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Post-Materialism and Foreign Policy – a First Cut

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The influence of political culture on foreign policy is a much-neglected topic. This article focuses on one aspect of political culture: the concept of post-materialism as developed by Inglehart. Using Canada and South Africa as case studies, the article determines the degree of post-materialism of these two countries' political culture and then attempts to assess the extent to which the ideas of post-materialism have influenced the foreign policy of the two countries. The methodology is that of examining the ratifications of relevant UN conventions and the press releases of the foreign ministries of the two governments dealing with the subjects of gender equality, environmentalism and the goal of nuclear disarmament, three typical post-materialist causes. The article does not find a relationship between post-materialism and the foreign policy of Canada and South Africa.

1. Introduction

Most students of foreign policy take note of the fact that foreign policy studies stand at the intersection of international relations and comparative politics (Hudson, 2007, pp. 9, 28). Yet when it comes to detailed studies or in depth analyses of foreign policy, they return to the familiar theories of international relations, realism, constructivism, liberalism and so on. There are, of course, some notable exceptions. The studies of the influence of interest groups on American foreign policy; a number of studies of individual foreign policy decisions, though many of these are related only to the US or Israel; or the outbreak of various twentieth century wars. Smith, Hadfield and Dunne (2012) provide a good example of the state of the discipline in that respect. There is also the democratic peace theorem, which relates domestic politics to just one aspect of foreign policy, the decision not to use military means of implementation (Hudson, 2007, p. 26).

One especially neglected aspect of the study of comparative politics as it relates to foreign policy, is that of the degree to which a state's political culture may mould its foreign policy (Hudson, 2007, p. 104; Geldenhuys, 2012). Though its origins can be traced back to Montesquieu and beyond, political culture as an established part of the discipline of political science began with Almond and Verba's path-breaking study, *The Civic Culture* (1963). Political culture now forms an accepted aspect of the study of comparative politics, but the number of studies of its influence on foreign policy can literally be counted on the fingers of one's hands (Hudson, 2007, p. 104). Stairs (1982) on Canadian foreign policy, Ebel, Taras and Cochrane (1991) on Latin America and Tsygankov and Tarver-Wahlquist (2009) on Georgia are three notable examples of such studies. Grenstadt (2001) tries to

relate domestic political culture and institutions to the European policies of the five Scandinavian countries. He finds that more egalitarian countries are less likely to be pro-European, but that other aspects of national political culture do not affect European policy.

This article uses one aspect of political culture, the idea of post-materialism as developed by Ronald Inglehart and his collaborators, and attempts to trace the influence of these ideas on the foreign policy of two states, South Africa and Canada. The hypothesis is that states whose people display a high degree of post-materialism, as evidenced by the World Values Surveys, will develop foreign objectives which reflect post-materialist attitudes on the environment, gender issues, multilateralism and arms control, in short, that political culture will be reflected in a state's foreign policy (Hudson, 2007, p. 112). The empirical evidence which will support or refute this hypothesis consists of the policies of the two governments as evidenced by (1) their ratification or otherwise of the relevant United Nations conventions (2) public statements on relevant foreign policy objectives.

The study of political culture should not be confused with that of public opinion. Political culture is diffuse and long term whereas the study of public opinion and foreign policy usually relates to specific events, such as the American intervention in Afghanistan or Britain's relations with the European Union. Another important distinction is that political leaders and policy-makers are steeped in the political culture of their country; political culture is an ethos that applies to the polity overall whereas the study of public opinion distinguishes between the policy-making elite and the public as two separate entities whose relationship needs to be determined (Nicolás, 1995). In an interesting attempt to relate public opinion to political culture, Goldsmith (2006) examines international public opinion on US foreign policy and the degree of post-materialism in some other countries. He found no correlation. Post-materialist populations were not more likely to be critical of US foreign policy than any others.

2. The Concept of Post-Materialism

Beginning with a path-breaking study first published in 1977, Ronald Inglehart developed the idea of post-materialism. He took the idea of progress, which falls squarely within the canon of Western liberalism, and altered it much as Marx stood Hegel on his head – only in reverse fashion. Marx took Hegel's ideas and substituted materialism for ideationality. Inglehart took the ideas of modernisation and progress, which are largely based on the concept of material progress, and foresaw a time when materialism would become less important than a series of other values that he terms “self-expression” values. These values include, but are not limited to, individual autonomy and freedom of choice, gender equality, a concern for the environment, multiple political identities (below and above those of the nation-state), the right to participate in the making of authoritative decisions and more recently, animal rights and the right to express one's sexual orientation (Inglehart, 1998 and 2005, p. 2).

Inglehart's studies show that post-materialism became politically significant in Western Europe in the 1960s and 1970s, at a time when there had been an unprecedented growth in material well-being and a generational change in political attitudes caused at least in part by the coming to political maturity of the “baby-boom” generation. These young people had not experienced the physical hardships of two major wars and the

depression of the 1930s. Moving up the hierarchy of values, they turned their attention to values of self-expression, identity, environmental protection and an attenuation of the concept of national identity. More specifically, many rejected the idea that a government should put its people's lives at risk by using military means to defend the national interest (on the hierarchy of values, see Maslow, 1970, pp. 51-9). In his later work, Inglehart does not make the simplistic claim that post-materialism will inevitably follow material well-being. He admits that material values will continue to form an important part of most political cultures, that the degree of post-materialism will vary from country to country, that national cultures, especially those of a religious nature, matter and that the transnational flow of ideas may lead to the formation of post--material values in countries that have not yet achieved material well-being for most of their people (Inglehart and Welzel, 2005, pp. 18, 225; Nicolás, 1995). Thus, ideas such as environmentalism can influence people in countries, for example China and South Africa, which are still far from achieving the degree of prosperity that exists in most of Europe and North America.

It is ironic that post-materialism, which when it first developed largely expressed itself through opposition to the Vietnam War and to the production and deployment of a glut of super-destructive nuclear weapons, has since been all but ignored as an influence on a country's foreign policy (Inglehart, 1984). It is this lacuna that this article seeks to begin to fill. Starting with a modest objective, I use Inglehart's World Values Survey to determine the extent to which post-materialist attitudes characterise the political cultures of Canada and South Africa. That is the independent variable. I then try to trace the influence of these values on the foreign policies of the two states, using just three aspects of these policies: environmentalism, gender equality and support for multilateralism. So I begin not with a large-scale statistical correlation but with two case studies which should provide a useful basis for further studies.

The dependent variable consists of two elements: (1) the extent to which the two governments have ratified relevant UN conventions on environmental and gender issues and have supported UN efforts to halt the spread of nuclear weapons; and (2) an analysis of the press releases of the South African (DIRCO) and Canadian (DFAIT) foreign ministries over the last two and half years. The press releases represent an important source of information because they are addressed to the national as well as the international community, and in that way they presumably give some indication of the national political cultures and values.¹

¹ A note on methodology: I consulted the press and media releases issued by the two foreign ministries from 1 January 2009 to 30 June 2012 and searched them for references to the three issues discussed in this article. I also consulted the relevant UN websites to determine which conventions the two governments had ratified. The use of the press releases created an imbalance because the South African foreign ministry (DIRCO) issues many more press releases than the Canadian foreign ministry, which has become very sparing with the information it provides to the public.

Table 1.

**Ranking of Countries according to Inglehart's post-materialism index
(various dates 2005-2007)**

	Post-materialism score in ascending order		Post-materialism score in ascending order
Russia	1.2	Brazil	9.0
Taiwan	1.8	Ethiopia	9.9
Egypt	2.3	Japan	10.7
Serbia	2.2	Cyprus	10.9
Bulgaria	2.7	Turkey	11.9
South Korea	3.2	US	12.1
China	3.3	Rwanda	12.7
Romania	3.6	Argentina	13.4
Jordan	3.6	Peru	14.0
Thailand	3.7	New Zealand	14.0
Ukraine	3.8	Mexico	14.2
Vietnam	3.9	Slovenia	14.2
Indonesia	3.9	Finland	14.3
Georgia	4.0	Chile	15.6
Ghana	4.2	Spain	17.4
Mali	4.3	Great Britain	18.2
South Africa	4.6	Italy	19.5
Burkina Faso	4.7	Uruguay	19.7
Trinidad	5.1	Netherlands	20.0
Poland	5.6	Australia	20.2
Guatemala	5.7	Mexico	20.2
Morocco	6.1	Germany	22.1
India	6.3	Norway	22.4
Moldova	6.3	Canada	23.9
Iran	6.5	Sweden	24.6
Zambia	8.2	France	25.7
Malaysia	8.5	Switzerland	30.4

Post-materialism index 12 item - extracted from
<http://www.wsevsdb.com/wvs/WVSAanalyzeQuestion.jsp>

(accessed 18 June 2012)

3. Post-Materialism in Canada and South Africa

Tables 1 and 2 give an overview of the degree of post-materialism in Canada and South Africa. Table 1 ranks the 54 countries included in the latest World Values Surveys according to the degree of post-materialist values, in ascending order of the degree of post-materialism. It is not surprising that Russia is the most materialist of the countries surveyed. Years of materialist propaganda followed by robber capitalism have taken their toll! South Africa ranks 17th out of 54 countries; post-materialism has begun to influence the politics of a developing country which is still struggling with huge economic inequalities (Butler, 2009, pp. 89-91). Canada ranks 51st, again not surprising considering that Canadians pride themselves on their welfare state and their environmentalism. What is surprising is the large gap between Canadian and American attitudes on post-materialism; the US ranks 33rd out of 54. As the data from the World Values Survey indicates, Americans are less environmentalist and more sexist than Canadians, they have a strong sense of national identity and some on the American Right have made multilateralism into a four letter word.

Table 2 consists of a summary of just a few of the kinds of questions the World Values Survey uses to determine post-materialism. The questions and numbers in Table 2 do not give a total summary of the factors used to make up the post-materialism index. They just give a few examples of relevant questions in the hope that they will spark the reader's interest in the concept of post-materialism. The table includes Sweden and India as well as South Africa and Canada, so as to give an overview of the range of answers from developed and developing countries.

On gender issues, Canada is clearly more post-materialist than South Africa (See Table 2). On multilateralism, the two peoples are pretty similar in their views (The identical number of 59.5% for confidence in the UN is not a typo). It is natural that rich Canadians should be more willing to give foreign aid than are poor South Africans. Canadians and South Africans are almost as proud to be who they are, but when it comes to protecting the jobs of nationals, South Africans are more protectionist.

Issues of national security are of special interest to students of post-materialism. Post-materialists, Inglehart (1984) argues, take national security for granted. Fewer than 40% of both Canadians and South Africans would be willing to fight for their country, a number that might well decrease if their conviction were put to the test. Interestingly, South Africans feel that they have some control over their lives, to a higher degree than the people of the other three countries. This may reflect the recent abolition of apartheid and the lifting of the heavy government controls which that system imposed.

On environmental issues, Canadians are stronger than South Africans on biodiversity, but they are equally impressed by the risk of climate change. The latter views almost certainly reflect widespread international publicity about climate change, showing that the spread of ideas can speed the evolution toward post-materialism. It is possible that South Africans had less understanding than Canadians of the concept of biodiversity, reflecting the lower levels of education in the former country. Nevertheless, an impressive 80% of South Africans considered biodiversity to be a serious problem. However, when the choice is put in stark terms, the environment or economic growth, it is understandable that

South Africans choose economic growth in overwhelming numbers (Table 2). This is not to say that there is necessarily such a trade-off, the environment versus economic growth, but this is the assumption behind the question used by the World Values Survey.

