

ISSN 1913-9047 (Print)
ISSN 1913-9055 (Online)

JOURNAL OF POLITICS AND LAW

**Vol. 2, No. 2
June 2009**



Canadian Center of Science and Education

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Contents

"Living in Interesting Times: President Obama and the Rebirth of the Labor Movement"	2
<i>Daniel S. Bowling, III</i>	
Privatization in Australia and the Western Economies in the 1990'S: Distributional and Political Effects of Accounting and Financial Reporting	8
<i>David Gowland & Max Aiken</i>	
The Measurement and Control of Chinese Administrative Expenses: Perspective into Administrative Expenses	27
<i>Xiangzhou He</i>	
Discussion about Shareholders' Right to Information	42
<i>Jingyi Wang & Peng Wang</i>	
The Role of the <i>Iş İda h</i> Movement in the State's Constitution of Perlis, Malaysia	50
<i>Mohd. Nasir bin Abd. Hamid, Che Latifah binti Ismail & Kamaruzaman Jusoff</i>	
Research on Condominium Ownership Based on Information Asymmetry - A Case Study of American Law	57
<i>Neng Wang, Yongxin Zhou, Feng Ji & Songhong Xu</i>	
Analysis of the Actuality of Shanxi Provincial Coal Miners' Labor Rights and Interests from the View of the Labor Contract Law of PRC	61
<i>Wei Wang</i>	
The Impact of Singapore's Military Development on Malaysia's Security	68
<i>Mohamad Faisol Keling, Md. Shukri Shuib & Mohd Na'eim Ajis</i>	
Study on the Historical Evolution of Chinese System of Voluntary Surrender	80
<i>Defa Kong</i>	
A Comparative Study of Shrink-Wrap License	86
<i>Jiao Xue</i>	
Statutory Rape Law in Chile: For or Against Adolescents?	94
<i>Claudia Ahumada, LLM</i>	
Prosecutorial Discretion at the International Criminal Court: A Comparative Study	109
<i>Jingbo Dong</i>	
Scientific Analysis of the Commonness in Human Civilization	115
<i>Yue Yang</i>	
Rosmini: Thomist or Neo-Thomist? The Debate Continues	120
<i>Nico P. Swartz</i>	
The Review and Forecast on Development History of IPR in the World	132
<i>Xuemei An</i>	



“Living in Interesting Times: President Obama and the Rebirth of the Labor Movement”

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Abstract

Legislation has been introduced in the United States that will allow workers to form unions without secret ballot voting among prospective members. This legislation, in its current form, is the most radical change in Federal law governing union recognition in its history. While passage of the legislation is far from certain, it has generated much discussion and argument, most of it polemical. This article examines the issue from a more academic perspective, reviewing the history of organizing and how management practices have developed that effectively use the current election process as a tool to resist organizing efforts, and the effect the legislation might have upon those practices.

Keywords: Legislation, Election, Effect, Form unions

There is an ancient saying: “May you live in interesting times.” Depending on one’s perspective, it is either a toast or a curse.

1. Introduction

The United States is on the verge of the most radical change in labor policy and law since Roosevelt’s New Deal in the 1930’s. The U.S. House of Representatives, controlled by pro-labor Democrats and with the backing of President Obama, has introduced legislation that will allow unions to form without a secret ballot vote among prospective members. The legislation, the Employee Free Choice Act (EFCA), commonly-referred to as “card-check” legislation, also provides stiff penalties for employer misconduct while opposing unionization efforts, as well as mandatory arbitration of collective bargaining agreements. If this legislation, or anything like it, becomes law there is likely to be a surge of labor organizing in American industry, with an attendant revitalization of private sector unionism. Also, the success rate for unions in representation elections is likely to be high, given that many of the tools and techniques companies have used to combat union organizing over the past sixty years will be either eliminated or greatly restricted if this legislation is enacted.

Any and all of these assumptions can be challenged. It is entirely possible the legislation will not pass this Congress in its current form. Alternatives have been proposed which will retain secret ballot elections but greatly shorten the time both sides can campaign. As this paper goes to press, other compromises are being discussed which would have similar effect (Greenfield, 2009). But political analysis is not the focus of this paper. What is clear is that any change in the law eliminating secret ballot elections, shortening the time for employers to resist unionizing efforts, or increasing penalties for unfair labor practices during such efforts, will have a dramatic impact on labor law and its practice in the United States.

2. A Brief History of Union Organizing and Industrial Resistance

The passage of the Wagner Act in 1935, which created labor law as we know it in the United States, was in and of itself a radical act at the time. In essence, it inserted government squarely at the intersection of capital and labor, which throughout most of American history – and to a certain extent human history - had been a private affair, and created a governmental body, the National Labor Relations Board (NLRB), to oversee it. With a stated pro-union bias at its inception (the language of the Wagner Act stated it was designed to “encourage the practice of collective bargaining”), and the economic tailwind of World War II, the percentage of private industry American workers joining unions expanded rapidly over ensuing years (see Smith, Merrifield, & St. Antoine, 1968). By 1950 the percentage of private sector workers covered by a labor contract grew to 35% percent. The number of representation elections supervised by the NLRB in that year was 5619, unions won 75% of them, and labor enlisted 753,000 new members (see Seeber & Cooke, 2009).

Although unions enjoyed general popular support during these years, as evidenced by their rapid expansion in membership, resistance from the courts and the legislative branch was growing. First, in a series of rulings the Supreme Court found the Wagner Act’s tight restrictions on employer conduct during union campaigns an unconstitutional

infringement of a corporation's right of free speech (*N.L.R.B. v. Virginia Electric Power*, 1941). Secondly, in 1947 a Republican Congress, suffering from a bit of a New Deal hangover, passed the Taft-Hartley Act (the "Act") over President Truman's veto. The Act was an attempt to level what some saw as an uneven playing field (Smith, et al., 1968). Among other things, it made it clear that employers may express their opinions about unionism and vigorously contest organizing efforts as long as they do not threaten union supporters or wrongfully promise benefits.

Some commentators felt Congress went a bit farther than leveling the playing field. Archibald Cox, later to become Attorney General of the United States, suggested that Taft-Hartley "represent(ed) a fundamental change in philosophy, which rejects outright the policy of encouraging collective bargaining" (Cox, 1947). However, as a recent chief counsel to the Chairman of the NLRB observed, the consensus view of the time was that Taft-Hartley reaffirmed much of the Wagner Act and was "hardly a fundamental change in philosophy" (Lopatka, 2007).

Unions continued to grow in power and total membership through the fifties and into the sixties, but this was driven more by growth in the major industrial unions such as the United Auto Workers than by organic growth (see Goldfield, 1989). Quietly, organizations and firms were being created to fight unionism, and in a broader context, what they saw as collectivism and corruption in American society (Miner, 1989). The facts backed them up. There was growing evidence of communist influence on the labor movement (Saposs, 1959), as well as evidence of organized crime influence (Hutchison, 1972; Jacobs, 2006). Companies seeking to resist organizing began doing so by presenting workers with these twin bogeymen, the mob and the Red Menace, no matter how benign a particular local union might be. Their efforts were given greater credibility in the mid-nineteen fifties by the publicity surrounding congressional hearings into American communism, followed by congressional investigations into ties between labor and the Mafia (McClellan committee, 1957). The latter led to a tough set of restrictions on labor power in the form of the Landrum-Griffin Act of 1959.

Given the ammunition provided by the more unsavory elements of the labor movement and the leeway afforded by the Taft-Hartley Act, employers were getting ever more effective at waging union resistance campaigns. Private sector union membership topped out at 39% in 1958, and went into a steady decline (U.S. Dept. of Labor, 2001). By 1980, unions were winning slightly less than half of representation elections, a percentage that remained roughly static until recently. Also, although many elections were taking place they covered much smaller groups of employees. In that year, although 7296 board elections were held, unions enlisted only 175,000 new members from their efforts (U.S. Dept. of Labor, id.).

It was hard to tell illness was spreading throughout the labor movement as long as the big industrial unions were healthy, or should we say as long as the big industrial conglomerates like General Motors and United States Steel were healthy. But the seeds of their eventual demise had been planted. For example, Japanese auto makers were taking market share away from Ford and GM and opening non-union plants in the South while other industries were moving jobs overseas (Farber, 2003). Additionally, technological change was rapidly turning America into a knowledge-based society dependant more upon the individual than the group (Drucker, 1991). Collectivist solutions such as those provided by unionism had little appeal to these workers.

The decline became more precipitous. The number of elections supervised by the Labor Board dropped almost five-fold from 1966 to 2006 and the number of persons voting in those elections (or eligible to do so) declined from 575,464 to 121,501 (U.S. Dept. of Labor, 2007; see Hirsch & Macpherson, 2009). In 2007, there were only 1526 board supervised elections and only 57,000 new members as a result, as the unionized percentage of private industry workers in the United States fell to under 8 percent (Hirsch & Macpherson, id.). Many were proclaiming the union movement dead (see, e. g., Steingart, 2008).

There is an anomaly that must be mentioned. Recently, the percentage of union victories in representation elections is slightly higher than in past decades (BNA, 2008). However, we cannot read too much into a sample base much smaller than those of historical levels. Rather than a union renaissance in the making, it is more likely that unions have become highly selective and only attempt to organize in situations close to "sure things," or when the company agrees to remain neutral in the campaign. Also, this data is skewed by the almost 75% success rate of the Service Employees International Union (SEIU) in 2006-7, a union which targets lower-wage employees, not traditionally a desirable unionization target (see Maher, 2007). In 2007, the highest number of representation attempts was made by the International Brotherhood of Teamsters. Their success rate of 48.6% is more in line with overall union organizing success rates since 1980 (BNA, id.).

An important factor in the acceleration of labor's decline since 1980 – some would say the primary factor – is the role of policy. Since former union man Ronald Reagan notoriously "broke" the air traffic controllers, oversaw the deregulation of the trucking industry, and gave the labor board a decidedly pro-employer flavor through his appointments, governmental policy has been not been particularly friendly to union organizing. Some claim it has been downright hostile: "union-busters (after Reagan's 1984 re-election) are in hog-heaven." (Goldfield, 1989, p. 6). President Clinton, while ostensibly supporting pro-labor positions, was seen to have turned his back on the labor

movement when he championed the North American Free Trade Act despite the obvious collateral damage it would inflict upon American unions (McArthur, 2001).

Other factors have contributed to the decline in unionism in the United States, such as the number of federal laws protecting worker rights passed in the last five decades (Bennett & Taylor, 2001), but these are not the central focus of this paper. There is little labor can do to reverse global economic trends, nor can it turn back the clock on technological change. It can, however, influence political policy and seek legislative change. For sustenance, it can look to the growth in the number of persons represented by unions in the European Union countries from the period 1970-2002. While there is much dissimilarity between labor laws in these countries and the United States, the EU experience provides vivid evidence that pro-labor governmental policy can mitigate macro-economic trends (Visser, 2006).

Labor has been waiting for this moment in history, along with its friends in Congress like Senator Edward Kennedy, who has called for a “leveling of the playing field for American workers” (Kennedy, 2008), and Representative George Miller, who claims the current Act is “skewed” in favor of those opposing unions (Congressional Record, 2007). The AFL-CIO calls the legal mechanics for forming a union “broken,” and demand for the passage of the somewhat disingenuously named “Employee Free Choice Act (EFCA)” is a central part of organized labor’s backing of the Democratic party (AFL-CIO, 2008).

3. Proposed Legislation

An examination of the EFCA in the historical context of labor policy in the United States shows that it will revolutionize the labor movement in the United States. In contrast to the bombast offered on web and editorial pages by both sides of the debate, there have been few scholarly analyses of the Act (a recent search of the University of Pennsylvania library data base showed fewer than ten published to date), scholars are largely united in their opinion that it promises dramatic change. One, examining the Act from a management perspective, goes so far as to say its “foreseeable consequences . . . could be cataclysmic” (Matchulak, 2009, p.41).

Any and all of these assumptions could be challenged. It is entirely possible the EFCA will not pass Congress, or even if it does, modifications in the legislation could occur. Certainly, whether the Democrats have a filibuster-proof majority in the Senate – which is uncertain as this goes to press – will be a key factor. But political analysis is not the focus of this paper; instead, it is about the potential impact on the law and its practice should this legislation succeed in anything approaching its current form.

The aspects of the EFCA that promise dramatic change are in three areas: card check recognition, arbitral imposition of a first contract, and increased legal risk for companies opposing organizing campaigns. Each will present a remarkably different way of doing business for any person working in labor relations today, regardless of which side he or she may represent.

As noted above, companies have used the procedures for secret ballot elections to wage long and generally effective campaigns against union organizing. The EFCA effectively eliminates this feature of the Act and replaces it with a requirement that employers recognize a union once a majority of employees in a certain group sign cards authorizing the union to be their agent for collective bargaining. That is it – no discussion, no counter-appeal, no campaign as it is traditionally understood by the labor relations industry. This is a truly radical departure from current labor law, where the courts and the NLRB have maintained consistently that the secret ballot is the preferred measure of determining employees’ wishes on the issue of unionization (Fisk, 2002). To its opponents, the EFCA is no less than an assault on free speech, freedom of assembly, and the essential role the secret ballot has played in Western society since the Enlightenment (see, e.g., Matchulak, J. 2009). Even stripped of hyperbole, it is quite clear that union organizing will be very different if elections are not part of the process.

The EFCA’s proponents, not surprisingly, argue that the effectiveness with which employers and firms have used the time between the filing of a petition for election notice and the actual vote to oppose unionization renders the current procedures inherently unfair, since employers control the site of the organizing. (AFL-CIO, 2007) Whether fair or not, it is true that private industry has created something close to a science of opposing union organizing, with an arsenal of campaign tactics and techniques honed over the years. It is these weapons the EFCA intends to make relics of history.

Many non-union companies, and the firms advising them, pride themselves upon their ability to resist unionization by “tough,” albeit legal, campaigning. Young labor lawyers are trained to run labor resistance campaigns by “walking to the edge of the line (of the law)” when advising clients on aggressive tactics (L. Forrester, personal interview, August, 1982). This approach, quite common in the labor relations industry, has been facilitated by the relatively benign enforcement powers of the NLRB for those occasions the line is crossed.

The role of the NLRB is focused more on remedial than enforcement actions, unlike other agencies such as the Securities and Exchange Commission. Since neither prison time nor punitive damages for unfair labor practices are provided for in the Act, aggressive actions against labor organizing carry little risk. The EFCA strives to make the penalty for campaign violations more closely approximate what its supporters perceive to be the magnitude of the crime.

Chief among them are greatly increased monetary damages and fines for illegal conduct, and requiring – rather than permitting – the NLRB to seek injunctive relief for violations. Accordingly, the risk of relying upon tried and true resistance tactics will be vastly increased, discouraging companies from combating union organizing with the vigor of the past. Those companies who do not understand they cannot rely upon the standard playbook at the first hint of card activity have not fully grasped the import of the sanctions provisions of the EFCA and are in for a rude awakening.

Finally, the EFCA will remove the ultimate backstop non-union companies have relied upon to minimize their exposure to union organizing. Current law doesn't require – even when a union wins an election – the company agree to a collective bargaining contract, only that it attempt in "good faith" to reach one. Critics of the law have long maintained that many employers never intend to reach a contract, and exhibit "good faith" only to the extent required to avoid legal action. Studies showing that as many as 40 percent of union contracts never culminate in a contract.

The EFCA will amend the Act by providing that after ninety days of bargaining, either party may submit the dispute to a process that eventually results in binding arbitration. In other words, an employer can no longer delay or "hardball" a negotiation – should the union choose, a third party will impose a contract on the parties that will be binding for two years.

4. American Industry Unprepared

Despite the dramatic ramifications of this legislation and the intense lobbying by pro-business interests, private industry in this Country is generally unknowledgeable about the dramatic change the EFCA will bring. "Companies have been lulled to sleep," says David Hagaman of Ford and Harrison, a labor and employment law specialty firm in Atlanta. "Nobody wants to talk about union avoidance because they don't think it matters anymore" (D. Hagaman, personal interview, July, 2008). Although few companies will admit the extent to which they conduct union avoidance training, it is the experience of the author that few companies have increased their training in this area.

In addition to industrial inattention, the makeup of most human resources departments today doesn't prepare private industry for the onslaught of organizing that will accompany passage of the EFCA or similar legislation. Traditionally, industrial companies had large, sophisticated personnel departments with an emphasis on labor relations. Twenty five years ago it was quite rare to find a senior human resources executive without labor experience, and it wasn't unusual for the top human resources officer with one of the largest industrial companies in the US to claim human resource executives without labor experience "aren't worth the powder to blow them to hell" (S. Hazen, personal interview, July 1990).

However, as unions have receded from the scene in private industry, human resources practice has focused itself on seemingly more modernistic topics such as diversity, talent management, and leadership training. Labor expertise is not a sought-after trait when corporate America searches for a top human resources officer today (unless the position is narrowly focused on labor negotiating). Jane Howze, Managing Director for the executive search firm The Alexander Group, notes that human resource searches in recent years have focused on skills other than labor. She also notes that should pro-labor legislation be enacted, "there will be a huge demand for human resource executives who have labor relations experience – and there is a very limited supply of these folks left." (J. Howze, personal communication, September, 2008). Her conclusion is similar to that of Emory Mulling, CEO of the Mulling Corporation, a leading human resources consulting firm: "Labor isn't something most companies look for in HR professionals anymore, which will leave companies in a bind if anything close to EFCA passes." (E. Mulling, personal communication, May, 2009).

A similar phenomenon has taken place in the law and consulting firms that represent private companies. Although most large law firms have a "Labor and Employment" department, the number of associates and younger partners with any true union representation campaign experience in most firms is small, and the ranks of the more senior practitioners have thinned.

Much of the evidence of this is anecdotal, inasmuch as there is little hard data on how many of the 22,000 members of the American Bar Association's Labor and Employment Law Section are traditional labor lawyers representing private employers. But conversations with long-time practitioners in this area are instructive. "Nobody is a real labor lawyer anymore," says Paul Beshears, a partner in a major law firm, with only slight exaggeration. "When I entered the practice in the early 80's that was where the action was. But the work dried up so it seems like the entire bar focused on discrimination lawsuits," (P. Beshears, personal interview, March, 2008). Mr. Beshears' impression is similar to that of Lisa Jern, head of the labor and employment practice at Sutherland, an American Lawyer Top 100 firm. "It is very difficult to provide proper training in labor matters to our younger lawyers because of the scarcity of the work." Her partner, Allegra Lawrence-Hardy, adds that "we are working to find ways to provide the necessary training because we feel this might get very busy under this administration" (L. Jern & A. Lawrence-Hardy, personal communication, August, 2008).

John Wymer, a labor law partner at Paul, Hastings, Janofsky and Walker, and a Fellow in the College of Labor and Employment Lawyers, explains why: "Beginning in the mid-to-late 1980s, more and more lawyers started specializing

in employment law, and the numbers of traditional labor law practitioners dwindled, through lack of work or retirement. There has been hardly anybody coming in to replace them, and few people left to train or mentor young lawyers in what can be an arcane area.” (J.Wymer, personal communication, August, 2008).

These statements should not be surprising. Given the fact, as noted above, there were only 1526 representation elections in 2007 as compared to 7296 in 1980, it stands to reason that the number of practitioners in the field declined by a roughly corresponding amount.

Some would argue, paraphrasing Mark Twain, that rumors of the death of the labor bar are greatly exaggerated. There are several large national firms that have active and excellent labor practices, and many smaller boutique firms with equal levels of expertise. There are also numerous consulting firms, as well as individual experts, who specialize in supervising union campaigns, as an internet search will quickly confirm. None would contest, however, that the overall size and expertise of the labor bar has shrunk along with the decline in union membership, and will be challenged to meet the significant increase in organizing activity the EFCA is likely to engender.

5. Conclusion

There are questions that must be answered before we can gauge the real impact of the EFCA. What is the impact of globalism? Has is made unionism in the United States permanently irrelevant by eliminating all manufacturing work that can be shipped overseas (see Gely & Chandler, 2008)? Also worthy of consideration is the fact that the American worker is a very different creature than he or she was during the heyday of unionism. The rise of the knowledge worker and the demise of the assembly line worker have been well-chronicled (see, e. g., Drucker, 1991). Combined with the independence the internet provides, as well as the increasing advent of offsite work and telecommuting, there are serious questions as to whether the intellectual and physical collectivism that supports union organizing still exists to any large scale.

Regardless of the long-term health of the labor movement or what legislative changes occur to the EFCA, some things seem likely. There will an increased level of labor organizing in the United States under this administration. Restrictions will be placed upon the techniques employers have traditionally relied upon to resist organizing: at the same time the ranks of those experienced in their use has greatly diminished. As the ancient toast, or curse, suggests, we are about to “live in interesting times.”

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This paper originated in a law school seminar during the spring, 2008, semester at Duke Law. The author wishes to thank the following students who contributed research and writings on various aspects of an earlier version of the EFCA, work that helped form the basis for this paper: Crystal Brown, Michael Rosenberg, Monica Chapin, Aryeh Hersher, and Elisabeth Pelgrims. Particular thanks go to Katie Manley and Emily Bieber, who led their research and writing efforts.

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Privatization in Australia and the Western Economies in the 1990'S: Distributional and Political Effects of Accounting and Financial Reporting

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Abstract

This article captures the effects of 1990's privatization two decades later and challenges whether the expected outcomes of Government debt reduction, a change in share ownership, reduced union and government intervention, and improved efficiency have been achieved. It also addresses whether the benefits of achieving such fiscal and political goals outweigh the social costs of a redistribution of wealth away from citizens should be considered. Otherwise financial results of such public sector accounting may raise issues of their justification in terms of non-trivial dimensions. Should public sector accounting standards and financial reports be used to justify government policies for the re-distribution of wealth?

The recent economic turmoil that has focused on ailing economies, company collapses and falling markets brings economic policies into question and this aspect is addressed within the paper together with traditional foundations of financial accounting for recognition of bargained equities among participants.

Keywords: Debt, Privatization, Shareholders, Wealth redistribution

1. Introduction

Prior to the 1990s there were only a few large privatizations in place (Reserve Bank of Australia Bulletin 1997, p.8). The most notable and earliest examples were in the United Kingdom (UK). In the early 1980s there were about fifty privatized public trading enterprises operating in the competitive sector. Other utilities followed as, for example, suppliers of water. According to the organization of economic co-operation and development (OECD), global privatizations totaled about \$US30 billion in 1990 alone and by 1997 were expected to exceed \$US100 billion.

According to Martin and Parker, (1997, Ch.7), political pressure in the United Kingdom for privatization came from a combination of disillusionment with the results of State ownership and from a belief that private ownership would bring substantial economic benefits. Included in these perceptions were concerns regarding inefficiency, lack of technical innovation, political intervention and union domination. This is not dissimilar to the situation in other western economies such as Australia and New Zealand, where privatization became dominant for state owned enterprises during this period.

The emphasis on privatization of government owned business institutions began in earnest in the 1970's in the United Kingdom for the reduction of public debt. While such macro economic imperatives have not been associated in the accounting literature with modeling the reform of accounting practices there has been a continuing theme from economists. This is that for over four decades that accounting reports should be more useful for inducing the required outcomes of economic policies (Hawkins, 1961). This has gone hand in hand with the claim that annual statements should be useful for economic decision making. These necessarily sit easily with the fundamental accounting requirements for the recognition of bargaining processes and regulatory mandates for equity determination among participants.

One major problem for this economic approach is that practitioners have not joined academic researchers in this full blooded acceptance of these outcomes of economic policies. A second problem is that the reduction of theories in

science to more basic networks (Nagel, 1961, Ch. 11) has not retained its status as a facilitating concept for unification of knowledge formation (Ayala, 1985). It may be that evolutionary development of financial accounting and reporting practice which has developed slowly and painfully since business began to grow with the advancement of science about 1650 when businesses grew in complexity with this expansion of science, is non trivial in its practical execution. In fact practising accountants believe that such practises constitute a strong element of management accountability not to be lost under standardization of practises. Also, business investment by disparate participants could not prosper without such practises because they may have an associated integrity with respect to all co-operating participants. And speaking of execution, King Louis XIV of France promised death as an outcome for all business people who did not comply with his Ordinance of 1673 for accounting and moral control of business under a managements' accountability (Howard, 1932). Treasury officers and other economic modelers and advisors might remember, or learn, that accounting practice has a strong accountability base in relation to ethics and science. While this may have only a passing relationship to economic practices and politics over the past 350 years, it has shown some tendencies to test the usefulness of economic concepts in a practical setting. In recent times economists in government seem to have become absorbed by the concept of "normative accounting" from the 1960's (Chambers, 1966, Edwards and Bell, 1961). This is the process of adding up current market prices or assets and liabilities to get a value for the balance sheet at periods' end. However, accounting and reporting has never been about adding up values or prices in balance sheets without reference to management accountability as a focus for periodic allocations (Littleton, 1953). These are to be determining periodic gain, not value (Dewey, 1922).

This is not seen as cherry picking accounting by unscrupulous manipulators in the private sector. Rather it provides a framework with the appearance of "arms length objectivity" from the preparer of the statements. Littleton (1953) made the point that any economic uniformity of measures stifled away accountability for recognizing existing equities associated with transactions (1953, Ch. 2). It ignored community laws and regulations which is the point to be examined here. Additivity of uniform asset market prices to approximate a whole value of the entity has been a major accounting problem since the seventeenth century and it certainly has been applied to normative accounting (Larson & Schattke, 1966). Littleton (1953, pp.214-5) continues:

"Current prices are momentary and can have accounting significance only to the extent they are made definably relevant to a given enterprise by actual transactions of the company"

What Littleton is implying is that the use of current prices as a communal measure of contributions to the "common good" (Dewey, 1922), will affect rights, obligations and existing equities as community arrangements, management strategies and existing environmental constraints. Under standardization today the preparer may use either historic or current market prices or management value to approximate the value of the entity as a whole in the balance sheet to keep accountability is sharp focus among equity holders of all types. Empirically this process is done by most professional accountants in the private sector who must justify management's assessment of gain with scientific rationality and morality (Aiken & Ardern, 2003). Although the same figure could appear in a specific case, current cost in this setting of providing hard figures to justify a manager's assessment of periodic gain of the whole entity at period's end is of a different genus to incremental adding up of the market price of assets in micro economics to determine whole value. It would be like comparing the genome individual (associations) and the genotype (whole being) in genetics.

Since the mid 1970's there has been an objective to centralize all important government accounting regulations under the umbrella of Treasury and the Department of Finance in Australia. Whole amounts for privatization have no doubt been influenced by these two bodies and "autonomous" managers of the business institutions. There is also evidence in financial statements that asset values and policies from government can vary from period to period by decree. These financial statements can be instrumental in forming a price at sale for the entity as a whole and in informing stock markets in case of a float.

The values recorded at privatization do not indicate over time that recognition has occurred of all equities bargained before or during the period of review. There may be two causative explanations for this:

- (1) The greater efficiency of private sector managers taking over the entities as economists would claim.
- (2) The doubtful nature of financial statements over the years preceding privatization as professional accountants would claim.

Both are extreme positions but further research areas into the outcomes will be suggested. The results of gains made in the decade after privatization will be identified for privatizations of the 1990's and possible areas for research will be identified.

In more recent times (2008) there has been an economic crisis where across the globe there have been financial collapses and government bail outs to ailing industries and also the need to promote consumer spending in an attempt to kick start the economy (Sikka, 2008). In view of these collapses one might question that had some of these industries

remained under government influence and not been subject to “market” pricing policies that some of the turmoil might not have occurred. Also, deterioration of share values may mean that rebuilding of capacity free government expenditure as the foundation of “give away” economic policies may never occur.

This paper will address each of the key factors of privatization i.e. financial analysis, debt reduction, government /union interference, share value and efficiency.

2. Theory and practice of Financial Reporting

The historic Littleton (1953) traced accounting practice-induced theory back to the early ordinances of the seventeenth century where accountability becomes formalized. This had become necessary with the growth and complexity of business entities with the advancement of science, given the function around 1650 of general economic definition, an attempt was made to generalize the common good. This good is always unique to each entity (Dewey, 1922, p. 210). Accountants accepted production as its focus. This invested cost became the measure of periodic social contribution. This invested cost may be historic cost, current cost or management value, whichever best represents the sacrifice or output of the whole entity. Under such standardization total invested cost for the common good as a qualitative moral issue is deducted from compensation paid by society for the cost outlay (Littleton, 1953, p.95). The remainder is gain or profit. Accountants have established the idea of adding up economic valuation of the firm for over three hundred years. The subjectivity of this procedure has often destroyed the professional awareness of accountants at this level of integrity for justice among all constituents. However when used in conjunction with gain as a “qualified” capital adjustment, some pragmatic use to investors has often evolved.

Gain as a qualitative term which can only be understood by reference to the strategies and environmental conditions which constrain its derivation in each case (Dewey, 1922, p.221). In this context readers may observe three qualities which may be the focus of accounting. These are:

- (1) economic decision usefulness
- (2) political policy facilitation, and
- (3) integrity.

If practice-induced theory is the aim of accounting as a community discipline then the latter can be defined for autonomy in a standards-setting environment (Benston et. al 2007).

Integrity here means changing the equities only in line with actual changes in management’s periodic environmental performance, in nature, not in line with compliance requirements for external decision makers or policy facilitation.

Generalization of market prices in balance sheets strips away the specific accountabilities imposed upon managements by Statute, law and traditional practices. These specific accountabilities can influence accounting measures. Thus the accountability structure for professional accounting theory becomes reduced to economic theory as this scientific method is generalized. This provides strong methodology in an irrelevant accountability structure, outside of perfect markets. It strikes out the essential morality of bargaining among a firm’s participants. In accounting both measurement and distributional issues are important for equity. For three hundred and fifty years equity has been enforced by statute and regulation together with relevance to management strategies and existing environmental conditions facing each reporting management. Periodic gain is induced at periodic end, financial accounting is not economics and its traditions are to be respected for equity in financial reporting. The opposition to “value” is as follows. In economics the market place is sovereign. Thus the sum of a firm’s values when these are assets and there are no liabilities is the sum of the current market price of these assets added together. In financial accounting the value of the firm has been management’s value of the whole entity (Canning, 1929, p.319) not the total of assets. Hopefully gain is then being justifiable under skilled auditing and associated guidelines. This is measured by profit for the period which is revenues less costs invested in earning the revenues in the period. A valuation judgment may then be made in practice under standardization allowing historic and current market prices as a management valuation.

The aim where general objectives of the discipline cannot be operationally defined is to hold management accountable for that which it has been accountable in terms of financial growth during the period, while recognizing laws and traditions which lead to the identification of existing equities at that date, not observing market prices to be added up in balance sheets. These laws are evolutionary but have changed only slowly since the French Ordinance first enforced periodic accountability in 1673 (Howard, 1932). Thus, the sum of the asset’s current market prices in economics does not equal asset values which add to a management’s value of the whole entity in financial accounting. There is an accountability distortion which leads to modified asset values. This is much the same as in evolutionary biology where genes add to the genome, but modified genes (alleles) sum to the genotype or basis for understanding the whole being in its environment. These alleles are like invested costs for determining gain in financial accounting. Thus the addition of the assets in economics ($a_1 + a_2 + a_3$) is not equal to market values for the whole in accounting. That is ($a_1 + a_2 + a_3$) does not equal the sum of (a_1, a_2, a_3) in financial accounting practice. Nor does discounted cash flow since 1650 when

the search for objectivity for large scale enterprises rejected the discounted future values concept (Shwayder, 1967).

The accounting profession is concerned with rather more than the mediation between productive and financial capital and its activities also include the provision of financial statistics. These may be used as a basis for the protection of property rights and ensuring the financial regularity and stewardship of economic agents (Cooper et al, 1989, Ch. 12. p.253.)

Any generalized market measurement system (including historical cost) will not be used outside perfect markets where distortions of measurement are at a minimum. The notion of uniformity for asset measurement has not been used strictly for over 300 years. Accountability in large scale organizations since 1650 could vary dramatically in line with complexities of each firm.

The results of privatization to be shown here indicate that it is management's assessment of the future worth of captive markets for essential services to be delivery which is relevant. The sum of the current net prices of assets and liabilities involved may be inappropriate (Larson & Schattke, 1966) even though such an overall value may appear to be "objective" and more compliant with potential ideologies and the values of governments and Treasury officials. However it is the conjoint credibility given by professional assessments of managerial accountability through laws, statutes, strategies, environmental constraints and agreements in a particular case, together with the justification of methods of inquiry which give financial statements their status. Cooper et al (1989, Ch.12, p.253) identify that the accounting statements produced by accountants legitimate the current mode of economic activity, embodying in their classification of accounts (e.g. what is to be treated as cost, what is seen to be valuable, what is to be treated as internal and external to the enterprise) the existing pattern of wealth and domination in a society, emphasizing the technical rationality of the statistics produced. They also identify (p. 255) that the choice of a specific accounting measure is unlikely to be important in the mediation between the various sectors of the economy or fractions of capital. Most notably they refer to inflation accounting where the State may be concerned with the role of indexation in an inflationary economy, the incidence of taxation, industrial policy and pricing in and performance evaluation of, the nationalized industries as outlined by Robson (1988).

Questions need to be asked as to whether the neo-liberal policies that were adopted have proved to be effective. Since the collapse of the Long Term capital management (LTCM) and its rescue by the US Federal Reserve, it has been acknowledged that derivatives are difficult to value and Nobel Prize winners in economics could not work out the value of such financial instruments (Sikka, 2008). This may mean that other economic strategies and predictions come into question as to their validity, and in particular, the economic theory related to the outcomes from privatization. The pre-privatization predictions about improved efficiencies and economies do not seem to have eventuated (Martin & Parker, 1998, Ch.5) and this supports that questions need to be raised with respect to the economic theories used in ratifying such direction. In the absence of general definitions of purpose to guide general deductive modeling, objectivity in accounting must relate to acceptance or conflict resolution between a bargained rights and obligations of co-operating participants.

Why is economics theory and policy inadequate for directing valuation in financial accounting and reporting statements? The reason, which has been known for half a century (Littleton, 1953, Ijiri, 1971) relates to the inability of scientific processes to reduce accounting theory to economics theory. This reason stands on the foundation that financial accountability is a multi-disciplinary concept, having associations with economics, biology, ecology, management science and political intent with respect to the recognition of legal rights and obligations with a community. All these elements cannot be satisfied by placing an economic valuation into a periodic balance sheet in order to facilitate some economic and political will. Offhand economic mantras that consumers will be better off because of:

- (1) transfer to private market places;
- (2) use of "taxpayers' monies" for other projects
- (3) more efficient environments for staff and for operational processes reducing costs.

These assumptions may be proven true or false at any specific time but in any case are not sufficient for the distortion of practice. This does not permit external valuations to distort financial statements without justification of the valuations at three levels of professionalism. These are

Level 1- Science and biology of operations which as observed under guidelines of practice/nature of the business or management accountability

Level 2- Standardization of professional measurement and related procedures of discovery, and

Level 3- recognition of all significant legal and community standards of human conduct with respect to the rights and obligations of all participants. This conflict resolution for a period or "objectivity" of accounting statements in practice cannot normally be met outside perfect markets by inserting economic or market valuations into balance sheets, especially at times of sale of the business entity.

3. Public Sector Background

In a fast moving world of social and administrative change it seems clear that historians, particularly accounting historians, should examine practices of significance to society. These may appear as big picture items when results become known in terms of a temporal scenario ranging from antiquity to the present. The paradigm of history which supports such a view of progress towards accountability and performance review is identified by Danto:

“Historians have the unique privilege in seeing actions in temporal perspective- the point of history is not to know about actions as witnesses might, but as historians do, in connection with later events as part of a temporal whole (1985, p.183)”

As State owned enterprises are under the influence of elected politicians, priorities can be very different and conflicts may arise as political decisions can be made, that don't support the business emphasis for providing essential services.

As International Accounting standards move towards a cohesion among countries of diverse cultures stretching from China to Europe and the Americas, a measure of solidarity may be emerging between use of connections, laws, rules and practices. Although often metaphysical in selections of choices between historic cost, current cost and management values, there is a tradition in practice going back three hundred years and more about discretionary choice. At that time production may have drawn attention to the “common good” and, given environmental conditions and management planning opportunities, it provided a foundation for the concept of historical cost. Throughout the years accounting practices and standards have attempted to reflect the nature of a reporting business entity by capturing environmental conditions for financial accounting measures and reporting perspectives. This was handled over centuries not by uniformity, but by flexible historic cost measurement in the context of invested periodic costs to be deducted from revenues to identify gains and losses.

Interpreting specifics of the purposes of the business entity as a whole led to a mix of uniformity and flexibility at the margin (Littleton, 1953, Ch.5, pp.54-5). Macro evolutionary features for the entity as a whole are reflected in both the ethics of evolutionary biology (Ayala, 1985) and the progress over time of financial accounting and reporting practices under standardization (Zeff, 2005). The key here is that macro evolutionary progress deals with the organization as a whole under its own existing accountability and planning criteria- not those of somebody else. The addition of economic values in balance sheets has been a control of the process not a valuation of the entity in financial accounting.

Accountability evolving through statutory and traditional powers is the discretionary force available to accountants seeking objectivity in the planning function and using interdisciplinary relationships of business conduct within the structure of accounting theory and practice. Normative economics appealed to many individuals with a scientific logical basis in the 1960's. It was emphasizing deduction as against a more inductively derived evolutionary procedure emphasizing observation of the natural world in which accountability prevails. At that time evolution of processes and generally accepted measures of performance were derided by some philosophers (Popper, 1959). Thus because financial statements contained micro economic data, a field of research became established which advocated specifically the use of current market prices to better capture in general terms the essence of a firm's operations (Edwards and Bell, 1961, Chambers, 1966). However, every “common good” produced by entities differs and objectives cannot be defined generally for moral fitness in financial accounting (Dewey, 1922, p. 310). Recognition of bargained equities, to be acknowledged at period's end, to be acknowledged at period's end, is allowed for not in market places and balance sheets, but by association with an environmental common good as a periodic increment to community wealth or progress to be measured within the structure of accounting theory.

The process of the scientific reduction of financial accounting theory to micro economic theory appears to have been recognized in economic policy. However generalization of measures has been rejected for centuries in accounting where conflicts among user needs have rendered current market price reporting impractical (Beaver & Demski, 1979). These authors advocate cost/benefit analysis to prove that accrual accounting benefits the community. Further research will have to take a trial and error inductive basis to determine this if the results here are a guide. They indicate that Public Sector accounting standards using current market prices might rank with the pragmatic use of such prices to destroy fair disclosure in the USA in the 1920's.

Economics bookkeeping has now become useful, particularly in the public sector of some western countries, for inducing and enhancing outcomes of economic policies of politicians and public servants. Public sector accounting practices under such “normative accounting” will be shown here to have permitted transformations of economics bookkeeping standards in countries such as Australia and Britain. The problem is that current market prices take the place of considered valuations based on the accountability of management for the entity as a whole, where objectivity is to be safeguarded by reliance on the whole codification of traditions, practices, rules, conventions and laws, as in the private sector. Value as a whole is a management assessment in conjunction with cost determinations which can have narrowed the scope of this valuation process for centuries. Objectivity in accounting would consider the fact that most business entities are not users of capital supplied by tax payers. History shows government funds for “start up” are

quickly withdrawn by Treasurers. Government as trustees provides loan monies which are paid off by consumers for these assets. Assumptions of government “ownership” are invalid (Aharoni, 1981)

The absence in economics of frictions among moral, ethical, technological and scientific foundations leaves only logic and assumptions to supplement an empirical basis for objectivity. It should be noted that financial statements are not simply part of a micro economics set of procedures for estimating, enhancing and inducing policy goals in line with government policies (Dopuch and Sunder, 1980). Such financial statements need possess at present only a slight resemblance to interdisciplinary based traditions, rules, conventions and laws underlying private sector standards accepted by a society. Choice among alternative values in economics bookkeeping may or may not refer to the firm as a whole, although there is a massive challenge for the additivity of current market prices in this context (Larson & Schattke, 1966). This is necessarily claimed at all times in government to be overshadowed by a host of interrelated economic associations and political aims of cost/benefit reviews to be fully sanctioned by accountants in practice (Guthrie & Parker, 1990). Have auditors-general and contracted public auditors performed such tasks by upholding the integrity of the most exulted reporting icon in business history? Economists can add up market values as they wish, but not within the context of accounting statements which carry the prestige of evolving objectivity to justify the existence of bargained equities.

In this context it may become clear that financial statements can have communication objectives that are ethical in terms of distributions which may flow from their publication under given statutes and regulations. However, economic amounts and ratios will need to be argued to be equitable under given conditions of use when appearing in financial statements. Much of this extra data may need to be available to the public. Also three different professions are involved here being auditing, economics and the law.

This paper will trace distributions of wealth by politicians and economists under privatization. The historical sequence of events, especially since 1990, will then be identified in a manner which is capable of real world scrutiny. The final results indicate that sociological and economic results do not necessarily justify use of accounting reports by economists in the public sector to achieve social and political objectives for change. The ethical and moral basis of interdisciplinary financial accounting standards under flexible accountability has seemingly been breached as has trust and integrity.

Accounting and financial reporting cannot be placed in the hands of technologists outside of the accounting profession. Data showing receipts from selling; or float prices of governments and subsequent securities prices over time have been verified here against the relevant competent authority. The conclusion reached is that no authorities, no matter how powerful, should be allowed to direct the accounting profession. It appears that no public sector accounting standards should exist unless cost/benefits of accrual accounting in government can be moved to induce a community evaluation of gain. Cost/benefits in this distributional context would not value government's economic management highly in this context of conflict resolution as the basis of distributional transparency and ultimately of objectivity.

4. Political Rationale and Historical Factors

4.1 Government Debt

A theme that seems to be generally attached by governments to privatization is reduction of government debt. This becomes extremely attractive where government ownership is emphasized while its essence as a mere legal convenience is hidden. For example, Government is selling assets where its economic, as distinct from legal ownership, may not be justifiable in terms of temporal market history of transactions or actual risk in a traditional accounting context. Suleiman and Waterbury (1990, p.2) supported debt reduction at that time. They suggest that privatization was begun and expanded in response to a crisis that involved heavy public deficits, high inflation, deteriorating trade balances and an inability to meet external debt obligations and ultimatums from public bodies and private creditors. These have been allowed to override legitimate notions of “ownership” under government as trustee for the public, a point often well expressed in the community at large which is aware that government funding not since repaid by consumers as loan redemptions is minimal. In most cases government would have been a guarantor for loans since repaid.

Thus, in addition to the efficiency and effectiveness aspects claimed for privatization, the other factor that has focused the interest by Australian governments is the potential to reduce debt (Department of Treasury 1994). The debts of both State and Federal governments had grown substantially during the 1980s and 1990s. There were a number of options available to reduce debt levels. Debts were incurred from tariff protection policies and support for local industries at the expense of imports. This ultimately would lead to high prices to consumers or, alternatively, higher taxes to help reduce debt. Another option could have been to manage existing funds more effectively. However, this would require long term re-structuring and could take considerable time to achieve. Finally, government could choose to sell public utilities, on behalf of the public, to private entrepreneurs or else raise additional revenues through an increase in the price of goods and services. As mentioned, a key justification must be increased efficiency in order to share benefits. This must actually occur in a democratic system and not simply be postulated as an article of faith if benefits redistribution is not to result in communal or social costs. Centrally, government departments do not “own” financial accounting

professionalism and need to avoid distorting accounting professionalism for their own purpose. This edict can be traced back over three hundred years to the early accounting and reporting ordinances in Europe which followed the breakdown of present value accounting for the whole entity (Howard, 1932). Financial accounting which must conceive changes in equity as morally justified on all occasions cannot be reduced theoretically to economics. There is a moral responsibility in disclosure to recognize changes in participants' equities, not necessarily changes in market asset prices.

All Australian governments (both State and Commonwealth) had been facing a growing debt problem often caused by borrowing programs used to fund government activities (Department of Treasury, State Government of Victoria 1994). The downgrading of their credit ratings has evidenced this issue through financial rating agencies. The state of the economy resulting from this situation, and to a lesser extent the general recessionary period faced by most world economies in the early 1990's, provided an opportunity to take action.

In addressing the first factor of excessive borrowing for essential infrastructure assets leading to perceived inefficiency, two options could be taken. The governments as trustee could (1) corporatize the public utilities, and this had already been done in a number of cases to provide a formal statutory and accounting portrayal of "government ownership". Also (2) government was able to sell off the public utilities to private ownership. There are a number of legal and ethical arguments for and against taking either of these actions. However, this paper will concentrate on identifying results of the privatization option in terms of both equity and efficiency.

Of the available options referred to above, a number of countries appear to have chosen the privatization option. This has been the preferred method as evidenced by the number of privatizations that have taken place in Australia and other countries, particularly the United Kingdom. Again given absence of the specifics of actual origins and continued funding of the services over time, assumptions of true economic government ownership, as in the private sector, could have been unethical or even unconstitutional if put to appropriate tests and debate (Ma & Mathews, 1993). The form of such ownership transactions has, however, been validated through privatization legislation and statutory financial regulations. Is this sufficient for professional recognition?

Australian governments (Federal and States) have embraced privatization as one of the tools to lower their debts and deficits. Privatization gives previously "government-owned" businesses access to sufficient valid ownership capital in private securities markets and can expose monopolies to market competition (Rogers 1993, p.45). The expectation of this strategy was that it would create an investment climate for assisting in reducing unemployment and rapidly growing debt burdens. Governments have thus used the funds derived from selling government owned enterprises to reduce public debt and to improve credit ratings (Public Sector Bulletin 1999, p.11). Whether this is an acceptable reason to debauch the history of the concept of morality in the accounting profession has seemingly not been addressed by senior accountants themselves for their iconic treasure of financial accounting and reporting.

The reduction of Australia's government's debt has been successful. The Australian Government's net debt has been reduced from around \$96 billion (19.1% of GDP) in 1995/96 to an estimated \$11.5 billion (1.4 % of GDP) in 2005/6 (Refer to Table 1 below). It was also argued that Australia has a much lower level of government net debt than most industrialized countries, including well performing economies such as Canada and New Zealand (Australian Government Budget 2005-6, Budget Overview).

