regularly vote for Islamic parties (Feldman, 2007) as evidenced by the incumbent Islamist AKP's fifteen year rule, not to mention that Turkey ranks third in ISIS recruits (Elazar 2014).

To approach these dilemmas, it would be unwise to not to ponder on the possibility of adopting a different paradigm of governance. While nation-state was the dominant political model in the past century, a growing body of literature favors a departure from the classical nation-state towards federalism as a tool for managing religious/ethnic conflicts (Elazar, 2014). Advocates of this view argue that the existence of multi-tiers of governance help diverse societies share power through engineering a fit between the dictates of segmented local autonomy and adherence to common constitutional norms (Choudry, 2011). However, for this model of governance to transpire in the region, there are two challenges; theoretical and political that this paper tackles and offers possible routes to overcome them. What is meant by theoretical challenges is to envision the institutional design of the model and by what is meant by the political is how to manifest it into reality.

Theoretical Design: hurdles and possible solutions

The theoretical challenge is twofold, first while regions that have adopted federal and multilevel governance shared some features with the Middle East, one should not overlook the fact the latter region has one of the world's strongest religious establishment. In the Middle-East religion cuts deeply in the social fiber and continues to influence not only politics but also political life as detailed earlier.

While as noted-above that Sharia's non monolithic nature has led to modern Muslim's double paradox, it is noteworthy that the very same nature has provided Islamic law with unequaled flexibility. This has helped Islamic law to adapt to customs and regional diversity for several centuries. This makes Islamic law, I argue, a double edged sword, if properly used could uphold cooperation and diversity as it did in the past. While if it is blocked forcefully, it contributes to the afore-mentioned three problems.

One of many examples to illustrate that the application of Islamic law in the pre-modern nation state bore the potential for the establishment of pluralism and regional diversity (Jackson, 2003) is a case properly tackled by Sherman Jackson in his article on Diversity and the nation-state. In the fourteenth century Ibn Qayyim, the Hanbalite jurist addresses the question of how the Muslim authorities should respond to traditions of other religious communities within the Islamic empire when such practices are deemed morally repugnant to Islam. In particular, the opinion was relevant to Zoroastrians tradition of marrying their mothers and sisters. He laid down the rule governing minority religious practices that such practices are to be recognized under two conditions": 1) that the religious minorities who engage in them not present their case to a Muslim court; and 2) that these religious minorities believe these practices to be permissible according to their own religious tradition" (Jackson, 2003, p 106). Therefore, despite his moral disagreement he decided that the authority should abstain from intervening in banning such marriage.

It is to be remarked that this is not a reformist view but rather mainstream and even regarded by many as orthodox classical jurist. Therefore, there is room to find within the body of jurisprudence what upholds the theory of regional cooperation and religious diversity. This example among others refutes the mistaken yet widely shared claim that adopting Islamic law necessary entail imposing sharia in uniform fashion to oppress religious minorities (Jackson, 2003, p 105).

The second part of the theoretical challenge, is that institutional design and political thoughts do not develop overnight. Contemporary literature—whether arguing for or against reconcilability of Islam and constitutionalism—is limited to the nation-state model (El Fadl, 2012). Even earlier Islamic jurisprudence, that addressed every single topic at the time were always anemic on constitutionalism and models of governance except for the work of al-Mawardi, Abu Ya'la and al-Juwaini written centuries ago, that adhered to theoretical analysis without going beyond the status quo (Al-Baghdadi, 1981).

It would be unrealistically ambitious to expect this design to be offered through an article or even one book. Yet, disentangling the study of Islamic constitutionalism from the narrow scope of the nation-state towards a more flexible structure of comparative federalism and multilevel constitutionalism

is needed. This new component could pave the way for new ideas and could stimulate further academic scholarship. Collaborative intellectual effort could help develop a more workable model. In the long run, this might lead to a paradigm shift in governance in the Middle-East.

Political Realities of the region: Monnet Method

Examining how to bring the model into existence logically comes after developing a theoretically sound model that builds on the existing nation-states. At such stage the main challenge would be how to get the existing regional powers to cooperate after years of distrust and radical nationalism.

While the US represents the strongest existing multilevel constitutional order which has continued to exist for almost for two and a half centuries unshaken, the EU has more valuable guidance due to the fact that it has imposed a new multi-layered constitutional system on a continent historically dominated by sovereign nation-states. Another reason of drawing on the EU experience is that the current Middle-East resembles post world war Europe. Namely, a conflict ridden region with nation-states pitted against one another.

Monnet, the genius framer of the EU remarkably avoided eradicating the existing nation-state model and identified instead common economic interest among conflicting states and develop gradual yet irreversible steps (Gilles, 2016) that would make cooperation a win-win situation. His long-term plan led to states gradually delegating their powers to a supranational body which statistically helped uproot intercommunal wars in the historically conflict ridden conflict. A similar approach might be very promising in the Middle-East region and could be the only path out of the region's blood bath.

Conclusion

Nation-state is not leaving the Middle-East in the foreseeable future, yet relying solely on it has led and will continue to lead to catastrophic outcomes. The paper suggests introducing a supplemental multilevel-constitutional order that builds up on the existing nation-states. Heeding the EU's experience could be useful yet the experience needs to be adapted to the region's different composition and peculiar features. The most salient of which is the strong religious establishment as well the historic ties of cooperation in the region. Collaborative intellectual thinking among the region's scholars is needed to rely on innovation instead of borrowing to carve out a model that reconciles the balance of the indigenous strong yet flexible Islamic establishments and the dictates of modern constitutionalism. Only the outcome of this intellectual discourse could curb support for terrorism causes which might open a new avenue for undermining terrorism recruitment appeal. Definitely testing this statement statistically could be a topic of future behavioral research on terrorism.

On the workability of such a model, gradualism is preferred over immediacy, the latter will lead to more bloodshed and conflict with political powers whose personal authority might incentivize them into maintaining the institutional status quo. On the other hand, mapping a gradual yet irreversible steps of cooperation will be smoother and [i]more sustainable.

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The Role of China in Influencing Indo-Pak Relations in Contemporary Era

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Doi: 10.19044/elp.v6no1a5 URL:http://dx.doi.org/10.19044/elp.v6no1a5

Abstract

This paper focuses on analytically viewing the nature of the tragic economic and political relationship among Indian, Pakistan, and China from 1949 to 2000. In addition, it explores how much Indo-Pak relations have been influenced by the Sino-Pak growing ties from the early 1960s. Shift in China's South Asia Policy after Mao and particularly in the post-Cold War settings are the major areas of concern. Furthermore, this study focuses on the transformation in the regional and international relations at the end of the cold war to race out the impact on the regional and bilateral dynamics of the three states: China, India, and Pakistan. Scholars agree in their opinion that the post-Cold war era can be best described as a period of rapid power transitions. There is considerable debate with regard to the direction and magnitude of this transition. Among these transitions, the most significant of them all is the emerging multiplicity with new power center. In the wake of the modernization drive being pursued by China and India, their focus is to liberalize their economics and the growing pursuit of normalization between India and Pakistan in comparison to Indo-Chinese efforts to accommodate each other. This, therefore, is regarded as a reflection of divergent held by the major players in South Asia.