4. Gender Issues and Foreign Policy

The United Nations' listing of conventions on the rights of women consists of nine items, including conventions adopted by the UN General Assembly, UNESCO and the ILO (Women Watch, 2010). South Africa has ratified eight of the nine conventions, the only exception being that on the political rights of women, which may be a reflection of the remnants of traditional governing structures which still exist in that country. Canada has ratified only six of the conventions. It has not ratified the convention on the minimum age of marriage, no doubt because marriage is a provincial responsibility, nor has it ratified the convention against discrimination in education. Education is also a provincial responsibility, but since the 1982 Canadian Charter of Rights and Freedoms specifically protects the rights of women, giving them a greater protection than that accorded any other group which might claim discrimination, it is truly surprising that Canada has not ratified this convention. The third convention which Canada has not ratified is that which is intended to suppress trafficking for the purposes of prostitution. South Africa ratified that convention in 1951.

When it comes to taking a position on women's issues at the UN and in other international fora, South Africa has taken a much stronger position than has Canada. Women's issues are mentioned in many of the statements of South African foreign policy as an important aspect of that policy. For example, when, on 2 January 2009, Minister Nkoane-Mashabane summarised the achievements of South Africa's first term on the Security Council, she mentioned "gender mainstreaming" as one of those accomplishments. On 7 March 2009, the minister emphasised South Africa's support for Security Council resolution 1325 on Women, Peace and Security, and for good measure she later (27 June 2011) linked South Africa's concern about climate change to the fact that women would be the worst affected by climate change. In short, women's issues form an important part of South Africa's foreign policy.

Paradoxically, South Africa's strong stand on gender issues in its foreign policy is *not* a reflection of its domestic political culture. As the data in Table 2 indicate, South Africans have a low rating on gender issues. What is more, South Africa is believed to have one of the highest incidences of rape and domestic violence of any country in the world. In the pithy statement of the United Nations Office on Crimes and Drugs, a woman in South Africa is more likely to be raped than to be educated (Sexual Violence, 2012; South Africa, 2012). In 2008, Afrobarometer found that gender issues were not something South Africans considered important. Less than one per cent of respondents mentioned gender issues as either a first or a second choice when it came to naming critical national issues, and just one per cent chose them as a third choice (www.afrobarometer.org, accessed 25 November 2012).

Women did play an important role in the liberation struggle against apartheid, but South Africans have not given that role much credit. Despite all the naming and renaming of monuments to heroes of the liberation struggle, the contribution of women has received but little attention (Miller, 2011). As for discussion of the possible revisions to the 1996

constitution, the media have said very little about gender issues. Discussion has focussed on issues such as judicial review, parliamentary supremacy, economic and social rights, and the role of traditional law.

While gender issues form such a prominent part of South Africa's foreign policy, this would not appear to be the case for Canada. Only four of the documents or press releases on the website of Canada's ministry of foreign affairs (DFAIT) over the period 1 January 2009 to 30 June 2012 refer to women's issues, and two of those, on 1 May 2010 and 26 September 2011, are devoted to statements of protest against Iran's election to the Commission on the Status of Women. That leaves only two statements on gender issues, neither of which refers to Security Council resolution 1325 on Women, Peace and Security, which the department's press releases ignore. One is a bland statement of principles, the other an announcement that a Canadian will chair a Francophone committee on issues of violence against women.

It is, therefore, quite clear that South Africa's foreign policy accords a much larger role to gender issues than does Canada's, even though Canada's political culture is clearly more post-materialist than that of South Africa. It would be facile to ascribe this circumstance to Canada's current Conservative government which is hardly an advocate of women's issues. Some of the UN conventions that Canada has not ratified have been open for signature for decades, when Canada had Liberal governments. Canadians' strong post-materialist position on gender issues is not reflected in its foreign policy. South Africans, on the other hand, may want to show the world that their new democracy wants to emphasise at least some aspects of human rights in its foreign policy.

5. The Environment – Climate Change

During the time period studied here, the two governments' foreign policy pronouncements produced a significant amount of information on only one environmental issue, namely climate change. The South African government was especially fulsome in its commentary, producing many statements on climate change and including climate change as a priority in general statements of foreign policy. This may in part be due to the fact that the effects of climate change are expected to be severe in poor countries. There was also the coincidental fact that South Africa hosted a major UN conference on climate change in Durban in March 2012, a conference which took the decision to replace the Kyoto Protocol with a new international instrument on climate change. The agreement, mediated by South Africa's foreign minister Ms Nkoane-Mashabane, focussed attention on the issue.

South Africa's policy on climate change emphasised three aspects of that issue. During the earlier period, in 2009, the government stressed the fact that, in accordance with the Kyoto Protocol, developed countries should bear the burden of reducing the carbon emissions which are believed to cause climate change. President Zuma's statement of 22 September 2009 provides a good example of this approach. As the Durban conference approached, the government's pronouncements took on a somewhat more responsible tone. On 11 September 2011, Deputy Minister Ebrahim spoke of the responsibilities of developed and developing countries, that it 'was important for all of us to be able to produce creative ideas in our respective energy policies'.

Secondly, the South African government spoke not only of the need to prevent further climate change but of the need to mitigate changes that had already occurred, to help people who were already suffering the effects of climate change. Minister Nkoane-Mashabane wanted the Durban conference to adopt a policy of helping countries adapt to climate change, programmes which it was hoped the developed countries would finance.

Thirdly, the government linked climate change to women's issues, as discussed above. It should also be mentioned that after the Durban conference, the South African government put its money where its mouth was by a carbon capture and storage policy.

Canada's policy on climate change takes only a sentence: in December 2011, the Canadian government announced its decision to withdraw from the Kyoto Protocol and to repeal the implementing legislation that was already in place, a threat which was duly carried out on 2 July 2012. Apart from the fact that Canada could not possibly meet its Kyoto commitments because it has not taken any concrete measures to do so, a possible explanation for the Canadian government's policy is that it favours the development of the Alberta oil sands, a project which would produce large quantities of greenhouse gases.

6. Nuclear Non-Proliferation

The one issue which traditionally occupies multilateral organisations and that interested both governments over the last three years was nuclear non-proliferation. Canada and South Africa have a common and commendable record in this field. Canada has had the capability of building a nuclear weapon for the last 67 years, but has chosen not to do so. South Africa is the only country which had nuclear weapons and has chosen to give them up.²

The government of South Africa has consistently maintained that it favours the abolition of all nuclear weapons and that it seeks the implementation of this policy by means of the creation of a network of expanding nuclear free zones, such as the Pelindaba Treaty which creates a nuclear free zone in Africa. It is also an advocate of the use of nuclear energy for peaceful purposes, a source of energy which it sees as useful for developing countries that have limited access to oil and natural gas. Ambassador Minty's statement to the Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons on 5 May 2010, provides a clear statement of these policies. The ambassador advocated the 'total elimination' of nuclear weapons, the creation of nuclear free zones and the entry into force of the Comprehensive Nuclear Test Ban Treaty. At the same time, he stressed that these treaties must not be used to deny developing countries access to the 'peaceful uses of nuclear energy'.

South Africa's government has been less emphatic when it comes to preventing the spread of nuclear weapons to governments which do not now have them. It has taken a strong stance against the government of North Korea, but has been much more conciliatory toward Iran. On 8 March 2012, South Africa's new ambassador to the IAEA, Xolisa Mbongo, spoke of resolving the 'Iran nuclear issue through dialogue and in a constructive spirit'.

² The case of the ex-Soviet republics where nuclear weapons were stored but which those governments did not control is somewhat different. They ceded these weapons to the government of Russia, which has inherited many of the responsibilities of the former USSR.

Contrast this with a 29 May 2009 statement on North Korea, in which the government calls on the 'Democratic Republic of Korea (DPRK) to fully and verifiably terminate any nuclear weapons programme'.

Why the difference? South Africa has commercial interests in Iran, which has just recently gone to some length to assist a South African company to obtain a contract for the provision of cell phone services which the Iranian government had promised to a Turkish firm. According to documents filed in an American court, the value of which have not yet been tested in that court, 'The suit alleges MTN [a major South African cell phone provider] bribed officials, arranged meetings between Iranian and South African leaders, and promised Iran weapons and United Nations votes in exchange for a license to provide mobile-phone service in the Islamic Republic' (Schoenberg, 2012). That said, the South African government's policy does not necessarily mean that it favours the acquisition of nuclear weapons by Iran. The debate on whether "constructive engagement" or confrontation is the better policy when it comes to influencing another sovereign government has not been settled, and in any case probably does not have a final answer. To cite just two historical examples: what did not work when Prime Minister Chamberlain appeased Chancellor Hitler at Munich worked quite well when Chancellor Kohl persuaded President Gorbachev to agree to the unification of Germany.

Canada also officially advocates the elimination of all nuclear weapons, but in recent years this policy has not formed a frequent theme of policy pronouncements (For an example, see the address by Foreign Minister Cannon to the Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons, 3 May, 2010). Canada, on the other hand, has taken a strong and confrontational stand on Iran's nuclear programme, imposing sanctions and using undiplomatic language such as 'Iran must change its approach of obstruction and obfuscation'. In the case of North Korea, Canada has adopted equally strong language. On 12 June 2009, the government quoted a UN Security Council resolution that condemned North Korea's nuclear weapons policy 'in the strongest terms'. By 2011, the Canadian government's stand appears to have softened somewhat. On 19 August 2011, the government issued a statement, which while maintaining sanctions on North Korea, speaks of a 'controlled engagement policy'.

So on nuclear non-proliferation, both governments maintained an almost equally strong policy. What would appear to be South Africa's soft policy with respect to Iran's possible development of nuclear weapons could well just be a fortuitous development, due to the government's eagerness to obtain the lucrative cell phone contract for its citizens. The government's position is not that Iran has the right to develop nuclear weapons if it chooses to do so; it is rather that talking may do better than sanctions in dissuading Iran from developing such weapons.

7. Discussion and Concluding Comments

Tables 1 and 2 show that Canada is far ahead of South Africa on the post-materialism scale. This distinction relates to nearly every issue under discussion here, with the exception of pride in one's nationality (Could one not be proud of the fact that one's country is liberal on gender issues or is environmentalist in its policies?) This difference is not reflected in the two countries' foreign policies, at least not on the three issues studied here. South African

attitudes on women's issues are traditional in nature, yet South Africa has made gender issues into an important aspect of that nation's foreign policy. There is no easy answer to this discrepancy. It is not as if the South African government has made other aspects of human rights a beacon of its foreign policy. In the future, interviews with officials of the South African ministry may help to clarify this issue.

Canada has not been active on women's issues on the world stage. In earlier years, that may have been a reflection of the fact that many such issues fall under provincial jurisdiction. They still do, but the adoption in 1982 of the Charter of Rights and Freedoms has given all Canadian women full rights under the law. When Canada first sent troops to Afghanistan in 2002, there was much talk in the media of helping Afghan women and girls. As Canadian involvement is fading, these claims have been negated or have disappeared from the media. The schools Canadian aid built are crumbling or have been converted to another use (Watson, 2012). At the UN, Canada has all but ignored gender issues in recent years. It is difficult to explain this quiescence when Canada has achieved so much on the domestic level. A possible explanation may be that foreign policy in general has, since the decision to withdraw from Afghanistan, not been a priority of the government of Canada. Both the foreign aid budget and that of the Foreign Ministry have recently been cut.

Climate change has been the subject of a successful transnational publicity campaign on the part of environmental groups. Hence no government can ignore the issue. While pointing out that the problem was largely created by wealthy developed countries, South Africa has responded by participating in relevant international conferences, ratifying the Kyoto Protocol and developing its own carbon capture policy. The government of Canada, after ratifying the Protocol, took no steps to implement the commitments it had made. Finally, it chose to withdraw, an admission of the fact that the commitments could not be met.

With respect to nuclear non-proliferation, both governments have taken a strong stand, with Canada's being perhaps a little more firm and consistent. However, South Africa's apparent softness with respect to Iran's possible development of nuclear weapons may be due to fortuitous and temporary circumstances, or it may reflect a feeling of Third World solidarity, which could be interpreted as at least an indirect reflection of materialist values. However, the evidence available to date is not sufficient to support such an interpretation.