The figures identified in the Australian Government Budget (2005-6) (Appendix F: Historical Government Data) for Net Debt were as follows:

Insert Table 1 here

Given that a number of privatizations occurred in the latter half of the 1990's (Refer Appendix 1) it would be logical that these sales had some impact on lowering debt levels in the period of 1994 to 2000 (refer Table 1 above).

The trend, however, has continued on a downward path and part of the reason for the reduction in debt levels can be attributed to privatization through funds received from the sell off, and lower interest payments in subsequent years given the lower debt levels that needed to be serviced. Other reasons for the lower debt levels could be attributed to a strong economy, high levels of taxation under the mining boom, and, reduced spending on infrastructure. Overseas experience suggests that government economic policies in extreme cases can also become affected by the extent of private sector debts owing to foreign lenders. The issue here is not the wisdom of economic policy, but use of non-transparent accounting reports to achieve such policies and the fairness of their distributional outcomes which must be justifiable in accounting theory for conflict resolution among participants- the traditional focus of objectivity.

4.2 Share ownership

In the privatization process there is a transfer of government ownership to the private sector. Given that most of the privatizations were key infrastructure organizations and utility services this may raise questions as to whether such a strategy has been in the public interest. Foreign ownership of infrastructures and utilities might not always be considered desirable because such owners are often in a position to influence pricing structures and service levels. Also,

the reduced influence of government might mean that the welfare of the general community is not considered fully when making decisions regarding these prices and quality of services. Furthermore, prices to consumers and also benchmarks for sale of privatized companies can be based on dubious current “values” bearing little credibility or justification outside economic objectives (Hay, 1992). Going further on the outcome to be shown here, it is postulated that professional accounting bodies should now divorce themselves from all contacts with public sector economic valuations for financial statements. Traditionally financial accounting has induced the nature of periodic gain not added separate assets to a whole economic entity value.

Nevertheless, the privatization process originally saw an investment boom begin in Australia. For example, the floats of the Commonwealth Bank of Australia (CBA), Commonwealth Serum Laboratories (CSL), Telstra and the betting agencies have resulted in the creation of a significant small share ownership. This increase in investment by small shareholders within Australia has had some positive outcomes. The small investors, some of whom were entering the market for the first time, have done reasonably well with respect to growth of their investments, and this could act as an incentive to future participation by these smaller shareholders. It is acknowledged that governments may have set issue prices below market value as an incentive to participate and to avoid a disaster of an unsuccessful float, which politically, would have been disastrous for the politicians. The world financial crisis will have affected outcomes, but lies outside the duration previously established for the analysis.

Tables 2.1 and 2.2 below identify the performance of privatized companies that were floated on the open securities market given government’s analysis for two different timeframes, 1999 and 2006. Whilst the increase in small share ownership was seen as a positive thing, it can be seen by the Table 2-2 that two companies of the seven public floats have since been taken over. The outcome of the aforesaid is that a lot of the share certificates issued to employees and the small shareholder have been transferred to the larger investors and therefore a failure to change the structure of the investment market is evident.

The figures indicate that economics theory and market prices and management values cannot of themselves stand in for a robust ethical interdisciplinary structure of growth and distribution to guide cultural accountability and acceptance of accounting and reporting outcomes.

Insert Table 2.1 and 2.2 here

The two tables above identify the movement of share prices since the float date for two specific time frames, that is, February 1999 and July 2006. In February 1999, it is clearly identified that the share prices of the privatized company saw a substantial increase when compared to the movement of the all ordinaries index, while in 2006 two of these companies have been taken over, or compulsorily acquired, and a further one is currently going through that process. Three of the remaining four entities indicate a similar trend of an increase in excess of the “all industries movement”. These trends might cause some unease about the use of professional accounting measures and periodic reports in facilitating privatization negotiations from time to time and particularly for the generation of associated securities prices in the immediate post-privatization period. The overall impact of small shareholder ownership has been minimal, and the significant owners of shares remain with the large shareholders. As referred to above, the small shareholders of two of the seven privatizations identified have already been compulsorily acquired by the large shareholders. Given the performance in Australia of some of the infrastructure companies relating to the transport system, it is reasonable to question whether the government needs to re-acquire control of these organizations.

4.3 Reduced Union Interference

The reduction in union power is one strategy that might lead to reduced disruption of essential services caused by industrial unrest. Whether or not this is good or bad in economic or political terms is an interdisciplinary study for justification when using accounts as a tool of privatization. There seems to have been some deterioration of union power based on lower union membership and fewer strikes post 1990. Privatization had some impact but was not the only factor related to a reduction in union power. Peetz (2002) suggested public opinion on trade unions became antagonistic during the 1940’s and 1960’s and was linked to anti communism and anti- unionism in general. Union membership also deteriorated sharply in the 1970’s due to the number of industrial conflicts. He argued that there was a weakening of sympathy towards unions in general (see also Rawson, 1983) during the 1990’s.

The Australian Bureau of Statistics Catalogue 6310.0 Employee Earnings, Benefits and Trade Union Membership, Australia (2004), identifies levels of union membership between 1980 and 2004 as follows:

In August 1999, 26% of Australia’s employees aged 15 and over were trade union members in their main job. This continued the steady decline in trade union membership from 46% in 1986.

Cranston (2000) indicated that at this point in time the Australian trade union movement was at its lowest level since official recordings began.

In August 2001, 25% of Australia's employees aged 15 and over were trade union members in their main job. This indicated that the decline was continuing. In the following three years to 2004 where the last official recording of numbers (25%) has taken place, it shows that membership numbers have remained stable.

The Australian Bureau of Statistics (2004) "Australian Labour Markets Statistics" suggested that part of the decline in union membership was due to changes in the composition of the labour market where job growth was in areas where union membership was traditionally low. Conversely there had been a decline in jobs in industries that were traditionally unionised. In these statistics, the unionisation rate for the electricity, gas and water supply dropped from 71.5% in 1993 to 53.7% in 2003. For communication services the drop in unionism was from 73.8% in 1993 to 31.2% in 2003. These are industries that were prominent in privatization.

In conclusion for this section it can at least be assumed that privatization has been one of the factors that led to a reduction in union influence because union membership in the industries that were privatised has reduced significantly. The public sector membership still remains strong and, if certain industries had not been privatised e.g. electricity, gas water and communication services then union membership might be higher. The Australian Socialist Coalition (2000) headed a campaign by all unions and the ACTU against any further privatization. Whether or not "accounting" measures in financial statements leading to privatization ought to be confused by political issues requires social analysis as well as dexterity in accounting practice. Of course, the nature of equity in the context of co-operating participants in the public sector needs to be determined and agreed before the prestige associated with the objectivity of the traditional reporting icon can be assumed.

4.4 Intergenerational Assets

In deregulating financial, transportation and other services, when privatising or partially privatising public enterprises, Australian governments were originally aiming towards greater efficiency (Thomas, 1992, p.12). Although this was often a matter of faith in the market it was sincere at that time. As early as 1986, privatization was identified as a required strategy for the airline industry in Australia. Kirby (1996, pp. 339-352) identified six policy options to introduce economies of scale to the airlines. One of those policies was to privatise the government-operated Trans-Australian Airlines (TAA).

However these examples raised questions about whether privatization was a positive step. These questions asked whether the ownership of assets really determines how they perform for diverse equity holders. Is there any logic to the structural expansion and contraction of the public sector? Do the origins of the public sector shape the way in which organizations are to be re-structured or liquidated? Is the reform process driven by responses to domestic considerations and pressures from creditors and also from international monitoring pressures? Once underway, do policies promoting market activities become omniscient with respect to the interests of widespread citizens, or the "economic owners" indirectly of the service infrastructure. This is where valuable consideration has already been exchanged once for debt reduction through write offs of loans by consumers. That is, do past generations of consumers and investors fade from consciousness in references about present day interests, with the government as originally a trustee now being the sole beneficiary from past agreements and activities? Are all longer-term interests to be generalized as public interests in government? This can be only if the direction of public benefits, become known. Public benefits cannot be generalized by economists, as in a vacuum (Dewey, 1922). Issues of accountability for the use of public funds must be identified for specific beneficiaries if accounting and financial statements are to be used as instruments of privatization.

Equity foundations of the Westminster systems now come into play. While managers of organizations may be seen to be an agent, governments are not principals. The principal is that set of rights and obligations in the community which can be historically justified for valuable consideration and which comes into the jurisdiction of parliament and the courts. Parliament is the surrogate principal and government the trustee for these rights and obligations (Aharoni, 1981). Thus particularly in cases where valuable consideration has been given or received as evidence of valuation, government as trustee may not unilaterally vary community rights to discharge its own obligations unless something of value is given and there is parliamentary debate (Ma and Mathews, 1993). In this case it could be about general benefits to the community from increased efficiency (Aharoni, 1981). The proceeds of privatization in Australia totaled \$A61 billion between 1990 and 1998. However, Table 2.2 shows a massive redistribution to private sector shareholder interests in subsequent years.

With respect to the efficiencies of public and private ownership, Suleiman and Waterbury (1990, p.5) suggest that there is no definitive proof that publicly owned firms are by definition less competitive and less efficient than those which are privately owned. Those authors do refer to the property rights school of thought. This argues that ownership matters a great deal for the performance of the firm and that privately owned assets are used to maximize financial returns to their owners whereas public ownership is uneven for efficiency. Assets are used more economically and efficiently than those which are publicly owned. To support this argument suggesting that private firms are more efficient, Hanke (1987, p.49) claims:

“The consequences of public ownership are thus predictable. Public managers and employers allocate resources (assets) that do not belong to them. Hence they do not bear the costs of their decision; nor do they gain from efficient behavior. Since the nominal owners of public enterprises, the taxpayers, do not have strong incentives to monitor the performance of public employees, the costs of shirking are relatively low. Public employees therefore commonly seek job-related perquisites which increase production costs and divert attention from serving consumer demands”.

It has been shown that taxpayers’ funds as distinct from government guarantees have not been used for government businesses. Issues of equity and self motivations from social psychology (Dewey, 1922) may be more here than standardized assumptions from economics.

4.5 Efficiency

A study in the United Kingdom on water privatizations (Shaoul 1997, p. 402) found that the expectations of government in respect to privatization were not achieved. In that study she made the point that the financial evidence refutes the assertions about the effectiveness of private ownership in controlling costs. Also, doubts are cast on the tacit assumption about public sector inefficiency and revised questions were asked about the ability of management to endlessly increase efficiency. Finally, Shaoul’s study refuted the notion of the “Stakeholder’s economy” from which all can benefit. She showed empirically that the stakeholders are continuously in conflict. As mentioned before, that is why transparency for conflict resolution is the essence of objectivity in accounting (Littleton, 1953, Ch.2).

Bishop and Kay (1988, p.69) also found that service quality in privatized industries had fallen. Social objectives had received a lesser role but this was not entirely because of the failure of privatization. These authors argued that quality in the public sector had typically been too high, the result of management being tied to technology rather than to profit. The social role of those companies had been overstated. The changes represented a move towards an optimal balance between price and quality.

Parker (1995, p.44) indicated that empirical research into the results of privatization in the United Kingdom has painted a mixed picture. He suggests that this research indicates that privatization has not always led to higher efficiency.

Existing studies in the literature on the ownership/efficiency issue of private and public utilities do not support the theoretical argument made by public-choice theorists that privately owned firms are more efficient than publicly owned firms (Bhattacharyya et al 1994, p. 197). It was also pointed out that this finding was consistent with Feigenbaum and Teeple (1983) and Atkinson and Halvorsen (1986).

Bhattacharyya et al (1994, p. 206) concluded that contrary to the widely held view of the public choice, or property rights, model that private enterprises are more efficient than public enterprises, their empirical findings provide the evidence that private water utilities in their sample of study were less efficient than public water utilities both technically and in the use of variable inputs of labor, energy, and materials.

Suleiman and Waterbury (1990, p.7) suggested that economists would argue that the structure of markets and of economic ownership are more important than legal designations of the property rights involved. Sappington and Stiglitz (1987) have suggested that the risks of ownership might ultimately be as widely diffused with shareholders as with taxpayers in public sector entities. Again economists appear to have difficulty in thinking through the position of “taxpayers” in the setting of economics bookkeeping.

Despite these arguments there is evidence to suggest that privatization has improved market performance of previous government-owned enterprises (Kikeri et al 1992, p.3). A World Bank study involving Chile, Malaysia, Mexico and the United Kingdom analyzed twelve cases of privatization. In those cases domestic welfare was improved as a distributional issue. Of the twelve cases, productivity went up in nine instances and showed no decline in the other three. It was also indicated that studies and data from outside the World Bank also showed that privatized companies grew more rapidly and were better able to contain their costs than they had been able to do before privatization. However, the studies acknowledged that most privatization success stories came from higher middle-income countries. Also such successes showed economic productivity and consumer welfare to be interacting with the overall macro-economic policy framework. However whether such economic benefits can be compared with social costs of selling bargained benefits of the citizen’s valuable consideration over time remains an interdisciplinary issue.

The intangibility of organizational functioning rather than current or historic market prices must now become the guide to both public and private sector valuations in the post- Enron era (Kaplan and Norton, 2004, Ch. 7). Accountants in practice for over 300 years have observed manager actions with respect to transactions and planning. These have also been the primary sanction under standardization for selecting objective accounting numbers which guard against non-transparent redistributions of wealth (Littleton, 1953, Chs.2& 12). This reference to community sanctions may now be impossible in the public sector in Australia. Only a full detachment of accountants from economics bookkeeping can afford a measure of relief and protection to the general public’s involvement in wealth transfers by governments and their economic advisors. This spirit of protection has come from early accounting ordinances since 1673 in Europe (Howard, 1932).

5. Conclusion

In the introduction some of the key economic outcomes of privatization have been challenged and issues such as debt reduction, share ownership, efficiencies expected from privatization and reduction of political and union interference and justification for the sale of intergenerational assets were discussed with regard to realized benefits. Also, the equating of government “ownership” with the issuing of a guarantee as a formal legal requirement for starting an essential service was examined.

The issue of debt reduction is quite clear and funds from privatization sales have gone a long way in reducing debt within government. Union and government intervention has also reduced however the benefits of this do not seem to be substantial, particularly when considering the expected efficiencies that would eventuate and the massive redistribution of wealth to the private sector.

During the 1990s in Australia a significant portion of its public sector entities “owned” by both State and Commonwealth governments as constitutional structures were privatized. According to the Reserve Bank of Australia Bulletin (December 1997, p.7), Australia has had one of the largest programs among the OECD countries. It was behind only the UK and, relative to Gross Domestic Product, New Zealand.

Table 2 shows that the results of sales may have been mixed in terms of sales at privatization representing value for money to previous equity holders. However there is evidence to suggest that employee ownership and the small shareholders enticed into buying shares have handed back those shares to the larger investors. With the government as trustee rather than principal, wealth changes over a decade are shown here to have been extreme and might provide a caution against using tools of accounting professionalism to facilitate government policy which seems to make use of prestigious financial statements of accounting in a way which transgresses against their interdisciplinary needs for objectivity.

The issue in financial accounting and reporting since the first ordinance appeared with the expansion in complexity of business and its size under scientific progress after 1650 has been twofold:

- (1) How to capture the specific accountability of the reporting management in terms of statute, law strategy and environmental constraints, and
- (2) How to promote sufficient uniformity of measurement for understanding, but not too much so as to destroy the expertise inherent in management’s accountability in the case.

Full uniformity destroys specific accountabilities, especially obligations to associated equity holders. Full uniformity as generalized use of market prices is economics, not accounting and public sector accounting standards with this trait should be abolished.

For over three hundred years accountants and business men have struggled to provide credibility in periodic reports with rewards from investment funds to flow among participants. The economic benefits from privatization may have been immense. However given results here, financial statements might have been vilified in the process. International accounting standards must be complied with when such statements are to be used to justify privatization. The benefits and costs of the economic outcomes are beside the point. The distribution of wealth from using financial statements to support privatization over the years amount to billions of dollars for buyers. Whether the economic benefits to the community might have been robust or meager, this situation of the use of financial statements is not acceptable and distorts the fundamental moral precept of objectivity in accounting, being transparency for conflict resolution.

Economics bookkeeping and normative accounting came into being when micro economists thought they were comparing uniform current market prices with uniform historic market prices frozen in time (Canning, 1929, Edwards and Bell, 1961). However for over three hundred years historic cost as a convention had been used in connectedness with management accountability which provided for flexibility and relevance in practice (Ijiri, 1971). Economics bookkeeping is yesterday’s technology in financial accounting for two primary reasons:

- 1). Uniform historical cost applied in accounting practice for almost three decades after 1929 but was then again abandoned for ethical reasons because accountability, not market prices, has been the conduit for fair treatment of equities for three hundred years, and
- 2). Use of financial statements to achieve policy objectives of outsiders in breach of this principle of accounting as here demonstrated, is arguably unethical.

A key reason for privatizing was the fact that there were expectations that efficiencies would eventuate. However there is clear evidence that this has not generally been the case and the research studies referred to have suggested there has been little or in some cases less efficiency since the organization was transferred from public to private ownership. Efficiency increments could not be compared with social costs demonstrated as the redistribution of wealth.

There has been less political and union interference post privatization but as the economy slips into a recessionary

period one might question whether it would have been better to have political/union interference than incur the social costs indicated including lack of essential services as the economy declines under recessionary gloom. Also, the outcomes have shown that economic valuations not referenced to social controls are not robust enough generally for the protection of the rights of all contributors to enterprise decision and action.

Periodic gain has been induced by professional accountants scientifically for over three hundred years. The process has involved a focus given by the interaction of market based transactions, accountability criteria provided by management strategies, community regulations and specific environmental constraints on periodic operations. These identify the scope of invested costs by the whole organization towards its interpretation of its own contribution to the "common good" (Dewey, 1922). The total of such costs is then deducted from total revenues as community compensation (Littleton, 1953, p.95) to reveal periodic gain or loss. Whether current market prices of assets give a value for the entity as a whole is an economics question which depends on the free efficiency of the markets involved (Beaver & Demski, 1979). However this is an issue which has failed cost/benefit analyses for using accrual accounting in the public sector.

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Table 1. Net Debt Australian Government

Year	\$ Million	Year	\$ Million
1990	16,121	1999	70,402
1991	16,936	2000	53,768
1992	31,132	2001	42,651
1993	55,218	2002	38,024
1994	70,223	2003	29,665
1995	83,492	2004	23,421
1996	95,831	2005	11,534
1997	96,261	2006(est)	-1,327
1998	82,935		

Table 2-1. Government Organisations Sale by Float 1999

Company	Year Flotation	Float Price \$	Feb 1999 Price	% Increase since sold	% B. All Ord Index Movement
CBA	1991	5.40	24.00	344	72
	1993	9.35	24.00	157	67
	1996	10.01	24.00	140	28
CSL	1994	2.30	14.80	543	47
TABCORP	1994	2.25	14.50	544	47
TELSTRA	1997	3.30 A	8.88	169	24
QANTAS	1995	2.25	3.70	65	31
TAB (NSW)	1998	2.05	3.39	65	-1
UNITED ENERGY	1998	2.30	1.80	-22	-1

A. Original Float Price \$1.95 + Call \$1.35 = \$3.30

Source: Company websites and Australian Stock Exchange (ASX) Trading Room Website.

Table 2-2. Government Organisations Sale by Float- 2006

Company	Year Flotation	Float Price \$	July 2006	% Increase since sold	% B. All Ord Index Movement Since float year
CBA	1991	5.40	44.41	722	220
	1993	9.35	44.41	375	211
	1996	10.01	44.41	344	138
CSL	1994	2.30	53.75	1367	173
TABCORP	1994	2.25	15.20	631	173
TELSTRA	1997	3.30 A	3.68	52	131
QANTAS	1995	2.25	2.96	49	144
TAB (NSW)	1998	2.05	Taken Over		
UNITED ENERGY	1998	2.30	Shares now acquired by scheme of arrangement		

A. Original Float Price \$1.95 + Call \$1.35 = \$3.30

B. Australian All Ordinaries Index July (ASX) and the movement between Float date and 2006

Index	1991	1573.9	1998	2735.1	2005	4229.9
1992	1572.3	1999	2704.6	2006	5033.4	
1993	1617.7	2000	3322.7			
1994	1844.0	2001	3425.3			
1995	2061.5	2002	3163.2			
1996	2116.1	2003	2999.7			
1997	2180.3	2004	3530.3			

Source: Company websites and Australian Stock Exchange (ASX) Trading Room Website.

Appendix 1: Privatizations in Australia Since 1990 (a)

	Proceeds \$ million	Type of Sale	Financial Year of Privatization
Commonwealth Government			
	Proceeds \$ million	Type of Sale	Financial Year of Privatization
Aerospace Technologies of Australia	40	trade sale	94/95
Australian Industry Development Corporation	25	public float	89/90
Australian Industry Development Corporation	200	trade sale	97/98
AUSSAT	504	trade sale	91/92
Australian Airlines	400	trade sale	92/93
Australian National (rail)	95	trade sale	97/98
Avalon Airport Geelong	1.5	trade sale	96/97
Brisbane Airport	1,387	trade sale	97/98
Commonwealth Serum Laboratories	299	public float	93/94
Commonwealth bank (b)	1.311	public float	91/92
Commonwealth Bank	1.686	public float	93/94
Commonwealth Bank	3,390	public float	96/97
Commonwealth Bank	1,770	public float	97/98
Commonwealth Funds Management	63	trade sale	96/97
Melbourne Airport	1,307	trade sale	97/98
Moomba-Sydney Pipeline	534	trade sale	93/94
Perth Airport	643	trade sale	97/98
Qantas	665	trade sale	92/93
Qantas	1,450	public float	95/96
Snowy Mountains Engineering Corporation (c)	1	trade sale	93/94
Snowy Mountains Engineering Corporation (c)	0.3	trade sale	94/95
Snowy Mountains Engineering Corporation (c)	0.3	trade sale	95/96
Telstra	14,330	public float	97/98
Total Commonwealth	30,102		
<u>State Governments</u>			
New South Wales			
Axiom Funds Management	240	trade sale	96/97
Government Insurance Office	1 260	public float	92/93
NSW Grain Corporation	96	trade sale	93/94
NSW Investment Corporation	60	trade sale	89/90
State Bank of NSW	527	trade sale	94/95
Total New South Wales	2,183		
Victoria			
Electricity Industry-			

Citipower	1575	trade sale	95/96
Eastern Energy	2080	trade sale	95/96
Hazelwood/Energy Brix	2400	trade sale	96/97
Loy Yang A	4746	trade sale	96/97
Loy Yang B	544	trade sale	92/93
Loy Yang B(d)	1,150	trade sale	97/98
Powercor	2,150	trade sale	95/96
PowerNet	2,555	trade sale	97/98
Solaris	950	trade sale	95/96
Southern Hydro	391	trade sale	97/98
United Energy	1,553	trade sale	95/96
Yallourn Energy	2,428	trade sale	95/96
Other:			
BASS (Ticket sales)	3	trade sale	94/95
GFE (Gas & Fuel Exploration) Resources	56	trade sale	95/96
Grain Elevators Board	52	trade sale	94/95
Heatane Division of Gas & Fuel Corporation	130	trade sale	92/93
Port of Geelong	51	trade sale	95/96
Port of Portland	30	trade sale	95/96
Portland Smelter Unit Trust	171	trade sale	92/93
State Insurance Office	125	trade sale	92/93
TABCORP	609	public float	94/95
Total Victoria	23,749		
Queensland			
Gladstone Power Station	750	trade sale	93/94
State Gas Pipeline	163	trade sale	96/97
Suncorp/Qld Industry Development Corp. (e)	698	trade sale	96/97
Suncorp-Metway Ltd. (e)	610	public float	97/98
Total Queensland	2,220		
South Australia			
Austrust Trustees	4.4	trade sale	94/95
Enterprise Investments	38	trade sale	94/95
Forwood Products (Timber)	123	trade sale	95/96
Island Seaway	2	trade sale	94/95
Pipeline Authority of SA	304	trade sale	94/95
Port Bulk Handling Facilities	1.8	trade sale	97/98
Radio 5AA	8	trade sale	96/97
SA Financing Trust	5	trade sale	93/94
SAGASCO	29	trade sale	92/93
SAGASCO	417	trade sale	93/94

SAMCOR (meatworks)	5	trade sale	96/97
Sign Services	0.2	trade sale	95/96
State Government Insurance Commission	175	trade sale	95/96
State Bank of SA	10	trade sale	94/95
State Bank of SA	720	trade sale	95/96
State Chemistry Laboratories	0.3	trade sale	95/96
State Clothing Corporation	1.4	trade sale	95/96

Total South Australia **1,899**

Western Australia

Bank West	900	trade sale	95/96
Health Care	9	trade sale	96/97
State Government Insurance Office	165	public float	93/94

Total Western Australia **1074**

Tasmania

State Insurance Office	42	trade sale	93/94
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Total Tasmania **42**

Total State Governments **31,166**

Total All Governments **61,269**

memo items,

Total trade sales **34,364**

Total public Floats **26,905**

(a) Privatization is defined here as the sale of public trading enterprises and does not include asset sales such as of buildings or plant and equipment.

(b) The sale of the first tranche of the Commonwealth Bank was an initial public offering by the Commonwealth Bank to raise capital. The proceeds of \$1.3 billion were received by the Commonwealth Bank to part fund the purchase of State Bank of Victoria, from the Victorian Government for a total of \$ 1.6 billion. The sale of the State Bank of Victoria to the Commonwealth Bank is not included above in the list of privatizations of the Victorian Government.

(c) Management buyout.

(d) Includes franchise, license fees etc.

(e) Suncorp and the Queensland Industry Development Corporation were wholly owned by the Queensland Government. These businesses were merged with Metway Bank Limited on 1 December 1996. Consideration received by the Queensland Government for contributing these businesses to the merger comprised \$698 million and 142.8 million shares in Metway Bank Limited. Subsequently the Government sold down part of its share holding for \$6 1 0 million, to be received in two installments in 1997/98 and 1998/99. A

SOURCE: RESERVE BANK OF AUSTRALIA BULLETIN DECEMBER 1997



The Measurement and Control of Chinese Administrative Expenses: Perspective into Administrative Expenses

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National Natural Science Foundation project: The empirical research of the cost of administrative expenses (70773065)

Abstract

Based on the reality of government administrative expenses, the article designed the theoretical models of government administrative expenses to predict the future cost of government---the basic criteria for administrative expenses, and came up with the corresponding proposes according to the basic analysis of Chinese government's expenses. The basic idea is: based on the actual expenditure of the Chinese Government's administrative expenses from 1978 to 2006 to establish the corresponding theoretical model and test, then according to 30 years of practice, to predict the basic bottom line the future expense of the Chinese government.

Keywords: The Chinese Government, Administrative Expenses, Predict and analyze

Generally speaking, The so-called government cost, is the negative effects brought to the community and the public by the government in the governance of the community or in public management activities (including all types of public projects decision-making, management processes, policy development, etc.), which can be controlled through governmental organizations or the Civil personal initiative. The governmental costs is a huge system, including tangible and intangible costs, marginal costs, decision-making costs, opportunity costs and accounting costs, explicit and implicit costs, incremental costs and sunk costs, and so on. So the scope of governmental costs is very broad, and different concepts of costs have different problems to study. This article specifically focused on the governmental expenses since 1978, and on the basis of research and theoretical model, forecast the scale of future costs of the Chinese government, then proposed advices on controlling government expenses.

1. Basis of the Research: the Basic Information of Chinese Government Expenditure during 1978 and 2006

In order to facilitate the research budget for the administrative costs of research, we can determine the basic conditions of administrative expenses. Generally speaking, financial conditions are prerequisite for the administrative costs, at the same time, it is also closely related to the total financial expenditure, and time is the inevitable element that socio-economic development should include. Actually, there are many variables that can influence administrative expenses, but the most important and basic variables are financial revenue and basic expenditure. Here, our assumptions are from the detailed information on the actual expenditures of China since 1978, thus making the whole research process built on the basis of empirical analysis. Table 1 is the actual implementation of budget cost of China from 1978 to 2006, and the whole research process is based on the actual information (hard expenditure targets).

Insert Table 1 Here

2. The Set of Prediction Model

2.1 Basic Analysis

According to the information in Table 1, We chose to establish multiple linear regression model with criteria of application of least squares. Based on the relevant circumstance of the variables, we assume that financial income and total financial expenditure are the cost of the dependent variables, i.e.

X1 represents fiscal revenue, X2 represents the total financial expenditure, t represents time, y refers to the dependent variable---Administrative Expenses.

According to relevant experience and knowledge, there are more than one variable that can influence the financial expenditure, we should consider using least-squares criteria to establish multiple linear regression model.

From Table 1, we can see that only the financial expenditure, financial revenue, the administrative cost are related, and the other set of data from area transformed from these three. Therefore, we only use administrative expenditure (y) as the dependent variable, the financial income (x1) and the total expenditure (x2) to establish the dual variable linear regression.

2.2 According to whether plot has the linear regression to establish relation-model

1) Based on *matlab*, we can get the plot of y and x1, x2 :

First list the data collection of y and x, i.e. Table 2 is the data collection of dependent variable y

Insert Table 2, Table 3, Table 4, Table 5, Table 6, Table 7 Here.

Insert Figure 1, Figure 2 Here.

From these two plots, we can clearly see that there are good linear relationships between y and x1, x2.

2) Establish the p-linear regression model between y and x_1, x_2, \dots, x_p

Assume that the linear relationship between them is:

$$y = \beta_0 + \beta_1 x_1 + \dots + \beta_p x_p + \varepsilon \quad (1)$$

x_1, x_2, \dots, x_p in the equation are the general variables that can be accurately measured or controlled, y is the random variable that can be observed, $\beta_0, \beta_1, \beta_2$ is the unknown parameters, ε is the random error that is subject to the unpredictable distribution, we got n groups of independent observations (sample)

$$(y_i, x_{i1}, \dots, x_{ip}), i = 1, 2, \dots, 29 \quad (2)$$

Thus, from equation (1), we know y1 has a data structure :

$$y_i = \beta_0 + \beta_1 x_{i1} + \dots + \beta_p x_{ip} + \varepsilon_i, \quad i = 1, 2, \dots, 29 \quad (3)$$

All of these $\varepsilon_1, \varepsilon_2, \dots, \varepsilon_{29}$ are independent, and all are subject to $N(0, \sigma^2)$. This is the p-linear regression model. About the p-linear regression model, we will examine several issues below:

First, according to samples to estimate unknown parameters $\beta_0, \beta_1, \dots, \beta_p, \sigma^2$ to establish relations between y and x_1, x_2, \dots, x_p (often known as the regression equation).

Second, test the credibility of the resultant relationship.

Third, test whether the variables x_1, x_2, \dots, x_p have a significant effect on the indicator.

3) Parameter estimates

First of all, let's discuss how to use the (2) to estimate $\beta_0, \beta_1, \dots, \beta_p, \sigma^2$, the parameters in (1). Suppose

$\beta_0, \beta_1, \dots, \beta_p$ as $\hat{\beta}_0, \hat{\beta}_1, \dots, \hat{\beta}_p$, then we can get a p-linear regression equation:

$$\hat{y} = \hat{\beta}_0 + \hat{\beta}_1 x_1 + \dots + \hat{\beta}_p x_p \quad (4)$$

That (4) is the p-linear regression equation. On (2) in each sample (x_{i1}, \dots, x_{ip}) , from (4), we can obtain the corresponding value:

$$\hat{y}_i = \hat{\beta}_0 + \hat{\beta}_1 x_{i1} + \dots + \hat{\beta}_p x_{ip} \quad (5)$$

The \hat{y}_i got by (5) is the return of value (in some cases, also known as predictive value, the value of fitting, etc.), we

hope that by the estimating the regression equation set by $\hat{\beta}_0, \hat{\beta}_1, \dots, \hat{\beta}_p$, we can make all the deviations to the minimum, according to least squares principle, which calls for

$$\min_{\beta_0, \beta_1, \dots, \beta_p} \sum_{i=1}^n (y_i - \beta_0 - \beta_1 x_{i1} - \dots - \beta_p x_{ip})^2 = \sum_{i=1}^n (y_i - \hat{\beta}_0 - \hat{\beta}_1 x_{i1} - \dots - \hat{\beta}_p x_{ip})^2$$

Therefore, we only ask that $Q(\beta_0, \beta_1, \dots, \beta_p) = \sum_{i=1}^n (y_i - \beta_0 - \beta_1 x_{i1} - \dots - \beta_p x_{ip})^2$ to the minimal $\beta_0, \beta_1, \dots, \beta_p$. As Q is a non-negative quadratic of $\beta_0, \beta_1, \dots, \beta_p$, there must be the existence of its minimum. According to the calculus theory, the first order partial derivatives of Q to $\beta_0, \beta_1, \dots, \beta_p$ is 0.

$$\begin{cases} \frac{\partial Q}{\partial \beta_0} = -2 \sum_{i=1}^n (y_i - \beta_0 - \beta_1 x_{i1} - \dots - \beta_p x_{ip}) = 0 \\ \frac{\partial Q}{\partial \beta_j} = -2 \sum_{i=1}^n (y_i - \beta_0 - \beta_1 x_{i1} - \dots - \beta_p x_{ip}) x_{ij} = 0 \end{cases}$$

$$j = 1, 2, \dots, p$$

So we can get a linear equations about $\beta_0, \beta_1, \dots, \beta_p$

$$\begin{cases} n\beta_0 + \sum_{i=1}^n x_{i1}\beta_1 + \dots + \sum_{i=1}^n x_{ip}\beta_p = \sum_{i=1}^n y_i \\ \sum_{i=1}^n x_{i1}\beta_0 + \sum_{i=1}^n x_{i1}^2\beta_1 + \dots + \sum_{i=1}^n x_{i1}x_{ip}\beta_p = \sum_{i=1}^n x_{i1}y_i \\ \dots\dots\dots \\ \sum_{i=1}^n x_{ip}\beta_0 + \sum_{i=1}^n x_{ip}x_{i1}\beta_1 + \dots + \sum_{i=1}^n x_{ip}^2\beta_p = \sum_{i=1}^n x_{ip}y_i \end{cases} \quad (6)$$

So (6) is the regular equations, and the solutions known as the least-squares estimation of $\beta_0, \beta_1, \dots, \beta_p$

(6) is available in the form of a simple matrix. So

$$X = \begin{pmatrix} 1 & x_{11} & \dots & x_{1p} \\ 1 & x_{21} & \dots & x_{2p} \\ \dots & \dots & \dots & \dots \\ 1 & x_{n1} & \dots & x_{np} \end{pmatrix}, \quad Y = \begin{pmatrix} y_1 \\ y_2 \\ \vdots \\ y_n \end{pmatrix}, \quad \beta = \begin{pmatrix} \beta_0 \\ \beta_1 \\ \vdots \\ \beta_p \end{pmatrix}$$

If we set (6) as the coefficient matrix A, the constant matrix as B, then A is XX, B is XY :

$$\begin{aligned} XX &= \begin{pmatrix} 1 & 1 & \dots & 1 \\ x_{11} & x_{21} & \dots & x_{n1} \\ \dots & \dots & \dots & \dots \\ x_{1p} & x_{2p} & \dots & x_{np} \end{pmatrix} \begin{pmatrix} 1 & x_{11} & \dots & x_{1p} \\ 1 & x_{21} & \dots & x_{2p} \\ \dots & \dots & \dots & \dots \\ 1 & x_{n1} & \dots & x_{np} \end{pmatrix} \\ &= \begin{pmatrix} n & \sum_{i=1}^n x_{i1} & \dots & \sum_{i=1}^n x_{ip} \\ \sum_{i=1}^n x_{i1} & \sum_{i=1}^n x_{i1}^2 & \dots & \sum_{i=1}^n x_{i1}x_{ip} \\ \dots & \dots & \dots & \dots \\ \sum_{i=1}^n x_{ip} & \sum_{i=1}^n x_{ip}x_{i1} & \dots & \sum_{i=1}^n x_{ip}^2 \end{pmatrix} = A \end{aligned}$$

$$X'Y = \begin{pmatrix} 1 & 1 & \cdots & 1 \\ x_{11} & x_{21} & \cdots & x_{n1} \\ \cdots & \cdots & \cdots & \cdots \\ x_{1p} & x_{2p} & \cdots & x_{np} \end{pmatrix} \begin{pmatrix} y_1 \\ y_2 \\ \vdots \\ y_n \end{pmatrix} = \begin{pmatrix} \sum_{i=1}^n y_i \\ \sum_{i=1}^n x_{i1} y_i \\ \vdots \\ \sum_{i=1}^n x_{ip} y_i \end{pmatrix} = B$$

Hence, use the form of matrix to show (6) is:

$$X'X\beta = X'Y$$

X is known as the matrix structure, showing the structure of the mathematical expectation of Y . $A = X'X$ is the coefficient matrix of formal equations, $B = X'Y$ is the constant matrix of formal equations. In the regression analysis, there usually exists A^{-1} , then the least square estimates can be expressed as:

$$\hat{\beta} = (X'X)^{-1} X'Y \quad (7)$$

When we obtained the least-squares estimation $\hat{\beta}$, we can create a regression equation $\hat{y} = \hat{\beta}_0 + \hat{\beta}_1 x_1 + \cdots + \hat{\beta}_p x_p$

So we can use it to predict and control the targets. For example, given any set of $(x_{01}, x_{02}, \cdots, x_{0p})$, the values of variables x_1, x_2, \cdots, x_p , based on $\hat{y} = \hat{\beta}_0 + \hat{\beta}_1 x_1 + \cdots + \hat{\beta}_p x_p$, we can get the corresponding forecast:

$$\hat{y}_0 = \hat{\beta}_0 + \hat{\beta}_1 x_{01} + \cdots + \hat{\beta}_p x_{0p}$$

Besides, in order to understand the accuracy of forecast and control the need of production, usually we need to seek estimates of σ^2 .

In order to estimate σ^2 , let's first introduce several terms. The margin between the measured value y_i and the return value \hat{y}_i , $y_i - \hat{y}_i$, is the residual value, and

$$\tilde{Y} = Y - \hat{Y} = Y - X\hat{\beta} = [I_n - X(X'X)^{-1}X']Y \quad (8)$$

is Residual Vector, and

$$\begin{aligned} S_e &= \sum_{i=1}^n (y_i - \hat{y}_i)^2 = \tilde{Y}'\tilde{Y} = (Y - X\hat{\beta})'(Y - X\hat{\beta}) \\ &= Y'Y - \hat{\beta}'X'Y = Y'[I_n - X(X'X)^{-1}X']Y \end{aligned} \quad (9)$$

is the remaining square feet (or square and residual), the equations in (9) is just all kinds of different expressions.

In order to give unbiased estimates of σ^2 , let's first prove a theorem:

$$\text{Theorem} \quad E(S_e) = (n - p - 1)\sigma^2 \quad (10)$$

$$\text{Proof:} \quad \because S_e = \sum_{i=1}^n (y_i - \hat{y}_i)^2 = \tilde{Y}'\tilde{Y} = (Y - X\hat{\beta})'(Y - X\hat{\beta})$$

$$= Y'Y - \hat{\beta}'X'Y = Y'[I_n - X(X'X)^{-1}X']Y$$

$$\therefore E(S_e) = E(\tilde{Y}'\tilde{Y}) = E(\text{tr}\tilde{Y}'\tilde{Y}) = E(\text{tr}\tilde{Y}\tilde{Y}') = \text{tr}E(\tilde{Y}\tilde{Y}')$$

$$\because \tilde{Y} = Y - \hat{Y} = Y - X\hat{\beta} = [I_n - X(X'X)^{-1}X']Y$$

$$\therefore E\tilde{Y} = E(Y - X\hat{\beta}) = E[Y - X(X'X)^{-1}X'Y] = X\beta - X(X'X)^{-1}X' \cdot X\beta = 0$$

\therefore

$$\begin{aligned} E(\tilde{Y}\tilde{Y}') &= D(\tilde{Y}) = D[(I_n - X(X'X)^{-1}X')Y] \\ &= [I_n - X(X'X)^{-1}X']D(Y)[I_n - X(X'X)^{-1}X'] \\ &= [I_n - X(X'X)^{-1}X'] [I_n - X(X'X)^{-1}X'] \sigma^2 \\ &= \sigma^2 [I_n - X(X'X)^{-1}X'] \end{aligned}$$

Put it into $E(S_e) = \text{tr} \sigma^2 [I_n - X(X'X)^{-1}X']$

$$= \sigma^2 (n - \text{tr} I_{p+1}) = \sigma^2 (n - p - 1)$$

That's all.

From $E(S_e) = (n - p - 1)\sigma^2$, we can see

$$\hat{\sigma}^2 = \frac{S_e}{n - p - 1}$$

is unbiased estimate of σ^2 .

Let's go back to the issues we are discussing, we want to establish the dual linear regression between administrative expenditure and financial revenue and financial expenditure. We use matrix form to write its formal equations. First write out XY matrix:

$$X = \begin{pmatrix} 1 & x_{11} & x_{12} \\ 1 & x_{21} & x_{22} \\ \vdots & \vdots & \vdots \\ 1 & x_{n1} & x_{n2} \end{pmatrix} \quad Y = \begin{pmatrix} y_1 \\ y_2 \\ \vdots \\ y_n \end{pmatrix}$$

then

$$X'X = \begin{pmatrix} n & \sum_{i=1}^n x_{i1} & \sum_{i=1}^n x_{i2} \\ \sum_{i=1}^n x_{i1} & \sum_{i=1}^n x_{i1}^2 & \sum_{i=1}^n x_{i1}x_{i2} \\ \sum_{i=1}^n x_{i2} & \sum_{i=1}^n x_{i1}x_{i2} & \sum_{i=1}^n x_{i2}^2 \end{pmatrix}, \quad X'Y = \begin{pmatrix} \sum_{i=1}^n y_i \\ \sum_{i=1}^n x_{i1}y_i \\ \sum_{i=1}^n x_{i2}y_i \end{pmatrix}$$

So, From $\hat{\beta} = (X'X)^{-1}X'Y$, we can get a formal equations:

$$\begin{cases} n\beta_0 + \sum_{i=1}^n x_{i1}\beta_1 + \sum_{i=1}^n x_{i2}\beta_2 = \sum_{i=1}^n y_i \\ \sum_{i=1}^n x_{i1}\beta_0 + \sum_{i=1}^n x_{i1}^2\beta_1 + \sum_{i=1}^n x_{i1}x_{i2}\beta_2 = \sum_{i=1}^n x_{i1}y_i \\ \sum_{i=1}^n x_{i2}\beta_0 + \sum_{i=1}^n x_{i1}x_{i2}\beta_2 + \sum_{i=1}^n x_{i2}^2\beta_2 = \sum_{i=1}^n x_{i2}y_i \end{cases} \quad (11)$$

x_{i1}, x_{i2} refer to financial income and financial expenditure from 1978 to 2006, $n = 29$,

A direct solution is:

By regular equations (11), we know that:

$$\hat{\beta}_0 = \bar{y} - \hat{\beta}_1 \bar{x}_1 - \hat{\beta}_2 \bar{x}_2$$

and $\bar{y} = \frac{1}{n} \sum y_i$, $\bar{x}_1 = \frac{1}{n} \sum x_{i1}$, $\bar{x}_2 = \frac{1}{n} \sum x_{i2}$, put it into the second and third equations of (11), we can get a binary equations about $\hat{\beta}_1, \hat{\beta}_2$

$$\begin{cases} \sum (x_{i1}^2 - x_{i1} \bar{x}_1) \hat{\beta}_1 + \sum (x_{i1} x_{i2} - x_{i1} \bar{x}_2) \hat{\beta}_2 = \sum (y_i - \bar{y}) x_{i1} \\ \sum (x_{i1} x_{i2} - x_{i2} \bar{x}_1) \hat{\beta}_1 + \sum (x_{i2}^2 - x_{i2} \bar{x}_2) \hat{\beta}_2 = \sum (y_i - \bar{y}) x_{i2} \end{cases}$$

Thus we can get three values of $\hat{\beta}_1, \hat{\beta}_2$.

$$\text{Let's put } l_{11} = \sum (x_{i1}^2 - x_{i1} \bar{x}_1) \quad l_{12} = \sum (x_{i1} x_{i2} - x_{i1} \bar{x}_2) \quad l_{01} = \sum (y_i - \bar{y}) x_{i1}$$

$$l_{21} = \sum (x_{i1} x_{i2} - x_{i2} \bar{x}_1) \quad l_{22} = \sum (x_{i2}^2 - x_{i2} \bar{x}_2) \quad l_{02} = \sum (y_i - \bar{y}) x_{i2}$$

So

$$\begin{cases} \hat{\beta}_0 = \bar{y} - \hat{\beta}_1 \bar{x}_1 - \hat{\beta}_2 \bar{x}_2 \\ \hat{\beta}_1 = \frac{l_{01} l_{22} - l_{02} l_{12}}{l_{11} l_{22} - l_{12} l_{21}} \\ \hat{\beta}_2 = \frac{l_{02} l_{11} - l_{01} l_{21}}{l_{11} l_{22} - l_{12} l_{21}} \end{cases}$$

After we got $\hat{\beta}_0, \hat{\beta}_1, \hat{\beta}_2$, first, from

$$S_e = \sum_{i=1}^n (y_i - \hat{y}_i)^2 = \tilde{Y}' \tilde{Y} = (Y - X \hat{\beta})' (Y - X \hat{\beta}) = Y' Y - \hat{\beta}' X' Y = Y' [I_n - X(X'X)^{-1} X'] Y$$

to get the value of S_e , then using $\hat{\sigma}^2 = \frac{S_e}{n-3}$ to get the value of $\hat{\sigma}^2$.