Keywords: China, Indo Pak, Relations, Revolutionary idealism, Cold war.

1.0 Introduction

Since the inception of Pakistan and India (Ganguly, 2002), both countries have been the major cause of concern for each other's foreign and security policies (Buzan & Segal, 1994). Mutual distrust and confrontational relationship have characterized their bilateral diplomacy since 1947 (Ganguly, 2002). Although there have been period of mutual and cordial working relations in their interaction, the overall climate has been antagonistic and less than normal (Varshney, 2003). There are various schools of thoughts as to why India and Pakistan have remained historically locked in a relationship of distrust and mutual hostility (Mukherjee, 2009). A well-known line of argument traces the roots of antagonism to South Asia's historical legacy, dating back to the period when Islam had challenged "Hinduism's" near monopoly (Rizvi, 1993). An offshoot of this historical legacy explanation in the argument of Congress versus Muslim League, and one nation theory contending the two nations theory, have resulted to ideological non-congruity between Islam Pakistan and secular India (Hilali, 2002; Jalal, 1995; Smith, 2015). Therefore, this is the root cause of the conflict between the states (Rashid, 2008).

Consequently, others have attempted to analyze the relationship on the basis of threat, perceptions, and reference to images. Sister Gupter talked on the images and perception cultivated by the ruling elite of both, on the eve of the partition of India (Pande, 2011; Ray & Qayum, 2009; Tudor, 2013). Similarly, the colonial legacy left behind in the form of the Kashmir dispute (Chaudhri, 1987; Lamb, 1966; Talbot, 2010), the cause of junagarh and Manaudar, the distribution of river waters (Barua, Kuehl, Miller, & Moore, 1994), the massacre of people while crossing Pak-India boundary followed by a war in 1948 has to be put into consideration (Forman & Kedar, 2004; Saini, 2014). The failure of India to recognize and follow the UN resolutions to hold a plebiscite in Jammu and Kashmir are termed as contributory factors to the negative security perceptions of the two States (Hussain, 2015). Whereas others are of the opinion that the particular chronology of India's aggressions against Pakistan (Perkovich, 2002; Tellis, Fair, & Medby, 2002), in the retrospect left nothing but doubts in the minds of the people of Pakistan concerning the notorious designs. Thus, this resulted in the Fall of East Pakistan (Schofield, 2010).

If a single most dominant characteristic of the relations between Pakistan and India could be identified from 1947 (Ganguly, 2002; Joshi, 1974), the finger would almost involuntarily point to the mistrust and lack of confidence between the two sovereign states. Secondly (Amar, 1990; Douglas & Wildavsky, 1983), there is no getting away from the reality that external factors played a major role in the Subcontinent. In this context both India and Pakistan become involved without side powers on issues which remained

essentially bilateral (Fisher, Ury, & Patton, 2011). Kashmir was internationalized by the two protagonists, to be follow by Pakistan's acceptance of Western-military aid and membership of US-sponsored pact (Rather, 2005; Sisson & Rose, 1991; Syed, 1969). This move was severely condemned by the India leaders on the premise that it had inducted cold war in the region. Later, however, when Indian defense were found inadequate against the relative Chinese Power, India also made maximum effort to secure external assistance (Gupta, 1998; Lavoy & Lavoy, 2009). Pakistan reacted to the Western power for making Asia fight against Asian.

China has a long boundary with Pakistan and India (Zhisheng et al., 1990). After the partition of the subcontinent, China still had good relations with Indian. Indian pivotal role as an active member of Non-Aligned Movement (NAM) was highly appreciated by Beijing. On the other hand, Pakistan's induction in USA sponsored military pacts not only worsened its relations with India, but also to some extent its relations with China (Brecher, 1963; Lerski, 1968). In the first decade of Indo-Pak Relations, China maintained a non-interfering policy in Indo-Pak bilateral issues (Siddique, 2014). China enjoyed good relations with India in her first decade of diplomatic relations by signing panchsheel and raising the slogans of Hindi Cheeni Bhai Bhai in 1955 (Norbu, 1997). At the time, China showed less concern on Pakistan's Commitments in south East Asia Treaty organization (SEATO) and central Treaty organization (CENTO) and gave friendly gesture in the Banduing conference about Pakistan (A. H. Syed, 1974). Sino Indian differences on McMahon line (Garver, 1996). Dalai Lama and his associate's political asylum in India on the request of USA was the beginning of the animosity between India and China. This gulf of Sino-India relation became wider in 1962 and ultimately led to war (Thomas, 1981). This was the actual turning point and China became a factor in Indo-Pak relations (Mishra, 2004). After the 1962 Sino Indian war (Garver, 2011), China inclined towards Pakistan to meet Indian required changes (M. Arif & Mahmood, 2012). On the other hand, USA military aid to India during Sino Indian clash caused threat and lot of concerns for Pakistan. It became the main reason to open up China in 1962 after seeing all pros and cons (Haqqani, 2010; Sachs, Warner, Åslund, & Fischer, 1995).

In 1970, Sino Pakistan collaboration in the nuclear field further deteriorated not only Indo-Pak relations (Ganguly & Hagerty, 2012), but also Sino-Indian relations. Nevertheless, China have continued to support peaceful negotiation sentiment of Indo-Pak disputes by underscoring its desire for regional stability (Tellis, 2001). After 1949 (Shambaugh, 2000), China's policy remained not to enter into any military alliance, pacts, and treaties with its friends. However, it supported their course (Hemmer & Katzenstein, 2002).

Despite qualitative international change after the end of the Cold war in 1991, and then after the Nuclearization of South Asia, some Pakistani still have unrealistically high expectation of China (Brzezinski, 2012; Rajain, 2005). However, they fail to realize that today's China, which is guided by hardboiled pragmatism, is quite different from Mao's China which was motivated by revolutionary idealism. China at the threshold of 21st century is in big-league competition. It is a much different revolutionary movement across the world. Now China is motivated by pragmatic national interests, where its relations with any country are judged on its own merits without ideological predilections (Dijink, 2002).

2.0 Pak-China Relation, an All-Weather Friendship: The First Phase 1950-1960s

The first decade of Sino-Pakistan relation saw increasing contacts at the governmental, professional (Kiernan, 1976), and intellectual levels on both sides. Whereas it remained barren of significant, political, and economic content (Kiernan, 1976). The policy reflected different opinion available. In the situations, the choices among alternatives, the bases, and the trends of Pak-China in the 1950s and 60s were also governed by the same conditions. Officially, Pak-China diplomatic relations started in the 1950s, and the ambassador of China and Pakistan formally resumed their assignments in their respective capitals by September and November 1951 (Hussain, Javaid, Sabri, Ilyas, & Batool, 2014).