It is thus clear that the initial hypothesis of this article fails. The aspect of political culture termed post-materialism has not influenced the foreign policies of the two countries studied here. This is not to say that the hypothesis has no merit. The small study done here is really just a pilot study, one that provides indicators that may become the beginning of further studies which could probe the issue in more depth. Further studies should include countries such as Sweden, which were among the earliest to display a post-materialist political culture. Further studies should also supplement the media releases used here with studies of the background of national policy-makers. Where did they go to school? What is their political background? (See also, Hudson, 2007, pp. 112-5). Presumably, policy-makers represent the core or centrality of national political culture (Nicolás, 1995). Ideally such studies should include in depth interviews with national policy-makers.

Another aspect of the topic that may be difficult to operationalise but that may be relevant to the study of political culture and foreign policy consists of the source and the

depth of the post-materialist attitudes of people. Attitudes that were formed over decades as a country's material well-being increased may be more relevant with regard to a country's policies than copy-cat attitudes that cause people to tell an interviewer what it is they think they ought to say. In short, this study is just a little toe in an ocean that remains to be explored.

Table 2.

Examples of Results from the World Values Survey, 2006-2008³

Gender Issues

University is more important for a boy than for a girl	<u>Canada</u> ⁴	South <u>Africa</u> ⁶	<u>Sweden</u> ⁵	<u>India</u>
- <i>Disagree or strongly disagree</i> %	95	79.5	98.9	53.5
It is essential in a democracy that women have the same rights as men <i>Rated 9 or 10 on a scale of 1-10, %</i>	78.2	55.7	100	71.0

Peace and multilateralism

Willing to pay higher taxes to increase country's foreign aid <i>Yes %</i>	64.7	33.4	50.6	not asked
Who should decide about international peacekeeping, National governments, regional organizations or UN?				
- <i>% choosing UN</i>	69.9	34.4	72.2	20.1
<i>% choosing regional organizations</i>	7.0	14.9	8.0	15.3
Confidence in UN <i>a great deal or quite a lot %</i>	59.5	59.5	78.2	64.0

National identity

How proud are you to be <i>% proud or very proud</i>	97.7	96.2	88.4	95.4
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³ Adapted from: <http://www.wvsevsdb.com/wvs/WVSAalyzeQuestions.jsp> (accessed June 21, 2012)

⁴ 2006

⁵ 2006

⁶ 2007

Mahant, 'Post-Materialism and Foreign Policy'

Willing to fight for country % <i>answering No</i>	39.6	36.4	14.2	18.6
When jobs are scarce, employers should give preference to nationals % <i>who disagree</i>	46.1	11.0	79.9	6.1
The Environment				
Loss of biodiversity, <i>serious or somewhat serious</i> %	92.8	80.9	92.9	78.8
Global warming/green house effect, <i>serious or somewhat serious</i> %	93.2	80.4	94.8	83.5
Protecting the environment should have priority over economic growth % <i>agreeing</i>	72.2	27.9	64.7	52.5
Perceptions of Self				
Leisure time, % <i>important or very important</i>	88.7	76.6	95.3	61.8
Feeling of control over one's life, % <i>9 or 10 on scale of 1 to 10</i>	32.3	41.7	34.5	27.5

References

Almond, G., and S. Verba. (1965). *The Civic Culture. Political Attitudes and Democracy in Five Nations*. Boston: Little, Brown and Company.

Department of International Relations and Cooperation of the Republic of South Africa. (2009). "South Africa condemns the reported Nuclear Test by the Democratic Republic of Korea's (DPRK)". Retrieved from <http://www.dfa.gov.za/docs/2009/dprk0526.html>

Department of International Relations and Cooperation of the Republic of South Africa. (2009). "Statement by the Minister of Foreign Affairs on the Conclusion of South Africa's Term as an Elected Member of the Security Council". Retrieved from <http://www.dfa.gov.za/docs/speeches/2009/dzum0102.html>

Department of International Relations and Cooperation of the Republic of South Africa. (2009). "South Africa to participate in the International Women's day conference in Monrovia, Liberia, 07- 08 March 2009". Retrieved from <http://www.dfa.gov.za/docs/2009/libe0309.html>

Department of International Relations and Cooperation of the Republic of South Africa. (2010). "Statement by Ambassador Abdul S. Minty, Special Representative for Disarmament and NEPAD at the South African Department for International Relations and Cooperation during the General Debate of the 2010 Review Conference of Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, New York, 5 May 2010". Retrieved from <http://www.dfa.gov.za/docs/speeches/2010/mint0505.html>

Department of International Relations and Cooperation of the Republic of South Africa. (2011). "Minister's Remarks at the Women and Climate Change Side-Event on the sidelines of the 17th Ordinary Session of the African Union (Malabo – Equatorial Guinea), 27 June 2011". Retrieved from <http://www.dfa.gov.za/docs/speeches/2011/mash0627.html>

Department of International Relations and Cooperation of the Republic of South Africa. (2011). "On the Road to Durban: Promoting Sustainable Energy Access in Africa, Speech for Deputy Minister Ebrahim, 15 September 2011". Retrieved from <http://www.dfa.gov.za/docs/speeches/2011/ebra0915b.html>

Department of International Relations and Cooperation of the Republic of South Africa. (2011). "Media Statement by Minister Maite Nkoana-Mashabane, incoming President of the 17th Conference of the Parties (COP17) to the UN Framework Convention on Climate Change and the 7th Conference of the Parties serving as the Meeting of the Parties (CMP7) to the Kyoto Protocol, 23 November 2011, Cape Town". Retrieved from http://www.dfa.gov.za/docs/2011/cop17_1124.html

Department of International Relations and Cooperation of the Republic of South Africa. (2012). "Statement on the Cabinet Meeting of 3 May 2012". Retrieved from <http://www.dfa.gov.za/docs/2012/cabinet0503.htm>

Ebel, R.H., R. Taras and J.D. Cochrane. (1991). *Political Culture and Foreign Policy in Latin America. Case Studies from the Circum-Caribbean*. Albany: State University of New York Press.

Foreign Affairs, Trade and Development, Canada. (2009). "Canada Welcomes Security Council Resolution 1874 on North Korea". Retrieved from <http://www.international.gc.ca/media/aff/news-communiques/2009/387260.aspx/lang=eng?lang=eng>

Foreign Affairs, Trade and Development, Canada. (2011). "Address by the Honourable John Baird, Minister of Foreign Affairs, to the United Nations General Assembly". Retrieved from <http://www.international.gc.ca/media/aff/speeches-discours/2011/2011-030.aspx?lang=eng>

Foreign Affairs, Trade and Development, Canada. (2011). "Canada Resumes Engagement in Conference on Disarmament". Retrieved from <http://www.international.gc.ca/media/aff/news-communiques/2011/240.aspx/lang=eng?lang=eng>

Geldenhuys, D. (2012). "Political Culture in South African Foreign Policy." *International Journal of Humanities and Social Sciences* 2(18): 29-37.

Goldsmith, B.E. (2006). "Regime Type, Post-Materialism and International Public Opinion about US Foreign Policy: The Afghan and Iraq Wars." *Japanese Journal of Political Science* 7(1): 23-39.

Grendstad, G. (2001). "Nordic Cultural Baselines: Accounting for Domestic Convergence and Foreign Policy Divergence." *Journal of Comparative Policy Analysis: Research and Practice* 3: 5-29.

Hudson, V. (2007). *Foreign Policy Analysis. Classic and Contemporary Theory*. London: Rowman and Littlefield.

Inglehart, R. (1977). *The Silent Revolution: Changing Values and Political Styles*. Princeton: Princeton University Press.

Inglehart, R. (1984). "Generational Change and the Future of the Atlantic Alliance." *PS. Summer*: 525-35.

Inglehart, R. and C. Welzel. (2005). *Modernization, Cultural Change and Democracy. The Human Development Sequence*. Cambridge: Cambridge University Press.

Maslow, A. (1970). *Motivation and Personality*. New York: Harper & Row. 2nd edn.

Miller, K. (2011). "Selective Silence and the Shaping of Memory in Post-Apartheid Visual Culture: The Case of the Monument to the Women of South Africa." *South African Historical Journal* 63(2): 295-317.

Nicolás, J.D. (1995). "Postmaterialism and the Social Ecosystem." In *Culture within Nature*, ed. B. and B. Sitter-Liver. Basel: Wiese Publishing, 179-89.

Schoenberg, T. (2012, July 3). MTN Asks Judge to Dismiss Turk cell Law Suit over Iran Deal. Retrieved from
<http://www.bloomberg.com/news/2012-07-02/mtn-asks-judge-to-dismiss-turkcell-lawsuit-over-iran-deal.html>

Sexual Violence in South Africa. (2012). Retrieved from
http://en.wikipedia.org/wiki/Sexual_violence_in_South_Africa

South Africa: Multi-Pronged Approach Needed to Reduce Gender-Based Violence. (2011). Retrieved from
<http://allafrica.com/stories/201211260249.html>

Stairs, D. (1982). "The Political Culture of Canadian Foreign Policy." *Canadian Journal of Political Science* 4 (Dec.): 667-90.

Smith, S., A. Hadfield and T. Dunne, eds. (2012). *Foreign Policy. Theories, Actors and Cases*. Oxford: Oxford University Press. 2nd edn.

Tsygankov, A.P. and M. Tarver-Wahlquist. (2009). "Duelling Honors: Power, Identity and the Russia-Georgia Divide." *Foreign Policy Analysis* 5: 307-26

Watson, P. (2012). Canada's Afghan Legacy: Shoddy School Buildings and Sagging Morale. *Toronto Star*, July 15.

Women Watch. (2010). *Directory of UN Resources on Gender and Women's Issues*. Retrieved from
http://www.un.org/womenwatch/directory/instruments_treaties_1003.htm

Freedom of Association and NGO Law: The Constitutionality of the 2009 Zambian NGO Law

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Freedom of Association is entrenched in the Zambian Constitution and in several International Law instruments to which Zambia is a party. By hindering the independent and effective operations of NGOs, the Non-Governmental Organizations (NGO) Act of 2009 unjustifiably curtails this freedom. This paper examines the NGO Act and documents the various instances in which it imposes an unconstitutional, unjustifiable and disproportionate hindrance on the ability of NGOs to operate effectively. It argues that the Act threatens to roll back the enormous gains that NGOs have made and continue to make in fermenting accountable, democratic and effective governance in Zambia.

1. Introduction

In 2009 The Zambian Government enacted the Non-Governmental Organizations Act (NGO) No. 16 of 2009.⁷ The Act created the NGO Board whose function is to consider and approve applications for registration from NGOs. The Act requires all NGOs formed after the passing of the Act to register with the said Board, and those in existence prior to the enactment of the Act to apply for a certificate of registration. The Act gives broad discretion to the Government to deny registration to NGOs, powers to dictate NGOs' thematic and geographical areas of work and imposes mandatory re-registration every five years in contravention of international human rights treaties, best practices and standards. In this article, we argue that the NGO Act of 2009 is unconstitutional and violates both the 1996 Zambian constitution and numerous provisions pertaining to freedom of association of international treaties and conventions, to which Zambia is a party and is therefore obligated to abide by. It is also in breach of well-established international best practices. The Act is clearly intended to curtail the freedom of NGOs in Zambia to operate independently and effectively. If implemented, it will without doubt hobble their operations.