As the data is from 1978 to 2006, 29 years' data to calculate, it's difficult to calculate. However, Matlab provides a tool for calculating the linear regression, so we can get a relatively accurate estimate with Can be minus a lot of red tape can be more accurate calculation of the estimate without much tedious calculations. In order to make the calculation more accurate, we narrow the data in each group by 10 times, i.e. each data is multiplied by 0.1, in this way, the use of statistics toolbox can help to get the initial regression equation.

Procedures are as follows:

Firstly, list the data collection of y and x1, x2, respectively, to Table 8, Table 9, and Table 10:

Insert Table 8, Table 9, Table 10, Table 11 Here

The results include regression coefficient $b = (\beta_0, \beta_1, \beta_2) = (-141.6291, -0.2704, 0.4182)$, and there are no zero points in the confidence interval; residuals and confidence interval; Statistical variables including four test statistics: the square of the correlation coefficient R^2 , supposing testing statistics F , the corresponding probability p , the value of s^2 . Therefore, we have a preliminary regression equation:

$$\hat{y} = -141.6291 - 0.2504x_1 + 0.4538x_2 \quad (12)$$

4) Judgement of the model from the results

There are no zero points in confidence interval and residuals in the vicinity of zero point both show that the model is

relatively good. Then test the model with statistics R^2 , F , p .

a. Evaluation of the correlation coefficient: generally, if the absolute value of correlation coefficient is between $0.8 \sim 1$, it can be determined that the variables and return variable have a strong linear correlation. The absolute value for R^2 in this model is 1, showing a relatively strong linear correlation.

b. F test: when $F > F_{1-\alpha}(m, n-m-1)$, we can say there is a significant linear relationship between dependent variable and variable x_1, x_2 ; or the relationship is not so significant. In the model, $F = 2005.8$

Larger than $F_{1-\alpha}(2, 22) = 3.4434$ (Check the distribution table of F or enter orders `finv(0.95, 2, 22)`).

c. p value test: if $p < \alpha$ (the pre-set the significant level), then there is a significant linear relationship between dependent variable and variable. The output result of the model is $p < 0.0001$, obviously fit $p < \alpha = 0.05$.

The above three methods of statistical inference is consistent with the results, showing that there is a significant linear relationship between y dependent variable and variable x_1, x_2 , so the regression model is applicable. The smaller s^2 is, the better, this is a reference when improving the model.

3. Forecast on Future Administrative Costs of Chinese Government

To test the accuracy of the model, we selected 2008, 2020 and 2050 to simulate the forecast. To get the administrative expenses of 2008 to 2020 and 2050, our idea is to treat time as an independent variable, the financial income and financial expenditures as dependent variables, through Matlab toolbox as a linear or nonlinear fitting we can expect the year's revenue and expenditure, and by a model in the regression equation, administrative expenses of the year can be expected. Likewise, we use Matlab toolbox for a time and financial revenue and expenditure of the plot, and find a quadratic function of a relationship, so we use quadratic polynomial to fit their relationship.

3.1 Forecast Procedures

1) Establish M Documents

```
function yhat=model(beta0,x)
```

```
a=beta0(1);
```

```
b=beta0(2);
```

```
c=beta0(3);
```

```
x2=x(:,2);
```

```
t=x(:,1);
```

```
yhat=a+b*t+c*t.^2;
```

2) Establish Procedures and Forecast

```
x=[1978 1132.26 1122.09
    1979 966.61 1281.37
    1980 1159.93 1228.83
    1981 1415.15 1426.22
    1982 1478.68 1428.32
    1983 1519.36 1556.88
    1984 1563.76 1647.49
    1985 2004.82 2004.25
    1986 2413.96 2491.28
    1987 2447.69 2562.23
    1988 2478.59 2604.95
    1989 2664.9 2823.78
    1990 2937.1 3083.59
    1991 3149.48 3386.62
    1992 3483.37 3742.2
    1993 4348.95 4642.3
```

1994	5218.1	5792.62
1995	6242.2	6823.72
1996	7407.99	7937.55
1997	8651.14	9233.56
1998	9875.95	10798.18
1999	11444.08	13187.67
2000	13395.23	15886.5
2001	16386.04	18902.58
2002	18903.64	22053.15
2003	21715.25	24649.95
2004	26396.47	28486.89
2005	31649.29	33930.28
2006	35423.38	38373.38]

```

beta0=[500 1 0.5];
x2=x(:,2)
[beta,R,J]=nlinfit(x,x2,'model',beta0);
betaci=nlparci(beta,R,J);
beta,betaci
a=beta(1);
b=beta(2);
c=beta(3);
t=x(:,1);
yy=a+b*t+c*t.^2;
plot(t,x2,'o',t,yy,'-'),pause
nlintool(x,x2,'model',beta)

```

Insert Figure 12 Here

Figure 12 shows 1978 to 2006 t the time and the plot of fiscal revenue, the line shows the relation between time t and financial income after the fitting, Figure 13 is received interactive screen.

Insert Figure 13 Here

By running the program, we got the relationship between x_1 and time t as follows:

$$x_1 = 5088.674 - 1000.588 \times t + 72.356 \times t^2;$$

Therefore, results of the analysis of time t and x_1 are showed as Table 12

Insert Table 12 Here

Insert Figure 14, Figure 15 Here

By running the program, we got the relationship between x_2 and t as follows:

$$x_2 = 5367.056 - 1123.257 \times t + 79.050 \times t^2;$$

In the same way, the results of the analysis between x_2 and t are showed as Table 13

Insert Table 13 Here

3.2 Estimated results:

Administrative budget of 2008:

Substitute $t=30$ into Model 2, and we can get the following results: $x_1 = 5088.674 - 1000.588 \times 30 + 72.356 \times 30^2 = 40191$

$$x_2 = 5367.056 - 1123.257 \times 30 + 79.050 \times 30^2 = 42814$$

Then substitute the value of x_1, x_2 into (2), and the administrative budget of 2008 is available:

$$y = -141.6291 - 0.2504 \times 40191 + 0.4538 \times 42814 = 9223.6$$

Administrative budget of 2020:

Substitute $t=42$ into Model 2, the result is: $x_1 = 5088.674 - 1000.588 \times 42 + 72.356 \times 42^2 = 90700$

$$x_2 = 5367.056 - 1123.257 \times 42 + 79.050 \times 42^2 = 97634$$

Then substitute the value of x_1, x_2 into (2), and the administrative budget of 2020 is available:

$$y = -141.6291 - 0.2504 \times 90700 + 0.4538 \times 97634 = 21454$$

Administrative budget of 2050:

Substitute $t=72$ into Model 2, the result is: $x_1 = 5088.674 - 1000.588 \times 72 + 72.356 \times 72^2 = 308140$

$$x_2 = 5367.056 - 1123.257 \times 30 + 79.050 \times 30^2 = 334290$$

Then substitute the value of x_1, x_2 into (2), and the administrative budget of 2050 is as follows:

$$y = -141.6291 - 0.2504 \times 308140 + 0.4538 \times 334290 = 704400$$

To sum up: the expected administrative costs of 2008 is: 922.36 billion

the expected administrative costs of 2020 is: 2145.4 billion

the expected administrative costs of 2050 is: 70440 billion

4. Governance Ideas of Chinese Government's Administrative Costs

According to the research result, we believe that the administrative costs of the past Chinese government have always been in the state of blind obedience and lack of scientific assessment standards. So, based on the research result and practical situation, we put forward our idea of governance here.

4.1 Respect for the scientific principles to identify administrative costs budget standards

Although the reform of the budget is an administrative manage and technical issue, a sound budget can not only has a far-reaching impact on a country's economic growth, but also is the key element of a good governance structure. Administrative costs of government expenditure are fully integrated into the annual budget, making the control of the administrative cost very subjective initiative. In the past, the government was on consistent respect for the traditional budget work in each year's total expenditure, however, the Government does not has a relatively mature budget or assessment standards on its own administrative expenses. Generally speaking, the administrative cost is not very volatile under a conventional circumstance, thus making it possible to formulate an appropriate scientific expenditure. The forecast above is just a method of setting budget for administrative costs, though we can not say that it is entirely on the scientific significance, it can find an appropriate standards or find an appropriate reference for the future administrative costs. We can take this principle and consider the appropriate adjustment factors well as the actual situation to make the Government's administrative costs more scientific and rational. For instance, according to the data of the past 30 years, we measured Chinese Government's administrative costs in 2008 should be 922.36 billion Yuan, and 2020 and 2050, it should be respectively 2.1454 trillion Yuan and 70.44 trillion Yuan. Perhaps such long-term forecasts as the 2050's also need a further adjustment of the factor to make it more realistic, however, judging from the recent situation, this prediction is still of very good reference value. To a certain extent, to Respect the scientific principles to regulate the administrative costs of the budget standards is an effective way of rigidly bound government's management initiatives and the only way to build entrepreneurs, to integrate different systems and provide seamless services, and promote modernization of the Chinese Government and public administration to be a service-oriented government.

4.2 Refer to socio-economic development indicators to establish the standards of administrative costs

In fact, many aspects of public management can be considered together. We assume in the conventional environment, the own share of the size of costs of a relatively Pareto government should be controlled within the scope of the pace of development in their performance, so we believe that the following are indicators which the Government must consider when making budget for administrative costs: First, government administration costs can not be higher than the growth

rate of the country's whole GDP growth rate; Second, the growth rate of the administrative costs of government expenditure should not be higher than the per capita net income growth rate; Third, the growth rate of administrative costs should not be higher than that of the whole society's consumption growth rate (If we consider more carefully, it should be no higher than the growth rate of the total consumption of the whole society, removing the building, education, culture, health and other necessities of life consumption), it should be said that the indicator is the reference to the target of the administrative costs; Fourth, the growth rate of administrative costs should not be higher than the growth rate of total national income. In addition, we can also consider the relationship between the administrative costs of government expenditures and the financial revenues. In short, only when a standard reference to the expenditure is established, the administrative cost of the budget is scientific. If they can not establish a scientific standard of expenditure for government administrative costs, administration and management is likely to cost more and deviate from the objective basis for the budget. For example, since 1978, the proportion between the Chinese government's administrative and financial costs and the total revenue is a process of sustained growth, that is, from the 1978 administrative costs of the total income of 4.71 percent to the development of administrative costs and expenditures in 2006 accounted for the total income of 19.46%. If accordingly develop, it is the unimaginable.

4.3 Combine the Government Performance and administration costs together

In the private sphere, cost-effective means the ratio between GDP and the cost of production. Using

$$\frac{C + V + M}{C + V}$$

that formula: Economic benefits = (GDP / production costs) =

C here for the consumption of raw materials; V is the wages of workers; M is profit.

In the field of management, the definition of performance is actually not very clear. We believe that the so-called Government Performance is the ratio between management decisions for the welfare of the community and the size of their pay, this price is the administrative cost, and the cost of such administrative expenses in the budget and government performance is closely linked. Western countries developed Entrepreneurial Budget System in the development of the recycling process of government. It is difficult to draw merits of the Government Performance if we do not consider the cost of government administration but just unilaterally emphasize the Government performance. Up to now, it is a co-existent problem that, whether public management practice or theoretical research, they do not closely combine the government performance evaluation with the government administrative costs. We assume that the management does not care about the costs, in the specific tangible public goods that might outweigh the project, and so is the case with intangible public good project. For instance, the history of massive land reclamation in the western region farm, resulting in the present and the future of the desertification phenomenon for a long time and the cost of recycling economy may be greater than the total social welfare. Therefore, how to organically analysis the Government Performance and administrative costs is the problem of security significance of the issue in the area of administrative costs.

4.4 Reinventing the business processes of Government management

Reinventing the business processes of Government management is to concern about government actions with management philosophy, which is the key to manage the increasingly diversity of administrative costs. Under the business process of traditional Chinese government management, the focus is to consider how to implement the government's political intentions rather than the cost, as long as the basic organizational form of government is to protect public interest. Fundamentally speaking, management is believed to fulfill the implementation if the business process of management is thought to have achieved the intended impact. The business process of management which came into being under the management philosophy of the government is, to a certain extent, neglects to consider the administrative costs. The concept of public service established by the government in managing business processes fundamentally rejected the government's traditional thought of just considering their own power rather the social needs. Public services under the government's management philosophy are to set up business process of community management. And government's objective value shifts from the vernacular form of government to the scope of protection extended to all public, the basic logo is a social Pareto improvement in the allocation of resources, reflecting the public with their taxes paid to the government to purchase the public the services they need and the administrative costs become the prerequisite for the operation. In fact, the new business processes should follow the four basic processes in the operation of governmental organizations, i.e. the allocation process, the integration process, border exchange process and the process of social motives. Therefore, reshaping the business processes of management is complementarily, mutually reinforced with the control of administrative costs.

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Table 1. Actual implementation of budget cost of China from 1978 to 2006

Year	Financial income	Financial expenditure	Balance of payments	Growth rate (%)		Administrative expenditure	
	(100million)	(100million)	(100million)	Financial income	Financial expenditure	Expenditure	proportion of administrative expenses (%)
1978	1132.26	1122.09	10.17	29.51	33	52.9	4.71
1979	966.61	1281.37	-314.76	1.20	28.05	70.88	5.53
1980	1159.93	1228.83	-68.9	1.21	1.25	75.53	6.15
1981	1415.15	1426.22	-11.07	12.20	16.06	76.17	7.99
1982	1478.68	1482.32	-3.64	4.50	3.93	102.33	6.90
1983	1519.36	1556.88	-37.52	2.75	5.03	158.62	10.18
1984	1563.76	1647.49	-83.73	2.92	5.82	161.08	9.78
1985	2004.82	2004.25	0.57	22.01	17.81	171.06	8.53
1986	2413.96	2491.28	-77.32	20.41	24.30	214.54	8.61
1987	2447.69	2562.23	-114.54	1.39	28.48	268.59	10.48
1988	2478.59	2604.95	-126.36	1.26	1.67	301.36	11.57
1989	2664.9	2823.78	-158.88	13.11	13.26	386.26	13.68
1990	2937.1	3083.59	-146.49	10.21	9.18	414.56	13.44
1991	3149.48	3386.62	-237.14	7.19	9.77	414.01	12.23
1992	3483.37	3742.2	-258.83	10.56	10.45	463.41	12.38
1993	4348.95	4642.3	-293.35	24.76	24.12	634.26	13.66
1994	5218.1	5792.62	-574.52	20.10	24.80	847.68	14.63
1995	6242.2	6823.72	-581.52	19.59	17.78	996.54	14.6
1996	7407.99	7937.55	-529.56	18.68	16.23	1185.28	14.93
1997	8651.14	9233.56	-582.42	16.79	16.33	1358.85	14.72
1998	9875.95	10798.18	-922.23	14.22	16.87	1600.27	14.82
1999	11444.08	13187.67	-1743.59	15.88	22.12	2020.6	15.32
2000	13395.23	15886.5	-2491.27	17.01	20.48	2768.22	17.43
2001	16386.04	18902.58	-2516.54	22.26	19.10	3512.49	18.63
2002	18903.64	22053.15	-3149.51	15.37	16.66	4101.32	18.6
2003	21715.25	24649.95	-2934.70	14.85	11.78	4691.26	19.03
2004	26396.47	28486.89	-2090.42	21.56	15.75	5521.98	19.19
2005	31649.29	33930.28	-2280.99	19.99	19.11	6512.34	19.38
2006	35423.38	38373.38	-2950.00	11.92	13.10	7779.64	19.46

Source of Information:China Statistical Yearbook.China Statistics Press 2006 Edition; *CEInet statistical database* January 17, 2007.

Table 2. data collection of dependent variable y

```
y=[52.9 70.88 75.53 76.17 102.33 158.62 161.08 171.06 214.54 268.59
301.36 386.26 414.56 414.01 463.41 634.26 847.68 996.54 1185.28
1358.85 1600.27 2020.6 2768.22 3512.49 4101.32 4691.26 5521.98
6512.34 7779.64]
```

Table 3. data collection of variable x1

```
x1=[1132.26 966.61 1159.93 1415.15 1478.68 1519.36 1563.76 2004.82
2413.96 2447.69 2478.59 2664.9 2937.1 3149.48 3483.37 4348.95 5218.1
6242.2 7407.99 8651.14 9875.95 11444.08 13395.23 16386.04 18903.64
21715.25 26396.47 31649.29 35423.38]
```

Table 4. data collection of variable x2

```
x2=[1122.09 1281.37 1228.83 1426.22 1482.32 1556.88 1647.49 2004.25
2491.28 2562.23 2604.95 2823.78 3083.59 3386.62 3742.2 4642.3
5792.62 6823.72 7937.55 9233.56 10798.18 13187.67 15886.5 18902.58
22053.15 24649.95 28486.89 33930.28 38373.38]
```

Table 5. data collection of variable x3

```
x3=[10.17 -314.76 -68.9 -11.07 -3.64 -37.52 -83.73 0.57 -77.32 -114.54
-123.36 -158.88 -146.49 -237.14 -258.83 -293.35 -574.52 -581.52 -529.56
-582.42 -922.23 -1743.59 -2491.27 -2516.54 -3149.51 -2934.7 -2090.42
-2280.99 -2950]
```

Table 6. data collection of variable x4

```
x4=[29.51 1.20 1.21 12.20 4.50 2.75 2.92 22.01 20.41 1.39 1.26 13.11
10.21 7.19 10.56 24.76 20.10 19.59 18.68 16.79 14.22 15.88 17.01 22.26
15.37 14.85 21.56 19.99 11.92]
```

Table 7. data collection of variable x5

```
x5=[33 28.05 1.25 16.06 3.93 5.03 5.82 17.81 24.3 28.48 1.67 13.26 9.18
9.77 10.45 24.12 24.8 17.78 16.23 16.33 16.87 22.12 20.48 19.1 16.66
11.78 15.75 19.11 13.1];
x6=[4.71 5.53 6.15 7.99 6.9 10.18 9.78 8.53 8.61 10.84 11.57 13.68 13.44
12.23 12.38 13.66 14.63 14.6 14.93 14.72 14.82 15.32 17.43 18.63 18.6
19.03 19.19 19.38 19.46]
```


Table 8. data collection of y

Y=0.1×[52.9 70.88 75.53 76.17 102.33 158.62 161.08 171.06
214.54 268.59 301.36 386.26 414.56 414.01 463.41 634.26
847.68 996.54 1185.28 1358.85 1600.27 2020.6 2768.22
3512.49 4101.32]

Table 9. data collection of x_1

$x_1=0.1×[1132.26 966.61 1159.93 1415.15 1478.68 1519.36$
1563.76 2004.82 2413.96 2447.69 2478.59 2664.9 2937.1
3149.48 3483.37 4348.95 5218.1 6242.2 7407.99 8651.14
9875.95 11444.08 13395.23 16386.04 18903.64]

Table 10. data collection of x_2

$x_2=0.1×[1122.09 1281.37 1228.83 1426.22 1482.32 1556.88$
1647.49 2004.25 2491.28 2562.23 2604.95 2823.78 3083.59
3386.62 3742.2 4642.3 5792.62 6823.72 7937.55 9233.56
10798.18 13187.67 15886.5 18902.58 22053.15]

Here , $n=25, m=2$

$X=[ones(n,1), x1', x2']$

$[b, bint, r, rint, s]=regress(Y', X, 0.05)$

$b, bint, r, rint, s,$

The operation results are shown in Table 11:

Table 11. operation results of $\hat{\beta}_0, \hat{\beta}_1, \hat{\beta}_2$

Regression coefficient	confidence interval of regression coefficient	The estimated value of regression coefficient
β_0	[-210.4264 -72.8317]	-141.6291
β_1	[-0.4468 -0.0939]	-0.2704
β_2	[0.2674 0.5691]	0.4182
$R^2 = 1$	$F = 2005.8$	$p < 0.0001$
		$s^2 = 7.4036$

Table 12. The results of the analysis marked with x_1

Coefficient	Interval of the value of the coefficient	Estimated value of coefficient
β_0	[2785.782 7391.566]	5088.674
β_1	[-1546.264 -838.588]	-1192.426
β_2	[60.911 83.801]	72.356

In the same way, we can get the relationship between x_2 and t

Table 13. The results of the analysis marked with x_2

Coefficient	Interval of the value of the coefficient	Estimated value of coefficient
β_0	[3181.663 7552.449]	53670.56
β_1	[-1620.442 -9488.73]	-1284.657
β_2	[68.188 89.911]	79.050

Secondly, according to the information we can draw plots of Y with X1, X2 see Figure 1, Figure 2.

```
plot(x1,y,'*');plot(x2,y,'*')
```

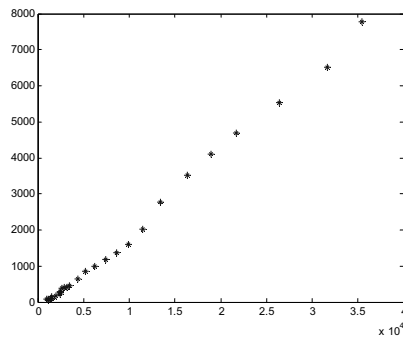


Figure 1. (plot between y and x1)

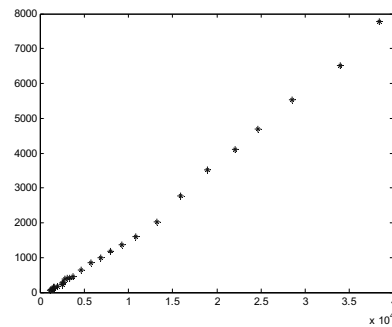


Figure 2. (plot between y and x2)

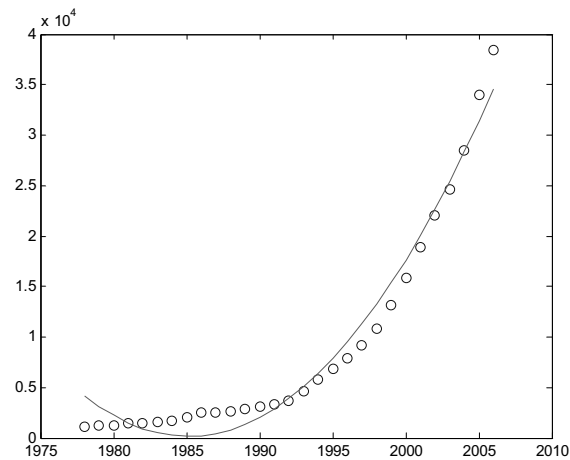


Figure12. Signs of the 1978-2006 financial income plots

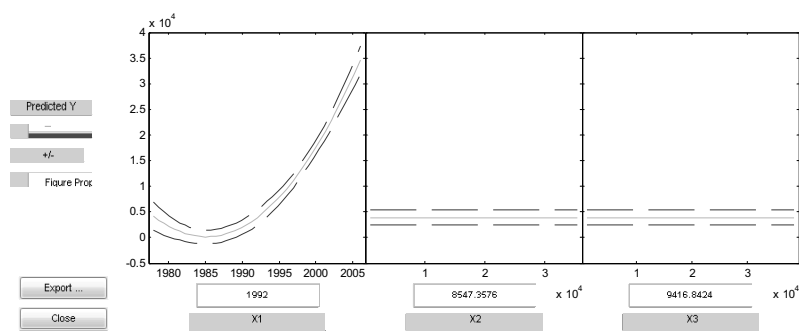


Figure13. the interactive screen of the signs of the 1978-2006 fiscal revenue

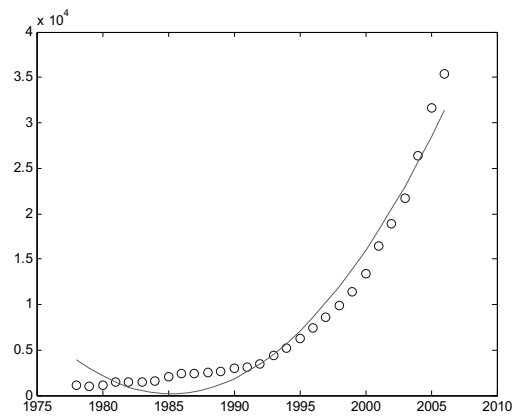


Figure 14. Financial scattergraph of 1978-2006 marked with x2

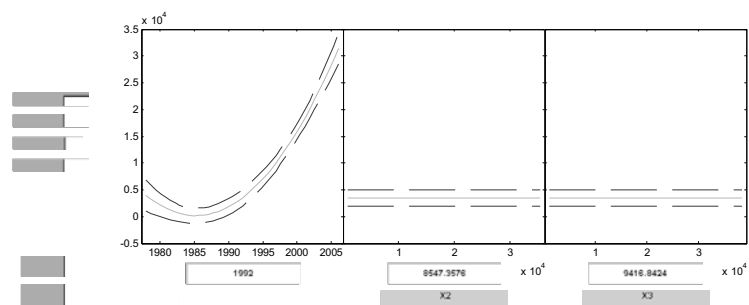


Figure 15. 1978-2006 financial income interactive screen of 1978-2006 marked with x2



Discussion about Shareholders' Right to Information

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Abstract

China's Company law was amended in 2005, in which the Stockholders' right to information has been protected much better than the last edition, for instance, confirming the shareholders right to consult the account books in the limited liability company. This new company law enhances shareholders' rights to a large extent, and promotes the prosperity of capital markets and numerous investments. With the development of society, the law to protect the Stockholders' right to information is gradually outdated, some issues such as the scope of shareholders right to consult the account book, the subject and object conditions, the procedure, and the judicial relieves are not covered by the revised law, which led to some disputes. This paper is trying to present some discussions towards these issues, and especially, focusing on the protection of shareholders' inspection right of accounting books, which plays a fundamental role in the exercise of shareholders' other rights. A strict law is one efficient way to protect shareholders' rights; furthermore, bringing up a good stock culture will be more significant in a long term.

Keywords: Stockholder, Stockholders' right to information, Inspection right of accounting books

In order to strengthen the protection of shareholders' right to information, increase the supply of information to small and medium shareholders, and improve their disadvantaged position, there was a significant break on shareholders' right to information in the new edition of company law in 2005. The Company Law article 34 is learning from the advanced experience of Europe and the United States and Japan and in response to a broad request of the medium and small shareholders, the law authorizes shareholders' inspection right to corporate books and records. In article 34 paragraph 1 it reaffirms a shareholder shall have the right to look up and copy the articles of association, the minutes of shareholders meetings, the resolutions of the meeting of the board of directors, the resolutions of the meetings of the supervisory board and the financial statements of the company; paragraph 2 further provides that: "The shareholders may require to look up the accounting books of the company." Legislators define the inspection right as a separate right of shareholders, with no restrictions on holding period for shares, so it is very easy to practice the right. In theory, any honest shareholder has the right to exercise the right. (Liu Junhai, 2008, p.296).

In this paper, the author will present some disputes of controversial points about shareholders' right to information.

1. The qualifications for people who have the right to information

1.1 Qualification standards for shareholders who own the right to information

First of all, we should make clear the criteria and conditions of shareholders' qualification. An eligible shareholder is the basis to practice rights and bear obligations. From the relevant provisions of company law, there are two prerequisites to become a shareholder: substantive condition and formal condition. The substantive condition is shareholder's capital contribution. As a capital-based organization, shareholders' capital contribution is the basis for establishing a company; therefore, this is the basic requirement to be a shareholder. The formal condition that qualifies for a shareholder is the form that can be recognized by others, including the records in articles of association, shareholders' roster, registration in company registration authority, capital contribution certificates issued by the company, etc; in a limited liability company, where a shareholder intends to transfer his or her stock ownership to persons who are not shareholders of the

company after securing the consent from over half of all the shareholders.

Company law article 26: The amount of initial capital contributions paid by all the shareholders of the company shall not be less than 20% of the registered capital of the company nor less than the statutory minimum amount of registered capital, and the remaining of the registered capital may be paid up by the shareholders within two years upon the incorporation of the company. Under this provision, shareholders can pay their capital contributions by installments, which means that the law does not link the eligibility of a shareholder with payment of their capital contributions inevitably, or that the Law allows to separate the time of payment and time to be a shareholder. To be a shareholder lies in the records in articles of association, roster of shareholders, and other documents. In other words, the proceeding formal conditions have a decisive role on obtaining a shareholder qualification. (Zhou Yousu, 2006, p.98)

1.2 Whether the shareholders who have not yet pay up their capital contributions could excise the right to information

Under the premise of incorporation of a company, could a sponsor who has not pay up his share be a shareholder of the company, or enjoy the right to information equally with other shareholders?

According to standards above about the shareholder qualifications, the criteria rest on the records in articles of association, as well as in the industry and commerce institutions' registration documents. The payment is only shareholder's primary obligation and is not the essential condition to obtain a shareholder qualification. Shareholders in violation of payment obligation still can have the right to know unless they are cancelled by the company. Generally, violating the investment duty does not cause to deny directly its shareholder qualifications. The shareholder exercises the right to know and whether to invest fully belong to two different legal relationships, which has basically obtained the unanimous understanding in the judicial practice. (Yang Lu, 2007, p.10).

Of course, to confirm the eligibility of shareholders, by the form condition does not mean to ignore the substance conditions of capital payment. According to the Company Law, if the shareholder's investment is defective, that is a false investment, capital flight or other faulty investment, the qualifications of shareholder still can be recognized, but the appropriate measures will be taken to make up for the legal remedies, including requesting to make up the investment in the stipulation time, investigating the shareholder responsibility of breaking a contract, limiting its shareholder rights exertion. If the breach is serious enough, administrative responsibility, even legal responsibility will be looked into. By taking these measures as a legal remedy, the legal relationship can recover to restoration and correction, so that the interests of the injured party can get some compensation.

1.3 The problems about how anonymous investors enjoy their rights to information

Anonymous investors, also known as anonymous shareholders in practice, refer to those who are actual investors but lack of eligible form as a shareholder in the company. Although the anonymous investors make actual investment, but in the company's charter, shareholders' list and the registration documents there is not their names but someone else's. Therefore, the existence of anonymous investors will be inevitably accompanied by the existence of other relative known shareholders. Here using anonymous for their shareholder status is still in an uncertain state; while the known shareholders have covered the elements of the form of shareholders.

The phenomenon of anonymous investor in the company is widespread practice, some does not want to publicize their financial situation, also some parties in order to circumvent the laws and regulations on investment restrictions, such as the restriction on investment qualification, restrictions on the number of shareholders. However, the anonymous investors does not violent the law directly. Company Law article 217, paragraph 3: "Although it is not the shareholders of the company, but through investment relations, agreements or other arrangements, to the actual disposal of the company acts." Contrast this provision with the definition of anonymous investors above, it is easy to see that the "actual control" is not the same with anonymous investors, but it can include anonymous investors, in other words, anonymous investors are a kind of "actual control". Whether anonymous members have shareholder qualifications, the author think the following several main points should be concerned:

First, Company Law article 217 clears that the actual control person is not the company shareholders, and anonymous investors as a form of actual control person, of course should not have the legal status of a company shareholder.

Second, the anonymous investors do not have the legal qualifications of shareholders, in accordance with Company Law provisions of article 217, because it "can actual control the company behavior" through the investment relations, it was decided that anonymous investors should also be subject to the rules and regulations of Company Law .

Third, considering the relationship between anonymous investors and known shareholders, significantly the two parties constitute a contractual relationship. Regardless of the form of a written contract, to regulate and adjust the relationship should follow the contract law. However, when dealing with their relations with the company, more application of the Company Law should be concerned. Such as anonymous investors involved in shareholder qualification is a company-related issue, should be to regulate and adjust in accordance with Company Law. For example, if there are no guarantees of procedures for registration changes, anonymous investors could not directly exercise the shareholders' rights. In addition, if the anonymous investors and eligible known shareholders are under dispute, we cannot affirm

directly known shareholder lose the shareholder qualification and thus the anonymous member has the shareholder qualification. (Zhou Yousu, 2006, p.102).

In practice, it depends on different situations to deal with anonymous investors claim to exercise the right to information. If the company and its shareholders know the relationship between the known shareholders and the hidden investors, and allow the anonymous members to exercise their right to know, this should be respected for their internal "autonomy"; if companies and shareholders do not allow anonymous investors to exercise the right, which should be supported (Zhou Yousu, 2008, p.111), then the anonymous one must have to be changed into a known shareholder by completing such procedures as adding his name to the records in articles of associations, roster of shareholders, registration of the company etc. Or, he or she can not exercise the right to information.

1.4 The question about former shareholders who have withdrawn from the company exercise the right to information

By transferring their stock ownership or shares, the former shareholders lose their shareholder's status. Those who have the right to information are the incumbent shareholders, so the former shareholders have not lawful right to information. Actually, there are some cases in judicial trial, the former shareholders who claim their rights and interests were damaged when they were shareholders, want to exercise right to information to prove the fact. Regarding this kind of lawsuit, the court must recognize the time condition of the behavior, or, according to litigant's identity when the damages happen, but not according to litigant's status at the lawsuit time. If the behavior occurs the time the litigant has the shareholder status, then, the litigant shall enjoy the right to know legally, the right should get legal protection. After transferring stock ownership or shares, if there is evidence to indicate that the company conceals the profit, the former shareholder shall have the right to inspect the accounting situation during his shareholder's period.

2. The scope of shareholders' right to information

According to different types of companies, the contents and the ways of exercise of shareholders' right to information have some differences.

2.1 The contents of shareholder's right to information in a limited liability company

Company law article 34: A shareholder shall have the right to look up and copy the articles of association, the minutes of shareholders meetings, the resolutions of the meeting of the board of directors, the resolutions of the meetings of the supervisory board and the financial statements of the company.

Inspection of company's accounting books is the most important aspect of right to information for shareholders in a limited liability company. For company's financial information is the most important part of value information for shareholders. The financial information is usually recorded in the financial statements, accounting books. However, because of the poor credit of companies, there are serious frauds in financial and accounting reports; it is unlike for shareholders to know the exact financial situation through public access to the company's accounting report. Therefore, in 2005 the new company law amendment, not only allowed shareholders of the company to look up company accounting reports, but also allowed shareholders access to company's accounting books. Therefore, company shareholders looking up company accounting books is the most important element of the right to information. (Zhao Xudong, 2005, p.155).

Whether the accounting book should include accounting documents is the greatest dispute about the right to information in a limited liability company. To find out this question, not only need to inspect to the accounting law and related concepts in accounting practice, but also the legislative intention and the judicial practice. Accounting law article 9: all units must make accounting checking, fill in accounting documents, accounting books, and compile accounting reports based on actual economic business. Furthermore article 15: the registration of accounting books shall be based on audited accounting documents.

From the accounting process, it is clear that the accounting documents include original documents and certified documents; accounting organizations and personnel write certified documents should be based on audited original documents. And register accounting books after audited certified documents, the financial accounting reports are compiles on the basis of accounting books. Therefore, the accounting documents, accounting books, accounting reports are three completely different concepts. Despite their close ties, they have a relatively independent status in the accounting law.

Accounting books include general ledger, itemized account, journal and other auxiliary book. According to the law, all units should register, calculate all economic business items uniformly in accounting books set up according to law, cannot make private accounting books which is in violation of the law and unified accounting system. Units must regularly check the record in accounting books with the material objects, the funds with the pertinent data, guaranteed that the accounting books record match the material object and the funds, the related contents between the accounting books record and the accounting documents, records between different books correspondingly. Accounting books should be numbered in accordance with the page number for the order of registration. Therefore, the accounting books

are the direct record of the company daily economic activity, which is the basic data to compile the corporate finance accounting report. (Hu Guangbao, 2005, p.124).

From the above accounting law, accounting practices, and legislative definition of related concepts, the author is in favor of company law to limit the scope of the right to information only of accounting books, and not of accounting documents.

On the practical operation, the accounting documents relate to more commercial secrets than the accounting books, if unrestricted allow shareholders to access to, the company may suffer loss from leak of trade secrets; for larger companies, every day there are a large number of new accounting documents, if allow inspection on the documents whenever shareholders ask to, the companies' daily operation will be seriously affected; too many accounting documents files, and high inspection workload and high costs; it is not possible under the supervision of all time when shareholders are inspect the documents, If someone alters the original documents or loss occurred, it is difficult to define responsibilities. (Gu Gongyun, 2005).

From provisions of company law, the limits to access accounting books are stricter than inspection of accounting reports. Obviously, legislators still have considerable doubts and worries about enlarging the scope of right to information to accounting documents. The right to information in principle should not include accounting documents. Certainly, if the articles of association have special agreement or in other peculiar circumstances, the judicature may also break this kind of limit, but supports the litigant to consult accounting documents. (Yang Lu, 2007, p.12).

2.2 The specific contents of shareholders' right to information in joint stock limited company

Company law article 97: A joint stock limited company shall keep its articles of association, roster of the shareholders, the counterfoil of company bonds, minutes of the shareholders general meetings, minutes of the meetings of the board of directors, minutes of the meetings of the supervisory board and financial statements at the company.

Article 98: The shareholders shall have the rights to check and review the articles of association of the company, the register of the shareholders, the stubs of the company bonds, the meeting minutes of the shareholders' general meeting, the resolutions of the board of directors, the resolutions of the board of supervisors, and the financial and accounting reports, and to raise suggestions and interpellation on the operations of the company.

After comparison article 98 with article 34, it will be found there is no mention of the "accounting books." in article 98. That is to say, the right of access to accounting books is only limited to the shareholders in limited liability companies?

Securities Law article 65-67 stipulate the shareholders of listed companies can learn about the company situation, including: operating conditions, involved in major litigations matters, the brief introduction of directors, supervisors, senior management and their shareholdings profile, issued stocks, debenture bonds, major events that can greatly influence the price of the stock, etc. Also not mention accounting books. Express provisions of law can not be found shareholders in joint stock limited company have the right to inspect accounting books.

The joint stock limited company has a nature of higher capitalization compared with the limited liability company, especially now in the increasingly well-developed capital markets, shares, in particular, of listed company, extremely dispersion. In China's bullish stock market in 2006, all people were shareholders, most of who only held a lower proportion as small and medium shareholders. Rather than long-term development of the company, they were more concerned about the growth in stock prices. Even if happens the controlling shareholder, the management against the interests of small and medium shareholders, very few people would take it seriously. There is nothing but profits. What is more, the costs and benefits were not proportional for small and medium shareholders to inspect accounting, lack of maneuverability.

On the other hand, the major shareholders who really cared about the actual operation of the company, usually participated in the company management, they had authority to inspect accounting books through management activities.

Therefore, to the actual needs, even if the law entrusts shareholders of joint stock limited company access to accounting books, this stipulation also does not have too many significances.

From the above comparison, one can see, the law bestows shareholders of limited liability company more initiative rights to collect information; while adds more obligations of information disclosure to the joint stock limited company, so that shareholders can receive the information they need more easily. Warren Buffett also uses the magic weapon by studying the company's financial statements. In accordance with the law, a joint stock limited company shall keep its financial statements at the company for shareholders to inspect. The financial statements of listed companies should be publicly announced. Now as long as installing a stock analysis software (free download available on the network), the financial reports of listed companies are readily available.

It is understandable that people hold suspicion about the authenticity of the accounting reports of listed companies. As the prosperity of capital market, financial fraud also keeps the pace with the times. Moreover, there are some scandal

broke out in developed countries such as Europe, America and Japan's listed companies, the most representative one is the collapse of American Enron Corporation. One of the world's top five accounting firms of Arthur Andersen is also close down, which provides accounting services for it.

It is too absolute to completely deny the right of inspection of accounting books of shareholders in joint stock limited company. After all, accounting books are closer to the truth than accounting reports.

How to balance the interests between corporations and shareholders?

The inspection right of accounting books should be defined as minority shareholder right in order to prevent some shareholders abuse the inspection rights, interfere the company operation, damage the interests of company and shareholders-at-large, which can be differed with the inspection right of accounting reports. (Liu Junhai, 2004, p.56). To enhance the protection of inspection right, the right should be regarded as a natural right of shareholders. (Liu Junhai, 2004, p.366).

Limitation on the inspection right of accounting books for shareholders in the joint stock company should refer the limits about the due purpose in provision of company law article 152 the paragraph 2. In judicial practice, the limits may refer to the stipulation of "in case of a limited liability company, the shareholders, or in case of a joint stock company, the shareholders separately or jointly holding one percent or more of the company's shares for 180 consecutive days may request in writing the supervisory board or the supervisor of the limited liability company having no supervisory board to bring a lawsuit before the people's court" in article 152. Certainly, the Supreme People's Court may also make the guidance stipulation about this in the judicial interpretation. (Liu Junhai, 2008, p.305).

3. Judgment about the due purpose when shareholders in the limited liability company exercise the right to information.

The restrictions mentioned above, whether they are the time-length of stock ownership, or the proportion of share, are both objective requests to shareholders. When the shareholders only achieve these conditions and ask access to accounting books, the company then can not reject. Generally, majority shareholders have due purpose to exercise the right, whether dissatisfaction or doubt either the performance or the management, operation of the company. They want to find out the real situation through the inspection to protect their shareholders' rights and interests, which is harmless to the company's benefits.

However, the cost brought by 1000 shareholders of goodwill to request access to the accounting books may be inferior to the cost and loss suffering from one presumptuous bad shareholder. If it is said the cost for company to provide offices, staff guidance and other ancillary services can be measured, then, in case some shareholders with bad intentions abuse the right to information by spying on the company books of the important information, obtaining trade secrets for personal gain, so that the loss caused to the company will be unable to estimate. Therefore, the due purpose is the most significant part of the stipulation about shareholders' inspection right of accounting books.

Company law article 34: The shareholders may require to look up the accounting books of the company. A shareholder shall, if requiring to look up the accounting books of the company, submit to the company a written request specifying the purpose. If the company reasonably holds that the shareholder's request for looking up the accounting books is for undue purpose and may damage the legal interests of the company, it may refuse to provide the access to the accounting books, and shall, within 15 days upon its receipt of the shareholder's written request, give to the shareholder a written reply specifying the reason. If the company refuses to provide the access to the accounting books, the shareholder may request the people's court to require the company to provide the access to the accounting books.

There is no limit on the time-length of stock ownership or proportion of shares for shareholders in the limited liability company to exercise the inspection right of accounting books. Just as mentioned before, theoretically, any shareholder of good faith has the right to exercise the inspection right.

What to do to be good faith?

The basic requirement for shareholders is having due purpose (proper purpose). "The reason why the legitimate demands of shareholders for the purpose of inspection are that inspection of the shareholders could be abused unfriendly to harassment of the company's management or to steal the company's trade secrets." (Stevenle, 2003, p.96).

So-called "due purpose", refers to the aim have a direct relation with the interests of shareholders based on maintenance of shareholders' status. (Liu Junhai, 2004, p.369).

In general, the proper purpose of shareholders proposing consult request is: (1) relate to the shareholders' identity; (2) legitimate; (3) not violate with company's interests nor harmful to company's benefits. (Yu Ying, 2008, p.91) "If to gain related information with the shareholder's benefits, or is to protect this shareholder's benefit as well as the company and other shareholder's benefit, then the goal is proper. To find out the stock value is also a proper goal; Seek the reason why the profit drops is also proper; as well as to determine whether there are management fault or venturous transaction." etc. (Robertwh, 1999, p.528).

The counterpart of due purpose is undue purpose, i.e. other purposes but the purpose to protect the shareholders' interests. From the disputes in judicial practice, the company may refuse access to inspection relative documents for any of the following circumstances: (1) not for the protection of interests of shareholders, but to damage the common benefits of other shareholders, or intervene the operation of company; (2) the shareholder operates another company competing with this company, either becomes competing company's shareholder or director; (3) in order to get ill wealth, spread the information gotten from the company documents; if there was some record that the shareholder did the proceeding behavior in last two 2 years.(Liu Junhai, 2006, p.112)

That shareholders enjoy the inspection rights does not mean there are no restrictions for shareholders to inspect any available documents. The documents for inspection should be relevant to what the shareholder want to know, which requires shareholders when exercising the right only limited to some certain documents according to the due purpose. The content of commercial secret, cannot be consulted at will by the shareholder. (Zhou Yousu, 2008, p.115).

4. Judicial relief for shareholders when their rights to information are infringed

At present, a good culture has not been established in our companies industry. (Cui Ping, 2007, p.501). Companies stand a positive attitude towards shareholders. Therefore, when shareholders require inspecting company accounting books, the company and shareholders will be in a natural state of confrontation. From the company perspective, shareholders looking up the books may be regarded as hostile or threatening. Whenever the shareholder consults company's financial materials, the company may suspect that this shareholder tend to intervene company's normal operation, while it is very difficult for the shareholder to prove that his good intentions, having reasonable demand.

Practically, the interests of majority shareholders and managers tend to be convergent major shareholders and managers on behalf of the company, the company also reflects and represents the interests of major shareholders and managers', however, there is a tendency that interests of corporation in line with controlling power but against the interests of many other small and medium shareholders. Therefore, small and medium shareholders claiming to access to company books will be regarded as wrongful act undermining the interests of the company. As long as the "company has reasonable grounds to believe that shareholders have access to accounting books improper purpose, you may damage the legitimate interests of the company, can refuse to provide access." If the company reasonably holds that the shareholder's request for looking up the accounting books is for undue purpose and may damage the legal interests of the company, it may refuse to provide the access to the accounting books.

Companies can take a variety of excuses to refuse. When the interests of the company are in line with those of directors, senior managers and inconsistent with the interests of other shareholders, these major shareholders and senior managers will make use of legal restrictions to achieve more, regardless of interests of other shareholders. However, even other investors suspect such deeds have happened, the entire benefits of company suffering damages, they have no certain evidences, and cannot exercise their right to information because they cannot prove their due purpose. Actually, it is impractical to prove human being's objective purpose, which creates a difficult situation for protection of small and medium shareholders. In fact to have the evil intention, in reality is also very difficult to say clearly.

Although the law also stipulates that if the company refuses to provide the access to the accounting books, the shareholder may request the people's court to require the company to provide the access to the accounting books, but if the shareholders sued the company, they have to provide guarantee. But according to China's status quo, compared with the company, ether economic strength or in the information resources, there is no doubt that the company locates in the dominant position, and small and medium shareholders in a much weaker position, even in the lawsuit proceedings. In addition, one can not deny the existence of a variety of human disturbance factors, the end of the lawsuit is unpredictable. Therefore, probability of the maintenance of the interests of shareholders through the action channels may also be greatly reduced, the realization of the rights of shareholders has been limited indeed. (Ba Tu, 2008, p.521).