Pakistan have served as China's main bridge to the Islamic world, and also played an important role in bridging the communication gap between the PRC and the West, by facilitating U.S. President Richard Nixon's historic visit to China in 1972. The relations between Pakistan and China have been described by Pakistan's ambassador to China as "higher than the mountains, deeper than the oceans, stronger than steel, dearer than eyesight, sweeter than honey, and so on" (The Economist, 14 May 2011). According to Stockholm International Peace Research Institute, Pakistan is China's biggest arms buyer, accounting for nearly 47% of Chinese arms exports (Wezeman, 2013). According to a 2014 BBC World Service Poll, 75% of Pakistanis view China's influence positively, while only 15% expresses a negative view. In the Asia-Pacific region, Chinese people hold the third most positive opinions of Pakistan's influence in the world, behind Indonesia and Pakistan itself (BBC 3 June 2014).

3.0 New Era of Pak-China Relations

The relationship between Pakistan and China were mostly limited to the political sphere. There were frequent exchanged visits of leadership of both countries to one another. Both countries supported each other on domestic

issues, as well as on regional and international issues. The Foreign Offices of both countries kept close coordination, which resulted in a complete harmony on international affairs (Conflict and Peace Studies, 2014). We made big strides in bilateral ties and many MoUs were signed between the two countries, with the launch of 'One Belt One Road' (OBOR) initiatives and the signing of the China-Pakistan Economic Corridor (CPEC). Hence, Pakistan and China entered a new era in their relationship. In addition to the already strong political and military relationship, economic relations have improved exponentially (Summers, 2016). Chinese investments are pouring into Pakistan, and several mega projects have been launched in power generation and transmission. Basic infrastructures like motorways, railways, airports, seaports, oil and gas pipelines, and optical fibre linkages are being upgraded and strengthened (Irshad, 2015).

4.0 China, Seato, and Pakistan

Even while Pakistan struggled with the awesome problem of their national survival, during the year following their independence, she watched with some concern the civil war in neighboring China. Pakistan welcomed the end of that war and the emergence of a central government, despite the presence of communist write-ups throughout China. Pakistan thought that the new posture of China, a great Asian nation rising from under a long and ruthless foreign domination, augured well for Asia. Pakistan established diplomatic relation with the new Chinese government without waiting for other state to do likewise. China was not only a neighbor but it contained a large Muslim population (Syed, 1974).

5.0 Muhammad Ali Bogra and Chou En-lai: Towards a Better Understanding

Personal contacts between prime Minster Mohammd Ali Bogra of Pakistan and Premier Chou En-lai of China at Bandung went a long way toward improving the tone of Sino-Pakistan relation. It is clear that Bogra went to Bandung with an open mind and a modicum of good will towards China (Rather, 2005). On this overall climates, India-China relations were technically at their best, following the Hindi-China-Bhai phase and the resultant pronouncement of India acceptance of the Chinese stance over Tibet. During this phase, Pakistan had fought one border war with India in 1948; it had inherited the Kashmir with dispute and was in search of enhanced, secure, and intimate relations with a strong country or an ally, which could help it in times of crisis (Malone & Mukherjee, 2010). After the 1960s, Pakistan had strongly favored China's permanent seat in the UN and tried to set pace for brisk and cordial relations with it. This is attributed to the overwhelming security environment it found itself in and its lack of success in gearing multi-

lateral diplomacy to motivate India to resolve its differences with Pakistan (Arif, 1984).

5.1.0 The Second Phase: 1960-1970

This period saw the disenchantment of Pakistan with the west and the increased propensity of trouble from India (Syed, 1974). China was confronted during this period with a two-pronged threat in its disenchantment with the Soviet Union and the changing relations. After the 1962 India-China war, Pakistan immerged on the south Asian scene as an ally and friend of China, as a result of the west's increased help to India during the China war and its insistence that Pakistan must help India in its China war (Javaid & Jahangir, 2015). Pakistani and Chinese national flags and huge placards affirm Sino-Pakistani "friendship". Foreign minister Chen Yi, significantly observed: we would like to point out that those who tried to isolate and blockade China have failed (Aycan et al., 2000; Dyakonov, 2015). China offered Pakistan an interest free loan of 50 million dollars and called for greater economic co-operation (Siddiqui, 2017).

5.2.0 1970's The Formative Phase

In 1969, Nixon visited Pakistan and expressed the wish to pursue a policy of engagement with China. He asked Pakistan's President, Yahiya khan, to act as a courier between Beijing and Washington in order to inquire about China's view in the normalization initiative suggested by the Nixon's administration (Kornberg & Faust, 2005). The mission was to be carried out with utmost secrecy, devoid of normal diplomatic channels (Kornberg & Faust, 2005). One of the reasons cited for Nixon's decision to use Yahya khan had sprung from the fact that Pakistan was one of the few non-communist countries, which had friendly and cordial relations with the PRC (Kornberg & Faust, 2005).

5.3.0 The Post-Cold War Settings: 1990s

Since the beginning of Deng Xiaoping's reforms process, China's primary task had been the pursuing of security environment which is favorable to the country's economic construction. From 1952 to 1998, China's GDP grew at an average rate of 7.7% which was much higher than the average. In tune with the post-cold-war dynamics, China's South Asian Policy went through the necessary re-adjustment in an attempt towards India-China normalization. However, defining this trend of the India-China relations was not fundamental in defining the Pak-China relations in the post-war settings. With the end of the Cold-War, Pak-US relations went through a metamorphic change. The US stopped all assistance to Pakistan in 1990 on the pretext that the country was developing a nuclear capability. The address of Chairman Li-

pen during his visit to Pakistan on April 10, 1999, clearly defined the extensive consensus of both states on further development of China-Pakistan friendship and on international and regional issues of mutual interest (vice chairperson 1999).

A) As a result of China's experience with imperial power, it believes that it will be possible to secure peaceful international environment and avert a New World Order (Chen, 1993).

B) China opposes all hegemonic policies and power politics.

C) It seeks to persuade an independent foreign policy based on the principle of peaceful co-existence and the UN system.

D) Protection of its rights with its own territory, space, and territorial waters. Pakistan also maintained the defense of its sovereignty as an essential component of foreign policy.

E) The settlement of dispute through peaceful means.

F) The purpose of military buildup for natural defense and for external expansion (Maier, 1990).

5.4.0 Hindi-Chini Bhai, 1950s

The earliest phase of the Indio-China relations was one of Cordiality. Soon after the forging of diplomatic relations, India and China not only shared similar or identical views on series of major international issues, but also coordinated their efforts and cooperated effectively on many occasions for a common diplomatic struggle. For instance, China supported India in her effort to reclaim Goa, and India backed China's bid to get a permanent seat in the United Nations. During the Korean war, India opposed the UN resolutions declaring China as an aggressor. She also helped China to pass a warning to the United States, a move that grew out of China's trust in India (Tanner & Feder, 1993).