NGOs, both domestic and international, are an indispensable component in the functioning of a democratic state and in the effective promotion of human rights, the rule of law and good governance. Their contributions are important in relation to fact finding, reporting, standard setting and the overall promotion, implementation, and enforcement of human rights and citizens' participation in governance. NGOs operate on the basis of

⁷ Non-Governmental Organizations Act, No. 16 of 2009.

differing mandates, each responding to its own individual priorities and methods of action, bringing a range of viewpoints to issues that arise in governance. In addition, they promote accountability in governance. From the earliest times, they have played a key role in protecting human rights, human dignity, and human progress. One of the oldest and most well-known NGOs is the Anti-Slavery Society, founded in 1823. It is well-known for its campaign to rid the world of the slave trade (Davies, 1966). Another well-known example is the International Campaign to Ban Landmines. Established initially by six NGOs, the campaign was awarded with the Nobel Peace Prize in 1997 for its contribution to the adoption of the 1997 Mine Ban Treaty. Further, NGOs' significant role in the establishment of the International Criminal Court is well recognized (see Glasius, 2006). Yet another example is the Kimberly Certification Scheme. This is an international diamond certification system established in 2003 that focuses on stopping the trade in conflict diamonds.⁸

Whatever the shortcomings, it is inconceivable that the progress made thus far in establishing democracy and accountability for governance throughout the world and in Zambia could have been achieved without the work of NGOs. An important condition for the existence of a democratic society is the respect for fundamental rights and freedoms enshrined in a national constitution. Freedom of association is a cornerstone for a functioning democracy. The right to form groups, to organize and to assemble together with the aim of addressing issues of common concern is a human right. The ability to organize is an important means by which citizens can influence their governments and leaders. The right of association not only applies to individuals who wish to form associations but also guarantees associations so formed the right to operate freely and without interference. It is important that government creates an environment that allows associations to flourish, rather than enacting draconian laws that claw back and impose unnecessary restrictions on the enjoyment of the freedom of association.

2. Freedom of Association: Basis and Scope

In this section we will analyze the international instruments that entrench freedom of association and the court jurisprudence interpreting these instruments by both domestic and international tribunals. Zambia, like all state parties to these instruments, has the prime responsibility to promote, protect and implement human rights and fundamental freedoms articulated by the conventions Zambia is party to. The freedom of association is guaranteed by a number of international, regional and national constitutions.⁹ The Universal Declaration of Human Rights 1948 provides per Article 20(1) that 'Everyone has the right to freedom of peaceful assembly and association.' It provides further that 'No one

⁸ <http://www.globalwitness.org/campaigns/conflict/conflict-diamond> (accessed 21 November 2013).

⁹ The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights (ICCPR), The Convention on the Elimination of Racial Discrimination, The International Covenant on Economic, Social and Cultural Rights are examples of international conventions that guarantee the freedom of association in democratic societies. The European Convention on Human Rights, The American Convention on Human Rights and the African Charter on Human and Peoples Rights are examples of regional arrangements that guarantee the freedom of association.

may be compelled to belong to an association.' The International Covenant on Civil and Political Rights provides per Article 22(1) that: 'Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.' Whilst guaranteeing the freedom of association, international conventions recognize that the freedom is not absolute and may be interfered with or derogated from under limited circumstances. The circumstances under which freedom may be interfered with are carefully and strictly circumscribed by law and once the requirements are not met, the continued interference becomes an impermissible violation of freedom, actionable before the courts.

International human rights treaties are replete with provisions that guarantee the freedom of association. Article 11(1) of the European Convention on Human Rights provides that: 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.' Article 11(2) provides that:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

Article 11(2) of the European Convention sets out the conditions under which the freedom may be limited under the European Convention. In *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* (2009)¹⁰ (hereinafter referred to as TMC case), The European Human Rights Court held that '... an interference will constitute a breach of Article 11 unless it was 'prescribed by law', pursued one or more legitimate aims under paragraph 2 and was 'necessary in a democratic society' for the achievement of those aims.' All three conditions must be fulfilled cumulatively or the implied restriction will be considered in violation of the Convention (Guluzade et al., 2010). Thus though the freedom of association is not absolute, the law set a very high standard allowing a limited scope of permissible intrusion.

The expressions "prescribed by law" require that there must be a domestic law that is precise and accessible to everyone in the country.¹¹ The expression also refers to the quality of the law in question.¹² Thus in the *TMC case* the court held that:

The expressions 'prescribed by law' and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among many

¹⁰ (Application no. 37083/03)

¹¹ *Tebieti Mühafize Cemiyeti and Israfilov V. Azerbaijan* (Application no. 37083/03) p. 14.

¹² *Ibidem*.

other authorities, *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004- I).

Domestic legislation aimed at limiting the freedom must also provide a level of protection against arbitrary interference by government officials, since it would be contrary to the rule of law to grant an unfettered discretion to the executive.¹³ The law must therefore spell out the scope of any discretion and how it is to be exercised by the executive.¹⁴ The expression 'necessary in a democratic society' is to be construed strictly and interference under it is permissible only where the interference corresponds to a pressing social need, but not construed broadly to encompass a regulation that is merely useful or desirable.¹⁵ The African Charter of Human and People Rights provides in Article 10(1) that: 'every individual shall have the right to free association provided that he abides by the law.' Article 10(2) provides that: 'Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.' In *Lawyers for Human Rights v Swaziland*, citing *Huri-Laws v Nigeria (2000) AHRLR 273 (ACHPR 2000)*, the African Commission, quoting its Resolution on the Right to Freedom of Association, held that:

the regulation of the exercise of the right to freedom of association should be consistent with states' obligations under the African Charter and in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom and that the competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards.

Flowing from this decision, state parties are obliged to regulate freedom of association in a manner that is consistent with the charter and not to limit the right, to regulate the freedom in a manner not to override constitutional guarantees and international treaties. Generally, international and regional bodies guard jealously the freedom of association as a fundamental right allowing official interference only under limited and prescribed circumstances.

The United Nations Declaration on Human Rights Defenders adopted on 9 December 1998 declared: 'Everyone has the right to promote and strive for the protection and realization of human rights and fundamental freedoms.' The declaration states that this right may be enjoyed 'individually and in association with others'. The Declaration emphasizes the fact that human rights defenders are entitled to their rights both as individuals and as members of any group, association, or non-governmental organization. The Human Rights Committee in General Comment No.25 observed that the freedom of association includes the right to form and join organizations and associations concerned with political and public affairs.

Under the United Nations Charter, member states are obligated to promote universal respect for, and observance of, human rights and fundamental freedoms without distinction as to race, sex, language, or religion. A state that is party to human rights

¹³ *Ibidem*.

¹⁴ *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000- XI).

¹⁵ *Tebieti Mühafize Cemiyeti and Israfilov V. Azerbaijan* (Application no. 37083/03) p. 16.

treaties is furthermore under a legal obligation to ensure the rights articulated in the treaties to all individuals under its jurisdiction, and to provide for an effective remedy in case of a violation. In *Velasquez Rodriguez v. Honduras* (Inter-Am. Ct (ser.c) No.4) the Inter-American Court of Human Rights held that when states join treaties they undertake to respect the rights and freedoms recognized in the treaties. States assume the following obligations: (a) to respect the rights and freedoms recognized in the treaties; (b) to ensure free and full exercise of the rights recognized by the treaties to every person subject to their jurisdiction. This obligation implies the duty of states to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights and (c) states must prevent, investigate and punish any violation of the rights recognized by the treaties.

2.1 Freedom of Association in the Zambian Constitution

The Zambian Constitution as Amended by Act No. 18 of 1996 echoes the determination of the people to establish a sovereign democratic state and promises the freedom of association to all citizens. Article 21(1) of the Zambian Constitution as Amended by Act No. 18 of 1996 provides that:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to any political party, trade union or other association for the protection of his interests.

The constitution guarantees every citizen the freedom to associate with any person with the view to protecting and promoting their interest. Flowing from this provision, the freedom is only to be curtailed with the consent of the individual.

Article 21(2) of the constitution further provides that:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision: (a) that is reasonably required in the interests of defense, public safety, public order, public morality or public health; (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons; (c) that imposes restrictions upon public officers; or (d) for the registration of political parties or trade unions in a register established by or under a law and for imposing reasonable conditions relating to the procedure for entry on such register including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

Article 21(2) introduces a limitation to the absolute enjoyment of the freedom. Thus without the consent of the individual the state may enact laws that seek to do a list of things aimed at interfering with the absolute enjoyment of the freedom. However, these laws must conform to a standard set by the constitution itself. The standard as interpreted by the courts being that the law must be reasonably justifiable in a democratic society and fall under the permitted exceptions under the constitution. This standard is akin to the standard espoused in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan* and *Lawyers for Human Rights v Swaziland* (ACHPR 2000).

3. The NGO Act of 2009: A closer look

The Non-Governmental Organizations' Act, No. 16 of 2009 of Zambia, according to its preamble, provides for the co-ordination and registration of non-governmental organizations; the establishment of the Non-Governmental Organization's Board and the Zambia Congress of Non-Governmental Organizations; the constitution of the Council of Non-Governmental Organizations; and the provision for matters connected with or incidental to the foregoing. The implementation of this law has a significant impact on the enjoyment of the freedom of association by individuals who seek to establish non-governmental organizations for the promotion and protection of their interest in the country. Thus the provisions of the law must be carefully matched against the enjoyment of the freedom to ascertain whether it unjustifiably interferes with same.

3.1 Self-Regulation of Non-Governmental Organizations

Part V of the NGOs Act deals with self-regulation of NGOs registered under the Act. The Act establishes a Zambia Congress of Non-Governmental Organizations which shall be a collective forum of all organizations registered under the Act.¹⁶ The Congress adopts its own structures, rules and procedures for its administration.¹⁷ In addition to this, the Congress elects a twelve member Council which shall be responsible for the management of the affairs of the Congress.¹⁸ The Council is mandated to develop, adopt and administer a code of conduct for NGOs, facilitate and coordinate the work of NGOs operating in the country and perform other functions assigned by the Congress.¹⁹ The law provides further that for the purposes of developing a code of conduct for the operation of NGOs, the first twelve NGOs to be registered under the law shall comprise an interim council competent to develop the Code of Conduct for NGOs in the country.²⁰

Flowing from the provisions of the Act, after going through all the mandatory registration requirements under the law, an NGO is compelled to join the collective forum called the Congress. It is not clear who will finance the activities of the Congress created

¹⁶ Section 29(1) of Non-Governmental Organizations Act, 2009.

¹⁷ Section 29(2) of Non-Governmental Organizations Act, 2009.

¹⁸ Section 30(1)(2) of Non-Governmental Organizations Act, 2009.

¹⁹ Section 31(a)(b) and (c) of Non-Governmental Organizations Act, 2009.

²⁰ Section 34 of Non-Governmental Organizations Act, 2009.

under the law and the subsequent Council the Congress is tasked to elect.²¹ The provisions of Part V must be subject to scrutiny because they compel all registered NGOs to form an association called the Congress. The law does not offer a choice whether to join or not. The freedom to associate has been held to mean the freedom to dissociate.²² As it is indicated above, Article 20 of the Universal Declaration on Human Rights mandates that no one can be compelled to join an association. According to Article 10(2) of the African Charter no one may be compelled to join an association. Moreover, it is a well-established principle of the European Court of Human Rights that the freedom not to associate is part and parcel of the freedom of association. In a case that is now regarded a leading authority of the European human rights law, *Young, James and Webster v. The UK*, the European Court on Human Rights discussed whether article 11 of the European Convention included a "negative right" not to be compelled to join an association. The Court held that the dismissals of the applicants as a result of their refusal to join a trade union represented a form of compulsion incompatible with the freedom of association guaranteed by the European Human Rights Convention.²³ To be able to compel NGOs to enter into a forum without giving them the option of leaving, the government must provide reasonable justification to satisfy the constitutional test since it is an interference going against the individual consent requirement under the constitution.