The law has always played a role in balancing interests of different parties. On the one hand, it is difficult for shareholders to prove their due purpose; on the other hand, the company is easier to refuse shareholders' access to accounting books. In this relationship, the shareholders are significantly disadvantaged. Vis-à-vis the shareholders, the company has more information resources. As a result, who should bore the burden of proving the due purpose? It now appears that the company, which is closer to the idea of protection of shareholders. This allocation of the burden of proof, make the company have initiative prevention against shareholders' harmful behaviors, and prevent shareholders from falling into an embarrassing situation that they cannot prove their proper purpose. If the company does not have sufficient evidence to prove that the shareholders have improper purpose, the company should bear the disadvantageous consequences.

In order to gain effectiveness of the inspection right, to protect shareholders from being deprived of their rights and interests, Company Law article 34, paragraph 2, also requires the company to bear the burden of proof of an improper purpose. If the company is unreasonably doubt and refuses to provide inspection, shareholders may request the people's court to require the company to provide the access to the accounting books. (Liu Junhai, 2008, p.303).

However, due to the complexity of the company's shareholding structure, diversity management, company law does not detail the kinds of corresponding proper or improper purposes, which requires the court combining with specific to make free discretion of the extent of proper purpose. (Chen Kaixin, 2007, p.71).

5. Conclusion

Montesquieu said: "All people with power can easily abuse of power, this is an eternal truth." The maturity of separation of the two powers, general shareholder meeting principle transferring to the principle of the board of directors means that the power of general shareholder meeting weakens and the swell of the power for the directors board. In the comparison of company and shareholders, the controlling shareholder and small and medium shareholders, the interests of weaker party always been squeezed by other sides. Shareholders invest their own capital to company is the social basis for company's existence. If the interests of shareholders, particularly of the small and medium shareholders, can not receive a timely and effective protection, the capital market is bound to suffer a credit crisis, the bad impact on the enthusiasm of the investment, with the result that the companies have difficulty to sustain.

In order to prevent managers to embezzle, erode profits from company and shareholder's moral hazard, reduce mediocre, management default of delaying company business opportunities, prevent the board of directors to form cliques for selfish ends, abuse power of corrupting practices, most countries regard shareholder's right as a extremely important part in the company law to curb abuses of management power effectively. These rights are crucial for the protection of shareholders against poor management. But it is a precondition to have a detailed understanding and knowledge of the company's business conditions and property status for shareholders to practice those various rights, i.e. to know business operation situation and financial standing. (Yu Ying, 2008, p.85).

Our country has enlarged the protection of shareholders' right to information, however, there are only some stipulations in limited articles, defect both in mechanism design and practice. The right to information is the basic foundational right of shareholder, to guarantee shareholders' interests, balance the profits between shareholders, and shareholders with company, which could only be realize in a sound theoretical basis and a comprehensive relief system. The exertion of shareholders' rights, not only directly link to the achievement of self-interest of shareholders but also closely link to the issue of standardization of company management.

The inborn laggard nature of law makes it impossible to cover all possibilities. The original intention of the legislator is good, but the legislation can not keep up with the pace of development of the reality. Legislation should be strict and judicial practice in line with the law, as well as flexible and responsive. Solution the above disputes in this article about shareholders' right to information, of course, hope legislators will give an explicit instructions. Then before the settlements given by the legislators, to hand the related controversies, it is necessary to follow the premise of the legislative intention, punish the evil, and promote the justice. What's more, the strict law of the poor, the company can improve the flaw of the law in the articles of association.

The protection of shareholders' rights of information is not to put the shareholders on an opposite side with the companies. We cannot only emphasize the protection of shareholders, regardless of lawful interests of the companies. The relationship between shareholders and companies is like fish and water, fertile water feeds fleshy fishes.

Protect the interests of shareholders and companies by neither allowing shareholders abuse the right to information to damage the company's interests, nor allowing the company against the lawful rights of shareholders. Under the background of building a harmonious society, shareholders and the company should get along with each other harmoniously in order to harvest a win-win fruits, furthermore guarantee the sustainable development of China's enterprises powerfully.

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The Role of the *Iṣ lā h* Movement in the State's Constitution of Perlis, Malaysia

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Abstract

In 19th Century CE the term *iṣ lā h* is used to denote 'reform' to perceive idealism of reformers, al-Afghānī, 'Abduh and Rida and those who were influenced by them. They struggled to refine Muslim society and to call them back to Islam. The objective of this paper is to study factors of diffusion of the idealism in Perlis, Malaysia. Besides, it would indicate the role of the *iṣ lā h* movement in determining the notion of Perlis's Constitution. Through researches in many documents as well as interviews the study found that the movement in Perlis emerged in the early 1920s CE to challenge the practice of the Shāfi'ī *madhhab* (school of thought) in the state. The movement succeeded in challenging the strength of *Kaum Tua* (the Shafi'i adherents) and caused the closing of their *pondok* (learning centre). What was more important, the movement's proposal to establish the doctrines of *ahl al-sunnah wa-l-jama'ah* without being subject to any particular *madhhab* to be the basis of the State's structures gained the support of the Perlis Sovereign as well as the State Executive. Meanwhile, a King who would be appointed to govern the State should be a person who follows the doctrines. When compared with provisions of the other States in Malaysia it means that only Perlis has chosen to make an open rejection to the practice of *taqlīd* of particular *madhhab* in the State's religious administration. Therefore, it would be good to suggest that people should be given a wide opportunity to study, to accept and to practise any opinion that is in accordance with *al-Qur'an* and *al-Sunnah* in order to show a great appreciation of the State's doctrine.

Keywords: Idealism of reformers, Factors of diffusion, Determining the notion, Shāfi'ī *madhhab*

1. Introduction

In modern Arabic the term *iṣ lā h* is used to denote 'reform' in a general sense. It is perceived as a function of the historico-cultural process in modern Islam, a modern form of the *salafiyya*. It refers more expressly to the group that emerged at the end of the 19th century in the doctrinal teachings of Jamāl al-Dīn al-Afghānī (1254-1315 AH/1839-1897CE), Muḥammad 'Abduh (1266-1323AH/1849-1905CE) and in the writing of Muḥammad Rashīd Ridā (1282-1354AH/1865-1935CE) as well as in the many Muslim authors who have been influenced by these masters. For example, 'Abd al-Qādir al-Maghribi (1284-1376AH/1867-1956CE) in Morocco and Shaykh Tahir

Jalaluddin (1286-1377AH/1869-1957CE) in Malaysia who made a very fertile contribution to *is lā h* in the both countries. Those reformers struggled to refine Muslim society from superstition and call them back to the original teachings of Islam. They want people to think in term of getting ahead, to justify opinions as better or worse and to motivate themselves to utilize their natural surroundings (Donzel 1960. See also Britannica Encyclopedia 2007).

In order to fulfill these aims al-Afghānī insisted that the success of the aim necessitated the abolition of *taqlīd*. (Note 1) He pointed out that the early '*ulama*' exercised the right of independent judgement but they had not exhausted all the secrets of *al-Qur'an*. Thus, a new *ijtihād* was required to solve new issues and even to revise the previous opinions, for the situation in that time did not conform to the current circumstances (Moazzam 1984). (Note 2) Meanwhile, 'Abduh regarded *taqlīd* as a disease which blinds the practitioners. In *al-Manār*, he blamed those who commanded people to practice *taqlīd* without understanding and being satisfied with the view of the '*ulama*' ('Abduh & Rashid 1952). 'Abduh argued that the principle of *talfīq* (which implies that in any particular case one should choose the best interpretation of the law befitting the circumstances whether it comes from one's own legal code or not), should be practiced especially by jurists. (Note 3) In his view, *talfīq* was a systematic comparison of all four *madhāhib* or even other jurists so as to get the best synthesis for the right judgement (Hourani 1962). Nevertheless, Rashīd Ridā, in this matter presented his own stand by calling every Muslim to entertain the rules of all four *madhāhib*, or to accept any procedure of the four which was convenient to him/her. He thought that was a better way to avoid the false innovations of ignorant men who deviated from Islamic teachings for their own glorification (Adams 1933). His concern was to minimize the questions of differences between Muslims so as to show Islam to be a religious of unity. Therefore, he proposed a greater freedom for everyone to support what they agree upon and be tolerant of differences (Badawi 1976. See also Sasi 1995).

2. The wind of *is lā h* in Malaysia

The wind of *is lā h* in the Middle-East blew across the ocean and caused the rising tide of *is lā h* in the Malay Archipelago, in this case, Indonesia and Malaysia. Students from this area who had studied in the Arabic countries brought back the spirit of al-Afghani and 'Abduh, as well as the teaching of Shaykh Muhammad bin 'Abd al-Wahhab from Saudi Arabia to become the stimulus in motivating a reform movement in their society. In Indonesia, the *is lā h* movement became aggressive in the early 19th Century CE when the three scholars Haji Miskin, Haji. Sumanik and Haji. Piobang, well-known as the *Paderi* group who had studied in the Middle-East, came back to Minangkabau, Sumatra (Othman & Badaruddin 1991). They began to direct their attacks against the deterioration in the society and opposed some practices of the '*adat jahlīyah*' in Minangkabau, for example; drinking *tuak* (an alcoholic drink) (Othman & Badaruddin.1991). They also warned people about the intensive Dutch exploitation in Indonesia (Ricklefs 1984).

At the end of the 19th century CE many people in Indonesia thought that it was impossible to challenge the forces of Dutch colonialism or struggle for progress in other parts of Asia if they continued with their traditional activities to uphold Islam. They became aware of the need for changes or reforms by digging up the treasures of Islam of the past which had enabled their brethren of the Middle Ages to surpass the West (Noer 1973). In the meantime, some opponents of the *Paderi* movement who had escaped from the Dutch attacks had been looking for a new base to continue their struggle for reform (Othman & Badaruddin 1991).

By the time, Shaykh Tahir Jalaluddin from Bukit Tinggi, Minangkabau who came back from Middle-East in 1317 AH/1899 CE decided to chose Singapore (in that time, Singapore was the Malaya's constituency) as his field of operation for reform. As a best friend of Rashid Rida and the follower of 'Abduh he and some other friends who were the members of the urban Malayo-Muslim community of Singapore and had extensive contacts with the Middle East, such as Sayyid Shaykh Ahmad b. al-Hadi (1862-1934CE), Haji Abbas M. Taha (1885-1946CE) began to publish *al-Imam*, a periodical which used 'Abduh's nickname and followed the *al-Manār* model, in July 1324AH/1906CE, a year after 'Abduh's death (Noer 1973).

Al-Imam was the first Malay radical publication formulating an intellectual stance in Malay society to build up religious awareness for fast social and economic change (Abdullah 1992). Its aims were "to remind those who are forgetful, arouse those who sleep, guide those who stray, and give a voice to those who speak with wisdom". In order to achieve these ideals it was firstly concerned with religion, "for religion is the proven cure for all the ills of our community" (Roff, 1967). It warned the Malay people that the main cause of the decline of Muslim glory is their ignorance of their religion and inability to follow the commands of God and the Prophet (p.b.u.h). It indicated that a correct sympathy with and resignation to the direction of Islam is "our only means of competing successfully with those who now rule and lead us" (Roff 1967).

However, *al-Imam* reflected awareness that in order to achieve *is lā h*, the practice of Islam among the Malays must be free from customs and beliefs derived from '*adat*', other religions and animism. So, in the article *Tegoran* (An Address), translated from the Arabic of 'Abduh, it reminded '*ulama*' of their responsibility to preach the truth, and stress the need to return to *al-Qur'an* and *al-Sunnah* as well as to practice *ijtihād* rather than *taqlīd buta* (blind

acceptance of intermediate authority) in their approach to the modern world. Al-Imam called the authorities and the masses to work for the excellence and clarification of Islam, including an increase in social and economic development for the advancement of Malay society (Roff 1967).

The influence of the voice of reform spread significantly in the Peninsula of Malaya while in the early 1340sAH/1920sCE the call for reform in Perlis began to develop. Consequently, the call to 'stop the culture of *taqlīd*' that was being expounded by the reformers had a big impact on the practices of the Shafi'i *madhhab* (school of thought) among the people of Perlis (Abdullah 1989).

3. *Is lā h* in Perlis

Perlis, in full *Perlis Darul Sunnah*, is the smallest state in Malaysia. It lies at the northern part of the west coast of Peninsular Malaysia and has Satun and Songkhla Provinces of Thailand on its northern border. Perlis has a population of 210,000. The ethnic composition for the year 2000 in Perlis was: Malay (174,805 or 79.74%), Chinese (21,058 or 9.6%), Indian (2,658 or 1.21%) and others (20,690 or 9.45%). The capital of Perlis is Kangar and the royal capital is Arau. Since 2000, the Raja or hereditary monarch has been Tuanku Syed Sirajuddin Putra Jamalullail (<http://en.wikipedia.org/wiki/Perlis>).

Over the centuries the Shāfi'i *madhhab* had become dominant in South-East Asia. The preachers who came to the Malay Peninsula either from Hadramaut, Yemen or other parts of Middle-East being considered under the influence of the Shāfi'i *madhhab* in their preaching as well as in their interpretation of jurisprudence. Consequently, the Malay people became followers of that *madhhab*. Considering the development of the *madhhab* through education and law in Malaysia, most states in Malaysia - Kelantan, Kedah, Perak, Pulau Pinang, Trengganu, Negeri Sembilan, Melaka, Selangor and Johore accepted the Shāfi'i *madhhab* and its *fatāwa* and application of Islamic Law (el-Muhammady 1982). In Perlis, it was also a dominant movement and had supporters among the leadership and noblemen of the state. Many religious leaders were those from the *madhhab* such as Haji Muhammad. Noor b. Haji Muhammad, the ex-Mufti of Perlis from 1339-1360AH/1920-1941CE (Abdullah 1989).

However, in the early 1920sCE some '*ulama*' who previously had not dared to challenge the teaching and practice of the Shāfi'i *madhhab* in the state began to do so. Among them were Lebai Kecik from Indonesia (who stayed in Batu Lima, Jalan Kuala Perlis), Pakih Sidin, Sayyid Ibrāhīm from Hadramaut (Zam-zam 1986). Another one was Haji Mohd. Rawi (1318-1372AH/1900-1952CE), who was born in Sumatra and educated in Makkah for ten years. After which he moved to Perlis and opened a school, the *Madrasah Khairiyah*, in 1356AH/1937CE. Among the student of the school was Haji Abdul Rahman Haji Isma'il, the former Mufti of Perlis from 1391-1403AH/1971-1982CE (Abdullah 1989). Although those '*ulama*' were not given a tumultuous welcome by the masses many learnt about Islam from them and they can be considered to have laid the foundation for *is lā h* in Perlis (Zam-zam 1986).

However, the most important man was a local scholar, Haji Ahmad b. Haji Muhammad (1303-1384AH/1885-1964CE), who was educated at Makkah and worked as a State Chief Justice and also the first Chairman of the *Majlis Ugama Islam dan 'Adat Istiadat Melayu* (The Council of Islamic Religious and Malay Customs), from 1368-1380AH/1948-1960CE. (Note 4) He was well-known as Haji Ahmad Hakim and was elected as one of the members of *Jemaah Pemangku Raja* (The Council of Succession of the King) on occasions when His Majesty visited other countries. He reorganised the way of collecting *zakaat* and *fitrah* in 1345AH/1927CE (Othman & Badaruddin 1991). (Note 5) For the first time, only those appointed '*ummāl*' (collectors of *zakaat* and *fitrah*) were permitted to collect *zakaat* and *fitrah*. This rule was a threat to some '*ulama*' from *Kaum Tua* (old faction, the adherent of the Shāfi'i) who depended on the sources for the survival of their *pondok* (traditional learning centre). Although they were against the proposal, the King, Raja Syed Alwi (1323-1363AH/1905-1943CE), legalized it and then a committee was set up in 1351 AH/1933 CE namely *Jawatankuasa Perusahaan* (The Committee of Industry) to manage the regulations (Abdullah, 1989). Eventually, according to Mat Jahya (2002), the former Mufti of Perlis, in 1940sCE many *pondoks* in Perlis were closed such as *Pondok* Haji M. Rejab in Beseri, *Pondok* Haji Ishak in Mata Air, *Pondok* Haji Rawi in Santan and some others. This means that the strong base of *Kaum Tua* to challenge the idea of *is lā h* had been weakened significantly. Two more persons who made a serious contribution to the spread of the idea of *is lā h* were Wan Ahmad b. Wan Daud (1310-1390AH/1892-1970CE) and Shaykh Ahmad b. Mohd. Hashim. Wan Ahmad b. Wan Daud worked as a Confidential Secretary to the King of Perlis and was appointed the Speaker of the State Common House in May, 21th 1959 CE/1379AH. He visited Indonesia to learn about Islam and the reform movement there. Shaykh Ahmad b. Mohd. Hashim (1314-1401AH/1896-1980CE), was appointed the Perlis Chief Minister in May, 28th 1959CE/1379 AH until December, 31th 1971CE/1391AH after he won the state election. Haji Ahmad b. Haji Mohammad, Haji Ahmad b. Wan Daud and Shaykh Ahmad b. Mohd. Hashim are well-known as *Tiga Mad* (The Three Ahmads), and they were members of the *Jawatankuasa Perusahaan* which made an important contribution in introducing reform in Perlis. They brought in many books and magazines as well as the publications that contained ideas about reform. Through these media people could read more about the opinion of reformers and consequently,

according to Ahmad (2002), the adviser of the movement, the struggle of the *iṣṭāḥ* gained more supporters and sympathizers (Abdullah 1989).

What was more encouraging for them was a visit by Shaykh Hassan, an *ʿālim* from Saudi Arabia to Perlis in 1345AH/1927CE who strongly supported the movement. By this time, many state leaders and noblemen were attracted by the success of the *Wahhabī* movement in the country. (Note 6) They were looking for a good example to copy in Perlis. Thus, Shaykh Hassan gave priority to teaching the masses and to call them back to *al-Qurʾān* and *al-Sunnah* and throw away all *khurafaʿ* and *bidʿah* (deviation). Wan Ahmad Wan Daud writing in his diary, about Shaykh Hasan's visit to Perlis claims that the movement went from strength to strength and progressed to champion reform programmes together with reformers in the holy land in combating all deviation (Din 1981)

4. The period of glory

During the Japanese period in Malaya (1360-1365AH/1941-1945CE) the political situation in Perlis was in trouble and the activities of *iṣṭāḥ* were significantly curtailed. In 1365AH/1945CE the Japanese were defeated and British came back to Malaya and confirmed Syed Putra Jamalullail as the King of Perlis in December 4th 1945CE/1365AH. His Majesty raised no objection to welcoming back the reformers. He supported their activities "as long as there was no bloodshed". No doubt, it was a great time for them. In addition the *Tiga Mad* were appointed as *Ahli Majlis Negeri* (Members of the State Council). Furthermore, when the *Majlis Ugama Islam dan ʿAdat Istiadat Melayu Perlis* was established in 1368AH/1948CE, Haji Ahmad Hakim was appointed the first President and also the Chairman of the Department of *zakaʿat* and *fitrah*, while Wan Ahmad was assigned as the accountant and Shaykh Ahmad as the Secretary of the department (Abd. Hamid 1996).

In addition, many state officials showed their support for the *Tiga Mad*. Therefore, they easily organized many programmes, such as founding religious classes, and selected imams and religious teachers etc. in order to fulfill the objectives of *iṣṭāḥ* (Othman & Badaruddin 1991). A new post, namely a Religious Inspector was created to inspect and report the performance of religious duties in Perlis to the Chairman of the *Majlis Ugama Islam dan ʿAdat Istiadat Melayu*. Consequently, the *Majlis* could monitor religious activities and would take action about any activity that opposed the *Majlis*'s policy as well as controlling the influence of the *Shāfiʿī madhhab* in Perlis. As a result, the influence of *iṣṭāḥ* became stronger and more powerful (Abdullah 1989).

5. Determining the notion of the state's constitution

Leaders of the movement who held the top posts of the State Government seemed to believe that Perlis was the only one among the States in Malaysia which had a good reputation and respected the struggle for reform. They saw it as the potential basis for the movement's ideals, i.e. that it would be a place where *al-Qurʾān* and *al-Sunnah* would be the basis of reference without *taqlīd* or dependence on any particular *madhhab* in *fiqh*. They considered that the role of the movement in Perlis should be supported continuously by the State authority in order to make it an effective one to fight the culture of *taqlīd* of the *Shāfiʿī madhhab* in most States in Malaysia. This was something they thought had to be done immediately while the movement was seen as the champion of reform and was appreciated by the people of Perlis.

Therefore, on 26th March 1959 CE/1379 AH leaders of the movement proposed to the Perlis Sovereign and the State's Executive that the doctrines of the *ahl al-sunnah wa-l-jamāʿah* (the people of *sunna* and of the community), should be established as the basis of the State's structures. The term, according to the movement's authority refers to those who follow the doctrines of *al-Qurʾān* and *al-Sunnah* without being subject to any particular school of thought in *fiqh* (Abdullah 1989). For this purpose, a King who would be appointed to govern the State of Perlis should be a person who practises Islam and follows the doctrines of *ahl al-sunnah wa-l-jamāʿah*. This proposal gained the support of the State Executive and thus, article 19 of the Laws of the Constitution of the State of Perlis established that "*The Sovereign shall be a person who is a Malay, of Royal blood, a descendant of the Perlis Sovereigns, a male and of the Muslim Religion Ahli Sunnah Waljamaah*" (The Laws of the Constitution of the State of Perlis 1959).

In order to exercise His functions as Ruler, the Sovereign has to appoint a Regent or Council of Regency, as seems most expedient to Him, but *no person shall be "appointed as Regent or as a member of the Regency unless he is a Malay, professing the Muslim Religion Ahli Sunnah Waljamaah"* (The Laws of the Constitution of the State of Perlis 1959).

Later, steps were taken to authorise the doctrines in the State's religious administration. The meaning of the doctrines, according to the movement's point of view, needed to be stated clearly; that is, *al-Qurʾān* and *al-Sunnah* should be established in the State's Regulation as the basic point of reference without mention of any particular *madhhab*. The movement believed that it would be much better for the religious authorities to practise *ijtihād* as well as to choose any *fatwā* which was strongly supported in the revelation and was more appropriate to the current conditions. In this way, the establishment would give strength to the struggle of the movement in the future. Therefore, in 1383AH/1963CE a new article was introduced in the *Undang-Undang Pentadbiran Ugama Islam Perlis* (The Laws of the Perlis Islamic Administration), and Part 2, article 7 (4) of the Laws confirmed that "*The Majlis when issuing a Fetua and the Shari'ah*

Committee when giving its opinion under sub-section (2) shall follow the al-Qur'an and or Sunnah Rasul Allah Alaihi Wasallam" (Ishak 1985).

This is different to some other States' Constitutions in Malaysia that follow a certain *madhhab*. For instance, The Laws of the Constitution of Perak - Part 11, Article 5 clearly states in the 'Qualification of Sovereign' that "*The Sovereign shall be a male who is a Malay of Royal blood through male lineal descent, able to read and write and professing the Muslim Religion of the Shafi'i Muzahab*" (Abd. Hamid 1996).

The above statements provided that in 'making and issuing a ruling' the *Majlis* and the *Shar'i 'ah* Committee shall ordinarily follow the most approved juristic view (*al-qawl al-mu'tamad*, mistakenly rendered in the Enactments as 'orthodox tenets') of the *Shafi'i madhhab* (rendered as a 'sect' in the Enactments), but where the public interest (*al-maslahah al-'ammah*) so require the *fatwa* may be given according to the tenets of the other schools, but only with the special sanction of the Sovereign (Ishak 1985). However, the provisions of the Perlis Administration of Muslim Law Enactment (1964), alone of all such Enactments on the subject states simply that the *Majlis* and the *Shar'i 'ah* Committee 'shall follow the *Qur'an* and the *Sunnah* of the Prophet (p.b.u.h), omitting all reference to any of the established schools of Islamic law or the need to adhere to any of them (Ibrahim et.al.,1985)

6. Conclusion

Local scholars believe that the phenomenon in Perlis seems to be a great achievement of the *islah* movement and shows a great appreciation for its reformers. Officially, Perlis has refused to practice *taqlid* of only one *madhhab* but it might be true that people are given a wide opportunity to accept and to practise any opinion that is in accordance with *al-Qur'an* and *al-Sunnah*. This is an innovation of unimaginable magnitude when compared with provisions of the other States in Malaysia. It means that at least one state - Perlis has chosen to disregard - perhaps in a bid to stimulate a measure of creativity - the partisan tendencies in the historical development of Islamic legal thought by the open rejection of the doctrine of *taqlid*.

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Notes

Note 1. As a term of *fiqh* (Islamic jurisprudence), the classical *fuqahā'* (Islamic jurists) define *taqlīd* as "one's acceptance of another's opinion *madhhab* without knowing the other person's justification or trying to substantiate it" (Al-'Alwani 1992).

Note 2. According to the classical doctrine of Islamic legal theory, *ijtihād* means exerting oneself to form an opinion (*zann*) in a case or as to a rule of law. This is done by applying analogy (*qiyās*) to *al-Qur'ān* and *al-Sunnah* (Donzel 1960). According to al-'Alwānī, al-Ghazālī defined *ijtihād* as, "The expending, on the part of a *mujtahid* (the lawyer who is qualified to use it), of all what he/she is capable of in order to seek knowledge of the *Sharī'ah* injunctions. Complete *ijtihād* happens when the *mujtahid* expends all of his/her energies in seeking, to a point where he/she is satisfied that no more can be done". This definition refers to *ijtihād* in the field of law and indicates that the effort expended must be exhaustive and emanate from those who are qualified. If an unqualified person undertakes these same efforts, one cannot say that *ijtihād* has been performed (al-'Alwani 1992).

Note 3. *Talfīq* means, “in any particular case one should choose the best interpretation of the law befitting the circumstances whether it comes from one's own legal code or not” (Abduh and Rida 1372/1952).

Note 4. The Government of every State in Malaysia established a separate body commonly known as the *Majlis Ugama Islam dan Adat Istiadat Melayu* in order to solve the ongoing questions and to reconcile the friction between the authority of the custom and the Islamic law. Although the regulation of the assignment and the authority of each council may be different from one State to another, generally the main duty of the *Majlis* is to help and advise the ruler of each State on all subjects relating to the Religious Administration, as well as to the Malay Custom. In Perlis the *Majlis* functioning at this time was established in 1368AH/1948CE and it was reorganized in 1384AH/1964CE under Part II of the Laws of the Constitution of Perlis (Amendment) 1383AH/1963CE. Members of the *Majlis* are elected by His Majesty, the King of Perlis (Ishak. 1971).

Note 5. *Zakat*; the alms-tax, one of the principal obligations of Islam. *Fitrah*; (*zakat* of the breaking of the fast) is the obligatory gift of provisions at the end of the month of *Ramadan* (Gibb and Krames (Eds.) 1974).

Note 6. *Wahhabis*; A sect dominant in Saudi Arabia and Qatar, at the beginning of the 19th Century it gained footholds in India, Africa and elsewhere. Adherents of this sect named after its founder Muhammad ibn ‘Abd al-Wahhab (1115-1201 AH/1703-1787 CE), prefer to call themselves *Muwahhidun* (Unitarians) (Glasse 1989).



Research on Condominium Ownership Based on Information Asymmetry

- A Case Study of American Law

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Abstract

Condominium ownership is an important content of real property right. Based on the theory of information asymmetry, the author discussed the information asymmetry of exclusive parts and common parts in the process of transaction of real property right, and then took Uniform Condominium Act of America as a reference in order to provide solution ways for eliminating the information asymmetry of exclusive parts and common parts under the current transaction situation in China.

Keywords: Information asymmetry, Condominium ownership, Common ownership

1. Introduction

Condominium ownership is an important content of real property right, the article 70 of Property Right Law of PRC that issued by 2007 defined it as “owners have ownership for exclusive parts such as residential and commercial room in the buildings, and have common ownership and rights of co-management for common parts except exclusive parts.” Namely condominium ownership is made of exclusive right, common right and membership right, among them exclusive right and common right are property right, membership right is not a property right (liu, 2006, p.38). Therefore, three parts determine jointly that condominium ownership is a composite ownership, which is different from the general ownership.

Ownership is transacted in the process of transaction of real estate, which is actually the process of transaction of exclusive right and common right. Because of the features of uniqueness of transaction object of real estate, complexity of formation process and territoriality of transaction market of real estate, it easily makes exclusive right and common right lead to information asymmetry in the transaction process. Generally speaking, developers are in information superiority, exclusive right and common right of consumers are difficult to guarantee efficiently. Especially now at the imperfect law situation of condominium ownership in China, it more easily leads to information asymmetry. In view of this, the author intends to discuss how to protect exclusive rights and common rights of the consumers better in the transaction process based on the theory of information asymmetry, and makes the American law - Uniform Condominium Act (issued by 1977) as a reference, in order to be further beneficial to standardize market order of real estate in China.

2. Related concepts

2.1 Information Asymmetry

The theory of information asymmetry is the core content of Information Economics, it specifically refers to that the information shows uneven and asymmetric distribution between the economic entities of mutually responding in the

market, all parties that have economic relations do not all know the relevant information of subject matter(zhang, 1996, p.397). It can be summarized two points, one is that the distribution of transaction information is asymmetric between transaction parties, namely one has more relevant information than the other, and one is that transaction parties are clear about the relative position in their respective possession of information.

Information asymmetry can cause adverse selection and moral hazard. Adverse selection means that one who is carrying on a market transaction has possessed some information which the counterpart did not have before signing the contract, but these information may affect the interests of the latter, thereupon one who has occupied the advantage of information may be possible to use this advantage of information do things that are better for himself but not better for the counterpart, thus the efficiency of market and economic will be reduced (xin, 2001, p.36-40). Moral hazard means that one part who is engaged in economic activities goes against the utility of the counterpart while is promoting his own in the maximum after reaching the contract (wang, 2008, p. 14).

Both adverse selection and moral hazard will lead to market failure or inefficient operation of market, the problem of information asymmetry is not be solved fundamentally by using market mechanism singly, so government regulations of seeking is an important measure to remedy inadequacy of market, government regulations have mandatory, it can directly order the two transaction sides revealing some significant information, thus the level of information asymmetry can be decreased in the maximal degree(zhou, 2006, p.25).

2.2 Information asymmetry analysis on the transaction process of condominium ownership

Information asymmetry of condominium ownership in the process of transaction means that buyers do not wholly master all effective information of developers about exclusive parts and common parts. this information inferiority is information asymmetry. Concretely speaking, developers not only master the public information which includes information of geographical position, terrain, traffic, house type of exclusive part, allocation area of common parts and so on, but also master the hidden information which includes the information of cost of exclusive parts, allocation cost of common parts, allocation scope of common parts and calculation method of allocation area of common parts, quality, appreciation potential and so on. Thus house buyers do not have this information superiority, which may lead to the following: ① Developers embezzle the common parts of house owners, which means developers embezzle the common parts that should belong to the house owners originally before signing the housing contract, or developers let common parts lease or sale to the third party. This phenomenon is adverse selection. ② Developers change the common parts without authorization, which means developers change the primary planning and design without authorization under unwitting condition of house buyers after signing the housing contract, which makes a change in scope or location or share of common parts of housing buyers. This phenomenon is moral hazard.

3. Uniform Condominium Act of American

In U.S., the information disclosure system of Real Estate market and the legal system of condominium ownership are comparatively sound, so the author chooses U.S. as an example. Uniform Condominium Act in U.S. was constituted by National Conference of Commissioners on Uniform State Laws and announced in 1977. By 1980, this act had been adopted by 12 states basically overall, such as Pennsylvania, Virginia, Washington, New Mexico, Texas, and so on. Although legislative amendments of other states did not have adopted this law wholly from the structure or content, the content of this act was absorbed substantially.

3.1 Relevant regulations of Uniform Condominium Act

According to the article 2.5.1 of Uniform Condominium Act the condominium declaration should include the following: Full description in law about all buildings and other structures in the situation of the property district; Description about the maximal amount of housing units that developers have rights to build; Description about boundary and number of each housing units; Description about other common parts which will be appointed for the special common parts in addition to this act; Description about the common parts else designated for special in future; Description about the development rights reserved by developers, and the necessary legal description about the construction land that developers have reserved the development rights, and description about the period when developers can exercise these development rights; If developers can have the development rights of different block at different times, this should be definite in the condominium declaration, and description about the specific location, boundary or four boundaries, and the specific time when developers exercise the development rights of each block; If developers exercise the development rights of any part of a block, they should express the development rights which will be exercised partially or wholly; Other conditions or restrictions to the development rights of developers above-mentioned; Description about the share of the common property allocated for each housing unit in the common parts of the property district under the provisions of this act.

3.2 Provisions analysis

By analyzing article 2.5.1 in Uniform Condominium Act it can conclude that it has been regulated in law that ownership of apartment of the entire property district should be affirmed in the condominium declaration, including range of

exclusive parts (boundary), range of common parts, and common parts for special. With the phased development adopted, the condominium declaration should explain further about the content of the common parts and exclusive parts involved in the phased development.

Among that the condominium declaration is drawn up by the developer in accordance with the law, and delivered Real Estate Register Institution to register after natural completion of buildings, and then buildings can be transacted after registration. While sale-building, developers should provide housing-consumers the condominium declaration and its accessories (Accessories refer to floor arch plan and profiles). The housing-consumers who certificate (accept) the article in the condominium declaration and sign a sales contract with developers, will be contracting parties or signing parties of the condominium declaration and its accessories in law. Thereupon the condominium declaration and its accessories produce legal binding force to the sellers and the buyers. After the finish of the sales of the housing units in the property district, the condominium declaration and its accessories will be main agreement or contract (correspond to Owner Management Protocol) between all owners of the property district.

3.3 Brief summary

Through summarizing the above content, we can conclude that Uniform Condominium Act demand developers to draw up a paper of condominium declaration by law before sales, the condominium declaration must includes compulsory contents which are regulated by this law, which is that the condominium declaration must illustrates the information about exclusive parts and common parts of condominium ownership in detail, then the commercial houses can be transacted after registration of the condominium declaration. Developers must express the condominium declaration to the housing buyer in the transaction, if the housing buyer accepts the condominium declaration and signs the transaction contract with the developer, he (or she) will be the contracting party of the condominium declaration and its accessories in law. Thus America has eliminated the information asymmetry of condominium ownership that exists in the developer and the housing buyers in the maximum through the law, whether adverse selection or moral hazard.

4. Circumstance of China

Commercial housing sales in China include commercial housing cash sales and commercial housing presales. So the stage of commercial housing presales is the start of the stage of sales. Information asymmetry seriously exist at the stage of commercial housing presales about condominium ownership in China according to investigation of relevant laws, such as City Immovable Administration Law (issued by 1995), Commercial Housing Sale Administration Law (issued by 2001), City Commercial Housing Presale Administration Law (issued by 2001), City Immovable Development and Management Administration Regulation (issued by 1998), Real Estate Management Regulation (issued by 2007) and so on. It is mainly shown in two aspects.

4.1 Housing buyers not know the scope of exclusive parts and common parts at the stage of presales

According to City Commercial Housing Presale Administration Law and Real Estate Management Regulation, developers only present Commercial Housing Presale License and express Provisional Management Protocol to housing buyers at the stage of presales, and both sellers and buyers should reach a written contract of agreement on the Provisional Management Protocol when the sale contract is signed, in which the article 22 of Real Estate Management Regulation about the content of Provisional Management Protocol stipulates that the construction unit should draw up a paper of Provisional Management Protocol before the stage of property sales, and should make convention by law on items which include use, maintenance and management of the related property, common interests of owners, obligation which should be performed by owners, responsibility that should be undertaken by owners when they violate the provisional management protocol and so on. Provisional Management Protocol which is drawn up by the construction unit must not infringe the legal rights of property buyers. The other articles of Real Estate Management Regulation do not regulate anything about the content of the provisional management protocol, and other laws also do not have concrete regulations for this point.

So we can conclude that Real Estate Management Regulation and other laws lack of concrete regulations about explanation of scope of exclusive parts and common parts in the provisional management protocol, which makes practice lack of guidance seriously and also causes housing buyers difficult to know those information.

4.2 Transaction contract of commercial house lack of definite engagement for exclusive parts and common parts

According to the article 10 of City Commercial Housing Presale Administration Law, the transaction contract of commercial housing should clarify these principal contents: appellation or name of the parties; address of the parties; basic situation of the commercial house; sale mode of the commercial house; determination mode of the price item of the commercial house; total price item and payment form and payment time of the commercial house; delivery conditions and date; commitment of decoration and equipment standards; delivery commitment of supporting infrastructure of water supply, power supply, heating supply, gas, communication, road, greening and so on; delivery commitment of public facilities and related rights and responsibilities; property ownership of public matching buildings; treatment method of area discrepancy; related matters of dealing with property right registration; methods of resolving

disputes; liability for breach; other matters which appointed by both parties.

According to analysis on the article 10 which is mentioned above, as for exclusive parts and common parts, the transaction contract only illustrates the property ownership of the public matching buildings, namely it only illustrates a part of condominium ownership. As to other parts it does not explain clearly such as scope of common parts of single building, boundary of exclusive parts, appointed common parts and so on. Because the contract does not reach an agreement about those, if the property district is developed in stages, developers may change the scope or location or share of common parts to a great extent from their own interests so as to damage the rights of owners finally.

5. Enlightenment of Uniform Condominium Act

In conjunction with Uniform Condominium Act of American and circumstance of China, the author believes that China should demand developers clearly explain exclusive parts and common parts of the whole property district in the provisional statute before sales by law regulations, such as boundary of exclusive parts, scope of common parts and so on. If the property district is developed in stages, developers should explain the further development rights that may influence exclusive parts and common parts, such as adjustment of agreed common parts which will be built in the future, adjustment of location of common parts and so on. The provisional statute should be expressed to housing buyers before the sales, and both the sellers and the buyers should reach a written contract of agreement on the provisional statute when the sale contract is signed. At the same time, the content of exclusive parts and common parts would be agreed in the sales contract in order to produce the credit relationship between sellers and buyers. Anyone who changes it unilaterally will bear legal liability. Consequently, the behavior of developers of adverse selection and moral hazard in the transaction of exclusive parts and common parts will be eliminated by government regulations, which makes the consumer rights be protected better.

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Analysis of the Actuality of Shanxi Provincial Coal Miners' Labor Rights and Interests from the View of the Labor Contract Law of PRC

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Abstract

Shanxi Provincial coal miners' labor rights and interests are damaged badly, which is worrying in recent years. Through the face to face interviews with principals of miners, labor unions, coal enterprises, labor and social security bureaus in Taiyuan City, Jinzhong City, Linfen City and Jincheng City in Shanxi Province, the first-hand materials were acquired. From the view of the Labor Contract Law of PRC, first the actuality of Shanxi Provincial coal miners' labor rights and interests was expounded in the article, then the reasons about the existing problems were analyzed, and finally the reasonable advices were proposed, which aim for perfecting laws and regulations, enhancing miners' consciousness of maintaining rights, regulating the behaviors of coal enterprises, and protecting miners' rights and interests from many aspects.

Keywords: Minors' rights and interests, Labor Contract Law, Advices

1. Introduction

The Shanxi provincial coal miners' labor rights and interests have caught the eye of the public for a long time. Frequent coal accidents, weak social security system and arrears of wages are appalling (Ren, 2008). According to spot checks, until the late of 2001, 70 state-owned key coal enterprises owed on-the-position workers' salaries 6.333 billion Yuan, and the phenomena are particularly bad in Shanxi Province. In 2006, the arrears of wages that the Liujialiang Mine in Xiang County of Shanxi Province owed about 200 peasant-workers from Sichuan, Hubei and Chongqing achieved about 1.8 million Yuan. In three years from 2005 to 2007, there were 1205 cases of arrears of wages to be investigated and processed, and 174 cases disobeying the minimum wage regulations to be checked, and 53.03 million Yuan involved in these cases, and 21.8 thousands present-workers (Shanxi News Network, 2008).

The Labor Contract Law of PRC brought goods news for the protection of the coal miners' rights and interests which were worrying by the public (Ye, 2008). The law further compulsorily provides labors' rights and interests, and was well received by labors. The coal miners occupies large proportion in the labor group, and Shanxi Province is one of largest coal producers in China, so the survey of miners' rights and interests in Shanxi Province can be used for references for the protection of the labor's rights and interests in various industries in China. This survey will follow the big trend that various subjects in the labor relation seriously carry out the Labor Contract Law, go deep into the coal industry in Shanxi Province, and study the actuality of coal miners' labor rights and interests from the view of the Labor Contract Law.

Based on field survey, combining with the legislation actuality of China, the first-hand materials of Shanxi provincial miners' rights and interests protection are acquired, the reasons of improper implements are analyzed, and the deficiencies and limitations of the legislation are pointed out, and relative legislation advices are proposed, and some opinions are proposed for many subjects in the legal relation such as the labor and social security bureaus, coal enterprises, labor unions and miners to seriously implement the law in the article. The survey is expected to offer active functions for the protection of the laborers' rights and interests in China.

2. The expatiation of the actuality of Shanxi Provincial coal miners' rights and interests from the view of the Labor Contract Law

The actuality of Shanxi Provincial coal miners' rights and interests is good in general, and the Labor Contract Law has been implemented to large extent and miners' legal rights and interests have been protected more, but many problems still exist.

2.1 *The signing of written labor contract is still not optimistic*

(1) The signing form of contract has no legal force.

Tens of workers sign one contract, and even if the labor contract is signed, but that is not the labor contract of labor and management according with the Labor Contract Law, and it is not the collective contract. The so-called collective contract means the written agreement that the labor union or the deputy elected by employees negotiates about labor salary, work condition, work time, vocation, labor security and sanitation, and social security welfare based on equal status according to laws and regulations and signs with the employer (Wang, 2008). The employment labor contract should confirm the right and obligation relationship between individual laborer and employer, and the collective contract is the same with all labors in the employing enterprise, i.e. one collective contract is applicable to each laborer in the employing enterprise. For the contracts without legal force, they should be defined by that the labor contracts are not be signed, and the employing enterprise should pay the salaries for workers according to the article 82 of the Labor Contract Law and the Regulations for the Implementation of the Labor Contract Law. However, at present, the principals of the coal enterprises have not performed the regulations and the supervision departments also wave aside.

(2) Most miners have not held the signed contract.

The contract should have two copies and the laborer and the employing enterprise hold one piece each. But in fact, only 7.79% miners in private enterprises hold contracts, and 98.41% miners in state-owned coal enterprises hold contracts.

(3) The signing of the open-ended contract is bad.

Article 14 of the Labor Contract Law provides the signing conditions of the open-ended contract. According to the interviews, most miners signing the open-ended contract belong to the situation of the first clause of the first item. In 203 miners in the interview, 80 miners have worked for above ten years continually, and 68 mines of them signed the open-ended contract.

The execution of the clause item of the first item is not good. Taking several private coal mines in Jincheng City of Shanxi Province as the example, about seventy percent miners signed the three-year employment contract or the five-year employment contract, and when the contract expired, the former fixed term contract continued. Though the miners required the enterprise to sign the open-ended contract, but the enterprise didn't sign it according to the laws.

(4) Various work types abandoned by the laws still exist, which invaded miners' rights and interests.

In the interview, some inexplicable and abandoned work types such as "casual laborer", "normal laborer", "contract laborer" and "fixed laborer" were found.

Chen is the employee of certain Coal Ltd. in Yangcheng County of Jincheng City of Shanxi Province. The "casual laborer" and "normal laborer" said by Chen are the contract laborers with different fixed terms, but the social insurance could not be shared by them equally, and same work can not obtain same salaries, which disobeys the principle of justice.

After the Labor Law of RPC was implemented, there are not the differences among "fixed laborer", "casual laborer" and "normal laborer" in enterprises. Only if the labor relationship is established according to the laws, miners and coal enterprise should sign the labor contract, and the labor relationship can be protected and adjusted by the Labor Law, and the insurance and welfare should be transacted according to the contract, the regulations of enterprise or the laws. Jincheng City of Shanxi Province is still distinguishing "casual laborer" and "normal laborer", which induces that same works can not obtain same salaries.

2.2 *Coal enterprises still take deposits from miners*

The ninth article of the Labor Contract Law provides that when hiring an employee, an employer may not retain the employee's resident ID card or other papers, nor may it require him to provide security or collect property from him under some other guise (Ma, 2008).

In the interview with Zhang, the section chief of labor and supervision section in Huozhou City of Shanxi Province, he said, some coal mines in Shanxi Province such as the Huozhou Municipal Coal Group Ltd., 60% miners were from other places, which indicated that the fluidity of miners was very high, so the enterprise employing outlanders would suffer certain risk. The enterprises should offer abodes, TV, bedding and other living things, and if they didn't take deposits, some miners would leave with the properties offered by the enterprises, which would induce the losses of enterprises. So in this industry, the guild regulations of deposit formed. Whether the deposit can be returned is decided by miners' coverage and ability to negotiate with the enterprise, and the coal enterprises will not actively return these deposits.

2.3 *The signed employment contract has not protected miners' rights and interests in fact.*

At present, the supply of the labor force exceeds demand in China, and the laborers' strength has a wide gap with the strength of the enterprise, especially in the labor intensive industry, the coal industry. The employing enterprises secure

in the knowledge that they have strong backing, and the contract can not ensure the implementation of laws and regulations (Wang, 2008).

(1) The phenomenon that the enterprise terminates contract at will still exists.

In 2008, by means of the three-exceeding regulations (exceeding ability, exceeding employee and exceeding intension), certain coal Ltd. in Yangcheng County in Jincheng City of Shanxi Province fired its employees at will because of some indispositions such as small disease of the body. According to the article 39, 40 and 41, and the article 18 of the implementation regulations, only in 13 kinds of situations, the employing enterprise can terminate the contract, but the above unemployment didn't accord with one of these 13 kinds of situations, it was obvious that the coal enterprise was arguing irrationally. And even if the employing enterprise terminated the contract, they should accord with the programs provides by the article 43 of the Labor Contract Law. So the contract termination between the coal enterprise and miners didn't accord with legal conditions and programs.