6.0 Sino-India Border Dispute of 1962: Its Effect on Bilateral Relations

By 1954, Tibet was by and large recognized by India as an integral part of China. However, India maintained that Tibet was a zone of influence for New Delhi, and it was to be perceived in this very context. In 1956, there were stray uprising in various parts of the Tibetan area under Chinese Control and the uprising turned into revolt in 1959. In this context, the Indian press gave expensive coverage of the spreading rebelling and openly talked about the lack of affinity between the Chinese and Tibetans (President Jian 1996)

6.1.0 1996 President Jiangzemin Visit and Its Ramifications

In 1996, President Jiang Zemin visited New Delhi and the second most important agreement, relating to CBMs, between India and China was signed (Dumitrescu, 2015). The agreement on confidence building measures (CBM)

in the military field, along the line of actual control on India-China border areas, maintained that peace and tranquility along the India China border was in the fundamental interests of the two parties and would contribute in resolving the boundary question.

The study of international relations between India and Pakistan is dominated by different variables such as conflicts, mistrust, antagonism, crisis, and cooperation. It is not difficult to underline or locate these areas because both were cultured socially, and were politically linked before they emerged on the world scene of independent sovereign state in August 1947. History and geography played a part in designating a nation's friends from its enemies. In Pakistan's case, India has filled the enemies' role during the last half century. The Hindu of the sub-continent has born a thousand years of subjugation, and the Muslim have been victims of foreign domination. They are yet to find their bearing as independent nation and they still need to acquire confidence to break ties with the past (Lodhi, 2013). The trouble between India and Pakistan actually began even before they were established as free and independence nations.

After the partition, Indian leaders were of the opinion that Pakistan would collapse sooner or later (Hasan, 1951). They were convinced that she would not be economically viable and that the Muslims have administrative capacity. Hence, when it would collapse, they thought they would have the Muslim of Pakistan as well as those of residuary India in the bag. Indeed, they did everything to bring about the collapse of Pakistan (Husain et al., 2006). Nevertheless, efforts were made in India to correct every conceivable difficulty for Pakistan and to endanger her existence. These efforts have led to the persecution of Indian Muslims. First and foremost issue for Pakistan after partition was its survival, which was highly threatened by India. Pakistan was termed by most Indian leaders as a tragic mistake, which might still be corrected. It was their hope that it would collapse by itself, and it was their move to assist this plan (Choudhury, 1975). This sense of insecurity pushed Pakistan into the western sponsored defense alliance SEATO and CENTO as her attempt to attain party with India and as challenge to the natural power hierarchy in the sub-continent. Westad (2005), in addressing the political committee of the conference, declared that he and Pakistani prime minster had reached an understanding of "collective peace and cooperation". Pakistan would not support any aggression that the U.S might launch China under the SEATO treaty, and she neither opposed China nor appended aggression from her. By now, China's policy toward the smaller nation in the context of super-powers hegemony began to crystallize. By 1965, Pakistan became a focal point of China's new approach in international problems. The government too was alive to the danger of massive military aid to India. Mohammad Ali,

External affairs Minister of Pakistan, took up the matter with President Kennedy and Mr. Macmillan when he saw them in October 1962.

6.2.0 China and the Indo-Pakistan War of 1965

In August 1965, sporadic fighting broke out between India and Pakistan in Kashmir. Then on the morning of September 6, 1965, the Indian army invaded West Pakistan, directing its attack at Lahore. Some took sides with Pakistan's allies. Iran and Turkey were sported vigorously and also others, such as Jordan, Syria, Saudi Arabia, and Indonesia. However, of all Pakistan's Supporters, China spoke the loudest. By linking the Sino-India and Indo-Pak conflicts, the Chinese fostered a sense of urgency among the powers about terminating the Indo-Pakistan war. They asserted that India's attack on Pakistan and her "intrusion" into Chinese territory were all part of the same Indian deign of aggressive expansionism (Brines, 1968).

The Chinese government, sternly condemned India for its criminal aggression, expresses firm support for Pakistan in its just struggle against aggression and solemnly warn the India government that it must bear responsibility for all the consequences of its criminal and extended aggression. India is in this case the aggressor and Pakistan is the victim. Similar expressions of support for Pakistan and condemnations of India continued to issue from Beijing until well after cease-fire line. All on the Pakistani side, but on none of these occasions had the UN Security Council uttered a "single word of disapproval". It becomes active only when Pakistan hit back on September. This shows that the United Nations partiality for India has long history. The United Nations, consistently reversing right and wrong and calling back white has always served the interests of aggressors; it is again siding with the aggressor on the Kashmir issue and Indio-Pakistan conflict. Premier Chou En-lai, in his speech at the North Korean embassy, declared that Indian government "could not have engaged in such a serious military adventure without the consent and support of the United States" (McDougal & Goodman, 1966).

The Chinese government pursued a policy of non-involvement by maintaining that it should be settled by the Kashmiris themselves. Just as the United States, the modern revisionists and the U.S controlled the United Nations. Beijing kept up the presser on Delhi. A note dated September 20th, following within the hours of the second ultimatum, posted fresh Indian violations of Chinese territory. The Chinese dismissed the Indian charges as fantastic tale and Pakistani spokesman described them as sheer propaganda designed to agitate certain section of opinion in the United States. In a television interview with the American Broadcasting Corporation, Pakistan's ambassador in Washington declared that there have been no promise and no collusion of any kind between my Government and China.

6.3.0 Tashkent Agreement-Chinese Perceptions

Pakistan and China formally ended their war when president Ayoub Khan and prime Minister Shari made a peace settlement, following a series of meeting in the Uzbek city of Tashkent in January 1966. In this connection, it is noteworthy that the Chinese maintained a degree of military presser on the borders of Sikkim, Bhutan, and the North Frontier Agency. Several months followed the Indo-Pakistan cease-fire with a view to strengthen Pakistan's position vis-à-vis India. The United States and Soviet Union had backed India against Pakistan and made a common cause against China in pursuing their interventionist policy in South Asia. The Russian were no friends of Pakistan. Reacting to the suggestions that the Ayub government had been unnerved by the vigor of Chinese diplomacy during the war, they insisted that Sino-Pakistan friendships was not merely a matter of relations between the two government but extended to the two parties. They urged Pakistan to stand firm in face of Indian pressure.

6.4.0 Indo-Pakistan War, 1971: Diplomacy of China

The outbreak of the East Pakistan crisis in March 1971, gave rise to certain political issues of international importance such as those of separatism, East Pakistan displaced persons, foreign intervention and external armed aggression. These issues because of their serious nature and repercussion on the situation in the subcontinent had to be considered by China, or any other country in the light of its foreign policy objective. Therefore, the nature and extent of China's support to Pakistan during the crisis and the ensuing war must be considered in the light of these issues and the relative's Chinese stance towards them (Chakma, 2012).