Compelling people or a group of people to join an association is frowned upon even if the initiative was at the instant of those compelled. In *New Patriotic Party V. Attorney-General*,²⁴ the plaintiff brought an action before the Ghanaian Supreme Court for a declaration that: (1) the Council of Indigenous Business Associations Law, 1993 (PNDCL 312)(CIBA) was inconsistent with and a contravention of articles 21(1)(e), 35(1) and 37(2)(a) and (3) of the Constitution, 1992 and consequently void.²⁵ The Attorney-General contended, inter alia, on the merits that since PNDCL 312 had been enacted upon, the petition of the associations specified in the schedule to the Law to enable them to freely operate under the umbrella of a council similar to the Trades Union Congress, it was not in breach of their right to form or join any association of their choice under articles 21(e) and 37(2) (a) of the Constitution. The Supreme Court held that:

²¹ It may be that the fees and remuneration of the members of the Council or the interim council under the law will invariably be borne by the NGOs and not the government.

²² *New Patriotic Front v Attorney General* [1997-98] 1 GLR 378 – 461 at 382.

²³ *Young, James and Webster v. the United Kingdom*, App. No. 7601/77, 13 August, 1981, para.55.

²⁴ [1997-98] 1 GLR 378 – 461.

²⁵ Article 21 provides 21. (1) All persons shall have the right to- ...

(e) freedom of association. which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interest ...

Article 37 (2) provides: The State shall enact appropriate laws to assure-

(a) the enjoyment of rights of effective participation in development processes including rights of people to form their own associations free from state interference and to use them to promote and protect their interests in relation to development processes. rights of access to agencies and officials of the State necessary in order to realize effective participation in development processes; free-dom to form organizations to engage in self-help and income generating projects; and freedom to raise funds to support those activities.

...in testing the constitutionality of any law, the court should not concern itself with the propriety or expediency of the impugned law, but with what the law itself provided. Accordingly, the fact that the organizations in section 4 of the Schedule to PNDCL 312 themselves had requested the enactment of that Law would not obviate the necessity for the requirement that the Law should pass the constitutional test.

The court held further that provisions contained in sections, 3(b) and 4 of PNDCL 312 were unconstitutional and would be struck down as null and void because:

...the organizations listed under section 4 of the Schedule were composed of individual persons with rights of freedom of association. Freedom of association meant freedom of people to voluntarily join together to form an association for the protection of their interests free from state interference. However, that freedom was effectively taken away, in the instant case, by the compulsion of the stated organizations to join CIBA under section 4 of PNDCL 312 which was not a regulatory law permitted under the Constitution, 1992. Since coercion implied some negation of choice and voluntariness, section 4 offended against article 21(e) and 37(2) (a) of the Constitution, 1992. Furthermore, since the freedom to associate implied the right to dissociate, the failure to provide the manner of leaving CIBA by the registered associations, took away the freedom of the concerned members to freely associate with others in violation of article 21 (e) of the Constitution, 1992.

What matters is that the law which follows as a result of a request or petition must satisfy constitutional standards. Therefore if government has sufficient reasons to interfere in the enjoyment of the freedom it must do so without contravening the Zambian constitution, the African Charter and other treaties it has joined. Article 21(2) of the 1996 Zambian Constitution provides that:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision: ... (d) for the registration of political parties or trade unions in a register established by or under a law and for imposing reasonable conditions relating to the procedure for entry on such register including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

The exception applies to political parties and trade unions. Section 2 of the NGOs Act provides that the law does not apply to political parties and trade unions. Therefore the Article 21(2) (d) exception does not apply to NGOs. Assuming it did, the requirement for limiting the freedom will still not be met since the exception pertains to setting

preconditions for registration of an association, but not necessarily post-registration restrictions as seen under the NGOs Act, since being a member of the Congress is not a precondition for registration by the Board.

Compelling NGOs to form the Congress has not been shown to be reasonably required in the interests of defense, public safety, public order, public morality or public health, or for the purpose of protecting the rights or freedoms of other persons. It has not been shown that democracy in Zambia will be in danger for which reason government must interfere and compel NGOs to join a Congress after their registration with the Board. The constitutional requirement that an exception to the rule must fall under one of the stated exceptions under the constitution has not been met. Barring all these, it has to be determined whether compelling NGOs to constitute a forum under the law is reasonably necessary in a democratic society. In the *TMC case* the court reiterated that:

...the exceptions to freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a 'pressing social need'; thus, the notion 'necessary' does not have the flexibility of such expressions as 'useful' or 'desirable'. Thus to be called a necessary restriction on the freedom of association in a democratic society the limitation must address a pressing social need and must not merely be useful or desirable.

The Congress is constituted for the purposes of adopting a code of conduct.²⁶ The code of conduct, the final product of Congress for which reason NGOs are compelled to form Congress, is subject to approval by the registration Board.²⁷ Although establishing codes to govern the conduct of NGOs is a good and progressive thing to do, it is however not necessary to burden the freedom of association under the constitution with such requirements. This is because when an application for registration is filed with the Board, the applicant is required to file a constitution and is required to enumerate its objects and purposes.²⁸ This serves as a good guide for the conduct of the activities of the NGO. The NGO is also bound by the general laws of the land, breach of which is saddled with dire consequences. A code of conduct may be useful and desirable but it is not necessary to burden the freedom to associate with such a requirement, especially when the end product is subject to the approval of the Board. The Board by itself can develop a model code of conduct to guide the affairs of NGOs in consonance with its responsibility to develop policy guidelines for harmonizing activities of NGOs in Zambia.²⁹ It has authority to constitute a committee of experts to produce a document like a model code of conduct. A very good best practice in the field of regulating NGOs is the Non-Profit Organization Act 1997 of South Africa, a piece of legislation that shuns the compulsion of registered association to develop a code of conduct but rather empowers the Directorate to produce a model constitution for

²⁶ Section 32(2) of Non-Governmental Organization Act 2009.

²⁷ Section 32(3) of Non-Governmental Organization Act 2009.

²⁸ Section 10(5) of Non-Governmental Organization Act 2009.

²⁹ Section 7(i) of Non-Governmental Organization Act 2009.

NGOs, a code of conduct and other documents that may be necessary to guide the affairs of NGOs.³⁰

The Congress elects a Council which is charged with the duty of facilitating and coordinating the work of non-governmental organizations operating in Zambia.³¹ The Congress also has authority to prescribe responsibilities for NGOs operating in Zambia.³² The list of responsibilities prescribed by the Congress is subject to the approval of the Board.³³ It is however, clear that the Board is also entrusted with the duty to advise on strategies for efficient planning and co-ordination of the activities of NGOs in Zambia.³⁴ It is therefore unnecessary to coerce NGOs into a single forum for the purpose of doing the same thing.³⁵ Furthermore, Part IV of the NGOs Act provides in an extensive way the duties of a registered organization under the law.³⁶ It serves no legitimate purpose to form an NGO Council to compile a list of responsibilities subject to the approval of the Board when the subject is tackled in a whole part of the law. No legitimate purpose is served by duplicating duties, a recipe for creating tension between the NGOs Council and the NGO registration Board. Compelling NGOs to belong to a forum fails the validity test and is contrary to law. It fails the test because it offers no option for NGOs to leave the forum, undermining the freedom to dissociate. It serves no legitimate purpose and is unreasonable in a democratic society.

3.2 Powers of the Minister Under the Act

The Minister who has the cabinet responsibility for the administration of the Act, may on recommendation of the Board responsible for registering NGOs make regulations for the terms and procedure of the Council of NGOs elected by the NGO Congress.³⁷ It is also provided under Part V that the members of the Council shall be elected at an annual general meeting of the Congress and shall hold office for such period and such terms and conditions as the Congress may determine.³⁸ Flowing from these two provisions it is clear that the Minister has power to regulate the terms and procedure of the council, while the same power to regulate is another breathe given to the NGOs Congress. This presents a critical legal problem to be resolved. Perhaps if a conflict arises and the matter is brought

³⁰ NPO Act 1997; s 6 (1) The Directorate must—

(a) prepare and issue model documents, including—

(i) model constitutions for nonprofit organizations; and

(ii) a model of the narrative report to be submitted by registered nonprofit organizations to the Directorate; 45

(b) prepare and issue codes of good practice for—(i) nonprofit organizations; and

(ii) those persons, bodies and organizations making donations or grants to nonprofit organizations.

³¹ Section 30(3), 31(2) of Non-Governmental Organization Act 2009.

³² Section 32(4) of Non-Governmental Organization Act 2009.

³³ Section 32(4) of Non-Governmental Organization Act 2009.

³⁴ Section 7(j) of Non-Governmental Organization Act 2009.

³⁵ Section 7 of Non-Governmental Organization Act 2009.

³⁶ Section 25-28 of Non-Governmental Organization Act 2009.

³⁷ Section 37 of Non-Governmental Organization Act 2009.

³⁸ Section 30(3) of Non-Governmental Organization Act 2009.

before court then the court will put to rest the tension created by the law. As it stands and in light of the purposes of the law it must be scrutinized to ascertain whether it can withstand the constitutional validity test. If the minister's power is maintained as it is currently stipulated in the Act, the minister has authority to appoint members of the NGO Board and unfettered discretion to approve or reject nominations from other agencies to the Board. The minister has power to set term limits for the NGO council, an elected body of the NGO congress. The code of conduct and list of responsibilities must all be approved by the Board appointed by the Minister. The minister also has power on the recommendation of the Board to make a statutory instrument for the better carrying out of the law. It goes without saying that the Minister wields absolute power and extensive influence on the Board and has unfettered discretion to interfere in the work of the NGO Council, and consequently Congress.

The Board is subject to control by the Minister in all its dealings. Thus even though the minister is not a member of the Council or Congress, he has authority to set the term limit and procedure of the Council and through the Board appointed by him approve their code of conduct and any other significant things done by the NGOs. Article 6 (3) provides that the Board shall comprise: two members appointed by the Minister, one person each from the Ministries of Health, Home Affairs, Economic Planning, Community Development, Local Government, Attorney's General's office, and seven members elected by the Congress. Apart from the fact that the majority of the members of the Board are Government officials, nothing is left to chance to ensure that the Government majority is not threatened and consequently article 6 (3) provides that the Minister shall, on receiving the names of the proposed representatives, consider the nominations and may reject any nomination. Never mind that the organization is allowed to make another nomination, that too can be rejected by the Minister presumably until the organization comes up with a name to the liking of the Minister. Institutional effectiveness and accountability are central to good governance and the rule of law. They require independent, functional and credible institutions to be meaningful checks on governance. A Board appointed by the Minister is a travesty and a shameful attempt to institute and legitimize a Board without the slightest integrity. Under the Act the Minister and the Government are the de facto board.

Freedom of association means freedom without interference by the state. It is not likely non-interference can be achieved given the powers of the minister under the law and no legitimate reason is provided for allowing a non-member of the NGO council to have authority to dictate the term limit and the procedure of the council. In *New Patriotic Party V. Attorney-General* supra, the Ghanaian Supreme Court held in relation to governmental interference as follows:

Since under sections 6 of PNDCL 312 it was the minister who appoints, inter alia, the executive secretary who was responsible for the day to day administration of the business of the council; and under section 13 it was the minister who by legislative instrument would make regulations for the effective implementation of the Law, the minister had in effect almost absolute control of the council. Thus the function of the council under section 3(b) of PNDCL 312 to monitor the operations of the registered associations would necessarily involve and result in interfering in its affairs by the

minister who was not a member of any of the registered associations but was in control of the CIBA council through his representatives and appointees. That was violative of articles 21 (e) and 37(2) (a) of the Constitution, 1992 regarding the right of freedom of association free from interference.

There is nothing democratic about being forced to join an association and elect your governing body and then await a non-member to determine their term limits and procedure for conducting their affairs. This interference is obscene and totally unjustifiable in a democratic state.