(2) The phenomenon of overtime was serious, and the call-back pay still lacked.

In the article 8 of the signed labor contract, party A (coal enterprise) should ensure party B (miner)'s right to rest according to the laws, and party B enjoys legal holidays and other vocation rights such as going home to visit his family, marrying and taking part in his family's funeral, procreating and annual paid vacation in accordance with the law. After the "Regulations about Employees' Work Time of State Council" was put in force at May 1 of 1995, "five-day workweek" was carried out universally, and enterprise employees can not work over 40 hours each weak, and they should rest for two days each weak (Drafting Group of Labor Contract Law of PRC, 2007). For the enterprises or posts which perform the comprehensive time, the employees should be ensured for one-day's rest time each weak in accordance with the article 38 of the Labor Law of PRC.

In the interviews, up to now, miners still have not enjoyed the two-day weekend, home leave and public holidays, and they had only three-day holiday in the Spring Festival. They were only paid in the day when they worked in the day. In 365 days in one year, if they had no illnesses, they should work for 365 days, and except for the first day, second day and third day in the Spring Festival, they could not be paid for overtime. Mr. Hang, one coal miner in the Huozhou Principal Coal Group, has been working for 23 years like that.

(3) The insurance and welfare are still deficient.

In the coal industry, the hourly wages is adopted, which wants to encourage working more and getting more. The young miners always get more than the miners who have worked in the mine for 30 or 40 years. But those old miners can not enjoy their social security and welfares what they should enjoy and their working enthusiasms are influenced seriously.

The work injury insurance adopts the unregistered insurance system, and the insurance proportion is 50%, for example, there are 100 miners, and only 50 of them are insured in the work injury insurance, and if the accident happens, the miner who is injured enjoys the insurance.

3. Analyzing the reasons of the problems existing in the actuality of Shanxi Provincial coal miners' labor rights and interests from the view of the Labor Contract Law

3.1 Reasons from miners

(1) Miners are in a devil of hole, and they have no power to strive for rights to the coal enterprise. At present, the supply of the labor force in China exceeds the demand, and the phenomena that strong capital invades weak laborers' rights and interests can be found everywhere, which specially pops out in the coal industry with intensive labors. For the group which is employed difficultly, it is not easy to find a job, and if they oppose the will of coal enterprise, they will lose their jobs, so they will not excessively run the legal justice, and the "empty promise" from the coal enterprise will occur repeatedly.

(2) Miners' quality is low. In the survey, 100% miners who work overtime could not obtain the call-back pay, but the data indicated that they didn't realize that their rights to obtain the call-back pay were invaded. Therefore, the laborers' quality largely influences their right-safeguarding.

3.2 Reasons from the labor union

The labor union existed in name only. According to the Labor Contract Law, the labor unions should supervise and urge the signing of the employment contract, the elimination of the contract and the settlement of the dissension. But in fact, they are isolated with miners. In miners' eyes, the labor unions were the logistic units, and they only provided quilts and safety handbooks, and organized some amusements, and miners didn't know clearly what the labor unions should do. Miners didn't contact with the labor union on the floor at all.

Mr. Cai, who was one miner of Shanxi Provincial Huozhou Municipal Coal Group, was transferred to the labor union because he was good at the act two years ago, and his work every day was to clean the floor and wipe the desk, and get on the internet in QQ. He said with self-mockery, "sleeping after eating, charging after waking", and "to work is to have

meeting, to mediate is to get drunk”.

3.3 Reasons from the coal enterprises

To escape the responsibility, the principal of the coal enterprise never returned the contracts to miners. If the dissension happens and miners' identity needs to be proved, though miners signed the contracts, but they could not hold them, so the validation of the identity may be the problem, and if the coal enterprise sticks to these miners without contracts are not the employees of the mine, miners can only do nothing. Though the article 14 in the Labor Contract Law provides that “If an employer fails to conclude a written employment contract with an employee within one year from the date on which it starts using the employee, the Employer and the employee shall be deemed to have concluded an open-ended employment contract,” but that is only based on that the labor administration departments have investigated the fact. In fact, if there are no departments to check, mine-owners always thought that they are too lucky to give miners their contracts.

In the late of 2008, the notorious “sealing-mouth charge” was exposed, which happened in the Huobao Mine of Huozhou Coal and Electric Group. Cai's mine also belonged to the Huozhou Coal and Electric Group. The “sealing-mouth charge” was not only one accident and it happen in Huobao Mine by no means. The exposing of the accident of “sealing-mouth charge” was not simple extortion, and it incisively and vividly embodied the infamy that the coal enterprises cozened the mine disaster.

At the same time, to restrain miners to learn the Labor Contract Law, some mine owners put the banners and pictures about the Labor Contract Law on the devious corners, and miners would not saw about them, which induced that the drumbeating of the Labor Contract Law performed practically no function.

3.4 Reasons from the labor and social security bureau

First, the drumbeating of the Labor Contract Law became a mere formality.

(1) The drumbeating form is too high to be popular, and it doesn't accord with miners' cultural degrees. Most miners are farmers with learning experiences in elementary school and junior high school. And in the course of lectures about the Labor Contract Law, they always slept when they could not understand, which induces the learning effects are not obvious.

(2) The drumbeating only emphasizes catchwords and neglects contents. Some courses and banners can not make miners grasp the essential regulations in the Labor Contract Law, so miners' understanding to the Labor Contract Law is only limited in the surface and the concept of the article. The coal miners' cognitions to the Labor Contract Law are seen in Figure 2.

Second, the supervision to the coal enterprises is weak, and the supervision of the labor bureau becomes a mere formality. When the labor bureau checks the signed contract in the mines, it only checks the holding contract in the office not in miners' hands. The un-strict execution of the laws induces miners can not hold the contracts and the supervision can not be implemented really.

4. Advices to protect Shanxi Provincial coal miners' labor rights and interests

4.1 Advices for the legislation

(1) Advice to the 5th items of the 46th article of the Labor Contract Law

The item (5) sub-article 1, article 46 of the Labor Contract Law provides that “The employment contract is a fixed-term contract that ends pursuant to item (1) of Article 44 hereof, unless the Employee does not agree to renew the contract even though the conditions offered by the Employer are the same as or better than those stipulated in the current contract; the Employer shall pay the Employee severance pay”. That means that when the employing enterprise maintains or enhances the appointed conditions in the labor contract to renew the labor contract and the laborers disagree to renew, the employing enterprise doesn't pay severance pay to the laborers. Except for that, when the term of the labor contract terminates, the employing enterprise should pay severance pay to laborers. In actual practice, because the work environment is cold, many well miners easily fall ill such as rheumatism and waist and leg pains, and they always turn to other works after tens years. Their body conditions can not be changed, so they must leave this industry when they have worked for tens years, which is clearly known by mine owners. If mine owners clearly know that miners want to leave, and to avoid the severance pay, they intentionally enhance same or higher contract conditions to detain miners, and miners only disagree to renew the contract because of the body conditions, so mine owners' one word can save their thousands Yuan of severance pay, which is so unfair to miners.

At the same time, for the instance in the first item of the 40th article, the employing enterprise should extra pay one-month salary to laborers, but for above situation, miners don't engage in original works, and the employing enterprise needs not to arrange other works, which reduce the burden of the mine in fact, but the fact is that miners can not obtain any severance pay.

If the regulation in the Labor Contract Law is followed, mine owners' asking while knowing the answer will make miners lose their jobs and corresponding severance pay. Therefore, the regulation should be modified by "when the labor contract expires, the contract terminates".

(2) Advice to establish concrete annual paid vacation system

The 45th article of the Labor Law issued in 1995 provides that "The State institutes the system of annual paid vacation. A worker who has worked for more than one year shall enjoy the annual paid vacation. The specific regulations in this regard shall be worked out by the State Council". But up to now, the State Council has not enacted relative regulations and laws.

In Guangdong, the worker who has worked in one unit above one year can enjoy the paid annual vacation system, and the vacation time is computed according to the length of service in the enterprise, and the vacation time is 5 days when the working time exceeds one year but doesn't exceed five years, and the vacation time is 7 days when the working time exceeds five years but doesn't exceed ten years, and the vacation time is 10 days when the working time exceeds ten years but doesn't exceed twenty years, and the vacation time is 14 days when the working time exceeds twenty years.

Up to now, the regulations about the vacation time in the Labor Contract Law and its implementation rules are still blank. The execution measures in Guangdong Province should be extended to the whole nation.

(3) Persisting in the principle that the enterprise should first help the employees in the production line to hand in their social insurances

When Shanxi Province institutes relative regulations about the social insurances of coal industry, it is advised to persist in the principle that the enterprise should first help the employees in the production line to hand in their social insurances. The employees in the production line are defined by the industrial regulations. According to the interview with local labor and security departments, the reason that many enterprises didn't hand in the insurances was that their capitals were deficient. To encourage and guarantee more miners to obtain insurances, the principle inclining to the employees in the production line should be advocated, and under the situation that the enterprise lacks in enough capitals, it should first hand in social insurances for the employees in the production line.

NPC & CPPCC convened in March of 2008 turned on the establishment and perfection of social insurance again, and the networking system of the "all-purpose card" of social insurance in off-site would be established. However, that can not ensure the social insurance rights of the laborers in the production line, so the principle that the social insurance should incline to the employees in the production line should be still advocated.

4.2 Advices for the labor and social security bureau

(1) The labor bureau should develop the home-visiting working mode.

Various principals in the labor bureau are hoped to go deep into miners, establish miner family basic information records including address and contact numbers, and find out real information in miners' homes at the rest days, which could suit the remedy to the case and get twice the result with half the effort.

(2) The legal drumbeating should adopt the mode of cases.

Various labor and social security bureaus and various coal enterprises are advised to use the real case to explain the laws when they preach regulations and laws, utilize vivid examples to explain how to use the laws to solve problems, and the legal program "China Court" suiting both refined and popular tastes is commended to be the video drumbeating material.

(3) The legal training to the mine owners should be strengthened.

Many mine owners exclude the Labor Contract Law because they have not understood the law deeply and they thought that the law seriously accepted the face of miners. The labor bureau should take not only miners but mine owners as the drumbeating objects, and especially strengthen the training to the coal mine principals.

To implement the Labor Contract Law, it is very important to establish coal mine principals' correct cognitions about the law.

4.3 Advices for miners

Many miners more know well the safety regulations and laws, but the pamphlets of the Labor Contract Law are put on the shelf. Aiming at this problem, following advices are proposed for miners.

(1) Miners should take out more time to learn laws, and be good at communicating what they have learned with others, and really grasp the rights what they should enjoy and the obligations what they should perform as the laborers.

(2) Miners should supervise and urge the work of the labor union to strengthen its function.

Many miners thought that "we are working under the well, but the labor union works on the floor, both of us can not

contact”, which could reflect the incapacity of the labor union and the mockery to the labor union. However, miners should abandon this kind of idea, actively contact with the labor union, reflect the working situation, take the labor union as the platform to present the opinions and claim rights with other miners. And miners should supervise and urge the labor union to perform its obligations.

(3) Miners should grasp multiple relief approaches.

Multiple relief approaches can help miners to maintain their own rights. The proportion (seen in Figure 3) indicates that most miners are more inclined to debate with the mine owners, and there are one fifth miners who don't know how to do, which make the relief approaches become very narrow, and the opportunity to strive for rights is limited. So miners should grasp multiple relief approaches.

(4) Miners should join up to establish the industrial alliance.

Miners should establish an alliance or organization which can really represent their rights and benefits and belong to themselves. The alliance should really maintain miners' vital interests, come from miners and go to miners, popularize laws, follow laws and maintain the rights by laws.

5. Conclusions

The final approach to protect miners' labor rights and interests is to make the approach gradually go to the system governed by law. Though the protection to the laborers' rights and benefits on the legislation layer have been perfect to some extent, but the implementation of the Labor Contract Law are suffocated frequently, and the damages of laborers' labor rights and interests in Shanxi are still very serious. To solve these problems, the Labor Contract Law and its implementation regulations should be further modified, and various levels labor and social security departments should strictly execute the laws and enhance their execution power and efficiency, and establish the confidence in miners' hearts, and the labor unions should renew their essential and carefully serve for miners, and obtain miners' identity, and coal enterprises should employ miners by the law and win miners trusts again, and laborers should try to enhance their own qualities, renew their ideas in time, and have the courage to maintain their legal rights and interests by the legal access.

The problems existing in the actuality of Shanxi Provincial miners' rights and interests still generally exist in various industries, especially in other labor intensive industries. The research about the actuality of Shanxi Provincial miners' rights and interests can offer some necessary data and research methods for other researches about laborers' rights and interests in various industries, and many advices proposed in the article are good for being further promoted and practiced. The in-depth survey is hoped to promote the protection to Shanxi Provincial miners' rights and interests to some extent, and further improve the protection to laborers' rights and interests in the whole nation.

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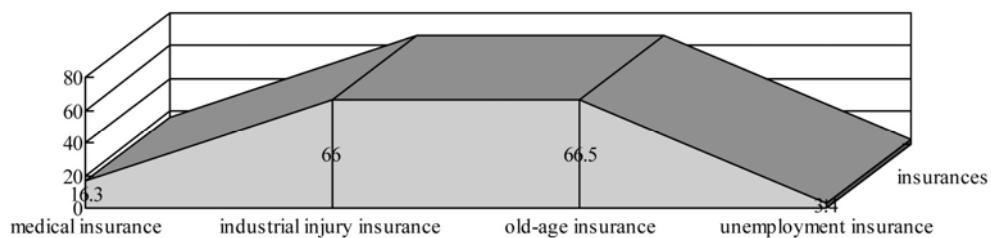


Figure 1. Coal Miners' Proportions of Various Insurances in the Survey

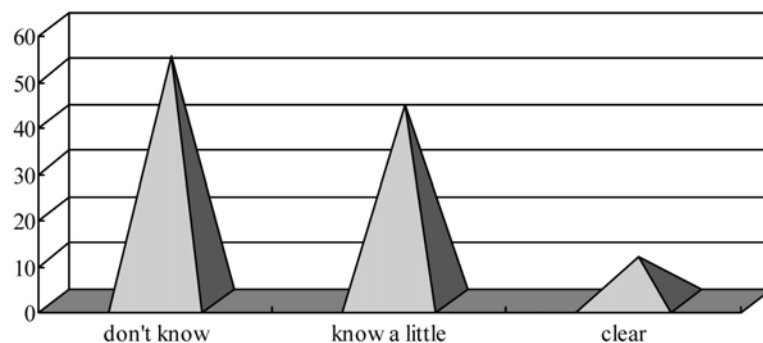


Figure 2. Coal Miners' Cognitions to the Labor Contract Law (%)

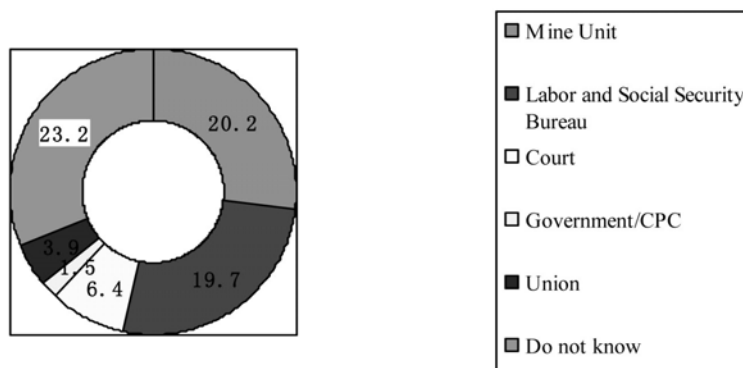


Figure 3. The Proportions of Various Solutions for the Dissension Solution in Coal Miners



The Impact of Singapore's Military Development on Malaysia's Security

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Abstract

In this intense era of military and defense development in South East Asia, Singapore has emergence as the fastest country in the development of military capabilities. The rapid military development that started in 1965 has made Singapore become the strongest and finest in military and defense compared to other Southeast Asia nations. Singapore's decision to be independent from Malaysia has forced it to be self-reliant, especially in terms of security and defense. Singapore adopted the approach to develop and strengthen its defense and military system after achieving independence in 1965. Its increasing economic development in 1990 has influenced the military development process and defense system. This rapid expansion has made Singapore emergence as the strongest and most advanced in military capabilities country in the Southeast Asian region. The offensive defense doctrine practiced such as forward defense, poison shrimp, pre-emptive strike and strategic weaponry ownership had raised concerns among leaders in the Southeast Asian countries. At the same time, Malaysia has also taken action to speed up its military development, diversifying the defense doctrine including total defense, complete military with modern and sophisticated defense equipment. It is speculated as a result of the security impact that Malaysia face from Singapore's military development. Hence, this study tries to elaborate the impact or security implications on Malaysia resulting from Singapore's military development from the Malaysian military perspective.

Keywords: Military Development, Security threat, Regional security, Strategic defense

1. Introduction

The history of the Singapore's military development has essentially been conducted before the separation of Singapore from Malaysia in 1965. However many researchers agree that the military development in Singapore has been conducted during the British rule. According to Huxley (2000:1-4) the initial Singapore's military development was aimed to protect the British's autonomy, in which the latter controlled the island of Singapore as the administration centre particularly in Southeast Asia. The importance of Singapore as an island port had influenced British to build a defense system as a move to protect the island. Since 1927, Singapore has owned system of defense which includes the army, navy and air force. Within 1948-1960, Singapore's military was controlled by two limited battalions, Singapore Infantry Regiment (SIR) and the navy force which is under the Malayan Naval Forces (MNF) base in Woodland, Singapore and the air force which is known as Malayan Auxiliary Air Forces (MAAF). Yet at that period, these defense forces known as SIR, MNF and MAAF are defense forces that were under the authority of the Federation of Malaya.

Singapore has rapidly developed its military forces since 1965 upon its separation from Malaysia, as an independent nation under the leadership of Prime Minister Lee Kuan Yew (Nasibah Harun, 2005:17). Realizing that in terms of geography condition the nation is small and its defense force is limited, Singapore was forced to rely on British to ensure its security through the establishment of Anglo Malayan Defense Agreement (AMDA) in 1957 and Five Power Defense

Arrangement (FPDA) in 1971 (Chamil Wariya,1989:49; Chin,1983:chapter3&4). During that period Singapore has taken the initiative to draft and build its military and defense system. SIR was changed to Ministry of Interior and Defense at the end of 1960 and the administration of all three arm forces became Singapore Army (SA), Singapore Navy (SN) and Republic Singapore Air Force (RSAF) and placed under one authority called Singapore Armed Forces (SAF). While since 1970 the Ministry of Defense Singapore (MINDEF Singapore) was established and Ministry of Home Affairs was founded to manage the internal affairs (Huxley, 2000:37-40).

2. Singapore's Military Development and Defense Process

The right after independence and due to the human resources scarcity in military forces, Singapore has decided to set up a volunteer organization known as People's Defense Forces in 1966 to strengthen the force of 6 battalion army at that time. Singapore also introduced the National Service program base on the national service model applied by Israel in 1967 that obligated 18-year-old citizen or permanent resident to join the National Service. As a result, the total force of Singapore's military doubled to 12 battalions with the increase of 6 more army battalion from the National Service at the beginning of 1972 (Yong,2001:286-288). It is a process to make sure Singapore's objective to form an army of citizen is achieved through the national service program. To ensure that the planning and the defense system are well-built, Singapore has brought in military experts from Israel, Britain and Sweden to train and help develop its military capabilities since 1965 (Hussin Mutalib,2001:41). These experts are responsible in providing the training and planning to Singapore's military officers at the military training institute known as Singapore Armed Forces Training Institute .

During 1965-1975, Singapore implemented the defense doctrine which is defensive through the approach of protecting the country from threats using the deterrence system also knows as the doctrine of *poison shrimp*. This doctrine warns enemies not to take any action that can affect Singapore's security and sovereignty. It depicts the readiness of Singapore to act upon enemies who threaten its security and also popular through the phrase: "eat it and you may die" (Mauzy and Milne,2002:170). After the United State's defeat in Vietnam in 1975, Singapore started to practice a defense doctrine similar to the defense doctrine of Israel which is more offensive in nature and known as preemptive strike (attack before the enemy strikes base on accurate intelligence information) using the air force, land force (amour), landing and mobility. Furthermore, Singapore Armed Force (SAF) received help from Israel Defense Force (IDF) who has introduced the defense doctrine named forward defense that stresses on the importance of air defense development, total military and sustainable defense. At the same time, Singapore has also reinforced its security system by practicing the dependence on superpowers policy to make sure Singapore receives support (Tan,1998:458).

Since 1980, Singapore has made changes in policy and ownership of sophisticated and strategic armaments parallel with the doctrine of defense that it has applied. It too is an approach to ensure the safety and considered as the process to guarantee Singapore's survival. During the 1980s, Singapore has possessed modern weaponry such as 270 light tanks and Main Battle Tanks (MBT), 720 carrier vehicles and artillery cannons 155mm (land), 26 F-5 battle aircrafts and Skyhawk aircrafts, F-16, Bloodhound missile, RBS-70, Rapier, Surface-to-Air Missile (SAM) and Airbone Early Warning system type E-2C Hawkeye. Singapore even has successfully produced its own aircraft called Super Skyhawk at the end 1980s. Huxley (2000:459) explained, around 1991 Singapore military power is far more establish compare to Malaysia and Indonesia. Military development in Singapore during 1990s involved the purchase and ownership of weaponry such as light tanks and Main Battle Tanks (MBT), F-16 aircrafts, helicopters, missiles, modern artillery equipment and submarines. Singapore's progress in the field of defense has proven its ability to produce Infantry Fighting Vehicle (IFV) in 1998, making it the first Southeast Asian country to successfully manufacture an IFV. In 2000, Singapore has already diversified its modern defense equipment that was imported from various countries like the United States, Russia, Sweden, Israel and France. Among the weaponry that Singapore possess is 12 AH-64 D Apache Longbow helicopters, 20 F-16 aircrafts and aircrafts with Dassault Aviation Rafale technology.

Singapore has also ordered as many as 6 Frigate La Fayette ships from France and by year 2004 Singapore is scheduled to receive 4 SSK submarine (please refer to the schedule below). Directly this will make Singapore become the strongest and the best navy force in Southeast Asia. According to Tan (1998:459), Singapore's strength at this moment is the best compared to other countries in Southeast Asia. Mazy and Milne (2002:169) said the rapid development and increase on allocation of expenditure has placed Singapore as a Southeast Asian country which owns the best defense and security system in the region of Southeast Asia.

Dibb (1997) stated that a countries RMA process in Southeast Asia is still vague except Singapore's. This is because since 1992 Singapore have started envisioning and directing its military to confront the challenges of the 21st century, parallel to the development of current technology. Realizing the current development of technology and world threats, Singapore have started to take measures in ensuring that the military moves together with technological development and current threat especially when encountering electronic warfare (EW). For example, the widespread usage of electronic combat radio in its military operation has directly shown Singapore's seriousness in applying EW during military operation activities such as survey, disruption and deception of the enemy (Tan,1998:467).

Singapore's seriousness has brought changes in its military RMA and it is visible through the efforts by trying to apply technological advancement that completes high technology military. For example the application of C3I's that is to Command, Control, Communication and Intelligence in its military with the use of electronics. It is based on the military's need of adaptation and technological advancement that could strengthen national defense and security system. The C3I application is especially noticeable through the use of electronic equipment in performing military operations including spying or investigating by utilizing the airborne early warning (AEW), unmanned aerial vehicle (UAV), with high tech aircraft surveyor, satellite, ground base radar, use to decide target through computer usage, purchase of aircrafts and other high technology defense equipment (Brooke,2004:4-7).

3. Malaysia's Concern on Singapore's Military Development

This military development has indirectly raised the concern of Singapore's neighboring countries, Malaysia in particular. Singapore military development is seen as a security threat to Malaysia. Rustam A. Sani (1998:23) stressed bilateral issues between the two countries such as the issue of water, newspaper, border invasion, territorial claims, racial problem and other lingering issues has influenced how Malaysia views the security threats from Singapore. According to Sarimah Othman (1998:15), there were reports in the Malaysian press regarding Singapore actions on the bilateral relation with Malaysia and has the purpose to create a strategic enemy (Malaysia) to achieve a higher purpose. Mohd Zuki Pileh (2003:36) quoted the Malaysia Foreign Minister statement, Datuk Seri Syed Hamid Albar concerning Singapore's actions regarding the bilateral ties:-

"They (Singapore) want to show when they separated from Malaysia, they were a small and weak country but now they have the ability to defeat Malaysia. Therefore, Singapore thinks they are more superior".

In the 1990s and 2000, Malaysia has started to modernize its armed force to be ready to face any threats from aggressors. Malaysia's Defense Minister, Datuk Sri Najib Tun Razak has stressed that the modernization efforts of Malaysian military will focus on mobility, fire power, increase the amount of battleships and possessing the Airborne Warning and Control System (AWACS) (*Asian Defence Journal*, Oktober 2003:16-23). According to Jayasankaran (2002:20) the Malaysian military development is Malaysia's reaction on Singapore rapid military progress. Malaysia has also taken measures in acquiring weaponry which are multi-function or defensive and offensive in nature. The purchase of FA-18 Hornet aircraft, MIG-29N Fulcrum, Hawk MK108, SU-30MKM, PT-91M tank, Scorpene's submarine, close range missile launcher ASTROS II, G5 MK III, Styer portable rifle among others are Malaysia's military development process to face any security threat (Nasibah Harun,2006:3-6; *Tempur*, July 2003:39-40). Badrul Azhar Rahman (1998) stated that:-

"Statement of Singapore's Minister of Trade and Industry, Brig Jen. Lee Hsien Loong, that Malay are not allowed to become pilot and hold high rank position in Singapore's military forces because concerned over their loyalty... indicates that Singapore is getting ready for war".

Hamdan Hj Abu (2003:10) quoted former Malaysian Prime Minister's statement Tun Dr Mahathir Mohamad relating to Singapore's threat on Malaysia's security:-

"...there is a country (Singapore) who has declared Malaysia as its battlefield...there is a proud country (Singapore) who claimed they have the right to take preemptive strike and forward defense towards our country. We promise if anyone tries to invade our country's independence with action such as preemptive strike or forward defense, they will get what westerners call a bloody nose".

4. Malaysia's Security Impact Analysis

4.1 Security threat

Singapore's military development and defense system in its early stage was initially defensive in nature, since 1971 Singapore has practiced the poison shrimp doctrine. This doctrine perceived as defense doctrine extracted from the Israel's doctrine of defense which affirms that Singapore warns any aggressor not to attack them. This doctrine takes into account the regional geo-political condition similar to Israel's position which is surrounded by Arab countries. This doctrine is only a warning towards aggressors, however if attacks or threats are thrown at Singapore then the aggressor are forced to face Singapore reaction. The emergence of offensive doctrines known as preemptive strike doctrine is Singapore's preparation to attack the enemy if the enemy is believed (base on accurate intelligence information) to try and threaten its security. Singapore will not attack any country Malaysia in particular, as long as Malaysia does not threaten the security of Singapore. This doctrine is categorized as a need to warn the enemy not to invade or attack Singapore. Hence, to complement the doctrine of preemptive strike, Singapore has implemented another defense doctrine called forward defense whereby the military development and defense must always be advance. This doctrine affects planning and war strategy, hence, Singapore would always need to stay ahead in the development of military in terms of physical and non physical features.

According to Arrifin Omar (2007) Singapore will not attack and threaten Malaysia's national security. It is due to Singapore will take into consideration various aspects, not only from Malaysia's military aspect but the economical aspect

(especially Singapore's investment in Malaysia and Singapore's own economy) and the geography of the region in case it opts for war. Dent (2001:1-23) stated the survival of Singapore does not solely depend on the power of its military capability but also on its economy. As a nation with limited resources, Singapore emphasizes more on its economic security that relies heavily on foreign country. Singapore would be forced to pay a high price if it opts for war because its economic prosperity depends largely from foreign countries, Malaysia in particular. If Singapore attacks or strikes Malaysia, then Singapore's economy and its investment dependence on Malaysia will surely be affected. It directly will jeopardize Singapore's security and survival. In evaluating whether Singapore can cause a threat to Malaysia, Ahmad Ghazali Abu Hassan (2007) stated that:-

"Singapore is not the main threat of Malaysia's security and sovereignty. Basically, Singapore is the second-largest investor in Malaysia after United States. The total export to Malaysia is believed to be 15.8% from the whole of its total export worldwide. The total imports from Malaysia are also significant with a total of 16.8% from all its import. In other words, both countries are interdependent of each other. Hence a military conflict on Malaysia will directly affect Singapore's own survival."

The concept of total defense that is implemented by Singapore is still insubstantial and will risk Singapore's ambition to react upon Malaysia. The concept of total defense is a doctrine of defense that stresses the use of all assets and resources of a nation to increase its ability to face any form of threats, be it domestic or international. Among the evident characteristics of total defense implementation is its activation of volunteer defense and security force in any related organization. The concept of total defense practiced by Singapore is a concept that is deemed unsuccessful because loyalty and nationalism of Singaporeans is believed to be fragile. Singaporeans that are one of the elements of total defense prioritize more on economic stability, their own possessions and life. It is different from the total defense concept of Malaysia whereby Malaysians are perceived to have high level of loyalty and nationalism (Mohd Zackry Mokhtar, 2006:38-43). Arrifin Omar (2007) stated that:-

"As a nation controlled by Chinese, Singapore must take into account the regional countries total population surrounded by the Malay Archipelago, if Singapore plans to attack Malaysia. In this context, it is positive that Singapore should not take the risk and bear the consequences in case it attacks Malaysia which is majorly populated by Malays."

Hence, in the context of survival of both countries during war is different. Here, Malaysia is deemed to survive when a war breaks compare to Singapore for the spirits of Singapore citizen patriotism is weak. Therefore, Singapore would not adopt a military force approach against Malaysia due to the fact that there is still weakness in its doctrine of defense that it practices. Assessing from the aspect of its military capabilities, Singapore has assets that are offensive, yet it is characterized as merely a need for a country that has insecurity issues. Although Singapore has carried out many operations, training and war strategy in the jungle (jungle warfare), yet Singapore emphasizes more on its military training performed in the city (urban warfare). This means Singapore's preparation is to defend the nation and not an attack on Malaysia which undeniably needs the jungle warfare strategy. Arrifin Omar (2007) said, if a country plans to go for war, the country must take into account the geographical aspect and its military ability and compare it to the environment of the battle field. This is because the decision to carry out war with no knowledge of the geographical condition would risk the country to face immense destruction and defeat. Although there exist several bilateral issues which rises tension between Malaysia and Singapore, the issues can be solved at a diplomatic level and not through the use of military force. The issues of water, border invasion (air and sea), islands dispute and other issues are issues that can be negotiated through diplomacy. According to Ahmad Ghazali Abu Hassan (2007):-

"What is apparent is the existence of action reaction approach which often fluctuate the relationship. Historically it is evident that both countries have shown that they are prioritizing the method of diplomacy in settling bilateral issues"

The rapidness of Singapore's military development is not at threat to Malaysia's security. This is because the relationship of both countries leaders is close and amicable. It must be understood that a decision to go to war or a conflict are in the hands of the leader (head of government) of a country. With the good ties among the leaders, it is the pioneer to increase confidence and trust in strengthening the relationship between Malaysia and Singapore. Both countries are manifestly serious in conducting and implementing measures in building confidence (Confident Building Measures or CBM). CBM is viewed from different perspective. Holst and Melander (1977:147) explained the concept of CBM as such, building confidence (CBM) involves the notification of credible prove that there exist no perturbing threats. Alford (1981:134) also explained CBM as a measures that can explain military actions or objectives, while Borawski (1986:3) describes CBM as a management tool to seek a way to control and notify how, when, where and why a military activity will be executed. According to Chalmers (1996:161), in Southeast Asia, CBM has started to be recognized since December 1993 when governments in this region started to implement CBM. He explained that:-

"It has become imperative that confidence building measures (CBM) be introduced into the region with greater vigor. CBM possess a genuine promise for reducing the chances of unintended conflict and for improving the basic quality of a region political environment. They basically aim at enhancing transparency between states....CBM also seeks to make

explicit military intentions in order to promote confidence by increasing the flow of information to make relations more predictable, thereby reducing the chances of conflicts and surprise attacks”.

The move to build confidence pioneered by the top level has also been conducted at ministerial level and government official, either officially or informally. In fact Singapore's readiness in sharing intelligence information since 2001 is an act of willingness to foster good relationship both military powers. Basically Singapore's military development does not give any threat to Malaysia's safety. This is because, since Singapore separation from Malaysia in 1965, there has been no security threat on Malaysia. From Malaysia's military perspective, Singapore is a country that is not classified as a major threat. On the other hand, Indonesia and Thailand are believed to be major threats on Malaysia's security compared to Singapore. This is because according to Ahmad Ghazali Abu Hassan (2007):-

“If we assess which country has the ability to threaten Malaysia, it is not Singapore but Indonesia. This is because historically Malaysia has faced armed confrontations with Indonesia during the era of Sukarno. We should be reminded about the vision of a Greater Indonesia that was introduced by Sukarno, symbolizing that Indonesia has had the objective and agenda to conquer Malaysia”.

The perception of this country regarding a threat is based on the history of Malaysia's confrontations with Indonesia that took place in 1963 (Patmanathan, 1980:23). The military was sent to confront Indonesian military attack that landed in Johor and was facilitated by Singapore to stop intelligence information to Indonesia in Malaysia (Aelina Surya, 1992:18). In fact, according to Ahmad Ghazali Abu Hassan (2007) this confrontation between Malaysia-Indonesia claimed a number of Malaysian troops in Borneo during the effort to protect national security. It is believed to be the sign and measurement of Malaysian military of Indonesia's ability to use its military force upon Malaysia (Tempur, April 2003:24). Ariffin Omar (2007) explained that:-

“Although Singapore is strong in term of economy, political and military power, it is not a country that can easily set out a war because Singapore realizes that it is still lacking in terms of nationalism or patriotic spirit. The countries that can afford to threaten the security of Malaysia are Indonesia and Thailand.”

Ahmad Ghazali Abu Hassan (2007) perceives Indonesia and Thailand as nations that are able to threaten Malaysia's security. This is because Indonesia and Thailand are regarded as unstable states base on the instability of internal politics. Internal problems such as poverty, internal rebellion, ethnic conflict, weak government and terrorist issues make Malaysia prone to security threat through the spread of these internal problems to Malaysia (Jasbir Singh, 2003:66-68). Indonesia's and Thailand's weakness and failure to prevent internal problems would provide a direct impact on Malaysia such as the excessive immigration into Malaysia, making Malaysia a hide-out and the spread of terrorist activity are all other factors that formulate the threats from Indonesia and Thailand (Allan Gyangell, 1983:116). The close ties between Malaysia and Singapore either from bilateral aspect or through international organizations, has been the pioneering of confidence and belief between both countries. The basic principle of ASEAN countries, that is not to intervene, will affect both countries to prevent from threatening each other sovereignty and security. Cooperation and agreement spirit emphasize stability of the region has become the essence of policy implementation of each country. Hence, any implementation of policy from any ASEAN member will take into account the region's interest. Five Nations Protection Law (FPDA) consisting of Malaysia, Singapore, Britain, New Zealand and Australia in 1971 has influenced understanding between countries to mutually help each another and can prevent military violence among members (Wariya, 1989:79). In conclusion Singapore's military development does not cause security threat to Malaysia. However the issue is why have several statements by leaders and scholars questioned that Singapore's military development can cause security threat to Malaysia?

4.2 Security dilemma

In explaining the issue on the action of leaders and scholar that perceive Singapore's military developmental as threatening, we need to understand the concept of security. According to Snow (1998:23) the concept of security involves the freedom of mind from fear and danger pertaining two aspects: physical and psychological. In other words, security does not only exist in a physical form but also non-physical form (security dilemma). According to Nye (2005:38) and Mingst (2001:153&288), security dilemma exists when a country adopts to enhance military capability, consequently it would affect another country which will perceive the enhancement of military as a form of threat. Directly it would encourage the country to adopt the same approach because by increasing the military ability of one country it will raise insecurities to other country. If one country develops a military force it would effects directly to another country and makes it feel weak. Collin (2000:32-34) said the dilemma phenomenon of security in Southeast Asia is represented in two aspects: in the country (inter-state) and between countries (intra-state). One of the aspects that can raise security dilemma are conflict border, rapid military development in Southeast Asia such as in Singapore, Indonesia, Thailand and Malaysia that had a positive effect on stimulating and created the phenomenon of dilemma security among Southeast Asian countries. To ensure Malaysia's security and sovereignty, Malaysia's military power has used strategy which involves four stages namely detection, survival, strike and control. Each stage has approaches and specific measures. In explaining

the impact of dilemma security on Malaysia from Singapore's military development, Ahmad Ghazali Abu Hassan (2007) explained that:-

"At this time, we (the military) have detected several signs in Singapore like its rapid military development and problems involving Malaysia-Singapore's bilateral ties. Hence, we (the military) as much as possible would strongly inclined and encourage solution through diplomacy. In efforts to face this scenario our strategy (the military) is to strengthen the relationship with Singapore so that security threat risk can be eliminated. At the same period we (the military) must continue military development planning that was planned by the government to ensure our safety. Malaysian cannot avoid security dilemma when our neighboring country Singapore is developing its military power aggressively. Yet the existing security dilemma is under control. This is because we ourselves (Malaysia's military) have our own approach in handling this phenomenon".

Although the above statements depicts that Malaysia is facing psychological impact (security dilemma), yet it is handled through strategy and approach whereby Malaysia's military especially has enhance confidence building measures (CBM) between Malaysia and Singapore. The military's strategy uses CBM as an approach to eliminate security dilemma and threat, through cooperation between both countries and defense force in ensuring confidence and belief between both countries that can be strengthened. It is consistent with Malaysia stance as a country that practice and emphasizes on peace and constructed relationship policy with neighboring countries, particularly Singapore. In conclusion, military development Singapore has a psychological effect (security dilemma) on Malaysia. Yet this effect was handled by Malaysia and its military through strategies and approaches that prevented this effect from affecting the relationship between both countries.

4.3 Arms Race

Klare (1993:136-152) believes that there are scholars trying to prove that the arms race phenomenon in Southeast Asia has existed since 1990s and described that after the Cold War (1991), NAT countries competed to obtain modern weapons to strengthen their defense system especially in the purchase of defense and weaponry equipment. In fact he observed that this phenomenon had made Asia the region that recorded a very high arms trade and if one country's military development process is uncontrollable (abnormal), then it would spur a phenomena of arms race between countries. Buzan (2000: 88-108) believes that one country's rapid military development will invite other countries reactions to develop its military to establish the balance of power. But does this arms race phenomenon also happen in Malaysia? The development of Malaysia's military force should not be looked as a reaction (arms race) against rapid development of Singapore's military force. Malaysia's military modernization planning was drafted earlier and implemented stage by stage according to the national economic position.

In fact the rapid military development in Malaysia has been conducted since the early 1990s and it is a normal development. The purchase of several strategic equipment like battleship KD Jebat and Kasturi in 1992 which at the time was the most modern and up-to-date warship in Southeast Asia, is seen as need for Malaysia in ensuring maritime sovereignty and security. It is corresponding to the fact that Malaysia is a country whose behave maritime state. Increase in assets and the purchase of 4 more Frigate's battle ships (2006) and 2 Scorpene submarines in 2002 conducted by Malaysia is not a reaction to counter Singapore's military capability, whereby at that time Singapore owns 4 submarine and warship furnished with missiles (1 Destroyer battle ship called Formidable, 6 corvette warships Victory, 6 boat with missiles Sea Wolf, 6 Fearless warship).

Instead, the purchase of strategic defense equipment in Malaysia is seen as need of one country to make sure the level of power and capability of sea defense in Malaysia is ready to face any security threats forms outside. The purchase of two submarines which is a strategic equipment of sea defense and a process to make Malaysia have the ownership of underwater strategic weapons is to strengthen the maritime defense. According to the Director of Centepis Center UTM, Azmi Hasan (2007), the purchase of submarines is not characterized as a weaponry competition against Singapore; instead it is process in strengthening the national under water marine defense weaponry. The Air force development in Malaysia, through the purchase of 26 MIG 29 aircraft from Russia, 8 FA / 18D Hornet aircraft from US and latest 18 Sukhoi SU-30MKM aircraft said to be the most sophisticated from Russia, cannot be seen as a phenomenon of arms race with Singapore. Malaysian military development process is a step to ascertain that it is able to function as a credible army in handling any forms of threat against national sovereignty and interest. Malaysia does not wish to engage in any arm race with Singapore and at the same time also don't want to be left behind in the field of national defense. Arrifin Omar (2007) also said :-

"In terms of sophistication Malaysia has made weaponry purchases and owns up-to-date aircraft enabling to increase Malaysia's strength. Yet in terms of quantity Singapore's has far greater ownership of aircrafts. Hence, arms race between Malaysia and Singapore is non-existent".

According to Gray (1983) among the features in arms race is the involvement of two or more parties behaving aggressively hostile. Parties involved will compete to match one another in term of quantity (army personnel, weapons) or

quality (military, weapons, organization, doctrine, location). Arms race phenomenon must possess a continuous increase in quantity and quality. The arms race assumption between Singapore Malaysia from the result of Singapore rapid development military is not conclusive. This is because military development process in Malaysia is based on plan and the planning is perform according to a specific time frame and also base on the countries financial capacity. What is certain is that the allocation of Malaysia's defense expenditure, since the country achieved independence in 1957, has never exceeded 5 %. This means there is no prove of Malaysia trying to match Singapore expenditure and military power. According to Acharya (2001), although there is an increase of defense expenditure allocation among Southeast Asian countries after the Cold War, it is only a record of figure increment. One country's military development is often misinterpreted by other country as a potential threat. This is influenced by psychological effect from the military development impact of the other country (Acharya, 2001:136-141). Ahmad Ghazali Abu Hassan (2007) stated that:-

"The development and purchase of our (Malaysian military) strategic and conventional equipment should not be considered as arms race. In fact, if we carefully analyze from our purchase of 8 FA-18 aircrafts, this lot is not qualified to be a squadron which must consist of 16 aircrafts. So where is the validity of the arms race assumption between Malaysia and Singapore? Moreover in terms of submarine purchase, it cannot be concluded as arms race because the purchase of 2 Scorpene submarines cannot match Singapore who owns 4 so far".

Additionally, in his opinion the purchase and development should be viewed as prevention because it is to make Singapore aware that Malaysia also has strategic equipment and Malaysia would be able to fight if war would ever erupt between both countries. Thus the military development and modernization process in Malaysia currently are process to strengthen the existing deterrence system.

4.4 Deterrence system

There are raising questions concerning Malaysia's military development goals and objective that been increasingly active since the early 1990s. What are Malaysian military goals and objectives in its development and modernization process? Ahmad Ghazali Abu Hassan (2007) explained that:-

"The military will continuously be modernized through phases according to its concepts which are deterrence and forward defense. At the same time, the development towards the direction of approaches will take into account the need of all three forces army, navy and air, to ensure their abilities are more effective."

What is deterrence? Deterrence can be defined as a social and political contact especially to enable one party to influence the other party. It aims to ensure the enemy or opponent abides to the party who implements deterrence. Kegley and Wittkopf (1989:377) said that deterrence is a strategic capability to avoid from being attack by the enemy and it also is a move to convince the enemy not to take any action so that war can be prevented. For further explanation, please refer to the diagram 1.

The application of deterrence concept in international relations is to make sure B does not take action or implement a policy that could threaten A's position. A will threaten a severe act if B continues its plan of attack and will have to pay the consequences. Therefore A's threats are aimed to warn and prevent B's harmful purpose. This can be concluded that the deterrence concept can be a tool of diplomacy, also known as diplomatic bargaining in the international relation arena. Threat which is used by a country to its enemy is a psychological tactic without involving the use of physical force that can produce. The implementation deterrence system has directly given the enemy an opportunity to weigh and reconsider the impact of their policy or strike before taking action.

Usually a country would not execute an action that is unfavorable to itself. According to Buzan (1987:69), deterrence is a strategic capability to avoid any attack from the enemy. In other words, deterrence is a tentative to convince an enemy not to initiate a war. In explaining the goal of military development in Malaysia, it should not be considered as Malaysia's a preparation to act aggressive upon Singapore. Instead Malaysia is trying to create peace and stability with Singapore through the deterrence system. With this system it should influence both countries to weigh on decision of adopting military force against each other. Here the statements which were issued by Malaysia's leader announcing that Malaysia will respond to the attack if it was threatened are forms of deterrence approach. Both countries have already built their own deterrence system either through development of military physical approach or non physical approach. This system has successfully influenced both countries to weigh upon the impact if one launches an attack. The peace and stability between Singapore since 1965 until today are influenced by the success of the deterrence system applied by both countries. According to Ahmad Ghazali Abu Hassan (2007):-

"If we compare military and defense capabilities of Malaysia with Singapore, Malaysia is lagging far behind. But with the strategic strength, even lacking in number, Malaysia still has succeeded in creating prevention of attack."

Additionally he thinks that the deterrence system is not only limited to development of a defense force branch. For example Malaysia's purchase of 2 Scorpene submarine in 2002, although it cannot match the strength of Singapore's armada equipped with 4 submarines, it does not mean that Malaysia's deterrence failed. This is because Malaysia's defense concept is not only subjected to the navy but is also a Comprehensive Defense Concept or Total Defense

(HANRUH). The concept of total defense involves all forces of security and defense, official public (volunteers force), which has given a great impact on Singapore in realize that Malaysia is strategically stronger. With the introduction and practice of joint warfare in Malaysia, this can send a message to Singapore not to belittle Malaysia's military powers. Indirectly this is another form of prevention to avoid any threats from Singapore. The military development in Malaysia has the purpose to establish a deterrence system for the enemy. It also is the aim of the government in ensuring the system and Malaysia's defense equipment is reliable and able to face enemy any threats. It does not aim to present a threat to another country, on the contrary it is the country's obligation in modernizing and upgrading the strength and military capabilities of Malaysia (Tempur, Julai 2003:2-5).