The Chinese official attitude towards the crisis and the issues arising out of it was first made public on April 12, through a message by Mr. Chou En-Lai to president Yahya Khan. A close study of this letter shows the Chinese point of view regarding the crisis namely: (1) That China considered the happening in Pakistan as purely internal affair which should be settled by the Pakistani people without foreign intervention; this adherence to non-intervention could also be seen in China's protest note to India of April 6, 1971, (2) that China opposed the separatists as was reflected in the expression that the unification of Pakistan and the unity of the people of East and west Pakistan are the basic guarantees for Pakistan's prosperity and strength, (3) that China's firm support to Pakistan was the assurance of it (the Indian expansionists dare to launch aggression against Pakistan), (4) the US decision to top the supply of arms to Pakistan with effect from 25 March, 1971; and the revocation on 8 November license for the export of 3,600,000 dollars' worth of military equipment had widened the existing military imbalance between India and Pakistan. While massive Russian arm supply to India continued, the

situation of Pakistan was in need of strong diplomatic and military aid. China was the only country which was able to provide arms and to whom Pakistan could turn to with confidence and would not be disappointed. China will resolutely support the Pakistan government and people in their just struggle to defend their state sovereignty and national independence.

7.0 Two Aids Bilateralism: A Quest for Normalization 1971-2000

Beijing's policy in south Asia during the 1970s has reflected a largely successful effort to expand relation in the region and to counteract the heavy Soviet influence. The crisis of 1977 in East Pakistan led to the Indian-Pakistani war which prompted a severe downturn in China's influence in south Asia later that year. India, which had long been hostile to China, aligned more closely to the Soviet Union in August 1971 by a Soviet-Indian friendship treaty. Pakistan, which in the past had helped China to check Indian and Soviet influence in South Asia, was split in two. The former eastern wing-Bangladesh decidedly adopted pro-Indian and Pro-Soviet policies. Over the next three years, Beijing adopted a low posture. Although China did what it could to assist Pakistan, Beijing has little alternative but to observe event happening outside, hoping for new opportunities. By 1974, two trends in South Asia promised to provide some new opening for Beijing. First India and Bangladesh eventually saw little utility in maintaining their hospitality toward Pakistan. Beijing's limited prospects in South Asia early 1972 were well demonstrated during the visit of President Bhutto of Pakistan to China from January 31 to February 2, 1972. Although Beijing afforded Bhutto's political support and afforded some measure of economic relief during the visit, yet there was an evident offered on both sides to let the dust settle in the South Asia while bolstering Bhutto's position during the post war period. Bhutto was accorded full honors, being hosted by Chou En-Lai and received by Mao. The visiting delegation, which includes the commanders of the Pakistani armed services, held talks with Chou, his leading associates Yeh Chien-ying and Li Hsien, PRC defense, and foreign affairs officials. Despite the strong military representation in the visiting delegation, the only reference in the communiqué to Chinese assistance was a decision to help the development of the Pakistan's economy by converting four outstanding loans into grants and deferring payment on a loan provided in 1970.

The Chinese muted their anti-Soviet polemic in deference to Bhutto's interested and concentrated their fire on the Indians during his visit in January 1972. The People's Daily editorial blistered the Soviets for supporting the dismemberment of Pakistan in the name of national liberation. As far as the question of Kashmir was covered, the Chinese joined their visitors in a joint communiqué calling for withdrawal to position which respected the cease-fire line in Jammu and Kashmir. Therefore, Chou declared Chinese support for

"the people of Kashmir in their just struggle for the right to nation self-determination." By mid-1974, the agreement between Indian and Pakistan to implement the UN resolution on returning prisoner of war and normalizing relations promoted expression of great Chinese interest in improving the relation with India and Bangladesh. At the same time, Beijing has continued to support Pakistan. Bhutto, now prime minister, retuned to Beijing from 11th to 14th May 1974, and the Chinese gave him the same full honour shown during his visit in early 1972. Teng Hsiao-Pring's banquet speech on UN resolution of 1971, stressed that these "New developments" had created favorable condition for normalizing relations among the countries in the sub-continent. Focusing on Beijing's own intention, Teng went beyond the usual Chinese affirmation of friendship with the People of the region, asserting that Beijing was now ready to develop relation with the countries on the subcontinent based on the five principle of peaceful co-existence.

On September 3, 1974, the People's daily article under the byline commentator offered an authoritative criticism of Indian's policy toward Sikkim. It denounced the Indian government proposal of August 1974 for a constitutional amendment to give Sikkim a status similar to that of an Indian state as a "flagrant" act of colonist Expansion. Also they alleged that reducing Sikkim to an Indian-Colony was nearly part of India's long standing design to become a "super power" and to lord it over South Asia. Making a rare reference to past Indian territorial aggrandizement fostered by Nehru, the article went on to accuse Indra Gandhi's regime of going even further along the expansionist road, citing its use of India's atomic test earlier that year to engage in nuclear blackmail.

More importantly was India's relations with Washington that had not been cordial, and their relations with Beijing have remained frozen. So, India made bids to restore full diplomatic relation with Beijing. India was still attaching great importance to Moscow's help, particularly of its military supplies, and was not happy over Beijing continued support to Pakistan. Yet, the Indian, as pointed out earlier, wants a wilder diplomatic option for the Chinese. Some dent in the Moscow-New Delhi entente would be a great diplomatic feat. It was reported in the India parliament on August 20, 1975, that there had been no anti-Indian propaganda by the Chinese in recent month. Chinese scientists took a week-long study tour of different enterprise and research and development centers in exploring prospects for increased trade with China as commerce between the two counties have declined sharply since 1962. By this time, China has emerged to the status of recognized participant in the global system, having regained its permanent seat in the security Council in 1971, in which Pakistan played a major role (Bjola & Kornprobst, 2018).

8.0 China and South Asia in the Post-Mao Era

The passing away of Mao Zedong in 1976 led to the ascendancy of Deng Xiaoping, following a brief interlude under Hau Guofeng that marked the transition. The Dengist period, which still continues, has been characterized by two dominant trends, which reflected the new leader's preoccupation with one fundamental objective: raise China from poverty and the result weakness to prosperity and strength. This reflects the aspirations of the Chinese people to have a standard of living comparable to those affluent counties of the west, and to see their counties attain the stature the "Middle Kingdom" enjoyed in its heydays in history (Maqbool Ahmed bhatty 1994).

9.0 The Dengist Approach Manifested Itself in Two Ways

a) Internally, the highest priory was given to the four modernization i-e agriculture, industry, Science and technology, and defense.