3.3 Refusal of Registration

Under the Act, the Board has authority to reject an application for registration, citing a variety of broad reasons for its action. The Board may reject an application if the proposed activity or the procedures of the organization are not in the public interest. One would wish that for the purposes of the Act, public interest would have been defined since the Act was made to enhance transparency, accountability and performance of NGOs. Public interest is not defined and it is too nebulous a term that can encompass a myriad of reasons to refuse registration. It is a term that has proved to be a darling of authoritarian regimes worldwide. Even more absurd is that under the act the Board can refuse registration of a NGO if its internal procedures are according to the Board not in the public interest. Matters of internal procedure should not be a reason for denying individuals the freedom of association. It is rather too harsh and undesirable in a democracy. Registration should be a simple and routine matter not subject to approval by a government official. That is the only way to remove the risk that a government official might abuse his or her power in determining which organizations should be allowed to exist or not. In the *TMC case*, the government of Azerbaijan had dissolved an NGO because, among other reasons cited, it did not comply with its internal procedures for holding a meeting of the organization. The European Court of Human Rights held that:

It is clear that, for example, when an association misses its deadline for conducting a members' meeting, it does not create a danger to a democratic society, and therefore, there is no necessity to restrict the activities of the association in order to preserve the democracy. Such a violation of internal governance rules may not be used as the basis for involuntary dissolution of an association, such an action is an impermissible restriction of the right to freedom of association.

Matters of internal procedures therefore should not of themselves be the basis for refusing the registration of an organization. This coupled with the fact that the public interest has not been defined, the danger that it may be used to limit the enjoyment of the freedom is glaring.

The Board has authority to refuse registration when it is satisfied on the recommendation of the Council of NGOs that an application should not be approved. This means that other NGOs have power to oppose the registration of another association and

may do this by a recommendation to the Board. This is deeply worrying. If an NGO sees a new entrant to the market as a threat to its operations, or for some other reason, it may convince the Council to make a recommendation to the Board to refuse registration. This undoubtedly is a violation of the NGOs freedom of association. The state is constitutionally bound to ensure that individuals under its jurisdiction enjoy the rights articulated in the constitution. Its failure to do so is a violation of the NGOs' rights. The quality of law requirement is not met under these circumstances because the law does not provide sufficient safeguards against abuse and arbitrariness by the NGO Council and the Board. The Law must spell out the scope of the discretion and how it is to be exercised and must give sufficient indication of what practices or conduct will trigger the NGO council recommendation to the Board.³⁹ In the absence of this safeguard government officials will interfere in the enjoyment of the freedom with their unfettered discretion by arbitrarily refusing registration. Further, the Board may refuse the registration of an association if it feels that the name of the association is repugnant or otherwise undesirable. No benchmarks are provided for exercising this power. It gives a wide discretion to the Board and can be used to frustrate the freedom of association.

3.4 Suspension and Cancellation of Certificate

The Board has authority to suspend or cancel the certificate of an organization if the NGO Council recommends the suspension or cancellation of the certificate (17 (1) (f). The section in 17 (3) attempts to give the NGO whose certificate is to be cancelled an opportunity to submit reasons why the NGO should not be suspended or have its certificate suspended. This procedural requirement is worthless as there are no strict and clear guidelines as to the grounds upon which the NGO Council may exercise this power in a clear, predictable and objective manner. Thus the NGO Council has wide discretion to do whatever it wants when it comes to who gets suspended or whose license gets cancelled. This is a threat to any meaningful enjoyment of the freedom of association. It is surprising that this provision is included in the Act especially when the Board has unquestionable broad powers over the life and death of registered NGOs. It vets their constitutions, vets their reports, checks who is managing and mismanaging funds, and approves the codes of conduct of associations. Giving this power to the Council is oppressive since the Council is not a regulatory body properly so called, but rather a body elected by the associations themselves. This gives power to a body the qualifications of whose members are not specified anywhere in the Act and are not subject to the requirements for appointment as is the case with the Board, yet they wield authority to recommend suspension of NGOs to the Board. It appears that the Board will have no discretion to refuse to follow the recommendations of the Council since none is provided for under the law.

The Board may also suspend or cancel the certificate of an association if the organization alters its objects or pursues other objects than its declared objects. Thus if an association is established for the promotion of human rights and it conducts charity or development operations the association has breached a cardinal rule and its certificate could conceivably be suspended or cancelled. This does not sit well with good reason,

³⁹ Hasan and Chaush v. Bulgaria [GC], no. 30985/96, § 84, ECHR 2000- XI).

especially when NGOs have no shareholders. So long as the activities undertaken by association are not illegal, contrary to the laws of Zambia and not inimical to the national security, no legitimate aims are achieved by shutting it down. There should be no need to cancel the certification of organizations on such broad terms. Besides, involuntary termination or dissolution of NGOs must meet the applicable standards and the relevant government official exercising such power must be guided by objective standards and restricted from arbitrary decision-making.

4. Conclusion

In our view the NGO Act is unconstitutional under the 1996 Zambian constitution. It also violated international human rights norms relating to the freedom of expression. It without doubt belongs to the pre-democratization era and completely fails to see NGOs as partners in the good governance project. The attempt by the Act in its introduction to justify and legitimize the obstacles it is placing for NGO operations, as necessary to enhance accountability and transparency of NGOs, to harmonize or coordinate the NGOs' activities and to meet national interest are mere rationalizations for repression and are violations of international laws and conventions to which Zambia is a signatory. Government must strive to promote freedom of association and a robust civil society, independent of state control or government involvement, since it is a necessary and important ingredient in a functioning democracy. It must give NGOs an enabling environment for them to operate effectively. Where it is necessary to restrict the rights of citizens, the interference must be made in accordance with the constitution, must pursue a legitimate aim necessary in a democratic society and the measures taken must be proportional to the legitimate aims sought to be achieved. While the NGO Act of 2009 is not a model in clarity of drafting, it is clearly riddled with provisions that are designed to facilitate interference with the enjoyment of the freedom of association. In its current form it has no place in a democratic society. The Government should immediately repeal the law due to its lack of compliance with the Zambian constitution, international human rights treaties and best practices.

References

- Davies, D.B. (1966). *The Problem of Slavery in Western Culture*. Oxford: Oxford University Press.
- Glasius, M. (2006). *The International Criminal Court: A Global Civil Society Achievement*. Oxford: Routledge.
- Guluzade, M & N.C. Bourjaily. (2010). "The NGO Law: Azerbaijan Loses Another Case in the European Court", *The International Journal of Not for Profit Law*, 12(3). Retrieved from http://www.icnl.org/research/journal/vol12iss3/art_2.htm

Seeing the Whole Elephant: A Comprehensive Framework for Analyzing Resource-for-Infrastructure Contracts as Intended by the Parties *

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The current state of scientific knowledge on resource-for-infrastructure (R4I) contracting is unclear and based on inadequate empirical grounds. As a result, it is not easy to tell a R4I contract apart from other forms of international business transactions, let alone describe it in a comprehensive, accurate and meaningful way. Such state of affairs is concerning given the dramatic transformative impact of R4I contracts. This article sheds light on R4I contracts and proposes a broad framework for analyzing these multibillion-dollar deals. It looks to the contracting parties' intentions – as expressly set out in the texts of contractual and official documents – as the decisive element in getting the big and full picture of a new kind of deal that has been responsible for tremendous infrastructural development on the African continent.

1. Introduction

There is considerable confusion about resource-for-infrastructure (R4I) dealings in Africa. Are these multibillion-dollar deals swaps, barter, loans, investments or aid? Are they steeped in a 'long history of natural resource-based transaction in the oil industry' (Foster et al., 2009, p.42) or have they emerged as a phenomenon of the twenty-first century? Are they a combination or all of the above? Are they contracts at all? The situation is so complicated today that it is difficult to see the forest for the trees and to tell what is a R4I contract and what is not. Even in instances where a R4I contract has been unambiguously identified, it is a tall order to describe its terms in a systematic, accurate, comprehensive and theoretically sound manner. Moreover, assumptions that R4I contracts are not new or 'not so new' have led experts to give descriptions that do not square with contract law theory and that are wildly inconsistent with experience and the available terms of real-life R4I contracts. For example, Louis T. Wells describes the 'not-so-new' R4I contracts (2013) as 'equivalent to loans' (2014, p. 83), a 'not-so-new' assumption that obscures reality and compounds the analytic problem of identifying and characterizing R4I contracts.

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The primary purpose of this article is thus to shed light on resource-for-infrastructure contracting. To dispel the confusion about R4I contracts, this article proposes a broad framework for identifying, analyzing and negotiating the essential, salient and common terms of R4I contracts. In short, R4I contracts creatively combine a mining or oil venture and an infrastructure project in order to extract minerals or hydrocarbons and to pay for major infrastructure projects with revenues generated from those extractive activities. Under this 'ring-fenced' arrangement, the host state gets the infrastructure and the foreign investor gets the extracted resources.

'How much is known for sure about R4I contracts?' is the central question this article speaks to. The question relates to the current state of scientific knowledge on R4I contracts and to the necessity of establishing a firm knowledge base on which to rest ongoing debates over those contracts. This research article places these debates on a secure contract law foundation by relying on the intentions of the contractants to analyze R4I contracts.

2. Survey of the Existing Literature

2.1 Significance of the Inquiry

The whole purpose of surveying the existing literature on R4I contracts is to provide an overview of the recurrent problems in identifying and specifying the R4I model; the overview then serves to resolve those problems systematically and comprehensively. This crucial process culminates into the analytical framework recommended in this article. Ultimately, the true significance of the article lies in the fact that it fills a gap in the literature. It tries to bring greater clarity to the muddled theory of resource-for-infrastructure contracts and approaches that theory through the magnifying lenses of contract law.

It is imperative to gain a detailed understanding of the terms of R4I contracts, which can be an uphill task as the literature is patchy, distorting, confusing and at times contradictory. While it is not worth emphasizing each and every provision of an R4I contract, it is important to focus on essential and salient terms. Given the myriad ways R4I contracts are depicted in the literature, it becomes necessary to authoritatively describe the basic organization of R4I contracts and, appropriately, their 'essential' terms. 'Salient' terms are those that raise extensive discussion or controversy. They are, at the same time, terms over which the contracting parties are most likely to lock horns in the course of intense negotiations.

Because R4I contracts have a dramatic transformative impact on the economies of host countries, it would be irresponsible to settle for vague and incomplete accounts of R4I dealings. To be sure, Angola (4,5 billion US dollars),⁴⁰ the Democratic Republic of the Congo

⁴⁰ The initial amount was 2 billion US dollars. Subsequently, China Eximbank added 2.5 billion US dollars in two payments, bringing the total to 4.5 billion US dollars.

(DRC)(9 billion US dollars)⁴¹ and Ghana (3 billion US dollars) attracted – thanks to R4I contracts – the largest finance in a single investment since their respective independence. Rough estimates of signed R4I contracts in Africa hover around 30 billion US dollars (Halland et al., 2014, p. 5).

The literature is dominated by the contributions of journalists, political scientists, economists and development experts, among others. Scarcely any study addresses R4I contracts from a contract law vantage point. The lack of such relevant and much-needed perspectives adds to the confusion about R4I contracts. Since the first legal treatise on R4I contracts, published in 2010 (Zongwe, 2010), about two other treatises tackled the issue of R4I from a legal point of view. Research by Zongwe (2011) and Beardsworth & Schmidt (Halland et al., 2014) analyzed R4I contracts from a legal angle and employed law-and-economics perspectives. Zongwe compares R4I contracts with traditional investment contracts (2010) and puts forth R4I contracts as a model to optimize China's mining investments in Africa (2011). Beardsworth & Schmidt discuss the project finance aspects of the infrastructure component of R4I contracts. Those treatises all note the multiple names and descriptions given to R4I deals, but none takes a shot at formulating a theory that unifies the multiple descriptions of the deals. This article is an attempt to formulate such theory.

2.2 Methodology

As shown later in the article, R4I deals are best described as contracts. Methodologically, this observation implies that the intentions of the parties to the contract must be the starting point in efforts to identify and analyze R4I transactions. It is a practical method of gaining a bird's-eye view of R4I contracts and formulating a unified theory that connects and explains the individual components of the contracts under scrutiny.