5. Conclusion

Singapore's rapid military development has been conducted since 1965 and has raise national security concern among Malaysian leaders. The emergence of bilateral issues such as water problem, border conflict and others have been the signs in assessing the possibility of threats that Singapore could inflict upon Malaysia. Actually these assumptions are irrelevant according to the Malaysian military's perspective, because it is just viewed as a mere development to fulfill this small country's need. The military development in Singapore doesn't intend to prepare a war on any country, but it is solely a deterrence system. The implementation deterrence system is the best asset for a country in guarantying its sovereignty and security without involving in war. Hence, offensive physical and non physical development is Singapore's approach to strengthen its deterrence system. To make sure the deterrence is strong, it has to be made aware among regional countries thus vast publicity is needed to convey the message of the deterrence system that is being implemented in Singapore.

Singapore is a small country that is very depended on service oriented economy, apart from trade and port. Singapore's shortages of natural and labor resources are elements that influence Singapore's policy to not be an initiator of triggering war. Its economic dependence with Malaysia is also another factor why Singapore would avoid not adopting military force and not affect their Malaysia-Singapore relationship. A sour relationship as a result of inflicting military force would directly destroy Singapore's economic strength. It is unarguable that the military development in Singapore will give psychology implications to Malaysia especially security dilemma. This is because according to the theory security, any increase in military development will give implications to other countries and make them feel insecure. This security dilemma does not affect Malaysia's security and sovereignty, Malaysian military has plan a strategy that is to implement the confidence building measures (CBM) concept with Singapore. This strategy not only creates good ties among head of states but also involves relationship of both countries' ministries of defense. Sharing intelligence information and cooperation among both countries relating to security aspects will eventually affect both countries confidence and belief to increase and become stronger. This progress is sure to erase the security dilemma and security threat assumptions.

The military development in Singapore has actually triggered Malaysia's awareness to address in modernizing its possession of military and defense. The purchase of military and defense equipment either strategic or conventional is Malaysia's action to ensure the system of defense and military are able to face any security and sovereignty threats. Malaysia's military development and modernization is to meet the planning and strategy which are fixed in accordance with a particular time span. In fact the purchase of defense equipment lies on the limited financial allocation. Hence, the assumption speculating an arms race by Malaysia's military from the development of Singapore's is not concluded, instead it is merely a development and modernization of both countries defense force. Basically Malaysia's military development and modernization is a process to strengthen the existing deterrence system. This is because, to ensure security and sovereignty are secured without launching a war, the implementation and enhancement of this system is the finest move. The purchase of modern equipment either conventional or strategic, is an approach that sends a warning to the enemy to consider the impact if they launch an attack on Malaysia.

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Table 1. Singapore's military Budget 1996-2006

Year	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Amount (Billion Dolar Singapura)	5.78	6.61	7.47	7.61	7.46	7.721	8.10	8.20	8.62	9.25	10.05
Amount (Billion Dolar US)	3.88	4.39	4.47	4.47	4.33	4.43	4.67	4.70	5.10	5.57	6.16

Source : Altered from *The Military Balance 2006*, International Institute for Strategic Studies, Routledge, 2006, *The Military Balance 2003-2004*, International Institute for Strategic Studies, Routledge, 2003 dan *SIPRI Yearbook 2003*, Oxford University Press, New York, 2003.

Table 2. Comparison of Singapore's and Malaysia's military Budget 2004-2006

Year	2004	2005	2006
Singapore's military Budget	5.10 billion (USD)	5.57 billion (USD)	6.16 billion (USD)
Malaysia's military Budget	2.25 billion (USD)	2.47 billion (USD)	3.08 billion (USD)

Source : International Institute for Strategic Studies, *The Military Balance 2006*, Routledge, 2006. pg 281-283.

Table 3. Orders and Purchase of weapons by Singapore between 1998-2002

Supplier	No. Of weapons	Weapon	Type of Weapon	Year
France	1	La Fayette Class	Frigate	2000
	144	Aster-15 SAAM	SAM	2001
Israel	600	Python-4	BVRAAM	1997
	-	Spike-MR/LR	Anti-tank missiles	1999
USA	8	AH-64D Apache	Helikopter tempur	1999
	12	AH-64D Apache	Helikopter tempur	2001
	192	AGM-114K	Anti-tank missiles	2001
	20	AIM-120C AMRAAM	Pesawat FGA	2000
	2	S-70A/UH-60L	Helikopter	2000
	54	M-109 chassis	Senapang	2001
Sweden	4	Challenger class	Kapal selam	1995

Notes : - No available information

Source : *Altered from SIPRI Yearbook 2003, Oxford University Press, New York.*

2003 and The Military Balance 2003-2004, International Institute of Strategic Studies, London. 2003

Table 4. Comparison of Singapore's and Malaysia's military force base on data and weaponry Army

Army	Singapore	Malaysia
Total	50,000 personnel	80,000 personnel
Tank (MBT):	100 <i>Centurion</i> (including in Taiwan & Thailand)	MBT PT-91 (48 are being ordered)
Medium Tank	350 AMX-13 SM1	26 <i>Scorpion</i> 90
AIFV	294 AMX-10P 44, AMX-10 PAC 90 and IFV-25	N.A
AIFV	294 AMX-10P 44, AMX-10 PAC 90 and IFV-25	N.A
APC	1,280 ATTC <i>Bronco</i> , IFV-40/50M-113 and M-113A1	1020 APC (T) 347 <i>Adnan</i> , <i>Stormer</i> , <i>Condor</i> , <i>Panhard</i> and <i>Commando</i>
Artileri	286 missiles 105mm and 155mm 37LG1, 8FH- 2000, FH-88 and M-114/A1	414 (Missiles 105mm and 155mm)
Rockets	30 - 30+Gil/Spike/Milan	18 <i>ASTROS II</i>
Missiles	SAM 75 and MANPAD 75 Mistral/RBS-70/SA 18	SAM dan MANPAD 48 <i>Anza</i> , SA-18 and <i>Starburst</i>
Radar	AN/TPQ-36 Firefinder	none

Navy

Navy	Singapore	Malaysia
Total	4,000	15,000
Submarines	4 SSK class	2 <i>Scorpene</i> (predicted in 2009)
Battle Ships	7 (Frigat 1 and Korvet 6) equipped with <i>Surface to Air Missile</i> (SAM), Missiles 2+140 <i>Harpoon</i> , <i>Surface to surface Missile</i> (SSM) RGM-84 C <i>Harpoon</i> and canon 76mm.	10 (Frigat 4 and Korvet 6) equipped with <i>Surface to air Missile</i> (SAM) <i>Sea Wolf</i> and <i>Aspide</i> , <i>Surface to Surface Missile</i> (SSM) MM-40 <i>Exocet</i> and <i>Otomat</i> cannon 76mm
Boats	17 equipped with <i>Surface to air Missile</i> (SAM), 2 + 140 <i>Harpoon</i> missiles, <i>Sea Wolf</i> missiles, <i>Surface to surface Missile</i> (SSM) RGM-84 C <i>Harpoon</i> , SAM <i>Mistral</i> and canons 176mm	17 equipped with SSM MM 38 <i>Exocet</i> and canon 57mm

Air Force

Air Force	Singapore	Malaysia
Total	13,500	15,000
Combat aircraft	111 aircrafts including: F-5 (F-5S <i>Tiger II</i> and F-5T <i>Tiger II</i>), F-16 (F-16A, F-16B, F-16C and F-16D <i>Fighting Falcon</i>), <i>Super Skyhawk</i> 10 TA-4SU, RF-5S <i>Tiger</i> , 4E-2 <i>Hawkey</i>	64 aircrafts including: F-5 (F-5E <i>Tiger II</i> and F-5F <i>Tiger II</i>), MiG 29N <i>Fulcrum</i> 16 (15 aircrafts), F/A-18 D <i>Hornet</i> (8 aircrafts), <i>Hawk</i> MK108, SU-30MKM (ordering 18 aircrafts)
Ballistic Missile	<i>Air to Surface Missile (ASM)</i> AGM <i>Shrike</i> , <i>Maverick</i> , <i>Harpoon</i> and AM <i>Exocet</i> , <i>Air to Air Missile (AAM)</i> AIM <i>Sparrow</i> and <i>Sidewinder</i>	<i>Air to Surface Missile (ASM)</i> AGM 65- <i>Shrike</i> and <i>Harpoon</i> , <i>Air to Air Missile (AAM)</i> AIM <i>Sparrow</i> and <i>Sidewinder</i>
Combat Helicopter	8 AH-64D <i>Apache</i>	none
Helicopter	40 <i>Super Puma</i> , <i>Super D Chinook</i> and <i>Cougar</i>	22 <i>Nuri</i> , <i>Black Hawk</i> and <i>Alouette</i>
UAV aircraft	64 <i>Blue Horizon</i> , <i>Chukar III</i> , <i>Searcher MKII</i>	3 <i>Eagle 150</i>

Source: *The Military Balance 2006*, International Institute for Strategic Studies, Routledge, 2006.

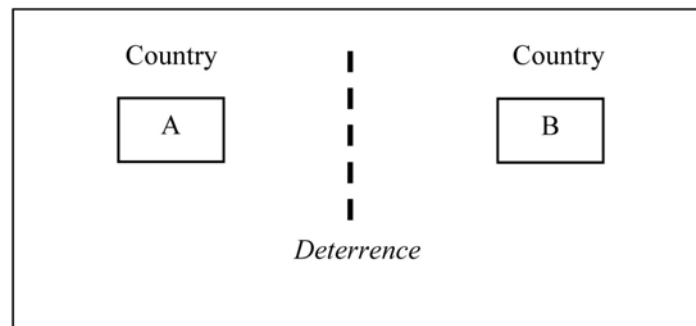
Deterrence Concept

Figure 1. Deterrence Concept

Source: Mohamad Faisol Keling, Mohd Dino Khairi Sharriffuddin and Laila

Suriya Ahmad Apandi (2006). *Theory and Concept of International Relationship and strategic studies*. Sintok: UUM Publishing



Study on the Historical Evolution of Chinese System of Voluntary Surrender

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Abstract

The voluntary surrender system of China budded in the Western Zhou Dynasty and matured in the Tang Dynasty, and its concept was first confirmed when the law amendment was implemented in the end period of Qing Dynasty. The 1997 Chinese Criminal Law defined the system of voluntary surrender in detail, and it has been one of special systems in the Chinese legal system. Because the understanding of the historical evolution of the voluntary surrender system is very important for the present jurisdiction and the perfection of the voluntary surrender system, so the course of the voluntary surrender system developing from nothing, becoming better and approaching perfection day by day was unscrambled from the historical view in the article for references.

Keywords: Voluntary surrender, Criminal law

1. The embryo of voluntary surrender system in the period of pre-Qin Dynasty

This period is the embryo stage of the voluntary surrender system. According to the recordation in the ancient Chinese book of "Shangshu Kanggao", in the Western Zhou Dynasty, someone committed a serious crime, but because he was just the negligent offender or the casual offender, so he might not be sentenced to death penalty. That was the first time in the existing literatures to applied different punishments for criminals according to intentional crime and negligent crime. Of course, this period is only the rudiment of the voluntary surrender system, and the real contents of the voluntary surrender had not occurred.

2. The system of voluntary surrender in the Qin Dynasty and the Han Dynasty

According to the recordation of the literatures, since Qin Dynasty, the content of voluntary surrender has appeared in laws, but the word of "Zishou (Chinese transliteration, meanings of voluntary surrender)" had not been appeared, but only the word of "Zichu" or "Zigao" (Chinese transliteration, meanings of voluntary surrender) appeared in laws. The Qin bamboo slips "Questions and Answers of Laws" recorded that "if the official of principal penalty steals above 110 coins surrenders first, he should be punished by penal servitude or money penalty" and "when the women are punished by penal servitude, they run away but surrender, they should be knouted 50 times", and above descriptive records all indicated that if the criminal surrendered, the punishment could be lightened, which is the early laws describing the voluntary surrender system.

Some scholars took the word of "Xian Zigao" as one of appellations of voluntary surrender in some articles, but they all quoted out of context, because the word of "Xian" in the "Xian Zigao" of the Qin bamboo slips "Questions and Answers of Laws" only means that the crime has not been discovered.

The Han Dynasty followed the laws of Qin Dynasty and inherited the voluntary surrender system of Qin dynasty, and it was called by "Zigao (Chinese transliteration, meanings of voluntary surrender)" in the laws of Han Dynasty, and "Zigao" could exempt criminal from criminal responsibility, and its punishment was lighter than the punishment in Qin Dynasty. According to the recordation of the Chinese ancient historical book of "Hanshu, the Biography of Hengshan King", "the son of Hengshan king surrendered first when Hengshan king rebelled, and his punishment was exempted".

The applicable conditions of the voluntary surrender system in Qin Dynasty and Han Dynasty include following aspects. First, the crime had not been discovered, and if the crime has been discovered, the voluntary surrender will not exist, so why the surrender was called as "Zigao". Second, in the complicity crime or the organized crime, the chief criminal could not be exempted from punishment even he surrendered first. Third, the criminal had multiple crimes, only the crime he surrendered could be absolved. Before the Eastern Han Dynasty, the surrendered criminals could be exempted from punishment, but in the Eastern Han Dynasty, some surrendered criminals would be exempted from punishment, and someone only were reduced punishment (Qiao, 2000, P.363). In subsequent dynasties, the federal official always gave priority to one of both and gave assistant to another one. In this period, the "substitute surrender" had not appeared, and the surrender was only limited by the criminal himself.

3. The system of voluntary surrender from the Three Kingdoms to the Sui Dynasty

The word of “Zishou” was appeared in the Three Kingdoms Times to replace the words such as “Zigao (Chinese transliteration, meanings of voluntary surrender)”, and it begun into the historical river of the criminal laws. The part of “Zishou (Chinese transliteration, meanings of voluntary surrender)” in the Cao Wei Laws stipulated that the surrendered criminals could be commuted. The historical book of “the Biography of Wangling” recorded that “King of Xuan received Shouchun, and Zhangwu et al all surrendered” (Zhang, 2008, P.158). After that, two Jin dynasties still followed the regulations about commuting surrendered criminals, and some criminals might be exempted from punishment, and the word still used the word of “Zishou”. The historical book of “the Biography of Yuchun” recorded that “the emperor exempted Chun’s crime because he surrendered” (Cheng, 2006, P.268).

In the period of the Northern and Southern Dynasties, laws of Southern Dynasty including Song Dynasty, Qi Dynasty, Liang Dynasty and Chen Dynasty all specially established the part of voluntary surrender system, and stipulated that the surrendered criminal could be commuted. Taking Chen Dynasty Laws as the example, accruing to the historical book of “the Biography of Huajiao”, “the thief commander in chief, Jiexiang, surrendered to the emperor and the emperor exempted his punishment” (Cheng, 2006, 335). Only the Northern Qi Dynasty and the Post-Zhou Dynasty in the Northern Dynasty didn’t established the part of the voluntary surrender in the laws, but they all stipulated the contents that the surrendered criminals could be commuted. The Bei Wei Laws still used the word of “Zigao”.

Though the Kaihuang Laws of Sui Dynasty had not contained the special part of voluntary surrender, but the contents about the surrender system were still included in it.

4. The system of voluntary surrender in the Tang Dynasty

Based on laws of past dynasties, Tang Dynasty further perfected the system of voluntary surrender, and first stipulated the system of voluntary surrender in detail in the history, and its legislation technology could be acclaimed as the peak of perfection, and Tang Dynasty laws about the voluntary surrender system could be called as the classic in the ancient legislations about the voluntary surrender system.

In the “Ming Li Law of Tang Dynasty Laws”, the applicable conditions of the voluntary surrender system, the punishments of the voluntary surrender system, the situations which could not be applied in the voluntary surrender system and the equal voluntary surrender system were stipulated in detail.

(1) The applicable conditions of the voluntary surrender system included four points. First, the crime had not been discovered, and if the crime was discovered, even the criminal give himself up to the federal official, he could not be treated as the surrendered criminal. Second, the criminal should inform against him by himself. Third, the voluntary surrender should be honest and complete. Fourth, the voluntary surrender should be made to the federal official.

(2) The punishments after voluntary surrender could be exempted or lightened. There were three situations under which the criminal’s responsibilities could be exempted. First, when the crime had not been discovered, the criminal could be exempted for punishments when he surrendered. Second, when the criminal committed above two crimes with different degrees, and if the lighter crime had been discovered but the heavier crime had not been disclosed, the criminal surrendered the heavier crime, so the criminal responsibility of the heavier crime could be exempted, i.e. when one criminal committed multiple crimes and only surrendered the heavier crime, he could be exempted from the punishment of the heavier crime and be run only for the crimes without being surrendered. Third, in the joint offence, when the criminal with lighter crime captured the criminal with heavier crime and surrendered, or one of criminals could capture above half of other criminals and surrendered, he could be exempted for punishment. The premise of these three situations was that the surrender must be honest and complete, or else, the criminal could not be exempted for punishment.

There were four situations to reduce punishment. First, the surrender was not honest and complete, the criminal should be punished by the un-honest and incomplete crime, but the death penalty could be “reduced for one class”. Second, when the criminal knew others would disclose his crime and surrendered, the penalty could be “reduced for two classes”. Third, when the criminal committed the crime and escaped, and surrendered then, the penalty could be “reduced for two classes”. Fourth, “the criminal committed a crime because of another criminal, and criminal surrendered, the penalty could be reduced for two classes, and if another criminal surrendered, his penalty could be reduced for two classes”. And when the criminal committed a crime, escaped and returned to the original place, but he didn’t surrendered, he should be punished according to the principle of reducing punishment, but this situation was not the situation of surrender, and the opinion which thought that was surrender in some articles was wrong.

(3) There were six situations which should not apply the principle of the surrender punishment. First, the crime was disclosed and the criminal was hunted but he refused to give himself up to the federal official. Second, the crime was to harm others’ bodies. Third, the crime was to damage or lose the public things such as chop which could not be compensated by other same things. Fourth, when the criminal committed a crime escaped, and he traversed the pass privately. Fifth, the crime was to rape women. Sixth, the crime was to study the astronomy privately.

(4) The so-called special surrender was stipulated in Tang Dynasty laws. Tang Dynasty laws also specially stipulated that some situations such as the remaining crime of surrender, the surrender capturing above half other criminals in joint offence, the surrender knowing being disclosed, and some articles called those situations as the special surrenders, but in fact, that opinion was not proper, because the Tang Dynasty laws only listed those situations which were not be applicable usually, and those situations had been described in the former parts of the article.

(5) The systems of “Shou Lu” and “Dai Shou” were stipulated in Tang Dynasty laws. Tang Dynasty laws stipulated that “the criminal stole or fleeced others’ property, and he confessed and returned the property, the behavior was same to the surrender for the federal official”, which was the system of “Shou Lu”. The system of “Shou Lu” was only limited in the crime of property. Some one thought that the behavior the official returned the bribes to the original owner belonged to “Shou Lu”, but it was wrong, because “Shou” means confessing, and “Lu” means returning property.

In Tang Dynasty laws, after the criminal committed a crime, his families who could hid him according to the laws replaced him and disclosed the crime to the federal official, the punishment to the criminal should refer to the principle of surrender, which was the system of “Dai Shou”, and the premise condition of “Dai Shou” must be implemented by the families who had right to hid the criminal according to the laws. So the systems of “Shou Lu” and “Dai Shou” should be called as the special surrender system more properly.

(6) The system of “Zi Xin” was stipulated in Tang Dynasty laws. If the crime had be disclosed, or perceived by the federal official, he went to confess the crime, which was called as “Zi Xin”, not “surrender”.

(7) The officials’ surrender was specially stipulated in Tang Dynasty laws, but the surrender was only limited in the situation that the official committed a crime non-intentionally.

5. The system of voluntary surrender from the Song Dynasty to the Yuan Dynasty

5.1 The system in the Song Dynasty

The laws of Song Dynasty inherited from the laws of Tang Dynasty, and the surrendered criminals were exempted from punishments, but some following new contents were added in the voluntary surrender system.

(1) In the “Ming Li Law” of “the Criminal Law of Song Dynasty”, “when the criminal committed a crime which was not disclosed, and surrendered, the criminal could be exempted from punishment. And though the lighter crime was disclosed, but the heavier crime was not disclosed, and the criminal surrendered his heavier crime, and his heavier crime could be exempted from punishment. And the families who had the rights according to the laws could replace the criminal to surrender, and the criminal could be exempted from punishments”. Based on the laws of Tang Dynasty, the laws of Song Dynasty further stipulated how to surrender when the lighter crime was disclosed, but the surrender was limited, i.e. when the lighter crime was disclosed and the criminal surrendered his heavier crime, the responsibility of the heavier crime could be exempted.

(2) The confession was accepted into the category of the voluntary surrender system. The content about the confession inherited from Tang Dynasty laws, and changed little.

(3) The articles that the surrendered criminal could not be exempted from punishment. According to the “Criminal Law One” of “Records 152nd” of “the History of Song Dynasty”, “if the official died or left his post and his underlings escaped, the underlings could not apply the surrender system.”

In addition, the article that “the crime was disclosed or undisclosed and the criminal surrendered” existed in “the Criminal Law of Song Dynasty”, how to explain the “disclosed”? Some scholars thought that the laws of Song Dynasty inherited the laws of Tang Dynasty which stipulated that “the crime was undisclosed”, so the “disclosed” in “the Criminal Law of Song Dynasty” was only the derivative word (Cheng, 2006, P.335). Except of the Song Dynasty, the word of “disclosed” didn’t exist, so the explanation may be the most reasonable one.

5.2 The system in the Liao Dynasty and the Western Xia Dynasty

The Liao Dynasty and the Western Xia Dynasty were the countries established by minorities, and they were the important minority regimes in the North, and their criminal laws absorbed the abstract culture of Han and also stipulated the system of voluntary surrender.

The criminal laws of Liao Dynasty stipulated that the surrendered criminal could be exempted or reduced from punishment, and according to the “the Records of Criminal laws” of “the History of Liao Dynasty”, “the official in Huiyong escaped and surrendered, and his crime was exempted”. But the usage of the voluntary surrender was random, for example, the attendants of the emperor escaped with the wife of the king of Qi, he surrendered in the sequel, but he was still killed by the emperor (“Records of Criminal Law Thirty” of “the History of Liao Dynasty”, Zhonghua Book Company Press, Oct, 1974).

The voluntary surrender system was stipulated in detail in the Western Xia Dynasty, and the correlative regulations not only included the detailed extent of the reduced punishment, but decided the degree of the reduced punishment

according to the losses retrieved by the surrender. "Thieves or robber returned the stolen things, and when 2/5 of these stolen things were returned, the punishment of the surrendered criminal was reduced for two classes, and the punishment of the accessories was reduced for one class, and when 3/5 of these stolen things were returned, the punishment of the surrendered criminal was reduced for three classes, and the punishment of the accessories was reduced for two classes (Yang, 2003)". This change was the advancement of the history, and it was the new development of the voluntary surrender system, and it could really exert the function and value of the voluntary surrender system, and it could be used for references to perfect the present system of voluntary surrender.

5.3 The system in the Yuan Dynasty

The laws of Yuan Dynasty "inherited the classics of Tang Dynasty and Song Dynasty, and integrated with laws of Han", and mixed with the culture and legal system of Mongolia and the traditional legal cultures of central plains. It also stipulated that the surrendered criminal could be exempted or reduced from punishment, and totally speaking, the voluntary surrender system had not been developed largely, but there were still following prominent advantages.

(1) The families were allowed to replace the criminal to surrender. Generally, the surrender should be performed by the criminal himself, and if he was sick, his families could replace him to surrender, but the false surrender was strictly forbidden. In the "Records of Criminal Law One" of "the History of Yuan Dynasty", "counterfeit surrender was forbidden, and if the criminal is sick, his families could be allowed to surrender". In the history, the families of the criminal were allowed to replace the criminal to surrender in the writing laws.

(2) When officials took bribes, they were not allowed to surrender. Not only the officials could not apply the surrender system, but the federal official who accepted the surrendered official should assume the criminal responsibility. In the "Records of Criminal Law One" of "the History of Yuan Dynasty", "the officials take bribes, they should not apply the surrender system, and the superior official who accepts the surrendered official will be punished".

(3) The surrender was limited by the time. In the "Records of Criminal Law Two" of "the History of Yuan Dynasty", the criminal surrendered after a long time, the surrender was not effective, but the concrete time limit such as one year or half year was not stipulated.

(4) The system of "Shou Fu (Chinese transliteration, meanings of voluntary surrender)" occurred. The system of "Shou Fu" rooted from "Shou Lu" in Tang Dynasty, and some scholars thought that the word occurred in the Ming Dynasty and Qing Dynasty, but the opinion was wrong, and the word first occurred in Yuan Dynasty. "Shou Fu" could be reduced from punishment, and in the "Records of Criminal Law Two" of "the History of Yuan Dynasty", "the thieves surrendered because the victim cross-examined them and they didn't return the stolen things, their punishments were reduced for two classes, and tattooed characters on the skin (an ancient corporal punishment)". Here, "Shou Fu" didn't require that the stolen things were returned completely to owners, and the criminals were punished according to the returning situation when they returned the stolen things.

6. The system of voluntary surrender in the Ming Dynasty and the Qing Dynasty

The article of "voluntary surrender system" was established in the "Ming Li Law" of "Laws of Ming Dynasty", and the laws basically inherited former dynasties and only the concrete contents were added or reduced. For example, in the "Ming Li Law", "the criminal perverted the law and didn't pervert the stolen things, and he regretted and returned the things to the owner, and he could be treated as the surrendered criminal, and his punishment could be exempted. And if he knew someone would disclose he and he returned the stolen things to the owner, his punishment could be reduced for two classes". Above content was exclusive in laws of Ming Dynasty, and total speaking, the contents about the voluntary surrender system changed little in laws of Ming Dynasty.

The "Ming Li Law" of "Laws of Qing Dynasty" not only stipulated the voluntary surrender system, but strictly distinguished the reduced punishment of the surrendered criminal, the undisclosed surrendered criminal, and the disclosed "Zi Xin" criminal, and the conditions of the surrender, and the treatment of the incomplete surrender (Zhang, 1993, P.180). Comparing with former dynasties, the range and time limit of the surrender punishment were extended, and in the "Du Pu Ze Li" in period of Kangxi Emperor, "the families in banner-men escaped in one year and surrendered, and their punishments could be exempted (the article of "Escaper Surrender" of "Volume A of Du Pu Ze Li)". For the criminals who captured the criminals in the same case and surrendered to the federal official, the reduced punishment degree and extent all exceeded former dynasties, "the criminals who could regretted their crimes and captured other criminals and surrendered to the federal official, and if they belonged to the harming-person criminals, their punishments were reduced for class one, or else, they should be exempted from punishment by the laws (Thieves of Criminal Law of Qing Dynasty Laws)".

In the beginning period of Qing Dynasty, the disposal principle of the surrendered criminal was extended to the forbiddance of opium, which was the measure aiming at the situation that the opium poisoned the government and people in the period of Daoguang Emperor.

In the law emendations at the end of Qing Dynasty, Qing Dynasty could “refer to laws of various countries”, and it first definitely put forward the concept of “Zi Shou” in the criminal laws in the history of China. In the “New Criminal Laws of Qing Dynasty”, “Zi Shou” was defined as the “the crime has not been disclosed, and the criminal surrenders to the federal official”. At the same time, the voluntary systems about the conspiring offender and the preparing offender were also stipulated.

7. The system of voluntary surrender in the Republican China

After the Republican China replaced the Qing Dynasty, because the political situation was not stable, and the rights were from various governments, so the contents about the voluntary surrender were not consistent.

In the “Implementation Regulations of Criminal Laws” enacted by Nanjing Kuomintang Government in 1928, the content of the voluntary surrender didn’t be contained. In the “Criminal Laws” of 1934, the voluntary surrender system had begun to occur, “for the criminal whose crime has not been disclosed and who obeys the judgment, the punishment should be reduced, but if there is the special regulation, the punishment is performed by the special regulation (Criminal Laws of Republican China enacted by Nanjing Kuomintang Government in 1934, P. 62)”. The conditions of voluntary surrender were that the crime had not been disclosed and the criminal obeyed the judgment, and the criminal’s punishment was reduced or exempted in special regulations. In the division regulations of Criminal Laws also stipulated the voluntary surrender system, for example, in the article 172, “for the surrendered criminals who committed the perjury crime and the false charging crime, their punishments could be reduced or exempted”. The Criminal Laws of Republican China was modified several times, but the contents of the voluntary surrender changed little, and only the specific words were added or deleted. The modified Criminal Laws of Republican China has been used in Taiwan area up to now. In other special decrees enacted by Nanjing Kuomintang Government, the content about the voluntary surrender was always contained, for example, in the decree about punishing traitors, “the criminals who committed the crime are punished by the traitor surrender decree (The Emendation of the Decree of Publishing Traitors, enacted by Nanjing Kuomintang Government, article 18, 1938)”.

In this period, the content of voluntary surrender also occurred in the criminal laws enacted by the Manchukuo, for example, in the urgency punishment law, “the criminals who committed the crime and surrendered before being disclosed are reduced from their punishments. For the autonomous-complaint crime, the punishment of the criminal is same to the above regulation (Criminal Laws, enacted by Manchukuo government, article 57, 1937)”.

The content of voluntary surrender in the criminal laws enacted by other governments except for Nanjing Kuomintang Government all didn’t exert the corresponding functions because the governments were illegal or those governments only presented a false picture of peace and legal system.

8. The system of voluntary surrender from 1949 to this day

Before PRC was established, most of the criminal legislations of the revolutionary base areas leaded by the CPC stipulated the criminal policy of “leniency toward those who confess their crimes”, and the regulations about the voluntary surrender system, for example, in the special decree enacted by the Shandong anti-Japanese base areas, “traitors who surrenders to the judicatory government or the democracy government before he is arrested, should be reduced or exempted for punishments (Shandong Provisional Regulation for Traitor Surrender, enacted by the Shandong Provincial Government, Article 2, 1945)”. The content about the voluntary surrender system almost all existed in the criminal special decrees or regulations by various revolutionary base areas, and the difference was little, and the quantity of the legal regulations was excessive.

After PRC was established since 1949, through using the foreign and ancient legislation practices of the voluntary surrender system for references, the voluntary surrender system has experienced the long term period from forming roughly to gradually developing and perfecting. There are four legal regulations about the voluntary surrender system, i.e. the old criminal laws of 1979, the united explanation of 1984, the new criminal laws of 1997 and the judicial interpretation of 1998.

The 1979 Criminal Law stipulated that “the criminal who commits a crime and surrenders voluntarily may be given a lighter punishment” in the “voluntary surrender” part of the chapter of “the concrete utilization of criminal punishment”. In addition, the 1979 Criminal Law also stipulated that the criminal with lighter crime who surrenders might be given a lighter punishment or exemption from punishment, and though his crime was heavier but he made contributions, he could also obtain a lighter punishment or exemption from punishment. The limitation of the voluntary surrender system in the 1979 Criminal Law was that the defined articles about the voluntary surrender system were deficient. But first, the 1979 Criminal Law broken the limitation of “the crime is not disclosed”, i.e. the whether the crime was disclosed or undisclosed, the voluntary surrender could come into existence, and second, the 1979 Criminal Law associated the voluntary surrender system with the “making contributions”, and extended the applicable range of the voluntary surrender, which more made for criminals’ regrets and save the judicial resources. The 1979 Criminal Law was substituted by the new Criminal Law of 1997.

In 1984, the Supreme People's Court and the Supreme People's Procuratorate issued the "Explanations of the Concrete Legal Applications about How to Process the Voluntary Surrender and Correlative Questions" with Chinese Ministry of Public Security, which compensated the deficiencies of the 1979 Criminal Law. The Explanation definitely stipulated many concrete judicial applications such as "how to cognize the voluntary surrender", "how to punish the voluntary surrender", "how to treat the case bringing families or relatives to justice" and "how to treat the contribution", and the Explanation further enriched and developed the system of voluntary surrender. The Explanation listed the voluntary surrender cognizance, stipulated the applicable conditions of the voluntary surrender such as subjectively giving himself up to the police, explaining the crime according to the facts and accepting the trial and judgment subjectively. For the situations that the crime had not been disclosed, or though the crime was disclosed but the criminal "has not been interrogated or adopted by compulsion measures", the voluntary surrender of the criminal could come into existence, which further extended the system of the voluntary surrender based on the 1979 Criminal Law. The crime confession was required that the main crime should be confessed, which was different to the part crime which should be given a lighter punishment or exemption of punishment, and in the joint offence, the criminal should also confess other criminals in the same case, and the principal "must disclose the crime of other criminals in the same case", or else, the voluntary surrender could not come into existence. For the subjective giving criminal himself up to the police, the situations that the relatives brought the families or friends to justice also belonged to the voluntary surrender. The making-contribution was divided into the common making-contribution and the major making-contribution, and the confession policy was also stipulated in the Explanation. At present, the Explanation is still being applied.

In March of 1997, the 1997 Criminal Law replaced the 1979 Criminal Law and perfected the system of voluntary surrender. In the chapter of "the Concrete Utilization of Punishment", the part of "Voluntary Surrender and Making Contributions" definitely confirmed the definition of the voluntary surrender secondly following the "New Criminal Law of Qing Dynasty", i.e. "the criminal who commits a crime and surrenders subjectively confesses his crime according to the facts, and the voluntary surrender comes into existence", which was the common voluntary surrender. The punishments about the surrendered criminal in 1997 Criminal Law were same to the punishments in the 1979 Criminal Law, and the extent of punishment was looser. In addition, in the new criminal law, "if the criminal suspect who is adopted by compulsive measure, the accused person and the criminal who is serving a sentence confess other crimes that the judicial department has not known according to the facts, the voluntary surrender comes into existence", which was called as the special voluntary surrender, quasi-voluntary surrender, or the voluntary surrender of remaining crime. The voluntary surrender in the special provisions of criminal law was generally called as the special voluntary surrender. The 1997 Criminal Law had not contained the regulation about confession.

The "Explanations of Several Application Questions about Criminal Case of Voluntary Surrender and Making Contributions" enacted by the Supreme People's Court stipulated the regulations about the honestly confession and how to cognize the voluntary surrender to justice, which was the concrete complement of the 1997 Criminal Law.

From the Western Zhou Dynasty to this day, the system of voluntary surrender was continually substantiated and developed, but comparing with foreign legal systems, the present system of voluntary surrender of China still needs to be further perfected, for example, further confirming the criminal punishment extents. In the article, only the evolvement of the system of voluntary surrender was briefly narrated, and the concrete contents of the voluntary surrender system in each dynasty were not introduced.

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A Comparative Study of Shrink-Wrap License

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Abstract

This paper presents the dilemma of e-commerce age that huge amount of computer –related litigation challenges the law of different countries on how to appropriately resolve these difficulties. Through this paper, the author tries to compare UCITA and EU with China's approaches, seeks for guidance or inspiration for policymakers in China. The author seriously examines the conflicting interests and problems faced by both software suppliers and users. By conclusion, the author believes that there exists a number of grey areas and an urgent need for new judicial interpretation in China.

Keywords: Shrink-wrap license, UCITA, Directive on Unfair Contract Terms

1. Introduction

For more than a half century, computer software has gradually reduced in price, revolved from huge mainframe use into retail items available to the mass market. Vast amount of computer –related litigation, resulting from legal problems with computer programs, as well as a massive amount of legal problems posed by the introduction of new computer technology, challenges the law on how to appropriately resolve these often difficulties. One predicament is the status of the shrink-wrap license, which raises both contractual and copyright law issues. Almost all countries around world, both developing and developed, are seeking to eliminate this irksome confusion. In 2000, the U.S passed a controversial rule for computer transactions at Federal level —the Uniform Computer Information Transaction Act (UCITA), which represents an attempt to tailor contract law to the types of transactions at issue. However, this has proved necessary because transaction in computer information involve dissimilar expectations, industry practices and policies from transactions in goods. Thus, the body of traditional contract law is wanting. The European Union has certain legislation reflected in the Directives.

A number of other countries either refuse to enforce shrink-wrap licenses at all, or place restrictive conditions on the form and contents of such licenses. Comparatively some countries freely enforce shrink-wrap licenses. With respect to China's legislation on this issue, few specific statutes or official interpretation can be found, and there has been no litigation on the basis of this issue yet.

Throughout the article, UCITA and EU approaches will be compared. Then this article will question whether these two approaches provide guidance for policymakers in China, after fully examining the conflicting interests and problems faced by both supplier and user. Finally, the article concludes that there exists a number of grey areas and a need for new judicial interpretation in China.

2. The conception and problem of the Shrink- wrap license

A. Conception

Shrink-wrap licenses are now very common. In fact, most of us have entered into a transaction to obtain software that is supplied subject to a shrink-wrap license. Scholars in the US generally define such shrink-wrap licenses as adhesion contracts. The manufacturer normally places the terms and conditions of the software license inside a box with the software disk or CD shrink-wrapped in plastic. The customer is then able to see through the plastic or on the outside of the envelope some of the terms of the agreement. The customer is advised that by opening the envelope or the plastic wrap, he or she is deemed to have accepted the contract inside and is bound by its terms. Under that situation, the consumer is only given two options—one, is he or she agrees to be bound by the terms and conditions contained inside the box, or two, he or she returns the unopened product for a full refund

Shrink-wrap licenses commonly include language along the following lines:

[Vendor] is providing the enclosed materials to you on the express condition that you assent to this software license. By using any of the enclosed diskette(s), you agree to the following provisions. If you do not agree with these license

provisions, return these materials to your dealer, in original packaging within three days from receipt, for a refund.

B. Conflicting interests

Unlike typical contracts, most shrink-wrap licenses do not involve bilateral exchanges of rights or promises. Instead, users are considered to have entered into a contract simply by tearing the wrap, regardless of their unawareness. The interests of consumers and the interests of producer thus diverge dramatically. On the one hand, these agreements allow computer software publishers to impose standard terms and conditions for the transaction on a purely "take-it-or-leave-it" basis. On the other hand, Purchasers of mass-produced software encountering shrink-wrap licenses are only given the opportunity to read the terms and conditions once the software has been paid for.

Ultimately — should Chinese legislators recognize the enforceability of terms and conditions that consumers have no chance to read before they purchase software?

3. US and EU approach

3.1 US—from case law to UCITA

Triggered by resolving the confusion in applying existing U.S. law, UCITA was once enacted UCITA soon received national-wide criticism. As a result, only two states as of 50, follow it. Consequently software transactions are still mainly subject to the "complex, conflicting and uncertain body of case and statutory law" in U.S.

3.1.1 Case law

Since the Uniform Commercial Code (U.C.C.) was not designed for intangible goods or services. in the U.S., courts have diverged on the issue of whether such agreements are enforceable against the purchaser or not. Most courts have refused to recognize the terms of these licenses because the terms were not previewed by the purchaser until after the price of the item had been paid. These courts have analyzed such agreements under the principles of contract formation found in the UCC, and ruled that the terms were not part of a bargained-for exchange. Some courts have also evoked the Federal Copyright Act to preempt state enforcement of some shrink-wrap contract terms. However, the prevalent attitude towards shrink-wraps has been negative.

The first exception to the general rule of non-enforcement of shrink-wrap licenses is the milestone case of *ProCD v. Zeidenberg*. In *ProCD*, Zeidenberg bought a personal copy of *ProCD's* Select Phone database. The copy Zeidenberg purchased came inside a shrink-wrapped plastic covering that contained a licensing agreement describing the manner in which the database could be used. *ProCD* used this shrink-wrap license to hinder the use of a personal copy of the database, like the one Zeidenberg had purchased, for commercial use. Nevertheless, Zeidenberg used the data from Select Phone to create his own database and then he uploaded it to the Internet. Zeidenberg argued that he had not violated the licensing agreement because he had not used the copyrighted software that came with *ProCD's* Select Phone database. On the other hand, *ProCD* argued that Zeidenberg ignored the shrink-wrap license attached to his copy of the software when he started to sell the information compiled by *ProCD* at a cheaper price. The United States District Court held that buyers did not have to obey the terms of shrink-wrap licenses, but the United States Court of Appeals for the Seventh Circuit issued an opinion that found a shrink-wrap license to be a valid contract. The court ruled that unless the terms of the license are unconscionable, or otherwise excused by contract law, then the buyer was required to honor the terms of the license.

ProCD therefore set a precedent of the recognition for the enforceability of shrinkwraps. This case was frequently cited by the courts before UCITA was formally enacted, and was further confirmed by the courts of *Hill v. Gateway* and *M.A. Mortenson Co. v. Timberline Software*. The overwhelming majority of commentators, however, have criticized its reasoning.

3.1.2 UCITA

In order to clarify this murky area of law and provide a standard set of rules, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") promulgated the UCITA. The stated purposes of UCITA are to "support and facilitate the realization of the full potential of computer information transactions in cyberspace; clarify the law governing computer information transactions; enable expanding commercial practice in computer information transactions by commercial usage and agreement of the parties; and make the law uniform among the various jurisdictions."

UCITA explicitly and controversially accepted Shrink-wrap licenses as enforceable contracts. However, in the year 2003, upon increasing opposition, NCCUSL decided to cease efforts to get the UCITA enacted in all states of the U.S. Thus, UCITA has only been enacted in two states —Maryland and Virginia.

3.2 EU—Directive on Unfair Contract Terms and independent approaches

The legal system for Shrink-wrap license adopted by the European Union is very different from that in the United States. The way the EU solves this issue is generally reflected in the 1993 EU Directive on Unfair Contract Terms, which

provides consumers with more effective legal remedies and directs all member states to develop such protections for consumers. By way of explanation and definition, the Directive provides that a term will be regarded as not negotiated "where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract." Such contracts are subject to review based on substantive fairness. In an Annex, the Directive provides a list of terms that would be presumptively problematic. However, one such provision is a term that would purport to bind the consumer to terms with which thus he had "no real opportunity of becoming acquainted." This is an important limitation on the ability to use shrink-wrap licenses.

There has been some litigation under the Directive and the various statutes of the countries implementing the Directive. However, the way to deal with the validity and enforceability of shrink-wrap licenses varies from country to country.

On January 1, 2002, the German civil Code codified the Germany Standard Terms Statute. Germany's approach generally provides a general provision against unfair contract terms, as well as a list of both prohibited and suspect terms. In addition, section 305c(1) specifically provides that surprising terms do not become part of the contract. To resolve a standard contract problem, like the shrink-wrap contract, two tests should be done: First is called the "accessibility test" — courts look to the lists of prohibited and suspect terms, and if the issue is not covered there, they turn to the more general section; Second is the "reasonability test," through which the court will find the terms are invalid "if, contrary to the requirement of good faith, they place the contractual partner of the user at an unreasonable disadvantage."

In contrast, the United Kingdom adopted a more regulatory approach. The Office of Fair Trading issued its Unfair Terms in Consumer Contracts Regulations to implement the E.U. Directive. Under these regulations, the Director General of Fair Trading takes the responsibility for investigating complaints about unfair terms, and the office has reportedly investigated thousands of complaints, securing amendments to the contract terms. However, rather than relying on litigation, the Office of Fair Trading has taken a proactive approach of working with the industry to devise contract terms ahead of time that meet the tests of the Directive. Thus, the industries can get the contract right ahead of time, rather than face governmental action later.

4. China's particular situation

China, with numerous people who regularly access software, has long explored laws to which aim to attract and build a fair and competitive atmosphere. As the consequence of rapid technical development, China now possesses a large amount of professional software vendors who are able to design software independently. However, the Chinese electronic market is still mainly dependent on the imports from other countries. Although there has been no recorded cases based on Shrink-wrap licenses in China, it is necessary and even urgent for China to fully considerate these questions — is the current Chinese body of law well-equipped enough to respond to the Shrink-wrap license, or is it necessary to adapt a fundamental change in the current body of law on this particular subject?

According to the Contract Law of People's Republic of China Chapter 9, Article 137 : "When an object such as computer software with intellectual property rights is sold, the intellectual property rights of such object shall not belong to the buyer except as otherwise stipulated by law or agreed upon by the parties." This statute is quite ambiguous, and it is hard to resolve the shrink-wrap license issue merely based on this clause. It leaves many muddy questions calling for the detailed interpretation or even modification of the statutes.

However, under China's particular atmosphere, modification is not feasible due to the congress's political sensitivities and lack of technical capability. Thus, judicial interpretations seem a preferential and pragmatic way of changing the statute, since it has well proven to clarify statutes, alleviate legislative burdens, and implement Party policies for a long time. What's more, judicial interpretation by the Supreme People's Court (SPC) has become a normal way to create new statutory provisions—the criminal code is an important example. The same has been true of the civil codes. In my belief, the shrink-wrap license issue can be settled through appropriate judicial interpretation. Nevertheless, to get the proper interpretation, some questions about the nature of shrink-wrap license should be seriously considered.

5. Problems and proposals

To make a proposal for the judicial interpretation, learning from other countries' approaches and valuable experiences would be beneficial. In fact, the EU and America set great precedents, which may be worth transplantation to a certain extent.

A. Copyright or contract law?

The status of shrink-wrap licenses remains unclear. It is disputable which law is preemptive—contract law or copyright law? Some Chinese scholars suggest that the preferential way to govern the shrink-wrap contract would be copyright law, arguing that the content of these agreements is an un-contractual license traditionally protected by copyright law.

However, significant difference between copyright and contractual right is that copyright is rights against the world, while contract rights, generally affect only involved parties, and do not create "exclusive rights." Under the shrink-

wrap licenses, users are considered to access and use the copyrighted software subject to the terms of the agreement. Thus, the software user may have to promise not to use the product in ways that would normally constitute fair use or to give up other rights that would otherwise be reserved to a purchaser under copyright law. As a consequence, this contractual license would be in addition to any software protection provided by copyright law. Comparing this with the sale of a book or record, under which the extent of protection is only determined by the general law on copyright, the shrink-wrap license should be entitled as a contractual license and thus subject to the contract law.