This produced two bisect in China's foreign policy, opening to the outside world, and it also promoted an international environment of peace and stability through negotiations (Maqbool Ahmed bhatty 1994).

b) There was early realization by China that the Soviet Union was determined to encircle and isolate it, just as the concept of Asia collective security advanced by Moscow had the same objective. China, therefore, attached primacy to improving its security situation viz-a-viz South Asia. Apart from strengthening relations with Pakistan and other countries of the region, special efforts were made to improve relations with India. Zhao-Rajeev meeting in New York October 1985 was reported to have set the tone for a constructive agreement. After the meeting, the pressmen were advised on behalf of both leaders that the Sino-Indian dispute would settle at "political as well as official level" and that effort would not be allowed to bogged down in bureaucratic hassles (Ahmed, 1992).

10.0 Impact of the Afghanistan Crisis

During the period, China was seeking to promote an international environment conducive to the pursuit of its economic goals. Moscow increased its expansionist activity from political support to pro-Soviet group in third world countries (Ahmed, 1992) (Angola, Ethiopia, south Yemen). This led to indirect military intervention in Cambodia through Vietnam, and finally through direct military intervention in Afghanistan as being a part of the Soviet strategy to isolate them. Thus, it is regarded as a particularly provocative move in this context. The Chinese attitude towards the major counties of South Asia was determined on the basis of their stance on the Afghanistan crisis. Chinese military assistance to Pakistan in various projects such as the setting up of the heavy rebuilding factory to overhaul, Type 59 tanks, F-6 rebuilding factory and the overhauling ability, in addition to other projects like Mbt-2000 Al-

Khalid tank, Karakarom-8 trainer, Super 7-fighter jets etc. were time and again projected as a potent threat to India (Yuan, 2007).

11.0 Sino-Indian Rapprochement

The visit of Prime Minister Rajiv Gandhi to China in December 1988 marks the first contact at the head of government level between the two countries after 1960, when Premier Zhou En-Lai had visited India. This visit also reelected "advice" by Gorbachev to India to mend its fences with China (Maqbool, Ahmed Bhstty).

12.0 The Working Dynamic of the Straddle Triangle 1910

The end of the cold war brought a noticeable de-escalation in the level of tension in numerous conflicts in the third world (Navnita, Chacha & Behern, 1946). The reduced presence of the erstwhile Soviet Union and Russia had contributed to lowering of tensions and the intensity of rivalry between the sub regional sectors. International security theorists argue that the rational sources of securities and threat had been replaced with non-traditional sources of security namely economic development, environmental security, and human development. The states of inertia, which had marked the Indian-Pakistan relationship for the last four decades till 1990s, saw a rapid increase of tension and hostility with a massive uprising in Kashmir's freedom struggle in 1998. The unprecedented tension led to the nuclear crisis of 1990s, when both sides had reportedly prepared their weapon systems for a possible exchange. South Asia's core regional conflict is that which exists between India and Pakistan, although it is perceived by the India-China threat perception, which is structurally different and does not relate to the same degree of interaction that characterize India-Pakistan rivalry (Chari, Cheema, & Cohen, 2009).

13.0 Impacts of Nuclear Tests of May 1998

The formation of a BJP-led government in India following the elections of March 1998 produced a significant change in New Delhi's perceptions and goals. The militant Hindu leadership proceeded to implement its agenda, in which open weapons of India's nuclear capability was on top. In an obvious move to garner western approval to this move, Indian defense minister, George Fernandez, in an interview with the BBC in April 1998 (within a month of his assuming office) said that China posed a greater threat to Indian security than Pakistan. Addressing a meet-the press session in New Delhi, Fernandez accused the Chinese of frequent intruding into Indian Territory and constructing a help in Raunchily Pradesh.

14.0 Conclusion

The purpose of this research was to view the impact of the developments within the ambit of relations amongst the three major players in the south Asia, namely; India, Pakistan, and China from 1974 to 2000. China's pragmatic approach in its foreign relations, Sino-Indian rapprochement, and end of cold war was viewed as an era of transition, ultimately paving the way for future global power configuration. Hence, the need arose to analyze the effect of the movement on international relations, in the face of the rapid change in the international system. Underlying emphasis on factors like globalization and free market economy, it was necessary to see how far the international trends had transcended the mutual relations of Pakistan, India and China. Hence, this is a bi-product of super power policy of engagement and inter-sate relations and mix of regional power politics.

Pakistan's overall perspective on foreign policy has been determined by the threat it had faced since independence from its much large neighbor, India. The threat which is derived from the hegemonic impulse of the second largest country in the world, and the rejection by it, is elite to the very basis on which Pakistan emerged. Hence, it compels Pakistan to pursue political design to safeguard its security and survival. In this context, the foreign policy of China, the only great power that has borders with South Asia, is of critical importance. Recognizing India as one of its major strategic rivals, China has since 1963 aligned itself with Pakistan to continue the common threat. Critics argue that Beijing's policy towards the sub-continental rivals has been based on the classic threat perception and strategic thinking. This was despite China's efforts to justify its political and military links with Pakistan as normal state-to-state relations.

Pak-China relations since their inception have been based on solid foundations and are likely to remain poised in the future as an all-weather relationship. The mutuality of interests is such that neither side can forego the benefits of the relations to either state. From a Chinese foreign policy perspective, conflict and war are counter-productive. Thus, China's indulgence into such an activity at this time in history could and can delay its rise to world great power. On the other hand, an improved state of Sino-Indian relations would and can also inadvertently raise the stake for China, amidst increasing Indo-US collaboration and the potential of India to use China as a means to justify its own rise to great power status. Hence, in the contemporary phase, the relationship of rivalry between the two states and that of friendship and strategic schism was in a bid to counter balance the Indian movement and her leverage in Beijing's central affairs. Thus, China requires a strong foothold in South Asia.

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What Causes Optimism Bias in Transportation Projects?

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Doi: 10.19044/elp.v6no1a6 URL:http://dx.doi.org/10.19044/elp.v6no1a6

Abstract

The design, planning and implementation of large-scale infrastructure, particularly about transportation projects has proven to be an inherently difficult task due to several factors. The often-incorrect information provided for predicted costs and benefits has a significant impact on the economic feasibility of a project. This paper aims at examining the evidence and flow on effect of cost overruns and underperforming benefits in large-scale transportation projects. The causation for these elements will be analysed as well as methods aimed at alleviating these impacts to advance the overall delivery of projects of this nature.

Keywords: Cost overruns, infrastructure, transportation projects, optimism bias and decision-making.