Insisting on the intentions of the contracting parties is consistently and overwhelmingly supported by contract law theory. The parties' intentions are the basis of contractual liability and the decisive element in ascertaining the general structure of a contract. The sustained emphasis on the intentions of the contractants has the added advantage of avoiding the sort of misunderstandings that so pervade the literature on R4I contracts. In reading the mental states of the parties, whether a subjective or objective approach is used, misunderstandings and other evidentiary challenges can be overcome with a 'paper trail' (see Posner, 2011, p. 31). In other words, the ideal place to find the parties' intentions is in the express provisions of a *written* contract. Searching for the declared intentions of the parties in the texts of R4I contracts and official documentary evidence is the methodology that forms the backbone of the analytical framework set in this article.

⁴¹ Under pressure from the International Monetary Fund, the government in the DRC renegotiated the R4I contract and put on hold 3 billion of the initial 9 billion US dollars. The investment is now valued at 6 billion US dollars.

3. The Analytical Framework

3.1 Pure versus Disparate Types

Before going into the essentials of the R4I model, a distinction must be drawn between the pure type and the disparate type of R4I contracts. In her interesting study on R4I contracts, BreeAna Jones (2013, p. 15ff) did not draw that distinction and mistakenly included the Zambia-China Economic and Trade Cooperation Zone in Zambia and the joint venture, China-Africa Overseas Leather Products, between Ethiopia and China. As she acknowledged herself, the Sino-Ethiopian project is not a “purely” R4I investment (Jones, 2013, p. 21). In fact, none of those two Sino-African transactions are R4I investments.

The pure type is exemplified by the 2004 Angola-China R4I contract, whereas the disparate type is illustrated by the 2007 Ghana-China R4I contract, also known as the Bui Dam project. Distinguishing between the two types answers the question as to whether R4I contracts are a new way of structuring international business transactions. The pure type of R4I contract is a new contractual phenomenon whereas its disparate variation is not. Unlike pure types, disparate R4I contracts stray into contested territory: they defy classification and are easily confused with one or more traditional contractual models in international economic law. The distinction between the two types will become clear as the essential terms of R4I contracts are examined.

3.2 The Parties

One of the first things that must be looked at when analyzing a deal suspected of being – or presented as – a R4I contract is the identity of the parties to the contract. In national reconstruction projects, R4I contracts are state-to-state contractual undertakings between a resource company of a host state and a consortium of companies owned by another state investing in the host country. In smaller investments, R4I contracts may involve profit-maximizing private firms. To sum up, states or state-owned entities are parties to typical R4I contracts.

The state-to-state strategy is of incredible importance given that the direct involvement of the two states has several far-reaching implications for the effectiveness of R4I contracts. In particular, it mitigates political risks in developing countries and it drastically lessens the very high coordination costs that a consortium of private firms would incur if they joined forces to design and implement a R4I contract.

However, except for China, virtually no one among capital-exporting nations can actively engage its state-owned corporations in a R4I deal as developer-lender-contractor. Like Paul Collier pointed out (2014, p. 71), China has a ‘monopoly’ in the supply of such deals. In R4I contracting, investors and capital exporters would also need deep pockets, an appetite for risk or the ‘animal spirits’ that John Maynard Keynes invoked in his *General Theory of Employment, Interest and Money*.

3.3 The Agreement

The Chatham House report *Thirst for African Oil* (Vines et al., 2009) on 'oil-for-infrastructure' in Angola and Nigeria, reflects a flawed understanding of the nature of R4I agreements. It mistook related yet unlinked political deals (memoranda of understanding) and a group of contracts (rights of first refusal and oil block sales) for R4I contracts in Nigeria. It first indicated that there were 'no legally binding agreements' tying the development of the oil blocks to the delivery of infrastructure (Vines et al., 2009, p. 27-8). But the report made the link anyway between the deals and the contracts on the basis of President Olusegun Obasanjo's stated intentions to trade oil for infrastructure. Though the report was right to take into account the intentions of President Obasanjo, it should have paid equal attention to the terms of the written agreements.

The dominant presence of two states in R4I contracts may allow the inference that the agreements the states entered into are treaties, with all the ramifications that go along with that. Despite the heavy engagement of states and state-owned entities in R4I agreements, they are not treaties. Sticking to the methodology adopted in this article, it is evident from the text of available R4I contracts that the state parties to these agreements intend to act in a commercial capacity. This is the case notwithstanding the intrinsically and prominently political nature of these deals. Incidentally, contrary to a belief widespread in mostly Western media that 'weak African states are ruthlessly exploited by resource-hungry Asian tigers', government negotiators and leaders have in several host countries asserted a remarkable degree of autonomy at the bargaining table (see Vines et al., 2009, p. 3).

It therefore flows from the foregoing that R4I agreements are contracts. A 'contract' is conceived in this article as the terms of *economic* exchanges, usually with consequences on property rights. In this economics-inspired conception of contracts, it is assumed that the parties have expressed a firm intention to form and be bound by the R4I contract in conformity with the law of contract of the applicable legal system.

3.4 The Essential Terms

A R4I contract is an elaborate and complex network of agreements between a host state and another state investing in the host state (1) to develop and extract natural resources (minerals and/or hydrocarbons) and (2) to use the revenues generated or expected from the extraction of resources in order to pay for (3) major infrastructure projects in the host state. Stated differently, the essential terms of a R4I contract are the resource development agreement, the loan agreement and the agreement on infrastructure development. These agreements are mutually interdependent in packaged or pure types of R4I contracts whereas they are loosely associated or otherwise varied in unbundled or disparate types of R4I contracts.

a) Resource Development Agreement

The parties agree that the foreign investor will prospect for minerals or/and hydrocarbons, conduct feasibility studies, and extract and export those resources. The host state issues all the necessary licenses, which set out an implementation schedule and a clear fiscal plan that provides sufficient financial flows to fund the infrastructure projects. The resource development agreement may take the form of a production sharing agreement.

b) Loan Agreement

In exchange for the promise to grant rights to specified natural resources, the investing foreign state gives a loan, often on concessional terms (this is why it is sometimes seen as aid (see Alves, 2013, pp. 7-8)), to the host state for the construction of infrastructure to be built by contractors owned by the foreign state. The loan is directly paid out to the contractor and the developer, and never reaches state coffers. It follows that the many experts who portray R4I contracts as tantamount to loans miss the full picture; they look only at a part (the loan), however essential, instead of seeing the whole elephant (the R4I contract), of which the loan is but a part.

c) Infrastructure Development Agreement

The parties agree that the foreign investor will construct or/and rehabilitate infrastructure. The host state selects the infrastructure to be developed. In the majority of packaged R4I cases, the agreement is to build either nationwide or economy-structuring infrastructure. In the 2004 Angola-China contract, the agreement was to construct and reconstruct infrastructure nationwide, for instance, the rehabilitation of municipalities and hundreds of kilometers of water supply; and the construction of roads, railways, bridges, ditches, houses and a drainage system. In the 2008 DRC-China contract (hereinafter the 'Sicomines' deal), the agreement features the construction of economy-structuring infrastructure: roads and railways that connect different parts of the vast country, thereby boosting domestic trade. In the 2011 Ghana-China R4I contract, the agreement is to develop ambitious public works (such as a railway, a harbor and a multi-modal transportation system) with revenues coming from the drilling of oil in the Jubilee Oil Field in Ghana.

Nevertheless, R4I contracts may provide for small-scale projects, like the water supply system to be built in Kinshasa (DRC) in return for copper, as stipulated in the R4I contract between the DRC and a consortium of South Korean corporations (hereinafter the 'Musoshi' agreement). The infrastructure agreement in a R4I contract may be informed by traditional infrastructure contract models.

3.5 The Salient Terms

a) Confidentiality Clauses

Confidentiality clauses further complicate the analytic problem of distinguishing and characterizing R4I contracts since they restrict access to the terms of actual R4I contracts.

The debate over confidentiality clauses boils down to the question whether confidentiality is an inherent attribute of R4I contracts or a deliberate choice of either contracting party. Some protagonists say that R4I contracts are inherently opaque, implying that R4I contracts are bad for host countries and must therefore be shunned. Others believe that confidentiality may be 'simply a habit' (Beardsworth & Schmidt, 2014, p. 45) and that parties should be encouraged through initiatives, like the Extractive Industries Transparency Initiative (EITI), to disclose the terms of the contracts.

Demands for transparency are hard to gainsay as the benefits of sunlight clauses are self-explanatory, the prevention of corruption, white elephants as well as the rigorous evaluation of contracts being three obvious examples. This is all the more the reason, considering the integral role of the state in the deals and the massive amounts of resources at stake. On the other hand, confidentiality clauses do protect legitimate interests: trade secrets, intellectual property rights, etc.

A few host governments have partially disclosed the contents of R4I deals. The Angolan Cabinet made public a series of resolutions that listed the infrastructure projects and their costs. The government in the DRC disclosed the framework agreement of the Sicomines deal and the memorandum of agreement of the Musoshi contract. In Ghana, selected key terms of the Bui Dam and the 2011 contracts have been reproduced in official documents in the public domain.

Expecting full transparency is – in spite of its indisputable blessings – hopelessly naïve at this juncture. Even if Liberia has embraced the practice of publicly disclosing its mining contracts, strict confidentiality clauses are commonplace in the extractive industries under every contractual model.

b) Key Financial and Valuation Provisions

Compared to other contractual models, the competitive edge of the R4I model is that it provides higher, quicker and cheaper capital. Unfortunately, bounded rationality, limited computing abilities and imperfect information make it hard for both contracting sides to determine the real monetary value of the loan, the resource deal and the infrastructure project, or to price in political and financial risks correctly. It thus may be as difficult to ensure that R4I contracts offer better value for money. This is a possible explanation for the controversy that has surrounded certain provisions relating to sovereign guarantees, collateral, committal fees and internal rates of return.

A group of pundits advocate subjecting the infrastructure component of R4I contracts to competitive bidding. In principle, competitive bidding increases the probability that the host country will get value for money, but it is doubtful this auction mechanism will outdo the creative combination by a R4I contract of a resource deal and an infrastructure project.

c) Deeds of Security and Payment Clauses

A resource-as-security paradigm prevails in the literature on R4I contracts. The portrayal of R4I contracts as pledges or collateralization of natural resources is a distortion in the sense that there is hardly any evidence demonstrating such claims (Brautigam, 2009). On the contrary, the wordings of R4I contracts indicate that natural resources are intended by

the parties to serve as 'consideration of the construction' of infrastructure, a phrase explicitly used in the Musoshi agreement. In the 2011 Ghana-China R4I contract, the deed of security refers to a standby letter of credit, which by no means amounts to the collateralization of oil. The same holds for the Sicomines contract, where it is the joint venture Sicomines that functions as security. In the overall scheme of R4I contracting, natural resources are used as consideration for the loan and the development of infrastructure.

d) Local Labor Content

The general consensus of opinion is that in order to maximize the benefits of R4I contracts, host states must ensure the largest number of local workers and contractors are hired. Media reports have shaped the widely held perception that Chinese investors do not employ local workers. These reports are contradicted by the legions of local workers visible on construction sites in Angola, Kenya, Ghana, and Cameroon, to mention but a few. More often than not, foreign investment laws, labor laws and the licensing regime in the host country, though not always respected, impose various obligations on foreign investors to employ local workers and/or contractors.

e) Knowledge Transfer

Employment of local workers and contractors normally results in some measure of technology, knowledge and skills transfer, even in the absence of specific contractual stipulations. However, to make the most of R4I contracts, they must be expressly 're-characterized to facilitate technology and skills transfers' (Gathii, 2013, pp. 1-2).

f) Quality Specifications

Parties must draw up quality specifications from the outset in the negotiation process. They must also write the specifications on technical standards and may plan the post-contractual management of the infrastructure. In that regard, it may be advisable to hire third-party specialist firms to supervise and monitor the construction of infrastructure. If the parties lay down, as well they may, that external firms operate and manage the infrastructure once construction work is done, they can reap substantial efficiency gains.

g) Stabilization Clauses

Stabilization clauses aim to prevent future changes in the legislation of the host state from varying the terms of an investment contract to the detriment of an investing foreign party before the contract expires. Whether stabilization clauses are in the interest of the host state is an inquiry whose answer hinges on the wording of those clauses. Global Witness appraised the text of the stabilization clause in the Sicomines contract as 'one of the most comprehensive and uncompromising' and as undermining the host-country government's sovereign right to regulate key areas such as taxation or the conservation of the environment (2011, p. 32).