B. Separate contract?

The first questions at issue is —is opening the envelope or box capable of leading to the formation of another contract —the software license agreement offered by the copyright owner?

US courts usually deal with this problem by means of integration of contract. In determining whether an agreement is integrated, "the court may consider evidence of negotiations and circumstances surrounding the formation of the contract." It seems unlikely for a US court to say that there are two dividable contracts because courts generally did not support the conclusion that the first contract constitutes an integrated contract.

The EU judiciary appears to support the same approach and has given the impression that the protection of the copyright holder provides an important policy reason for holding that shrink-wrap transactions bind to the license unless the consumer at that point decides to withdraw. In this situation, the first contract would appear to serve no worthwhile purpose. This conclusion stems from the Scottish case of *Beta Computers (Europe) Ltd v. Adobe Systems (Europe) Ltd*, in which the court specifically rejected the two contract notion. However, the judge stated where possible, effect should be given to license conditions because of the interests of the industry as a whole and the protection of copyright owners provide sufficient policy reasons for this approach.

China should follow the US and EU way because once one recognizes that there is a second contract between the consumer and the supplier, the effect of the first contract would be meaningless, because all it shows is the existence of an agreement, not its extent.

The secondary question is — is the license provisions a written confirmation and as an attempt to modify the terms of the contract?

In the American famous case of *Step-Saver Data Systems, Inc. v. Wyse Techn. And Software*, the manufacturers argues that the contract is not sufficiently definite without the shrinkwrap terms that manufacturers have only "conditionally accepted" the contract by shipping the software, and that consumers consent to a modification of the contract when it opened the software package containing the license. However, the court rejected this argument and treated the shrinkwrap license as a modification of contract and thus did not bind consumers, because U.C.C. sections 2-202 and 2-209 require that both parties intention to adopt the additional terms. This conclusion was confirmed by the court's application of U.C.C. section 2-207, which establishes a legal rule that proceeding with a contract after receiving a writing that purports to define the terms of the parties' original contract is not sufficient to establish the party's consent to the terms of the writing. In the absence of a party's express assent to the additional or different terms of the writing, section 2-207 provides a default rule that the parties intended, as the terms of their agreement, those terms to which both parties have agreed, along with any terms implied by the provisions of the UCC.

The main issue for Chinese legislator to seriously think about is whether or not the shrinkwrap license is effective enough to modify the contract terms without consumers expressed agreement to such a modification. Importantly, if we treat it as a modification to the contract, the license is very likely theoretically unenforceable. Because under Chinese contract law, the parties' intention is a prerequisite to modify a contract no matter it is a form contract or not. Undeniable, this is inconsistent with the argument made by this article, but this issue is of interest because it can reveal the nature of shrinkwrap license to some extent.

C. Disclaimer of warranty and limitations on remedies

The form of disclaimer on warranties and limitation on remedies is common to most shrinkwrap licenses. The manufacturer disclaims warranties and representations of any kind with regard to the licensed software, including the implied warranties of merchantability. It is worth noting that American contract law has well-settled the warranty limitation provisions about the existence and nature of implied warranties. A number of cases have specifically considered the enforceability of warranty disclaimers in the shrinkwrap license context.

A more complicated and practical matter is what if the supplier and the copyright owner is not the same? This phenomenon is quite normal in real life, and thus significant. Assuming there are three parties involved here— is the copyright owner essentially acting as a third party beneficiary and thus allowed to enforce a contractual term once certain conditions are fulfilled? In this situation, the manufacturer does not need to carry the obligation of warranty according to U.C.C if the consumer is not reasonably foreseeable by the manufacturer.

My suggestion for the Chinese legislator is to examine the disclaimer of warranty and limitations on remedies. In

another word, the warranty can be disclaimed, but the validity of the disclaimer is subject to stringent judicially incorporated requirements. The court should hold that the implied warranty against redhibitory defects may be disclaimed only if (1) the disclaimer is written in clear and unambiguous terms, (2) the disclaimer is contained in the sale document, and (3) the disclaimer is brought to the attention of the buyer or explained to him. However, this is still a controversial resolution, which remains some further consideration.

D. Formation

To discover whether or not a contract has been fully formed, it is necessary to analyze the transaction by examining whether the necessary legal steps have been completed. Unlike the US. Or the EU, where subjective elements are taken into consideration, Chinese contract law highlights more on the objective matter—a valid offer and acceptance. So, the biggest question for formation is when does the acceptance happen?

Answering this question, UCITA espouses the ProCD “layered contracting” approach, which recognizes that making a contract is a process and that some contractual terms are “hammered” out over time. In other words, under the framework of UCITA, a contract may be formed even if the exact time that the contract is made is unknown. Thus, until the purchaser has installed the software after reading the license, there is no acceptance. All the actions taken by the consumer before hand — unveiling the shrink-wrap, reading the license — only constitute a process of acceptance, and thus have no meaningful legal effect. The consumer can at any time before installing the software repudiate without taking any legal obligation, because a contract has not been effectively formatted. This approach seems quite adoptable and effective, and can balance both interests. However, the more pragmatic reason is the function as a guideline that judicial interpretation plays, which means a more precise and definite rule.

E. Enforceability

The major objection from the U.S. to recognizing enforceability concerns sufficient notification to a consumer or business that has not reviewed and understood the provisions of an agreement. The option available to it—non-participation—would lead to market stagnation if other consumers or businesses took the same position. Thus, the fact that consumers continue to sign form agreements does not reflect their willing acceptance of such terms, but their lack of realistic alternatives. Therefore, U.S. courts regard the shrink-wrap contract a violation of contract rules.

An alternative to this is German way, also a general European attitude, under which the question of whether shrink-wrap licenses (“Schutzhüllenverträge”) are enforceable is rarely addressed by the court and commentators mainly deny its enforceability, however it depends on a case by case basis, and two tests routinely are used.

The legality of these licensing agreements has been questioned. Notwithstanding these doubts, shrink-wrap license should be a presumptively enforceable contract under the Chinese contract law, unless there exist obvious unfair terms to the consumer. One of my arguments is based on the adequate notice prior to performance, which follows the notice principle. The other reason, maybe more important, is the economic interest that the standard form license brought. If courts hold that consumers are not bound by the licenses, then the consumer price would have to rise.

The legitimacy of the shrink-wrap license derives, probably not from the social value of a transaction freely negotiated, but from the social value of goods produced more abundantly and cheaper by reducing the cost of legal and other distribution services. Meanwhile, in contrast to the common law, under which fairness is at the heart of adhesion contract doctrine, China, with a special legal and social circumstance, does not have a doctrine of unconscionability per se. At the current developing phase, Chinese legislator would probably be willing to weigh more on efficiency principle and give the general enforceability to the license, balancing the potential unfairness and inequality of bargaining power through the limitation from detailed judicial interpretation on the standard contract. Ultimately, the recognition of the agreements would promote certainty, commerce, and fairness by removing the current unknowns.

However, one may be confused by this question: since China still mainly depends on imported software and its software or other advanced electronic product is still much behind western countries. Importantly, does the recognition of the enforceability of these shrink-wrap license agreements bind or baffle the development of the Chinese own software industry? For instance, if the foreign software suppliers limit the use of Reverse Engineering by the use of shrink-wrap license agreements, and thus make it difficult for a Chinese software producer to progress to independent production through Reverse Engineering, China may lose both time and economic investment. Also, does the recognition of enforceability break the balance of conflicting interests, which intelligent property law seeks and aims to protect, and thus overly favor the computer software supplier over legitimate rights of the consumers?

Recognizing the enforceability of the shrink-wrap license agreements only manifests that the use of such agreements would not be invalidated merely because they are in electronic form, in an electronic communication, or in standard form. There still remains the possibility that particular terms contained in those licenses will not be enforceable if the contract term is unreasonable, unfairly bind individual consumers, or against the public policy. Certain restrictions on the agreements would completely maintain the balance. For example, legislator could explicitly invalidate terms which violate the Chinese copyright law, like the “No Reverse Engineering” clause in the shrink- and click- wrap license

agreements, or the terms that contain inobservance of the fair, good faith, and other essential contract or copyright law principles, with the purpose of sufficiently protecting China's domestic industry.

F. Consumer's rights

However, there is great potential for abuse from the use of this license. A noteworthy drawback of the shrink-wrap license is that its terms may be drafted with the intent to provide the utmost protection for the party providing the form, thereby minimizing the actualization of the adhering party's reasonable expectations. Either as part of general law, or as a separate consumer protection law, more careful definition of some basic protections for the consumer could give both consumers and manufacturers some stability in what is now a very troubled area.

(1). Right of sufficient "opportunity to review"

The opportunity to review contract terms is fundamental to contract fairness. The UCITA, the European Union's Directive on unfair contract terms, and the set case law, all emphasize that the Shrink-wrap license should provide the consumer with sufficient "opportunity to review" the term before he or she has engaged in some conduct manifesting assent. The key requirement is the reasonableness of the presentation method, which will determine whether the term is procedurally unconscionable.

(2). Right of withdraw

Both UCITA and EU Directives state that, if a product is not of reasonable quality, or does not measure up to the product's stated purpose, the purchaser should be entitled to return the product for a refund. Because software creators have the obligation to disclose any known, nontrivial defects in a digital product, the consumers should be entitled to assume a product will meet or surpass reasonable customer expectations and the seller's claims. Plus, that refund should be easily available from the point of purchase or by a reasonably convenient refund procedure.

If the program does not actually do what the advertising or the salesperson said it would do, then there may have been a material misrepresentation and the customer should be entitled to a refund.

To adequately protect the consumer's interest, the UCITA further indicates that even after the license agreement is in effect, the consumer still owns the right of withdraw as long as revocation happens within a reasonable time. This method perfectly balances the inequity, especially with the lack of equal opportunity of negotiation. In this sense, despite some pessimistic claims about UCITA in the popular press and in some law review articles, UCITA still maintains the contextual, balanced approach to standard terms, which deserves Chinese legislators' deference.

A more tricky question arises —when layered contracting applies and when the traditional approach. Because the first is good for sellers as long as they have monopoly power, but the minute they face competition, they are not going to like a rule that allows purchasers a period of regret in which to undo a sale to which they initially agreed. The traditional contracting rules fluctuate in situations where there is a changing market price. Periods of regret allow one of the contracting parties a way out of the contract and thus reduce the utility of the contract as a mechanism for allocating price risk.

Answering this question, we need to define sharply the situation to which the ProCD approach will apply. We should probably understand the case based on the presumption that the manufacturer acted in bona fide. If the evidences show that the main reason for the manufacturer's withdrawal is to take advantage of increasing market price, the court should not adjudicate in favor of the manufacturer. The layered contract approach is to be used to resolve the problem of formation, and should not be used by the manufacturers in bad faith.

6. Conclusion

Today, some variation of a shrink-wrap agreement is included in almost every piece of software purchase, it is an efficient way for the software vendor to dictate the terms of the sale. Transactional efficiency is necessary in an increasingly technological world, and to interpreting this license through the judiciary is an effective way to fill the blank or gray area existing in the current Chinese law body, in order to attract high technology industry, including software manufacturers, to our country.

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Statutory Rape Law in Chile: For or Against Adolescents?

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Abstract

This article sets forth the interests and conflicts involved in the current Chilean law on statutory rape. Through a thorough investigation of the conceptualization, implementation, and current life of this legislation, the possible effects of the Chilean case on adolescents' rights is investigated and evaluated. Examining the development of this law and its related policy, and if their consequences conflict with the Chilean Constitution or international and regional human rights conventions allows us to evaluate the merits, utility, and potential problems of such legislation. A detailed investigation of the social and legal data available, as well as the concrete liability implications reveals that the policy which implements the Chilean statutory rape provision is in violation with domestic and international human rights law.

Keywords: Statutory rape, Adolescents, Sexuality, Rights

1. Introduction

In the past few years, a tendency to increase the age of consent in statutory rape laws has arisen. Chile is one of the countries where, in 2004, the Criminal Code was modified to increase said age to 14, whereas the previous age was set at 12. (Note 1) Through this law, sexual intercourse with any minor under the age of fourteen, regardless of whether the parties believed it was consensual, is considered a crime.

This legislative modification was significant for Chilean society, as it took place at a time when it was experiencing feelings of outrage and horror, in the face of high profile sexual abuse and pornography cases. (Note 2) In this context, the law was presented as a way to protect children and adolescents from such situations. (Note 3)

The adoption of this law led to the creation of a policy by the Prosecutors office which establishes the legal obligation of health care professionals and teachers to report any adolescent under the age of fourteen who is sexually active or seeks contraceptives. (Note 4) Once reported, it is the prosecutors' responsibility, in accordance to Chilean law (Note 5), to lead the investigation of possible criminal activity, such as the existence of statutory rape. (Note 6)

Given the policy through which this law is being implemented, it is relevant to consider the effects that it may have on adolescents and their human rights. Throughout this article, it will be argued that the Chilean provision on statutory rape and, in particular, the elected mode of implementation violates adolescents' human rights. Specifically, it will be said to violate adolescents' right to confidentiality, information, health, as well as equality and non-discrimination, as recognized both by domestic and international human rights law.

1.1 *The close-in-age exception*

When examining statutory rape law, it is relevant to consider whether a close-in-age exception has been established. In the case of Chile, the law which establishes a system of responsibility for adolescents who infringe the criminal law contains what is known as a "close-in-age" exception. (Note 7) By way of this exception, it is established that adolescents may not be criminally prosecuted for rape of a person under the age of fourteen, so long as the age difference between the victim and the accused doesn't exceed two years in the case of rape, and three in the case of other sexual conducts. (Note 8) The law also requires that there be no use of force, intimidation, the victim not be deprived of consciousness, advantage is not taken of the incapacity to oppose resistance, and there is no abuse of the loss or mental disturbance of the victim. Additionally, there must not be abuse of a relationship of dependency of the victim, or of the abandoned state of the victim or of the inexperience or sexual ignorance of the victim. (Note 9)

In other words, the close-in-age exception admits the possibility of consensual sex amongst peers with a person under the age of fourteen, thus avoiding criminalization. While relevant, the limitation of this exception to a two-year difference amongst parties may prove to be problematic. That is, while age based distinctions may be useful they are also necessarily arbitrary to a degree. (Note 10) This is revealed by the way in which statutory rape law addresses different cases. For example, it establishes that it is legal for a fifteen year old boy to engage in consensual sexual intercourse with a thirteen year old girl, but it is not legal for a sixteen year old boy to have sex with that same thirteen year old girl.

A situation such as the above poses certain difficulties. For instance, if it is the same thirteen year old girl in both cases, and she is recognized as capable of freely consenting to engage in sexual intercourse in the first scenario, what is the justification for denying this capacity in the second scenario? Is the capacity and level of maturity required to be able to freely consent to engage in sexual activity different depending on whether the expected partner is two or three or even five years older?

While the initial response may be negative, it can be argued that the rationale behind this norm is that it presupposes that a person with over two years of age difference with their partner, who is under the age of fourteen, may be able to exert undue influence on their partner, thus making consent impossible. In certain cases, this may occur. For example, if a forty year old man engages in sexual intercourse with a thirteen year old girl, and this intercourse is said to be consensual, one may very well inquire as to how the forty year old man was able to use his mature age and experience as a tool to wrongfully induce the thirteen year old girl into apparent "consensual" sexual intercourse.

In cases where the age difference is so great, the law would appear to have reason to presume that sexual intercourse between such parties was not, in essence, consensual. Nonetheless, it is necessary to distinguish between the amount of undue influence and pressure that a person with a twenty or thirty year age difference may exert on a person under the age of fourteen, and that which may be exerted by a person of an age that also forms part of the span of adolescence, or even, in accordance to the Convention on the Rights of the Child, a child themselves.

2. Adolescents' sexuality in the Chilean legal context

Chilean society can be said to be marked by a variety of strong influences and historical events. Its political history is rampant with dictatorships, the most recent one dating from the year 1973 to 1990. This period was a time where the most basic rights were unacknowledged, leading to mass human rights violations. (Note 11)

In this time, adolescents and their rights were not a priority on the public agenda. Once the dictatorship ended, the newly democratic government had the task of leading the country through the process of reconciliation, while at the same time providing justice. As time passes, governments and society have begun to widen the horizon of issues on the public agenda, reaching a point where the dictatorships legacy of human rights violations can no longer be said to be the only topics of the agenda.

One of the issues that arose in this context is the regulation of gender and sexuality. Feminist groups have taken the initiative to demand that gender equality be recognized in law and sexual and reproductive rights be acknowledged, (Note 12) in keeping with the international human rights treaties signed and ratified by Chile.

Though some significant legal changes have been made (Note 13), there is still a long way to go. Indeed, to the political legacy of the dictatorship, one must add the strong influence of the Roman Catholic Church. The Catholic Church acts as a strong conservative force, exerting significant influence over cultural values and political elites, particularly in matters of sexuality. (Note 14)

In such a context, legal actions contending sexuality issues tend to be wrought with controversy which tend to delay, if not impede, their success. For example, conservative actions to stop the distribution of the emergency contraception pill took place from 2001 to 2008. (Note 15)

Regarding adolescents, international human rights bodies have expressed particular concern about Chile's compliance with its obligations as State party to the Convention on the Rights of the Child (CRC) and Convention on Economic, Social and Cultural Rights (CESCR). Issues highlighted include the rate of teenage pregnancy and teenage mothers that drop out of school (Note 16); the lack of information, counselling and preventive programmes on reproductive health, including the lack of adequate access to contraceptives (Note 17), and the persistence of authoritarian and paternalistic attitudes towards children. (Note 18)

It is this last point that impacts the general treatment of adolescents in Chile, as these attitudes permeate different spheres of adolescents' lives, in a way which may affect their status as rights bearers. (Note 19) As noted by the Committee on the Rights of the Child:

"(...) due to traditional and paternalistic attitudes still widespread in the country, children are not encouraged to express their views and that, in general, their views are not heard nor given due weight in decisions affecting them in the family, at school, in the community and in social life at large." (Note 20)

The lack of recognition of adolescents as rights bearers, leads to common public controversy whenever the issue of adolescents' sexuality is raised, whether it be at the judicial, legislative or policy level. At the judicial level, sexuality is viewed under a moral lens, which circumscribes it to adults. An example of this can be seen in a case brought against a Chilean television station, for televising a segment which showed adolescents playing a game called "cultural striptease", in which they took off certain pieces of clothes and danced sensuously. (Note 21) The Court ruled that this segment was not acceptable, stating that the segment invited minors to naturally follow behaviours that are more

appropriate to the adult world, while sending the message that sexuality is free of affection. (Note 22) This case provides us with an example of the tensions that arise when the issue of adolescents' sexuality is on the table.

3. The rationale of Statutory Rape Law

The understanding of what constitutes a sexual offence varies over time and cultures. Indeed, all sexual crimes are, to a degree, socially constructed, in the sense that they indicate what is considered as "normal", while reflecting society's fears and prejudices. (Note 23) Thus, the definitions of sexual crimes portray what is considered to be sexually appropriate behaviour. (Note 24)

One of the main sexual crimes is rape. Though recognized today as a sanctioned in order to protect women – and sometimes men –, it arose as a way to protect the economic interests of males and to perpetuate male dominance over females. (Note 25) Rape, understood as non-consensual sex, continues to be a prevalent crime, both among young and older women. (Note 26) This raises particular concerns in regards to young adolescents, as they may be less prepared to confront situations of non-consensual sex, as well as to deal with them if they do occur. (Note 27)

In light of this, taking special measures to protect children and adolescents from rape appears to be reasonable. One of these measures may be the adoption of statutory rape laws. These laws have existed since the seventeenth century and stem from a Western medieval notion that it was necessary to preserve girls' chastity in order for them to be marriageable. (Note 28) Originally, the object of protection of these laws was a girls' virginity, though today they are held to serve as a means to protect children. (Note 29)

These laws criminalize sexual contact with a minor, (Note 30) by presuming them incapable to consent to sexual activity and/or intercourse. (Note 31) In other words, they invalidate consent, whereas, in non-statutory rape cases, consent is a defence to rape. At first these laws only made this presumption in regards to girls, but the modern tendency is to also include boys. Nonetheless, the majority of statutory rape cases still affect younger girls, rather than boys. (Note 32)

Currently, different interpretations of statutory rape law and its value may be observed. On the one hand, there is a growing awareness of the need to put a stop to child sexual abuse, (Note 33) which in turn has led to efforts to create or strengthen mechanisms that will serve this purpose. One of the ways in which the problem of child abuse is being confronted is through statutory rape laws and, moreover, by raising the age of sexual consent involved in these laws.

By raising the age of sexual consent, the scope of statutory rape is extended to include a wider age-group. The expectation is that, by raising the age of sexual consent, young people will be protected not only from sexual abuse, but also from teenage pregnancy and sexually transmitted infections (STI's.) (Note 34) In addition, those in favour of raising the age of sexual consent have argued that to not do so is to incite adolescents to initiate sexual activity at a still earlier age. (Note 35)

On the other hand, there are those who argue that, while condemning sexual abuse and rape is a commendable goal of any legislation, statutory rape law is not successful in doing so and, rather, has other negative effects. (Note 36) Indeed, statutory rape has long faced criticism for failing to distinguish between a brutal rape and a teenage romance. (Note 37) As Levine puts it:

"(...) statutory rape is not about sex the victim says she did not want. It is about sex she did want but which adults believe she only thought she wanted because she wasn't old enough to know she did not want it." (Note 38)

In this sense, statutory rape serves as a means to impose a certain morality, under which young adolescents should not be having sex. (Note 39) According to these moral norms, traditional notions of adolescence, which equate adolescents to helpless children, are reinforced. At the same time, since statutory rape laws continue to overwhelmingly affect girls, these laws also reinforce traditional images of girls as in need of protection. (Note 40)

Detractors from statutory rape laws also criticize the fact that they take away the agency of adolescents, as proceedings tend to be initiated by upset parents, who are not happy about their little girl having sex. (Note 41) This victimization is said to be disempowering, particularly when the adolescent felt she was engaging in consensual sex. (Note 42) Instead of denying adolescents ability to consent to sex, the law should recognize that many young people are already having sex or will choose to do so and therefore provide the support, information and services needed for them to make this choice responsibly. (Note 43)

Statutory rape laws can be viewed as part of a broader tendency to criminalize sexuality. Since ancient times, the discourse of sexuality has been subjected to powerful moral ideologies which construct entire systems to keep sexuality in check. (Note 44) In addition, history attests to a broad movement to use criminal law as a tool to enforce religious and traditional morality. (Note 45)

4. Statutory rape law and Human Rights

The effects of the Chilean provision on statutory rape may be examined from two perspectives. First of all, one may consider the effects produced by the law *per se*. In the second place, one may look at the effects generated by the way in

which the law is being implemented. While the effects produced by the law itself raises issues of criminal law, those that arise from its implementation have to do with matters of human rights. This article will focus on these last issues, though the effects generated by the law itself will also be briefly addressed.

In terms of the effects produced by the law *per se*, the desired effect is for it to protect adolescents from sexual abuse. Though this may be accomplished to some extent, it also places an inherent risk of prosecution on adolescents who engage in sexual intercourse with a peer under the age of fourteen. The presence of this risk is problematic and gives rise to particular concern due to the fact that rape is one of the crimes which is most severely punished under Chilean law. Perpetrators may be convicted to up to twenty years of imprisonment. (Note 46)

Given that the law does not admit the possibility of consent, the teenage boyfriend of a thirteen year old girl may, under this law, be prosecuted and condemned as a rapist for engaging in consensual sexual intercourse. Conversely, the person under fourteen who engaged in sexual activity will be stigmatized as a rape victim, regardless of that person's feelings and belief that they have engaged freely and consensually in said activity.

In addition to this risk, posed by the law in itself, concerns also arise upon the examination of the way in which the statutory rape provision is being implemented. As noted earlier, this law was followed by a policy which orders health care professionals and teachers to report any indication of sexual intercourse to the prosecutor.

Regarding health care professionals, this policy has led to the denial of sexual and reproductive health services. This is so because health care providers, when faced with the option of either reporting an adolescent to be investigated on the charge of rape or denying services, choose what seems as the lesser evil: denying service. (Note 47) Whether they choose one option or the other, adolescents' human rights are implicated. Particularly, concerns about adolescents' right to confidentiality, information, health, and equality and non-discrimination, arise, as will be seen in sections 4.1., 4.2., 4.3. and 4.4.

Before proceeding to examine these rights, it is relevant to consider that any affectation of adolescents' rights in this context is of particular concern, given the Chilean statistics related to adolescent's sexual activity. Indeed, according to a study produced by the National Institute of Youth (Instituto Nacional de la Juventud, INJUV), the majority of young people have a partner (Note 48) and the majority of young people have also had sexual intercourse. (Note 49)

Though the majority of Chilean youth have sexual intercourse for the first time between the ages of fifteen and 18 (62,6%), 13,7% have had sexual intercourse before the age of fifteen (Note 50) and are, therefore, likely to fall into the category of what statutory rape law views as illicit sexual activity. It is also relevant to note that there is a tendency for a decrease in the age at which most Chilean youth have sexual intercourse for the first time. (Note 51) With this context in mind, the following section will examine the specific rights implicated through the implementation of the Chilean provision on statutory rape.

4.1 Adolescents right to confidentiality

The statutory rape provision of Chile, along with the policy that arose from it, may be evaluated based on the way in which it may affect different rights. One of the rights that may be implicated is adolescents right to confidentiality, particularly in the sexual and reproductive health context.

In the health care context, confidentiality means that all and any information shared between the health care provider and the patient/client must remain within the consultation. (Note 52) While the right to confidentiality has been recognized for all people (Note 53) regardless of age, it is important to become familiar with the way in which this right has been enshrined for adolescents specifically, given the particular challenges that arise for this age group.

The right to adolescents' confidentiality when seeking both information and services regarding sexual and reproductive health services has been recognized in a variety of international forums, as well as addressed in different judicial cases. Though these cases do not create legal precedent for Chile, they constitute a relevant means to understand the way in which adolescents' confidentiality has been interpreted and upheld worldwide.

An example of such a case is that of *Gillick v. West Norfolk and Wisbech Area Health Authority*. (Note 54) This case was originated through an action brought by the mother of five daughters below the age of sixteen, who sought the declaration on behalf of the Court that a circular that stated that a doctor could lawfully prescribe contraceptives to a girl under sixteen, without parental consent, was unlawful. The House of Lords, in a decision with a 3:2 majority, determined that it was. When reviewing this case, one of the judges, Lord Fraser noted that the capacity and autonomy of young people must be understood according to the social context, and that it could not be thought that English teenagers would be under strict parental control until reaching the majority of age. (Note 55)

At the same time, another judge, Lord Scarman stated that doctors did not incur in criminal responsibility for prescribing contraceptives to adolescents below the age of sixteen without parental consent, given that the doctors do not instruct adolescents to have sex, but rather act guided by their clinical judgement aimed at protecting the health of

their patients. In this way, the case upheld adolescent's right to confidentiality in the context of sexual and reproductive health services. (Note 56)

Another relevant case is that of AID FOR WOMEN et al. vs. Nola Foulston et al. (Note 57) This case was brought by the Centre for Reproductive Rights on behalf of a group of health care providers and counselling services, challenging Kansas's attorney general's interpretation of the child abuse reporting statute. This interpretation called for doctors and school counsellors, among others, to report all suspected sexual activity involving anyone under the age of 16 as evidence of child abuse. (Note 58) The Kansas District Court ruled against said interpretation, noting that reporting all teen sexual activity infringed their right to privacy and was not consistent with the goal of the statute. (Note 59) Rather, the focus should be put on identifying true victims of abuse, being health care providers in a unique position to determine whether such abuse exists. (Note 60) Thus, health care providers should be able to retain the discretion of whether or not to report based on signs of sexual abuse. (Note 61)

These judgments contribute to an understanding of what adolescents' confidentiality means, as well as why it is relevant. The analysis of these cases leads to the conclusion that adolescents' right to confidentiality is not only recognized internationally, but that ensuring that it is upheld is of particular importance when it comes to their reproductive and sexual health. Indeed, the Committee on the Rights of the Child has also highlighted the importance of ensuring adolescents' confidentiality, including on health matters. (Note 62)

Adolescent's right to confidentiality in regards to their sexual and reproductive health can also find legal basis in Chilean law, chiefly in the Constitution (Note 60) as well as in the Code of Medical Ethics. This Code establishes doctor's duty of confidentiality towards their patients (Note 64) and also notes that the opinions of minors must be taken into consideration, according to their age and level of maturity. (Note 65)

Exceptionally, doctor's may be allowed to reveal information related to their patients if the patient has a sickness where reporting is mandated; if the Courts order them to do so; when required for birth or death certificates; when it is absolutely necessary to avoid harm to the patient or others; and when it is necessary for their own defence in Court. (Note 66) Similar exceptions can be found in both Chile's Sanitary Code and Chile's Penal Process Code, which order that the duty of confidentiality be forgone in cases where there is the obligation to protect the health of the population (Note 67), or when the professionals must report the existence of a crime or the signs of one. (Note 68)

The Chilean statutory rape provision puts us in this last hypothesis. That is, it would be a case where professionals have the legal obligation to report the existence of a crime (statutory rape), or the signs of one. Based on this, it would appear that doctors are protected by the law in surrendering their duty of confidentiality.

However, according to the Chilean provision on statutory rape, the crime consists of engaging in sexual intercourse with any person under the age of fourteen. (Note 69) The law does not penalize contraception, nor does it view the person under the age of fourteen as perpetrator or criminally liable. Consequently, doctors and health care providers broadly are under no obligation to denounce young teens who seek contraceptives or who disclose their intent to engage in consensual sexual activity. Quite to the contrary, in the absence of true signs of abuse, their obligation is to uphold confidentiality.

4.1.2 Implications of statutory rape law on adolescents' right to confidentiality

In the process of examining the implications of the Chilean statutory rape provision on adolescents' confidentiality, a distinction must be drawn between the implications generated by the law *per se* and those that result from its current mode of implementation.

Regarding the implications of the law itself, as already seen, they consist of the inherent risk of prosecution. In order for such prosecution to take place, a case of sexual intercourse with a person under the age of fourteen must be reported to the prosecutor. If this report comes from a health care provider, the issue of confidentiality arises.

This leads the focus to shift to the policy designed to implement the law, which orders health care professionals to report to the prosecutor any sexual intercourse with a person under the age of fourteen or who is seeking contraceptives. This policy makes the surrender of confidentiality mandatory, without allowing room to consider whether sexual intercourse is consensual or not.

Though disclosure is meant to protect adolescents from sexual abuse, whether this is an effective and appropriate way to do so is subject to discussion. Indeed, there are those who argue that denying adolescents' confidentiality is neither an effective nor appropriate means, as it may lead them to not access these services. (Note 70) Such a response finds basis in studies which show that confidentiality concerns are a major reason why adolescents' don't access health care services. (Note 71) The threat of criminal prosecution may be expected to heighten these concerns, given that adolescents should not be expected to want to expose themselves or their partners to criminal charges. In regards to this, the right to not incriminate one-self also raises challenges. (Note 72)

This context may lead to sexual activity among adolescents to be driven underground, thus defeating the protective purpose of the law. The consequences of this are dire, as it may lead to a heightened number of teenage pregnancies, unsafe abortions and untreated STI's, including HIV and AIDS. (Note 73) On the contrary, if confidentiality were to be upheld, adolescents would be encouraged to access health services. When doing so, health care professionals would have the opportunity to provide the guidance and information that adolescents need to make healthy, informed and responsible decisions about their sexuality. (Note 74)

4.2 Adolescents right to information

The right to information is internationally recognized as an aspect of freedom of expression, which is established in the Chilean Constitution as a fundamental right. (Note 75) In order to understand how the right to receive information pertaining to sexual and reproductive health has been addressed, it is useful to consider the case of Open Door Counselling and Dublin Well Woman v. Ireland. (Note 76) Though this case falls under the jurisdiction of the European Court of Human Rights, which does not have jurisdiction over Chile, it is helpful to consider as a means to understanding how this right has been framed internationally.

This case examined whether an injunction preventing two women's health clinics from disseminating information to women in Ireland on legal abortion services provided outside of Ireland violated Article 10 (Note 77) of the European Convention, and ultimately ruled that it did. In its resolution, the Court recognizes that restrictions on such information could cause some women to seek or obtain abortion at a later stage in their pregnancy, which would, in turn, threaten their health. Additionally, the Court noted that withholding information may have particularly negative effects on women of insufficient resources or education that would enable them to access alternative sources of information.

Though this case refers specifically to abortion, its reasoning may be extended to other situations which may lead to withholding information on sexual and reproductive rights matters. Thus is the case of the policy which followed the current Chilean provision on statutory rape, which, due to mandatory reporting and the threat of prosecution, leads to withholding services – and consequently information – or adolescents simply not going to avoid this threat.

The importance of upholding adolescents' right to sexual and reproductive health information has also been acknowledged by international bodies, such as the Committee on the Rights of the Child. The Committee has held that governments should provide and ensure that adolescents have access to sexual and reproductive information, regardless of their parents or guardians consent. (Note 78)

4.2.1 Implications of statutory rape law on adolescents' right to information

The implications on adolescents' right to information on sexual and reproductive health matters stem from the consequences being generated by the policy which implements the statutory rape provision. As noted, this policy calls for mandatory reporting to the prosecutor. In order to avoid the need to report, health care professionals sometimes choose to deny service to younger adolescents. (Note 79)

Though this denial may be argued to be caused by the doctors, a closer look reveals that it stems from the policy which puts them in the position to report adolescents to the prosecutor, against their better judgement. Indeed, rather than reporting for public health purposes, this reporting is for crime control, even in the absence of any true crime.

Either way, the denial of services to adolescents can place barriers to their ability to access information on sexual and reproductive health matters. This can raise concerns because this information serves as a means to avoid certain health risks, such as unwanted pregnancies, unsafe abortions, and STI's, including HIV and AIDS. (Note 80) Access to information also helps adolescents anticipate the consequences of their actions and develop the capacity for long-term planning. (Note 81)

Studies have also shown that adolescents who receive comprehensive sexuality education are more likely to make informed and responsible decisions about their sexuality. (Note 82) Specifically, they are more likely to delay sexual activity, less likely to engage in risky sexual practices, more likely to use condoms and other contraceptives, have fewer sexual partners, and have sex less often than those who do not. (Note 83)

Health care professionals play an important role when it comes to providing scientific, accurate, information regarding sexual and reproductive health. Their role is particularly relevant in regards to adolescents, who many times are exposed to a great amount of misinformation or may receive no information at all.

When health care professionals that are faced with the choice of reporting an adolescent to the prosecutor and not providing service, choose this last option, adolescents' right to information is infringed upon. Indeed, though denying service in order to avoid possible prosecution of the minor, may be the lesser evil, fundamental human rights – such as the right to information – should not be subject to a system of “either/or”.

Moreover, even if health care professionals do not deny services, adolescents may abstain from seeking them, given the confidentiality concerns discussed in the above section. In such circumstances, they would again be left without access to essential sexual and reproductive health information.

Though it is possible to argue that such information is available and it is adolescents that choose not to access it, one must examine this matter in more depth. That is, since the foreseeable consequence of accessing this information is criminal prosecution, a true choice does not exist. Thus, their right to information is inherently affected by the policy on statutory rape. Indeed, adolescents' right to information would be better upheld by providing sexuality education and guidance, instead of placing the threat of criminal law on those who engage in sexual intercourse. (Note 84)

4.3 Adolescents' right to health

While the Chilean Constitution does not establish the right to health, it does recognize the right to the protection of health (Note 85). The right to the protection of health can be interpreted as encompassing the right to health, in certain cases. Such an interpretation was recently given by the Constitutional Court of Colombia. (Note 86)

In this case the Court determined that a Penal Code provision that criminalized abortions performed on adolescents' below the age of 14, even with their consent, was unconstitutional. (Note 87) It acknowledged that even when the right to health is not formally included in the list of rights established in the Constitution, it acquires this nature when it is connected to the right to life, that is, when such protection is necessary to guarantee the continued dignified existence of the person. (Note 88)

Whether Chilean courts will follow this interpretation, though, remains to be seen. Regardless, there is a legal basis to sustain that Chile must uphold the right to health. This basis may be found in the Convention on Economic, Social and Cultural Rights (CESCR), which has been ratified by Chile and is currently in force. The CESCR establishes this right explicitly. (Note 89) It is also important to note that the Committee charged with monitoring the implementation of the CESCR has acknowledged that the right to health includes the right to reproductive health. (Note 90)

When examining the scope of the right to health, the CESCR Committee has established that it contains four interrelated and essential elements. These elements are: availability, accessibility, acceptability and quality. (Note 91) Therefore, for the right to health to be fully respected, these four elements must be upheld.

4.3.1 Implications of statutory rape law on adolescents' right to health

Though the right to health is composed of the four elements seen above, for the purpose of this article, only two will be examined. These are: accessibility and acceptability. This is so because neither the availability of health services, nor the quality is put in question.

The first element to be examined is accessibility. This element is composed of four over-lapping dimensions:

- a. Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.
- b. Physical accessibility
- c. Economic accessibility (affordability)
- d. Information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues. (Note 92)

Though it is possible that several of these dimensions may be problematic for Chilean adolescents, it would exceed the scope of this article to examine them all. The purpose here is to focus solely on those aspects that may be affected by the implementation of the statutory rape provision. Therefore, physical and economic accessibility will not be addressed. The matter of non-discrimination and information accessibility, though, may be implicated.

The issue of non-discrimination will be analyzed in the following section, so will not yet be discussed. As for information accessibility, this dimension of the right to health relates directly to the right to information, examined in the above section. Therefore, when adolescents' are denied health services, both their right to information and health are affected.

Another dimension of the right to health that may be affected by the implementation of the statutory rape provision is acceptability. The meaning of acceptability has been examined by the CESCR Committee, which reasoned as follows:

"Acceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives." (Note 93)

Applied to adolescents, acceptability means that delivery of health services must ensure fully informed consent, respect of dignity, confidentiality and sensitivity to their needs and perspectives. As already seen, the implementation of the statutory rape provision compromises adolescents' confidentiality. Thus, this dimension of acceptability is not satisfied. To this, it is necessary to add that these services do not appear to be sensitive to adolescents' needs and perspectives, either, as they fail to consider how the denial of services or the alternate threat of prosecution may affect them.

4.4 Adolescents right to equality and non-discrimination

The Constitution of Chile recognizes a legal right to equality and non-discrimination. (Note 94) For the purposes of this article, it is relevant to consider whether age-based discrimination may be considered unlawful. Though “age” is not specifically enumerated as grounds of discrimination by any human rights treaty, it is a factor which may be called upon when establishing differential treatment. Indeed, the Convention on Civil and Political Rights, the American Convention and the Chilean Constitution all have open-ended equality provisions (Note 95), meaning that other grounds of discrimination, such as age, may be invoked.

The dismal effects of age based discrimination are slowly becoming acknowledged by the international community, leading several human rights treaty bodies to address age-based discrimination regarding sexual and reproductive health. For instance, both the Committee on the Rights of the Child and the CEDAW Committee have lamented adolescents’ lack of access to sexual and reproductive health information and services, calling upon governments to eliminate age-based discrimination. (Note 96)

4.4.1 Implications of statutory rape law on adolescents’ right to equality and non-discrimination

The statutory rape provision at hand makes a distinction based on age. That is, it draws a distinction between adolescents under the age of fourteen and those above that age. This distinction consists of denying that anyone below the age of fourteen has the capacity to consent to sexual intercourse. In other words, one group (those younger than 14) are not provided with a certain right or service that the second group (those older than 14) are provided with.

The policy which arose from the statutory rape provision extends this distinction. This is done by denying the confidentiality, right to information and health of adolescents below this age who are sexually active or request contraceptives.

To consider whether this distinction is unlawful under the Chilean Constitution, one must consider the way in which the equality clause is interpreted domestically. Currently, equality is understood as a limit to State powers and as a defence mechanism in cases of arbitrary discrimination (Note 97). What is specifically prohibited by the Chilean Constitution, then, is arbitrary discrimination, understood as an unjustified or unreasonable difference in treatment. (Note 98) In turn, difference in treatment will be deemed unjustified or unreasonable if it lacks sound reason, a legitimate aim and proportionality (Note 99).

The distinction in this case is based on “age”. At first glance, this may appear to be an objective criterion. Indeed, it certainly is a convenient way to measure maturity. (Note 100) Nonetheless, a closer look will reveal that “age” is not purely objective. This is so because adolescents of the same age tend to have different levels of maturity. The Constitutional Court of Colombia has elaborated on this point in a case which sought to determine whether a Penal Code provision that criminalized abortions performed on adolescents’ below the age of 14, even with their consent, was unconstitutional. (Note 101) In its ruling, the Court established that it was and warned that “age” is not an absolute criterion. Consequently, the Court has established that “*the higher the intellectual – emotional capacities are, the lower the legitimacy of the intervention measures over the decisions made based on these.*” (Note 102)

Though Colombian jurisprudence does not generate any legal obligations for Chile, the reasoning exposed in the above judgement also finds resonance in one of the principles of the CRC, which Chile is legally bound to. This principle is that of *evolving capacities*. It is broadly contained in article 5 of the Convention, which establishes that:

“States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

Based on this principle, States have the obligation to consider the level of maturity of individuals. This must be done on a case by case basis, as cognitive capacities vary from individual to individual.

Notwithstanding the above, there are some common factors that health care providers, amongst others, can look at when assessing the evolving capacities of the child/adolescent. In the context of sexual and reproductive health services for adolescents, what must be determined is whether the adolescents’ capacities have evolved enough to be able to access these services in confidentiality and make their own decisions.

While health care providers must assess this on an individual basis and also consider the possible harm to the adolescent or others, they must start their inquiry on the amply recognized premise that if a young person accesses services on their own accord, this signifies their to seek care and thus to make their own choices regarding care (Note 103). Not recognizing this generates situations where an adolescent “engages in a ‘mature’ sexual relationship without the ‘mature’ knowledge of how to protect him or herself.” (Note 104)

Given that the policy that implements the Chilean statutory rape provision calls for mandatory reporting to the prosecutor, without allowing room for health care professionals to consider the evolving capacities of the adolescent,

this principle is neglected. The high stakes involved in the case of statutory rape, which include criminal prosecution, call for a more flexible norm.

Indeed, this legislation, as well as its aim to protect children and adolescents, coincides with a specific image of adolescent sexuality. That is, adolescents are assumed and expected to be ignorant of sexual matters. The policy which followed the statutory rape provision, which calls for mandatory reporting regardless of whether sexual intercourse was consensual, can be said to be an example of the moral panic that surges around adolescent sexuality.

This policy acts as a means of preserving the traditional image of childhood and adolescence, as chaste and innocent. This scenario is typical of parentalistic societies, such as the Chilean one, which tend to be reluctant to recognize that young adolescents' can make responsible decisions regarding their sexuality. (Note 105) Such an aim exceeds the limits of legitimacy, denying adolescents' rights and autonomy.

4.4.2 Gender discrimination

Sexuality is constructed in a fundamentally gendered way. (Note 106) The traditional image of female sexuality is essentially passive, as girls are seen as victims or objects of desire. Male sexuality, on the other hand, is seen as active, natural and uncontrollable. These images of female and male sexuality are reflected in the Chilean policy on statutory rape, leading to gender discrimination. Indeed, statutory rape laws generally affect girls. (Note 107)

The mandatory reporting ordered in the Chilean policy fails to distinguish situations where adolescents, including female adolescents, may have chosen to freely engage in sexual intercourse. Reporting in such circumstances leads to the victimization of adolescent girls and, consequently, disempowers them. It sends the message that they are not free to make decisions about their sexuality. Thus, the traditional image of female sexuality is re-enforced. This can be argued to constitute gender discrimination, in the terms set out by CEDAW. (Note 108)

5. Conclusions

This article has attempted to address the effectiveness of the Chilean provision on statutory rape in fulfilling its declared goal of protecting young adolescents from potential sexual abuse and rape. A careful analysis has revealed that the provision does not adequately accomplish this goal, as in its attempt to protect it violates adolescents' fundamental human rights. The statutory rape policy provision lacks proportionality and denies adolescents autonomy, leading, in turn, to the affectation of their human rights.

The health care community experiences challenges in fulfilling adolescent's sexual and reproductive health needs with a highly restrictive policy: sexual and reproductive health services to any adolescent under the age of 14 is not permitted without reporting to the prosecutor. This results in the denial of much needed services and the heightened vulnerability of young adolescents.

The lack of flexibility in the policy implementing the statutory rape law, accompanied by the threat of prosecution, places adolescents in a vulnerable position because they are left without health services that would enable them to make responsible, healthy choices. In cases where service is provided, medical decision making would be highly discretionary and reporting would ultimately depend on the good will of the practitioner, thus submitting both the adolescent and the health care provider to a high degree of uncertainty.

In such a context, it is necessary to seek the abolition of the policy which seeks to implement the statutory rape norm. Establishing measures to evaluate the extent to which the law impacts adolescents and their rights would likely contribute to a heightened degree of awareness regarding the challenges that this policy generates. Additionally, it would allow for a genuine respect of adolescents' human rights, while at the same time achieving the original legislative goal of protecting young adolescents.

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Notes

Note 1. Chilean Criminal Code (Codigo Penal) (2009). Available: <http://www.bcn.cl/lc/lmsolicitadas/cr>, articles 361, 362 and 366 bis.

Note 2. Casas, Lidia. (2005). Confidentiality of medical information, the right to health and sexual consent of adolescents *REV. SOGIA*, p. 95.

Note 3. Chilean Parliament (2002) Report of the Commission on the Constitution, Legislation and Justice on the proposed law that modifies the Criminal Code, the Criminal Procedures Code and the Criminal Process Code, on the issue of crimes of child pornography, Issue No. 2906-07, Session 39, Tuesday, September 10th, 2002, p. 83

Note 4. Northern Metropolitan Service (2005). Memorandum N° 371. Santiago, Chile.