Cost Overruns and Benefit Shortfalls in Transportation Projects

It is acknowledged that there has been little research about the actual costs and benefits of large-scale transportation infrastructure that has had such vast amounts of money spent on it in the modern age. A study carried out in 2002 examined transportation infrastructure projects spread over 20 countries adding up to a combined total of US$90 billion between the years of 1928-1998 (Flyvbjerg et al., 2002). It found that in roughly a third of cases (28%) the actual construction costs were higher than forecast and that 90% of projects had experienced cost overruns. The common theme running between the projects (258 in total) was that the associated costs were often underestimated. In a somewhat troubling finding, it was registered that there was no improvement in the overall accuracy of cost estimation during the 70-year period. The authors of the study concluded that the decision-making process employed in large-scale transportation infrastructure is disingenuous in a high number of projects (Flyvbjerg et al., 2002).

Within this study, it was noted that it was not just construction costs that are incorrectly forecasted. With most transportation projects within the

study, the feasibility of the project draws heavily on the benefits associated with customer demand and utilisation forecasts. Forecasts of this nature are the basis for the environmental and socio-economic assessment of large-scale transportation infrastructure (Flyvbjerg, 2007; Huo et al., 2018; Love et al., 2016). Noteworthy examples of large-scale transportation infrastructure projects with significant cost overruns and a noticeable benefit deficit include the Channel Tunnel linking the United Kingdom with mainland Europe (via France). It came in over budget 80% for construction costs despite the private owner informing investors that 10% for overruns would be a sufficient contingency for construction costs. Another infamous example for cost overruns is the Denver International Airport that came in close to 200% over budget (US$1.7 billion quoted – US$5.1 billion actual cost) in combination with passenger traffic only being 55% of the forecasted use, in its first calendar year of operation (Flyvbjerg, 1996).

The Effect of Inaccuracy in Forecasting

It is evident in the current economic climate that the inaccuracy of forecasts that culminate in such significant cost overruns and benefit deficits pose stakeholders, investors and key decision makers with some problems when assessing the viability of a new project (Flyvbjerg et al., 2002; Wang et al., 2018). In a practical sense, it is known that cost overruns are generally tied to delays in work, as the securing of surplus funds is often a lengthy process and may be exacerbated by the need to renegotiate and gain re-approval for the project. Because many projects of such a large scale are debt financed with extensive construction periods, they are particularly susceptible to impacts from delays, which compound into further debt through interest payments and an extension of the remuneration period. In conjunction with large cost overruns and benefit, deficits are the tendency it must undermine elements of the project such as policy, planning, implementation of policy and general operations. This is due to projects that require a constant process of re-approval cause a significant amount of 'noise' or debate, leading to an increase in pressure amongst the stakeholders tied to the project.

These factors accumulate as the project increases in size; cost overruns and benefit deficit accrue in real terms, meaning they carry more consequence. Some of these large-scale infrastructure projects place such a burden on their national economies that cost overruns and benefit deficits from an individual project may have a negative impact on national budgets or even place the finances of the country in a volatile or unstable state. An example of this was the sufferance of the credit rating of Greece after the benefit deficit of the 2004 Athens Olympics struck its economy. The desire to avoid financial stress on both a national and regional scale has been at the forefront of reforming

planning techniques in relation to large-scale infrastructure projects (Flyvbjerg, 2007).

What Causes Cost Overruns and Benefit Deficits?

Errant decision-making on large-scale transportation infrastructure projects is recognised as having three main categories. The industry standard would be to facilitate improvement in this process, but for this process to occur, the causes for the inaccuracy of the forecasts must be assessed further. The categories divided into psychological, technical and political-economic (Dudley & Banister, 2018).

In assessing the impact that technical explanations have had on cost overruns and benefit deficits in relation to decision-making, it is evident that technical issues arise when utilising flawed forecasting techniques. Contributing factors such as insufficient data or when the forecasters are not experienced in the area being examined also play a significant part (Flyvbjerg et al., 2002).

Optimism Bias or psychological explanations account for the majority of cost overruns and benefit deficits. In defining optimism bias, it is recognised as being the disposition for humans to be overly optimistic when predicting or forecasting the outcomes of future actions. Because of this, the decision-making process is often based on an inaccurate forecast (underestimated costs and overestimated benefits) instead of on the balance of the expected gains, losses and probabilities. As a consequence of this those in charge of the large-scale transportation infrastructure projects approves projects that are almost certain not to be delivered on time, on a budget or deliver the benefits prescribed (Dudley & Banister, 2018; Flyvbjerg et al., 2005).

The political-economic aspect of the problem identifies the planners and promoters as intentionally overemphasising the benefits while underestimating costs when predicting the outcomes of large-scale transportation infrastructure projects. Actors in the political-economic realm do this to ensure that their projects gain the necessary approval and funding needed (Dudley & Banister, 2018).

A study into the way in which these three categories interact found that despite their being the presence of technical errors within the forecasting of issues it did not account for the empirical data gathered (Flyvbjerg & COWI, 2004). The researchers pointed instead to the interplay between the psychological and political-economic categories, as the data was nearly always presented in the same way, with an underestimation of costs and an overestimation of benefits. This pointed to the issue of being an inbuilt mechanism of bias within the decision-making process and not simply unexplainable inaccuracy (Szafranko, 2017; Wachs, 1989). This is supported by the notion that if the inexperience of forecasters or flawed forecasting

techniques were the main causes, then an increase in the accuracy of forecasts could be expected as more experience was accrued, and the process of refining techniques and models was undertaken.

Flyvbjerg agreed that the psychological aspect accounted for optimism bias while the political-economic impact accounts for the elements of strategic misrepresentation encountered. This combination of these elements can effectively explain why large-scale transportation infrastructure project costs are consistently higher than forecast while actual benefits are considerably lower (Flyvbjerg, 2007; Flyvbjerg et al., 2018).

Accounting for Optimism Bias in the Decision-Making Process

It is well recognised that projects or proposals of an optimistic nature are generally approved, while proposals of a pessimistic nature are often suppressed or aborted. From an individual sense optimism bias within each employee can be reinforced and bound together by the prospects of a project. Ultimately this validation from within an organisation causes both individuals and organisations to make imperfect decisions on large-scale transportation infrastructure projects based almost solely on optimism (Love et al., 2016; Wachs, 1990). This process results more often than not in underestimated costs and inflated benefits to the project (Flyvbjerg, 2016). In reviewing when optimism bias was most easily identified it was noted that it was during the appraisal stage that included the business case. It was found to decrease as the project progresses as mitigation strategies and other risk management techniques are utilised. While some within the industry label these distortions, made almost explicitly for political reasons a lie, it is rarely deemed as such (Flyvberg et al., 2002).

Underestimated costs + Overestimated benefits = Funding (Flyvbjerg, 2009, p.353)

This simple equation is found to be true when discussing misrepresentation, or intentional optimism bias appears not only like an inbuilt industry mechanism but a certain aspect of developing large-scale transportation infrastructure projects.