4. Common Clauses

Common clauses are not part of the analytical framework devised in this article, although a number are also salient terms. They are not indispensable to the issue at hand, but they nonetheless deserve a cursory outline. R4I deals are investment contracts and, as such, deploy the tools foreign investment law has developed and sharpened over the years to manage political and commercial risks to protect the interests of host states and foreign investors.

There are investment-specific and general contractual devices to shield foreign investors and host states from risks. The general devices endeavor to specify the parties' obligations or investment incentives in each possible state of the world and the sharing of risks, gains and losses in each state of the world. Investment-specific devices protect foreign investors from political risks by internationalizing investment contracts. These devices are stabilization, choice-of-law clauses, arbitration, damages, waiver of sovereign immunity, waiver of local remedies exhaustion requirement, currency conversion, profit repatriation, interest rates and internal rates of return, *force majeure* clauses, state interest in projects and state-as-party clauses.

5. Conclusion

The literature search and the framework conducted and created in this research are called for by the novelty of the R4I approach. Indeed, knowledge of the subject is still relatively embryonic, and a great many experts in international business transactions are unfamiliar with this new generation of investment contracts. Meanwhile, the framework presented here is broad and has modest ambitions. An in-depth analysis of the clauses of R4I contracts is beyond the scope of this article.

In this research piece, the main submission is that, in the face of a literature limited in several material respects, the texts of contractual and official documents define the extent and the limits of scientific knowledge on R4I contracts. Through its analytical framework, this article worked out what should count as good science and what should be cast aside as mere conjecture.

The framework has laid a solid theoretical foundation that would hopefully enable experts, government delegates and other stakeholders (1) to identify R4I contracts by looking for the essential terms of international contractual agreements; (2) to analyze and negotiate the contracts by perusing the salient terms; and (3) to finalize their dealings by adding the common terms of international investment transactions. This article has tried to enrich the holey R4I literature by proposing a holistic theory that should help analysts see the whole elephant.

References

- Alves, A.C. (2013). "China's Economic Statecraft and African Mineral Resources: Changing Modes of Engagement." Southern African Institute of International Affairs Occasional Paper No. 131.
- Beardsworth Jr., J.J. and J.A. Schmidt. (2014). "Financial Issues." In *Resource Financed Infrastructure: A Discussion on a New Form of Infrastructure Financing*, ed. H. Halland et al. Washington DC: The World Bank.
- Bräutigam, D. (2009). *The Dragon's Gift: The Real Story of China in Africa*. Oxford: Oxford University Press.
- Collier, P. (2014). "Comments by Paul Collier." In *Resource Financed Infrastructure: A Discussion on a New Form of Infrastructure Financing*, ed. H. Halland et al. Washington DC: The World Bank.
- Foster, V. et al. (2009). *Building Bridges: China's Growing Role as Infrastructure Financier for Africa*. Washington DC: The World Bank.
- Gathii, J.T. (2013). "Making Technology Transfers a Key Component of Resource Extraction and Construction Contracts in Africa." Lecture Delivered at the Institute of International Law and Justice, New York University School of Law.
- Global Witness. (2011). *China and Congo: Friends in Need*. Global Witness.
- Halland, H. et al. (2014). *Resource Financed Infrastructure: A Discussion on a New Form of Infrastructure Financing*. Washington DC: The World Bank.
- Jones, B. (2013). *Resources for Infrastructure: The Sustainability Dynamics of Sino-Afro Trade*. SynTao.
- Posner, E.A. (2011). *Contract Law and Theory*. New York: Wolters Kluwer.
- Vines, A. et al. (2009). *Thirst for African Oil: Asian National Oil Companies in Nigeria and Angola*. London: Chatham House.
- Wells, L.T. (2014). "Comments by Louis T. Wells." In *Resource Financed Infrastructure: A Discussion on a New Form of Infrastructure Financing*, ed. H. Halland et al. Washington DC: The World Bank.
- Wells, L.T. (2013). "Infrastructure for Ore: Benefits and Costs of a Not-so-Original Idea." Columbia FDI Perspectives No. 96.

Zongwe, D.P. (2011). "Ore for Infrastructure: A Contractual Model for the Optimization of China's Investments in the Mining Sectors of Africa". Ithaca, NY: Cornell University, PhD thesis, unpublished.

Zongwe, D.P. (2010). "The Competitive Edges of China's Resource-for-Infrastructure Investment Contracts." *Peking University Journal of Legal Studies* Vol. 2.

Book Review

Review of the Economic Policy Research Center (EPRC) Repository hosted by the Southern African Institute for Policy Research.

Introduction

The EPRC Repository is an online, open access site established in 2014 and hosted by SAIPAR, a new center for policy research and the proprietor of this journal. SAIPAR is quickly establishing its name in the region as dynamic, innovative and not averse to using modern approaches for its outreach to academics and policymakers. The institute brings a new excitement to social research and policy in Africa. Research at SAIPAR is also included in the EPRC. By June 2014, after only six months of existence, the EPRC Repository had accumulated close to 140 quality papers from various institutions in Southern Africa and beyond. The total number of items now totals over 400.

The purpose of this brief review is to present the contents of the EPRC Repository to a broad, but not necessarily specialist, audience. Reviewing an online site might be unduly influenced by the reviewer's immediate research interests. To avoid this, I try to describe what is available in a general manner, while also highlighting the Repository's emerging strengths. I list areas where the EPRC could be expanded, or where it could establish a niche. The interest and willingness of researchers in the Southern African region and further afield to deposit their papers on the site will be crucial. For although the repository is still in the early days of its development, it could become an important engine of socio-economic policy research.

Overview of Content

The EPRC site divides its contents into numerous subject areas: economic policy and economic development; government and public administration; international relations and cooperation; finance and taxation; business; industrial production; trade; agricultural and rural development; infrastructure; natural resources and environment; tourism and service industries; and labour markets and social protection. However, the number of entries in each area varies considerably. For example, agricultural and rural development claims 99 entries, followed by economic policy and economic development, finance and taxation, trade, and government and public administration. Others have only a couple of entries, although it is still impressive that the collection already has 7 recent papers on infrastructure and another 7 on labour markets and social protection. Considering that individual papers often have over twenty references each, this Repository will have a notable multiplier effect and it might indeed be a treasure trove.

The EPRC site, for good reasons, is dominated by entries from Zambian authors and institutions, but there are also a number of entries from other countries/institutions in Southern Africa, and further afield (for example the Centre for Chinese Studies at Oxfam; the African Studies Center at Leiden; USAID; Sida; UNDP, etc.). The entries are fairly recent,

and I have not seen a paper that predates 2008. In fact, the bulk of the entries are from 2010 and beyond. This makes the site fairly up to date with respect to recent developments. Obviously, effort will be required to attract entries from earlier years, to ensure wholesomeness.

Sample of the Content

To give a feel for content, I provide a quick overview of some of the papers on the website. For example, Chilufya Chileshe of the Jesuit Centre for Theological Reflection (many papers have been written under its auspices) reflects on how Zambia could boost international trade and argues that supply side constraints, notably energy, need to be addressed. She argues that the government should have a good idea of what it wants to achieve—reflecting on the importance of creating an enabling environment, including a well-streamlined regulatory framework. Similar arguments are made by Simon N’gona and Cornelius Dube of Consumer Unity and Trust Society, who add that trade needs support from the grassroots, because trade development is not merely a concern for governments alone.

Papers from the Indaba Agricultural Policy Research Institute offer a number of interesting perspectives on methodologies, policy and impact for developing agriculture. They describe a number of research projects, including one funded by USAID in Zambia’s Eastern Province, with the goal of lifting a quarter million people out of poverty. Another Indaba study, undertaken by Jones Govereh, T. S. Jayne and A. Chapoto, on alternative maize trade and marketing policy interventions in Zambia, illustrates the versatility of the papers from that institution. The study by Mary Lubungu, William Burke and Nicholas Sitco looks at soy value chains in Zambia’s Eastern Province. The EPRC site provides many other papers on agriculture in Zambia, notably on cotton and cassava, providing a basis for the comparison of outcomes, a deepening of knowledge on particular subject matters and various methodologies.

The Netherlands Ministry of Foreign Affairs and the Swedish International Development Cooperation Agency jointly commissioned a paper on budget support for Zambia. This paper illustrates another dimension of the material on the site, as a number of papers have been commissioned by donor governments, examining the impact of their aid support. Note, for example, the comparative analysis by Arne Bigsten, Jorgen Levin, and Hakan Persson on ‘Debt Relief and Growth: A study of Zambia and Tanzania’, done for United Nations University WIDER and linked to the website.

The website also has interesting papers on infrastructure, such as that on the crisis in Zambia’s roads by Gael Raballand and Alan Whitworth, and feeder roads on the Copperbelt by Sydney Mwansa. Other notable areas of focus include banking, employment, poverty, and inequality. The Zambian public sector is also discussed in several papers. The papers on macroeconomic development and finance comprise a good part of the collection on the website.

Conclusion

The EPRC website is an important initiative that is already bringing a number of valuable papers to the attention of the research and policy making community. It well complements SAIPAR’s research activities and outreach. The bulk of the papers are on Zambia, and

mainly from think-tanks—as opposed to universities—including innovative ones such as the Jesuit Center for Theological Reflection. Some effort could be made to post more papers from university research. There is also much more work on regional economies that has been undertaken in Europe and America that could be linked to the website. EPRC could consider “specializing” in two or three areas, attempting to bring as many papers on those topics as possible. These topics could include urbanization, private sector development and good governance/public policy and development. This would of course not pre-empt other interesting areas already listed above.

Steve Kayizzi-Mugerwa

(African Development Bank)

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Call for Papers

The Southern African Journal of Policy and Development is accepting for publication articles, policy briefs and reviews of current importance to Southern Africa. Focused on informing policy and development within Southern Africa, the short articles, policy briefs and reviews should be of theoretical and practical relevance on the following issues: law, health, politics and governance, economics, social, development, technology, and peace and security. The interdisciplinary online Journal will be published in bi-annual issues, distributed electronically and freely accessible through an open-access format. Submitted articles will go through a process of anonymous peer review.

Contributions to the Southern African Journal of Policy and Development should be submitted online via the SAIPAR [website](#). Upon submission, authors are asked to select an appropriate field: Law, Economics and Development, Social Policy, Science and Technology, Law and Gender, Law and Global Health, Governance and Elections.

Manuscripts submitted for publication should be in English and should indicate if they are submitted as:

A. Research Articles – up to maximum 3,000 words, inclusive of endnotes and references, and an abstract of 80 words. Research Articles should focus on a discrete research study and should describe the background, methods, results, and analysis of that study.

B. Policy Briefs – up to maximum 750 words, inclusive of endnotes and references, and an abstract of 50 words. Policy Briefs should focus on a country/region-specific situational updates, impacts or outcomes of intervention strategies by donors/government/NGOs, or a commentary on contemporary practices, programmes, projects, statements/declarations, etc.

C. Reviews – up to maximum 500 words, inclusive of endnotes and references, and an abstract of 25 words. Reviews should be on country/region specific books, documents, projects, programmes or official pronouncements, etc.

Further submission guidelines can be found [online](#).