Methods for Liming the Impact of Optimism Bias

In his research on the subject, Flyvbjerg has suggested that the combination of optimism bias (psychological) and strategic misrepresentation (political-economic) of cost overruns and benefit deficits have merit. In a real-world setting, it is often challenging to differentiate between what is an unintentional delusion (optimism bias) and intentional deception (misrepresentation) (Flyvbjerg, 2009, 2016, 2018). In a retrospective light, the detection of political-economic pressure increases the likelihood of strategic misrepresentation. In the same light if there is a lack of political-economic

pressure then the likelihood of optimism bias being the cause for unforeseen cost overruns and benefit deficits increases. This leads many analysts to believe that the two types of explanation optimism bias (psychological) and misrepresentation (political-economic) accompany each other and more often than not may exist within an individual project.

The development of a more efficient method for forecasting is the most known way in which the decision-making process for large-scale transportation infrastructure projects. Reference class forecasting aimed at mitigating or reducing the cause of optimism bias was developed by Lovallo and Kahneman (2003). It is intended to counteract the type of unintentional cognitive bias found in the majority of human forecasting.

Reference class-forecasting forces the project planners to take an exogenous view of the project. This forces the planners to take into account projects of a similar nature that have been previously completed, essentially comparing it against a database of previously completed projects. This allows for the real term costs and benefits incurred against the previous project plans against which the current project plan is to be in direct comparison.

The most advantageous element of reference class forecasting is that it circumvents the psychological impact of human bias (optimism bias) as well as limiting the impact of strategic misrepresentation. This method removes from the forecast the uncertainty of specific events that might impact on the project, but rather allows for the project to be compared directly with the outcomes from the database of previously completed projects. This eases the pressure on the project planner's as they are no longer required to speculate on the possibility of uncertain events. Thus, the circumvention of human bias is facilitated (Flyvbjerg, 2006; Huo et al., 2018; Love et al., 2016). While this exogenous view of forecasting may not allow for the prediction of scenarios outside of the reference class, for the majority of large-scale transportation infrastructure projects, it will inevitably prove more efficient for forecasting real term costs and benefits (Flyvbjerg & COWI, 2004; Szafranko, 2017).

Instances of reference class forecasting being utilised are headlined by the British Department of Transport including it in their publication of 'Procedures for Dealing with Optimism Bias Transport Planning' (Flyvbjerg & COWI, 2004). This publication provides a recognised format for the reference class method as an essential element of project appraisal for all large-scale transportation infrastructure projects. It forces project planners to facilitate with the appraisers in order to generate precise, empirically driven amendments to the forecasts provided for a project projected costs and benefits as well as construction period. All these adjustments are to be based on previously completed projects of a similar nature, with exceptions to be made to allow for the specific unique features of the project. In strengthening the case for the use of reference class forecasting, the American Planning

Association (APA) has given the method formal endorsement, advocating that project planners utilise the method and not to rely on standard forecasting methods when forecasting for a large-scale transportation infrastructure project (APA, 2005).

To counteract the non-accountability of both the public and private sector several processes have been put forward. These processes include forcing forecasters and promoters to carry the full risk attached to their forecasts essentially. To safeguard transparency in this process the forecasts provided should be further analysed by a board of independent industry professionals.

Within the large-scale transportation infrastructure, project construction industry practices have arisen that have had a definite amount of success in forecasting more accurate costs and benefits. The principal method involves structuring of contracts such that forecasters and their organisations hold sole or shared financial responsibility any overrun of costs and for the deficit of benefits if they should so arise. This facilitates a better alignment of shared incentives and project vision (Flyvbjerg et al., 2008, 2016, 2018).

The second method is coined a Design-Build-Finance-Operate-Maintain (DBFOM) contract. This contract compels the private sector to take full responsibility for the design, building (construction), financing, operation and maintenance of the transportation infrastructure on a long-term basis (commonly 20-30 years). At the expiration of this contract, the ownership of the facility is handed over to the correct government authority. This accountability of the contract addresses the majority of the issues that occur as a result of forecast inaccuracies (Flyvbjerg et al., 2009).

The last method involves a joint venture in risk allocation or a balance of risk sharing between the public and private investors. The investment of risk capital facilitates this into the project. This is usually accomplished by circumventing financing entirely by the public sector but rather through PPP arrangements, partnering the project or outsourcing the finances (Flyvberg et al., 2009). This compels the project financers (private lenders and shareholders) to analyse the prescribed costs and benefits of the large-scale transportation infrastructure project, increasing the prospect of exposing optimism bias or strategic misrepresentation.

This method has received large-scale support from a study completed by Mott MacDonald which revealed that conventionally financed projects contained a significantly greater level of optimism bias than methods financed in a manner above. “The variation between the publicly and privately managed projects is recognised as the relocation of project risks to the organisation best positioned to attain the best benefit to cost ratio while still maximising quality” (2002, p.12).

Conclusion

The evidence indicating that cost and benefit forecasts utilised in the decision making the process for large-scale transportation infrastructure projects is overwhelming, with evidence indicating not just forecasts of a significantly inaccurate nature, but systematically misleading ones as well. This seemingly inbuilt industry mechanism poses a series of issues for those involved in the decision-making process as well as the other parties involved such as taxpayers, stakeholders and investors as they have to deal with the misallocation of assets (resources) placing significantly more pressure upon the feasibility of a project.

The main proponents for cost overruns and benefit deficits identified in Flyvbjerg's research are optimism bias and strategic misrepresentation. Also identified is the ability of these two explanations to coexist within the same project, despite this the approaches to mitigating their existence are divergent.

The prominent approach to mitigating optimism bias in environments where it is identified is by adopting more efficient forecasting methods. The industry-endorsed method of reference class forecasting, which utilises an exogenous view of project planning, has gained traction as the most successful method forecasting for large-scale transportation infrastructure projects. Its prominence has been garnered by successful integration within Europe and has the seal of approval from the American Planning Association as the recommended method of forecasting costs and benefits for large-scale transportation infrastructure projects. Despite this advance in forecasting methods in circumstances where there is a lack of motivation for parties to avoid strategic misrepresentation, the impact of the reference class method is diminished, save for it being used in conjunction with an increased sense of responsibility in mitigating such behaviour.

Models for amending this type of behaviour include restructuring government grants and placing forecasts provided for the project through an independent industry review process. In conjunction with this is the realignment of the finance methodology for large-scale transportation infrastructure projects. This can essentially be forcing the government as adopting the part of safeguarding the interests of the public, while project planners and investors carry a greater portion of the risk attached to the project. This is generally accomplished by the structuring of the project into a partnership or PPP arrangement or by outsourcing the risk to a suitable organisation.

In summation, it is evident that those in charge of project planning (forecasting and promotion) should be charged with the task of carrying the accepted risk of their forecasts. This would utilise the burden of an inaccurate forecast as a safeguard against optimism bias and strategic misrepresentation.

Without this safeguard or methodology in place with all large-scale transportation infrastructure projects then issues most often connected with optimism bias and strategic misrepresentation will continue to be a mitigating factor in the success of large-scale transportation infrastructure projects.

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