Note 5. Penal Process Code of Chile (2000). Law 19.696. Available: <http://www.bcn.cl/leyes/pdf/actualizado/176595.pdf> Santiago, Chile, article 180. According to Chilean law, prosecutors are responsible to lead investigations. They can investigate themselves or delegate the investigation of tasks that they believe will clarify the facts to the police.

Note 6. However, it must be noted that Chilean law does provide mechanisms to avoid investigations, through “temporary filing”, which enables prosecutors to - as the name indicates - temporarily file a case, when there is a lack of information that would be able to lead to the clarification of the facts. See Penal Process Code of Chile, *supra*, note 5, article 167.

Note 7. Law 20.084 (2005) Establishes a system of responsibility for adolescents who infringe the criminal law. Chile, article 4.

Note 8. Law 20.084, *supra*, note 7, article 4.

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Prosecutorial Discretion at the International Criminal Court: A Comparative Study

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Abstract

In International Criminal Court (ICC), the prosecutorial discretion in nature is a hybrid of the common-law adversarial model and the inquisitorial approach of civil-law systems. This paper studies the ICC prosecutorial discretion from the perspectives of common law and civil law and draws the conclusion that the ICC needs some more time to carefully design the prosecutorial discretion to reach coherence.

Keywords: Prosecutorial discretion, The International Criminal Court, A comparative study

1. Introduction

The term “Prosecutorial discretion” refers to a prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court. (Note 1) This paper will focus on prosecutorial discretion on whether to bring a charge and what charge to bring.

The prosecutorial discretion in common law system is different from that in civil law system. In common law system, the prosecutor's discretion is broad and prosecutor is free to choose whether to bring a charge and what charge to bring. However in civil law countries, prosecutorial discretion is comparatively limited and subjected to judicial review.

In International Criminal Court (ICC), the prosecutorial discretion in nature is a hybrid of the common-law adversarial model and the inquisitorial approach of civil-law systems. Following the common-law model, prosecutions at the ICC are directed by an independent prosecutor rather than by an investigating judge, as would be the practice under civil-law systems. However, the ICC prosecutor is subject to close judicial scrutiny by the Pre-Trial Chamber, something that would not generally be the case in a common-law system.

The purpose of this paper is to explore the issue of prosecutorial discretion at the ICC from the comparative point of view. First, this paper will discuss the different practice in the matter of prosecutorial discretion under common law and civil law system and the reasons behind the practice. Second, the ICC approach will be compared with the common law and civil Law practice and the reason of the mixed approach will be discussed. Third, the current practice of ICC will be examined. Finally, the conclusion will be given.

2. Comparative study of prosecutorial discretion in civil and common law system

2.1 *Prosecutorial discretion in civil law and common law system and the role of attorney in this matter*

2.1.1 Prosecutorial discretion in civil law system and the role of attorney in this matter

In civil law countries, the prosecutorial discretion is limited and subjected to judicial control. It is generally impossible not to prosecute felonies, but with regard to misdemeanors the prosecutor has certain powers to end proceedings.

France provides a good example of the prosecutorial role under civil legal tradition. In the prosecution process, there are three actors: the judicial police, the prosecutor, and the examining magistrate. Examining Magistrates function as an investigation director who assigns and supervises activities of the judicial police and the prosecutor, but he cannot open an investigation unless requested to do so by the prosecutor or the victim. The prosecutors determine appropriate charges against the accused, prosecute less serious felonies and most misdemeanors, and direct the work of the judicial police. For the serious offenses, the prosecutor must send them to the Examining Magistrate for a judicial investigation. At the completion of the magistrate's investigation, prosecutors must follow the magistrate's recommendation for disposition. (Note 2) In Germany, The prosecutor can only exercise discretion in the context of less serious offences (“*Vergehen*”) and where the law provides for. (Note 3) The prosecutor can end the case when the guilt of the perpetrator is considered minor and where there is no public interest in the prosecution. With the exception of the most unimportant cases, the prosecutor's decisions to discontinue proceedings are subject to supervision by a judge. In China, The criminal action can be initiated only by the prosecutor. For the minor crimes, the prosecutor can choose not to bring a case before a court. (Note 4) All the solutions of not sending before court pronounced by the prosecutor, as well as the measures taken

or the actions performed by him during the investigation, can be contested, the complaints being under the hierarchically superior prosecutor's competence. (Note 5)

In a civil law system, although the prosecutor is a party in the litigation, He functions as an administrator of Justice also. In this sense, the prosecutor carries the function of seeking truth, therefore, he should assess the evidence impartially to determine appropriate charges against the accused. In fact, the prosecutor in civil law is a government official, a separate professional group than lawyers. Moreover, since the prosecutor does not have discretion to drop a charge at his own will, the prosecutor should cooperate with court and police closely rather than reaching conclusion too fast and arbitrarily. In addition, the popularity of plea bargaining in civil law countries requires prosecutors to have the skill of negotiation also. (Note 6) However, due to the difference of the criminal law, the bargaining power of prosecutors from civil law countries is not as strong as the American prosecutor. For example, French prosecutors' inability to drop charges at post-filing makes it impossible for them to use overcharging as a means to coerce cooperation from the accused. Moreover, Prosecutors in Germany cannot expect that a threat to charge the accused with multiple crimes would create pressure on the accused because the German law does not permit the imposition of multiple consecutive sentences.

2.1.2 Prosecutorial discretion in common law system and the role of the attorney in this matter

In stark contrast, under common law system, the officer charged with public prosecutions has absolute discretion (Note 7) on whether a case will be carried forward, what the formal charges will be, and even if the charges should later be dropped.

In the U.S., the prosecutor decides whether to prosecute or not to prosecute, who to prosecute and with what offence. The typical examples of broad prosecutorial discretion are selective prosecution and plea bargaining. The prosecutor also has power to withdraw or discontinue any prosecution whether initiated by him or by a private prosecutor or authority. And in doing so he does not have to give any reasons, for to require him to do so would be to encroach on his discretion. The result is that the American prosecutor at least has broad discretionary power, and at the extreme is the most influential person in America in terms of the power he or she has over the lives of citizens. (Note 8) During the pre-trial investigation, the judge has traditionally hardly any role to play, apart from authorizing coercive measures. It is a judicial task (magistrate or a grand jury in the United States), however, to determine whether the evidence is sufficient to commit the accused for trial. However, neither the review by magistrate nor a grand jury has exercised much control over prosecutor's discretion. First, there is no control on the prosecutor's decision to discontinue a case because those two procedures are initiated after the prosecutor brings a charge. Secondly, it's easy to pass the review of grand jury and preliminary hearing conducted by a judge because the standard is really low. Therefore, such kind of judicial control over prosecutor is not comparable to judicial control in civil law system. In the English system the main responsibility for the continuation of the prosecution lies with the police. It is for them to decide whether to charge a suspect and refer the case to Crown Prosecution Service (CPS). (Note 9) If they transfer the case to the CPS it is then in its discretion to decide whether or not there is sufficient evidence and whether or not 'public interest' requires a prosecution. (Note 10) The CPS therefore has the power to discontinue proceedings. If the prosecutor want to discontinue a case and caution the suspect, they have to refer the case back to the police.

Since the prosecutor in common law countries has broader discretion than in civil law countries, he should have more responsibilities and skills. First, the prosecutor should assess the evidence more carefully to make decisions or charges because, unlike the civil law prosecutor, the common law prosecutor might only have the evidence not favorable for the accused. Second, the skill of negotiation is necessary for common law prosecutors in plea bargaining. The prosecutor should judge the bargaining power of the accused and make the bargaining strategy. In those cases which involve the important witness, the prosecutor should try hard to make a successful plea bargaining in exchange for the witness's cooperation in giving testimony. In those cases where the evidence is not sufficient, plea bargaining might be a better choice than going to trial. However, Prosecutors should handle the plea bargaining in a lawful way. Overcharging is a tactic often employed by prosecutors to augment leverage in bargaining. The strategy, though it is unlawful, can be a successful one. Because American law does not require prosecutors to open their entire file for inspection by the defense, the defense may well be kept in the dark as to the true strength of the prosecutor's case against the defendant. In the exercise of discretion in selective prosecution, the prosecutor should be objective in making a decision to charge the accused to avoid the law enforcement become personal. For example, the prosecutor should not pick people that he thinks he should get, rather than pick cases that need to be prosecuted. The greatest danger of abuse of prosecuting power lies here. Finally, in order to use the broad discretion properly, the prosecutor must have a sophisticated understanding of people and their motivations and of the needs of the public, as well as the wisdom to determine an appropriate course of action. Being a prosecutor draws upon legal skills as well as one's capacity for fairness, compassion, and empathy.

2.2 The reasons behind the different prosecutorial discretion in civil law and common law system

First, the different practice in prosecutorial discretion is closely linked to different legal traditions. A common law,

‘adversarial’ system, is a contest between two equal parties, seeking to resolve a dispute before a passive and impartial judge, with a jury pronouncing one version of events to be truth. Civil law, ‘Inquisitorial’ systems consist in the investigation by the state of an event, with a view to establish the truth – the state doubly present in the fact-collecting prosecutor on the one hand and, on the other, an impartial and independent judge actively involved in truth finding. (Note 11) Therefore, in the matter of prosecutorial discretion, the civil law approach likes to involve the judiciary to intervene to help to find the truth. On the same reasoning, the civil law countries do not accept the plea bargaining because it might disguise the truth. Comparatively, the adversarial principle is generally taken to mean that judges in American courts are not commissioned to investigate cases, determine the truth, and provide justice. The judges take a more passive role. Primary responsibility for defining the nature of the dispute, and presenting the relevant facts, lies with the parties and their lawyers. More specifically, criminal cases are seen as disputes between the government and individuals accused of crime. In a criminal case, the prosecutor, as representative of the government, can decide that the interests of his client are best served by not taking any legal action at all, or by settling for relief short of what could in theory be available if litigation were pursued to its final conclusion. This justifies the broad prosecutorial discretion of the prosecutors in common law countries.

Second, the different practice in prosecutorial discretion is due to the different legal principles in this matter that are adopted in common and civil law systems. In Civil law system, it is believed that the legislator is the proper person to prescribe rules and criminalize certain behavior. Therefore all arbitrary decisions, including Prosecutor’s decision, must be controlled. (Note 12) The prosecutor could not drop a charge unless permitted by law to do so. In common law system, there are four policies that seem to govern the discretionary power of the prosecutors. (1) legal sufficiency, which means that there is in general an interest to prosecute offences which constitute a crime; (2) system efficiency, which contributes to the huge overload and backlog of prosecuting agencies (3) defendant rehabilitation, which aims at assessing what would be best in the interests of the defendant, opening up possibilities of pre-trial diversion programme or probation without verdict; (4) trial sufficiency, whereby the possible outcome of a trial is assessed and it is decided accordingly whether or not to continue prosecution. The system is governed by practicability and effectiveness. (Note 13) Under the above guided principle in common law system, the prosecutor has full discretion in making decisions on charging.

2.3 Recent transformations and assessment: are common law and civil law converging or permanently divergent?

Having looked at the common law and civil law systems we find that important variations exist regarding the prosecutorial discretion. These national systems, however, have undergone important transformations over the course of history. Civil law systems in the past thirty years have undergone significant changes. In the context of prosecutorial practice, nothing illustrates the extent of the changes better than the emergence of plea bargaining and the gradual expansion of prosecutors’ autonomy. However, it remains true that prosecutors’ discretion is subject to much stricter control than that enjoyed by their American counterparts.

From a comparative angle, the intriguing question arises whether the legal systems of civil and common law countries are gradually converging. Will the adoption of the other’s characteristics make the differences no longer essential? Take plea bargaining in civil law system for example. Plea bargaining was introduced in the Italian code of criminal procedure recently. Unlike the U.S., the plea bargaining in Italy is used only in minor crimes. Additionally, in Italy, only the sentence of the accused could be bargained, which makes it different from the U.S. where both the charges and sentences of the accused can be bargained. Therefore, the judge still has to try the case to determine the proper charges. Why is the plea bargaining practice in Italy substantially different from that in U.S.? The reason is rooted in the fundamental differences between two different systems. In Italy, a civil law country, Prosecutorial discretion is subjected to judicial control, including plea bargaining because the judge serves the function of truth finding. On the contrary, in U.S., Prosecutor, as a party of a case, can make bargaining with the accused freely. The differences of the two systems are still essential although there are similar practices with regard to prosecutorial discretion.

3. Prosecutorial discretion at the ICC ---civil law, common law or mixed?

3.1 The Mixed approach and the role of the ICC prosecutor

At the ICC, the prosecutor’s discretion in charging is shared with the Pre-Trial Chamber. (Note 14) On the one hand, the ICC Statute affirms the principle of prosecutorial independence in stating that ‘the Office of the Prosecutor shall act independently as a separate organ of the Court’. (Note 15) On the other hand, the ICC Statute entitles the Pre-Trial Chamber to confirm the charges against the accused on which the Prosecutor intends to seek a trial: a hearing is held for the confirmation, the aim of which is to determine whether there is “sufficient evidence” to establish “substantial grounds” to believe that the person committed each of the crimes charged. (Note 16) Nevertheless, the Prosecutor has the right of an interlocutory appeal when he disagrees with the pretrial chamber when it actually takes over part of the responsibility of the Prosecutor. (Note 17)

The confirmation hearing has received general support from all sides and it can be accommodated within both the

common law and civil law model: one may consider it –as common lawyers usually do– as a kind of filter to ensure that only the really significant cases go to trial or –as civil lawyers do– as a rather lengthy pretrial in order to confirm or check the charges and to avoid time consuming disputes about disclosure of evidence in the trial stage.

Indeed, the ICC confirmation procedure is a compromise that combines several elements of different systems of pretrial procedures but does not imitate one of them completely. The prosecutorial discretion is not completely common law in nature because the Prosecutor normally acts under the supervision of the Pre-Trial Chamber. The confirmation procedure is not comparable to the review process by the magistrate or grand jury in common law system because the ICC Pre-Trial Chamber plays a more active role than the magistrate or grand jury. Unlike the Pre-Trial Chamber in the ICC, the Grand Jury has no power to require the prosecutor to amend the charges or reduce the charges. Additionally, Restrictions on the Prosecutor's discretionary powers are further manifested with respect to his decision not to prosecute. (Note 18) The Pre-Trial Chamber acting *proprio moto* on the application of either the State or the Security Council may review the decision of the prosecutor and "request" him to reconsider the decision. (Note 19) Notably, the confirmation hearing is not same as the practice in civil law system because this pre-Trial judge has only coordinating or controlling, not investigation functions.

Under this mixed approach, the ICC Prosecutor functions have characteristics of both systems: "The Prosecutor acts both as an 'administrator of justice', in that he acts in the interest of international justice pursuing the goal of identifying, investigating and prosecuting the most serious international crimes and, as in common law legal orders, as a party in an adversarial system." (Note 20) To carry his function, the prosecutor should independently make the decision to guarantee the justice against the self-interested parties. Additionally, the Prosecutor should have the wisdom in using his discretion because the Prosecutor in the ICC needs cooperation and help of domestic countries in the exercise of his prosecutorial discretion. The ICC prosecutor must be both a diplomat and a judicial officer. Moreover, the prosecutor of the ICC should have good command of civil law and common law knowledge since he has to deal with judges, defense counsel, witnesses and victims from different systems. Finally, for the sake of judicial economy, the prosecutor should have the ability to filter the cases and select the proper individuals to charge without sacrifice of justice.

3.2 The reasons behind the mixed approach

The extent of prosecutorial discretion in national jurisdictions depends on a variety of legal, social, political and historical factors. In the international dimension, the exercise of prosecutorial discretion must be adapted to different features and needs. ICC is an international forum to accuse those most serious international crimes. The independence of the prosecutor constitutes the best guarantee of the independence of the whole international judicial institution towards self-interested states. Yet because of man's proneness to err there is need to put in place mechanisms and practices to minimize the prosecutor's errors, to monitor his exercise of his powers and to correct him when he appears to be going astray. The inclusion of the Pre-Trial Chamber avoids the concentration of too much authority in the hands of the Prosecutor and prevents the use of prosecutorial powers in other purposes divergent from the justice administration.

Additionally, looking back to the history of the Rome statute of ICC, We might find the controversial arguments of the representatives from civil law and common law system contributes to the mixed approach in prosecutorial discretion. (Note 21)

4. Evaluation of the ICC mixed approach on prosecutorial discretion

The existing rules on prosecutorial discretion are sufficient to bring manageable cases at the ICC. However, there are controversial arguments on the efficiency and coherence of those roles. It might be a time to consider whether there is a better way to solve the issue of prosecutorial discretion than the current practice.

4.1 Controversial arguments: different opinions result from different perspectives ---common law and civil law perspective

The mixed approach on prosecutorial discretion aroused many controversial arguments. Obviously, different opinions result from different perspectives of civil law and common law. The main issues are as following:

First, the triggering proceedings on the initiative of the prosecutor are unusually long. Indeed, they may require up to two sets of decisions by the Pre-Trial Chamber and eventually by the Appeal Chamber, on the admissibility of the situation referred to in the Prosecutor's activation request before the ICC's dormant jurisdiction can be definitively initiated. (Note 22) The common law colleagues do not like the delay of process caused by the confirmation process. On the contrary, civil law colleagues might think confirmation hearing will make the later trial more efficient by filtering the charges. It is a common practice in civil law countries.

Second, the restriction of the prosecutor's power is contrary to common law practice where the independence of prosecutors is emphasized. On the contrary, from the view of civil law, judicial control is a guarantee of a fair and efficient trial. Additionally, the civil law colleagues think that the confirmation process puts a minor restriction on Prosecutor's discretion.

Third, due to lack of clarity in the Rome statute, there are arguments regarding the Pre-Trial Chamber's discretion in the confirmation hearing which illustrates the internal tension between the Prosecutor and Pre-Trial Chamber. The key issue is whether the Pre-Trial Chamber has the power to amend charges. In *Prosecutor v. Lubanga*, the charge brought by the Prosecutor contains conscripting and enlisting child soldiers to fight in Ituri, Congo. The Prosecutor marked this armed conflict as being internal, the Pre-Trial Chamber changed the charge and found an international armed conflict. The prosecutor sought leave to appeal the decision because of his concern that at trial he would be unable to meet his burden of proof for establishing Lubanga's individual criminal responsibility—that is, to prove, the international nature of the conflict. Moreover, the prosecutor believed that the right of the Prosecution to bring charges before the Chamber is violated by allowing the Pre-Trial Chamber to amend the charges. Actually, the argument on this issue illustrates the different view on judicial control in this matter. Based on the theory of common law, the discretion of amending charges should belong to the prosecutor since in its tradition the Court is bound by the Prosecutor's legal classification of the charges. Comparatively, based on the theory of civil law, the Court can not only accept or dismiss but also – according to the principle *iura novit curia* – amend, in its own right, the charges. (Note 23) In fact, the lack of clarity of the ICC Statute in this matter is due to the lack of agreement of common and civil lawyers during the negotiations. (Note 24) The question was, as many, conspicuously left open.

4.2 Is there a better way than the mixed approach?

Given the controversial arguments regarding the mixed approach, it is time to consider whether there is a better way than the current practice. Some might argue the adoption of a common law or civil law approach rather than the mixed approach because each system represents a carefully structured balance between the rights of the parties to the trial. Although it is true that problems of coherence exist in the ICC, it is no solution to adopt either a common or civil law approach because successful national practice might not work well in the international world. Unlike domestic legislators, it is hard for international legislators (party members of the ICC) to reach an agreement on the Prosecutorial discretion. On the one hand, it is good for a prosecutor to work independently to achieve justice. On the other hand, the over-expansion of the prosecutor's rights might work against a party member's interest. The above special concerns in the ICC make the adoption of either civil law or common law approach not so effective. Therefore the current issue is whether these rules can be applied more systematically than they are. The aim is clear, ensuring that justice in complex and wide scale cases such as those of serious violations of international law can be at the same time fair and expeditious.

It must not be forgotten, however, that procedural rules only provide for a general framework, the smooth functioning of which depends, ultimately, on the procedural protagonists. A truly mixed procedure requires Prosecutors, defense Counsel and Judges who have knowledge of both common and civil law and are able to look beyond their own legal systems.

5. Conclusion

Adapting the notion of prosecutorial discretion from domestic jurisdictions, where it was born and well integrated within the intrinsic checks and balances, to the newly evolving field of international criminal law, where no such structures exist and where world politics play a major role, will not be done easily.

From the comparative study of national practice in civil law and common law system, one can see fundamental differences still exist although there is emergence of similar practice in both systems. The integration of elements of both systems in a new well-balanced system calls for a search for a new coherence, an intrinsic balance between all the elements of the system in its various procedural stages. It took most national systems, embedded in one of the major legal systems, many centuries to find such a coherence and intrinsic balance, without being perfect yet. The ICC needs some more time to carefully design the prosecutorial discretion to reach coherence.

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Notes

Note 1. Black's Law Dictionary (8th ed. 2004), discretion (4)

Note 2. Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find out, and Why Should We Care?* 78 Cal L. REV. (1990)

Note 3. Christoph J.M. Safferling, *Towards and international criminal procedure*, Oxford University Press, P173.

Note 4. Article 142 of criminal procedure law of China

Note 5. Article 145 of criminal procedure law of China

Note 6. Some civil law countries in some degree adopt plea bargaining, but plea bargaining is limited to minor crimes.

Note 7. In U.S., There are limits to a prosecutor's discretion, and the judiciary has a responsibility to protect individuals from prosecutorial conduct that violates constitutional rights. Such conduct usually involves either selective prosecution, which denies equal protection of the law, or vindictive prosecution, which violates due process. However, the prosecutor is rarely found liable for abuse of prosecutorial discretion because most courts apply a clearly erroneous standard of review. *U.S. v. Schoolcraft*, 879 F.2d 64, 67 (3d Cir. 1989); *U.S. v. Johnson*, 91 F.3d 695, 698 (Sth Cir. 1996) cert. denied, 117 S. Ct. 752 (1997); *U.S. v. Sammons*, 918 F.2d 592, 601 (6th Cir. 1990).

Note 8. Reichel L. Philip, *Comparative Criminals Justices Systems, A Topical Approach*, Sec.Ed.1999, p. 211.

Note 9. J. Fionda, *Public Prosecutors and Discretion* (Oxford, 1995), p. 39

Note 10. Id. p. 24

Note 11. Jörg, N; Field, S & Brants, C. 1995. Are Inquisitorial and Adversarial systems converging? In Fennell, P et al (eds) *Criminal Justice in Europe: A Comparative Study*. Oxford: Clarendon Press., p 41-42

Note 12. Christoph J.M. Safferling, *Towards an international criminal procedure*. Oxford university press, 2001, p.174

Note 13. Id.

Note 14. Article 61(7) Rome statute of the ICC

Note 15. Article 42(1) of the Rome Statute of the ICC

Note 16. Article 61(5) Rome statute of the ICC

Note 17. Article 56(3) (b) Rome statute of the ICC

Note 18. Article 53(2) of the Rome Statute of the ICC

Note 19. Article 53(3) of the Rome Statute of the ICC

Note 20. Antonio Casses Paola Gaeta John R.W. D. Jones, *The Rome statute of the international criminal court: A commentary Volume II*, Oxford University Press, P.163.

Note 21. As to the ICC, the beginning of the Preparatory Committee discussions in 1995 was common law dominated to such a degree that the French delegate Gilbert Bitti decided "to warn" his government "that a strong reaction was necessary in order to avoid a pure common law system". Bitti, *Two Bones of Contention between civil and common law: The Record of the Proceedings and the Treatment of Concurus Delictorum*, in: Fischer/Kreß/Lüder, *International and national prosecution of crimes under International Law*, 2001, p. 274.

Note 22. Article 15, Article 18 of Rome statute of the ICC

Note 23. The judge knows the law (technically, there is no need to "explain the law" or the legal system to a judge/justice in any given petition). see at [http://en.wikipedia.org/wiki/Brocard_\(legal_term\)](http://en.wikipedia.org/wiki/Brocard_(legal_term))

Note 24. Bitti, *Two Bones of Contention between civil and common law: The Record of the Proceedings and the Treatment of Concurus Delictorum*, in: Fischer/Kreß/Lüder, *International and national prosecution of crimes under International Law*, 2001, p. 273

Note 25. Article 61(7) of the Rome Statute does not explicitly authorize the pretrial chamber to substitute its own charges for those of the prosecutor. According to Art. 74 (2) cl. 2 of the Statute, the Court must base its judgment "on the facts and circumstances described in the charges and any amendments to the charges"; however, it is not clear whether these charges are still the original ones as drafted by the Prosecutor or whether the Pre-Trial Chamber has the right to amend them proprio motu in the confirmation hearing.



Scientific Analysis of the Commonness in Human Civilization

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Abstract

Contrary with the opinion and idea that the civilization difference induces the civilization conflicts, the commonness of civilization is more important in fact. In the various past researches about the civilization comparison, most scholars emphasized to review and look the differences among different civilizations, and deduced that the differences induced the conflicts. However, the differences among various civilizations are only one aspect of the fact, and on the other hand, the commonness exists among different civilizations. From many aspects such as common system, common earth, common goals, common opportunities, common threats, common benefits and common deficiencies, we scientifically analyzed the commonness among the human civilizations.

Keywords: Globalization, Human advance, General characteristics of civilization, Scientific analysis

The word of “civilization” has two meanings, and the one meaning is to indicate the advance degree that human break away from the state of blindness and wildness, and the other meaning is the division unit which exceeds the country and nationality in the human system. In the writings about the civilization, there are always the alternative uses of two meanings, so is this article. In past comparison researches of various civilizations, most scholars emphasized to review and find the differences among them, and deduced that these differences would induce the conflicts. However, the differences existing in various civilizations are only one aspect of the truth. On the other hand, the commonness exists among various civilizations. For the commonness of the civilization, human still have not sufficient cognitions, and when the human have entered into the age of globalization, we should repair this limitation of the cognitions.

Facing the conflicts of civilization, when people are wild about exploring the differences of civilization, we should urgently act in a diametrically opposite way, i.e. find the commonness among various civilizations. To find the commonness among various civilizations is the hope to seek common points while reserving difference in different civilizations, walk out the abysm of conflict, and go to the harmonious royal road.

1. Common system

There are exclusive human being in the earth, even in the known universe and space so far, so the civilization of human being is exclusive, and it can equal to the world civilization or the earth civilization, and it is the civilization possessed by the whole human being. Certainly, the human civilization is the system with complex compositions and diversiform configurations. As a system, the human civilization is exclusive. The so-called various civilizations divided by people are just the sub-civilizations in the human civilization system. As various civilizations with all types are the human civilization, they should possess the common attributes of the civilization such as the commonness of the human civilization, the commonness of the world civilization, the commonness of the earth civilization. The commonness of the human civilization is the essential attribute of the human civilization.

The commonness of human civilization is based on the commonness of humanity. Like the mathematical model, the differences of humanistic commonness are only different parameters, and like the physiological structure, the differences of humanistic commonness are only different appearances. With the beautiful aspect, the humanity certainly has the deficient aspect. The beautiful humanity is certain, and the deficient humanity is practical. The humanistic basic antinomy is not only the antinomy between the nicety and the fault, but the antinomy between the certainty and practice. The whole human civilization history can be deduced by the basic antimony of the humanity.

Not only the commonness and differences co-exist in various civilizations, but they have primary and secondary sequences. The commonness of civilization is in the dominant status and exerts the leading function.

2. Common earth

In the universe, the civilization is the particular patent of human being. In all ages, human being comes into the world and survives in the only earth. In the far past, human didn't come from multiple planets, and at present, human can not survive in multiple planets. Supposed that human come from multiple planets or human survive in multiple planets, the different essential civilizations may exist between earthman and extraterrestrial being.

In fact, the survival age of human being is very short. “Comparing with the long history of the earth, the time that human lives in the earth is not long. In the past, human always thought the human age was 500 thousands years, but the

new research results indicated that the age of human was 700 thousands years, even might be 900 thousands years. Even so, we can not forget the proportion, i.e. the human age is only one in a thousand of the age of earth (Zhou, 2003, P.3)". Human being has common origin and common evolvement course. The difference between the human being and animals far exceeds the differences among human races and nationalities. The differences about the complexion, language, custom and religion among human races and nationalities are only the exterior, and human being's talent showing itself in many aspects such as physiology, labor, sense, morality and emotion from the animal kingdom is the interior. The difference among peoples is finally less than the difference between the human being and inhuman, and the commonness among peoples is finally more than the commonness between the human being and inhuman.

In space, the survival range of human being is very narrow in fact. The human being with thousands years' civilization history has gradually known the panorama of the earth in recent hundreds years. The astronomical radio telescope has detected the planets which were from tens billions light-years in the universe, and the earth lived by the human being in the vast universe is an insignificant particle. "The earth where we live is just a ceaselessly rotary asteroid in the tiny Milky Way galaxy, and comparing with the whole universe, it is very small as a dust in the Pacific (L. S. Stavrianos, 1999, P.63)". On the desktop of the universe, the tiny earth can be observed only by the microscope. The earth not only looks tiny in the astronomical scale of the universe, but with the advance of human science and technology, the scale will further change. The advances of the traffic tools make the human being span the natural obstacles in the earth to travel with high speed. The advances of the communication tools make the human being span the natural obstacles in the earth to communicate each other. The traffic and communication reduce the space distances among peoples in different regions and different positions. From that meaning, the earth is diminishing relatively.

The earth is the common life ark for all humankind. The population leap is making the life ark become more and more crowded. Though human being are distributed in different regions of the earth, but the earth ecological system is an organic macrocosm for the humankind. In front of the earth ecological system, we have no other choices except we are in the same boat. Human have common demands for various natural resources such as water, air, land and mine. The catchword in Beijing Olympics Game is "one world, one dream" and the reality of human history is that "one earth, one home". Human lives in common earth, common land and common sky. The absolutely irreconcilable relation among humans is very absurd.

3. Common goals

Civilization is not only the common career for human being, but also the common ideal hope for humankind. The bourn between the civilization and the blindness and wildness is entirely different. Human being is pulling away from the blindness and wildness to obtain the liberation and go to the civilization. There are two foundation stones for the human civilization, i.e. the relation among peoples and the relation between the human being and the nature. For the human civilization based the relations among peoples, all peoples yearn towards peaceful, safe and plentiful world, and all peoples look forward to just and flourishing society. The human civilization, environment protection and sustainable development based on the relationship between the human being and the nature have exceeded the interior limitations of the human being and been the advance direction confirmed by the human being.

The civilization course is also the course that human perfect themselves. From of old, human being always pursues common beautiful values. Contrary to the worth sense difference among different cultures, peoples living in any cultural backgrounds will appreciate same excellent qualities such as hardworking, assiduity, brave, adamancy, brightness, wittiness, kindheartedness, friendliness, honesty and keeping faith. These excellent qualities are recognized by all human being, and though many peoples can not realize them in fact, but as the value rules, they are identical in different value views. The value views of any races, any countries, any nationalities and even any tribalism will not advocate abominable views such as idleness, nonfeasance, poltroonery, flabbiness, blindness, peremptoriness, bloodiness, ruthless, guile and cheat which are chided in any cultural value view, and no body will take them as an honor. The excellent qualities are the same with not only individuals, but also nationalities. Hardworking and brave nationality is also regarded as the recognition full of prides. Almost all nationalities are happy to accept thus recognition. In fact, all nationalities in the world are hardworking and brave nationalities, and there is no one nationality to be defined as the lazy and faint-hearted nationality.

4. Common opportunities

Facing difficulties and crises, confidence, courage and hope are human special active psychological reactions for any individual, nationality or country. But all active psychological reactions should be enhanced to the global layer. The confidence, courage and hope are the confidence, courage and hope that all peoples walk out the corner, realize the mutual benefits and win-win, and go to the bright foreground, and they are not the traditional confidence, courage and hope about conquering among individuals, or nationalities or countries.

The beacon light which leads human being to leave the animal kingdom and go ahead continually is the sense in the deep soul of humanity. The course of human advance is the increase of extension and sense, and it is an alternant and

progressive course. The increase of human sense is mainly represented in the scientific advance, i.e. the innovation of scientific theories and systems, and the accumulation of scientific knowledge and technologies. All suspicions and arraignments for the science are temporary, and they can be gradually clarified and eliminated with the time. The opinion that the science is the double-edged sword is blundering, and it will induce and deepen the mistake for the science. Whether in the early life of human being or in the modern life, the use of fire is very important, but it will induce the fire disaster, so the fire is also the double-edged sword like the water, because certain useful invention or certain profitable things will produce certain negative function under certain conditions, and we should not refuse to do what one should for fear of running a risk. According to human practical experiences, the double-edged sword is not the problem that can not be solved. Human completely can face the science just like water and fire. As viewed from the science system, the development of the science is not balanced so far, though the human being has obtained historical breakthrough and decisive result when scientifically exploring the nature. If the humanity can equally push the scientific explorations in the human domain and the social domain, that will be the resplendent celebration for completion of the building of human civilization.

To scientifically know the world is the necessary premise to change the world according to human demands and wills, and to change the world is the final goal of knowing the world. The modern natural science has acquired significant advancements, and the cognition level to the objective world has exceeded certain limitation, and to change the world by human demands and wills has been realized in many aspects. When both the human science and the social science acquire same significant advancements, it will be realized to change the subjective world according to human demands and wills.

5. Common threats

The human being is facing common threats and the global crisis induced by these threats. That is not the alarmism, but the austere fact. The biggest threat to the human survival comes from the behavior that the humanity falls away from its civilization. Except for that, there are not any exterior powers which can threaten human survival.

In the history, human fought for life and death in countless wars, but they are not in the whole survival state at present. The two world wars in the twentieth century achieved the peak of cannibalism among peoples, which indicated that human sense was so brittle. The research and use of many weapons of mass destruction such as atom bomb, biological weapon and chemical weapon had pushed the humanity to the suicidal cliff. The uncivilized behaviors except for the war are quite serious. The influences of the drugs are not divided by the race and nationality. The terrorists' execution and destruction have affected the whole world aiming at human body and spirit. The increasing gap of wealth is still the pendent problem for the world. The corrosion of corruption has gone into every corner of the society.

There were numerous natural disasters in the history, but the world has not faced the ecological crisis like the present. The plunders to the land, forest, mine and water resource and the damage to the ecological environment have pushed the human being to the grave for the humanity themselves.

The human psychological structures and mechanisms are identical in fact. Human will suffer same illnesses and same invasions from same virus. The sufferings of various illnesses are same to European, Asian, African and American. Different races and nationalities have same immunities. The occurrences and prevalence of various diseases are threatening the family of human being, which needs human common endeavors to control the diseases.

6. Common benefits

Standing on the universal position, the sovereign global benefit and human benefit have occurred and formed, which needs all peoples from different countries and nationalities to maintain together. To do that, the premise is that the cognition should achieve corresponding altitude. Peoples should exceed original sovereign national benefits, and clearly identify with the new sovereign global benefits and human benefits to achieve the consensus about the global benefit and human benefit.

The global benefit and human benefit contains all national benefits to the largest extent. So to recognize and maintain the global benefit and human benefit in the cognition and practice doesn't breach the national benefit. Comparing with the global benefit and human benefit, the former national benefit is only local and narrow benefit. In front of the common threats and global crises, if we ignores the global benefit and human benefit, only maintain our own national benefit, we will be perished together.

For the individuals, the national benefit is certainly great and scared, but on the layer of the global benefit and human benefit, we need to reconsider the doings of many countries and nationalities. In the conflicts among countries and nationalities, the hero of one country or one nationality may be the enemy of another country or another nationality. Because of the bigness, elevation and holiness of the country and nationality, the actions by the name of the country and the nationality will have more deceptive and intimidatory functions to make all living things have to follow like sheep. In the history, numerous human infamies, devilties and crimes happened by the camouflage of the country or the nationality.

If we still persist in the supremacy of the country or the nationality and pursue the profit maximization of one country or one nationality in the globalization era, not only the benefits of other countries and nationalities but also the global benefit and the human benefit will be harmed. The benefit view in the globalization era is that the global benefit and human benefit are higher than the national benefits. When the beneficial conflicts occur among countries or nationalities, we should give way to ensure the global benefit or the human benefit.

7. Common deficiencies

According to the meanings of the civilization getting rid of the blindness and wildness, the human history is still in the state of half-civilization. "By the nature of the civilization, there are two kinds of civilization. The first one is the civilization between the humanity and the nature, which is generated and developed in the relationship between the humanity and the nature. The second one is the civilization among peoples, which is generated and developed in the relationship among peoples. Up to now, in the development of human society, there are not only the glory and resplendence of the civilization, but the uncivilized sins and darkness, so the process of the second sort of civilization is still in the half-civilization and half-wildness stage (Yang, 2008, P.102)". Not only individual uncivilized phenomena still exist universally, but also the representations of the country and nationality are uncivilized also to the large extent.

The behavior characteristic of country or nationality is very similar with individual's behavior characteristic. The behaviors of country or nationality are not always distinguishable, and even some of them are despicable. In the international relationships taking the country or the nationality as the behavior subject, bad phenomena such as pride and prejudice, mistake and suspicion, cheat and cabal, peremptoriness and shamelessly action, greed and flaunt were commonly seen. On the confused international stage, some countries and nationalities always use their strength to bully the weak for the external affairs. Many very solemn international friendly agreements could not be tested in the time. Large numbers of formal international treaties lost the sanction when the ink marks had not dried.

Individual ignominious behaviors will be restricted by the social consensus, morality and laws, but the ignominious behaviors of the country or the nationality are always defended and covered by the name of the country or the nationality to enjoy the immunity to some extent. Therefore, those individuals who represent the nation or the nationality will have nothing to fear when they make false decisions. When every country or nationality starts the war or is drifted into the war, he always put the national benefit on the first state.

The worried civilization conflict is related with not only the differences among various civilizations, but also the commonness of various civilizations. For example, two people who are same selfish or same jealous, how they will establish the harmoniously stable relationship. When everyone wants to father his wills upon others and will not accept others' dominances, the conflicts will occur among individuals, so is the country or the nationality. The common deficiencies existing in all countries will compose in the negative influences which will more easily induce the mutual conflicts than the differences in various civilizations.

The consciousness and the potential consciousness opened by the Freud's psychology exist not only in individuals, but in the society, the nationality or the country. Through the deep researches, we will find that the individual consciousness and the potential consciousness are always dissociable, that is why the individual will get into the painful ideological struggle. In the intercourse among individuals, one person's consciousness usually can be harmonized with other's consciousness, and one person's potential consciousness will always conflicted with the other's potential consciousness, that is why two persons with same wills and benefits will get into the dissension without reasons. So are two or multiple countries or nationalities. The deviation of the consciousness and the potential consciousness will largely increase the probability of the antinomies and conflicts on various layers from the microcosmic to the macrocosmic, and largely increase the difficulty and costs to solve the antinomies and conflicts.

Both the humanity and the human civilization are facing the mutual future. Because the biggest threat to the human survival comes from the human being, so it can only depend on the human being to eliminate the threat and crisis. Except for that, there is no any exterior powers can decide human future and destiny. The commonness of human civilization will be noticed and researched by more and more scholars and government figures early or late. In Huntington's "The Clash of Civilizations and the Remaking of World Order", he mainly discussed the differences and clash of civilizations, and pointed out that "the coexistence of cultures needs to look for the commonness of most civilizations, which is not to promote the universal characteristic of certain civilization in the hypothesis. In the world with multiple civilizations, the constructive road is to abandon the universalism and accept the diversity and look for the commonness (Samuel, 1998, P.369)" from another aspect. In the inaugural, US President Obama said, "As the world is becoming smaller and smaller, we believe the mutual humanity and morality of human being will appear automatically one day". And based on the foundation of human mutual humanity and morality, the monument of human civilization commonness will be lifted highly.

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Rosmini: Thomist or Neo-Thomist? The Debate Continues

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Abstract

Neo-Thomism alludes to the aspect of renewal within the context of continuity. Thomas Aquinas himself effectuated expansion and renewal of the works of Aristotle. By virtue of this the neo-Thomist may not allow his thinking to become staid and stagnant in respect of the views of Thomas Aquinas. He should progress and make adjustments in keeping with the dynamics of the current period of time and should not merely relate the words of Thomas Aquinas. The neo-Thomist should carry into effect the spiritual thinking of Aquinas and where possible expound on this. On this basis neo-Thomism is indicative of expansion, renewal, originality and application. According to this premise Rosmini may be considered a neo-Thomist. On the question, whether he will also be considered a Thomist, the answer can be found in the opinions of Rosmini's advocates and opponents. Rosmini's advocate's, on the one hand, argue that he attempted to introduce innovative thinking to the Thomistic tradition that emphasized him as a neo-Thomist. His opponents, on the other hand, uphold traditional Thomism and were adamant that Rosmini could not be classified in terms of this grouping. This paper underpins a *via media* by emphasizing, on the one hand, that Rosmini's views of theology and philosophy fall within the ambit of traditional or classical Thomism. His theological and philosophical views would eventually replace Thomism as the official philosophy of the Catholic Church. According to Rosmini's advocates, his ideas were interpreted out of context by his opponents. They believe that Rosmini upheld traditional Thomism and that hostile political influences should be left out of the picture. It is evident in this paper that Rosmini's viewpoints uphold the fundamental truths of traditional Thomism while expanding on it in the light of the prevailing social and political context of the era. He applied the points of departure of Thomism in such a way that they gained a new and dynamic actuality. In this respect Rosmini's views fall into the category of neo-Thomism, in addition to the traditional or classical Thomism.

Keywords: Neo-Thomism, Thomist, Expanding, Advocates, Opponents, Influences, Renewal, Progress, Adjustments.

1. Rosmini within the context of Thomistic thought

1.1 Towards a philosophical definition of Thomism

In his definition of Thomism, J.D. Van der Vyver points out that both Thomism and neo-Thomism are indicative of the connection of Roman Catholic philosophy to the system of thought of Thomas of Aquino. (Note 1) Robbers in turn shows that, apart from its connection to the thinking of Thomas Aquinas, neo-Thomism alludes to the aspect of renewal within the context of continuity: *"Dit neo-Thomisme wil een Thomisme zijn dat St. Thomas zelf had leuteren voortbrengen in de 20 eeuwen, met die seuten die en by hem reeds waren 'n de 13de eeuw, krachtens een intense dynamiek, die ook het geestesleven van den mens en van die mensheid doet groeien."* (Note 2)

Before recognising neo-Thomism legitimately as a form of Thomism, there should be clarity as to the actual meaning of Thomism. Up to now Thomism has been seen as an Aristotelian notion. However, owing to the originality of the theoretical view of Thomas Aquinas, Thomism is no longer associated only with Aristotelianism. Robbers accordingly argues that Thomism should also be determined on the basis of the views of Thomas Aquinas and not those of Aristotle. Manser, on the other hand, claims that Thomism is indicative of the Aristotelian doctrine of the delimitation of faith and knowledge and the harmony that exists between the two. He states that the doctrine of *actus* and *potentia* of Aristotle influenced Thomas Aquinas to such an extent that the latter also attempted to reconcile faith with knowledge. This particular Aristotelian teaching assumed a central position in the philosophical dogma and methodological moments of Thomas Aquinas. (Note 3) According to Robbers, Manser argues that Thomism can be detected in the following quotation which illustrates the development of the Aristotelian doctrines of *actus* and *potentia*: *"[...] het scherp logisch en consequent doorvoeren en het verder voeren der aristotelische leer van potentia en actus."* (Note 4) It was through this development that Thomas Aquinas earned himself the characteristic of originality. Manser writes that

Thomas Aquinas further expanded and applied the Aristotelian doctrines of *actus* and *potentia* in a consistent and logical manner. (Note 5) In the official document, the *Aeterni Patris* of 1879, Pope Leo XIII emphasised the advancement and development of knowledge. His message was that the *Aeterni Patris* document should not be seen as the culmination of ideas, but rather as a point from which progress should continue to be made through further development and application. (Note 6) Pope Pius XI supported Leo XIII in his view that Thomism should not deviate from this developmental line of thinking of renewal and adjustment. They thus endorsed the expansion and intellectual development of traditional Thomism. Rosmini desired to be part thereof by assuming an active role as a contemporary thinker. It should be kept in mind that Thomas Aquinas himself effectuated the expansion, amendment and renewal of the works of Aristoteles. Rosmini has done the same with regard to the works and doctrines of Thomas Aquinas.

1.2 Requirements for a Thomist to be considered a neo-Thomist

Neo-Thomism comprises two significant moments: one embodies the thinking of Thomas Aquinas, and the other the thinking of the modern era. These are appropriately referred to as the conservative and progressive elements respectively. The neo-Thomist may be associated with the progressive element.

By virtue of his nature, the neo-Thomist may not allow his thinking to become staid and stagnant in respect of the views of Thomas Aquinas. Instead, the neo-Thomist should progress from the philosophical and theological opinions of Thomas Aquinas and make adjustments in keeping with the dynamics of the current period of time. This implies that where Thomas Aquinas may be silent on certain issues, further development and growth should be evident in the thinking of others in order to generate solutions to present-day problems. The neo-Thomist should thus be capable of original thinking which should further evolve in his works. He should not merely relate the words of Thomas Aquinas, but should carry into effect the spiritual thinking of Aquinas and where possible further expound on this. The following maxim should be put into effect: *veteres novis augere* (the ancient should be enriched with the modern). (Note 7) On the basis hereof neo-Thomism is indicative of expansion, renewal, originality and application and thus resides under the progressive element: “*Veeleer dient rechtvaardigheidshalve de gehele oriëntatie van het neo-Thomisme met het predicaat progressief te worden aangeduid; het denker gevoel als heel het historisch bestaan der mensheid verkeert nu eenmaal ‘n een proses, waarin geen stilstand beslaat.*” (Note 8) According to the above premise, Rosmini may be placed within the category of the progressive element and may be considered a neo-Thomist.

Can Rosmini also be considered to be a Thomist? In order to qualify as a Thomist, Rosmini will need to have upheld traditional or classical Thomism. Was this the actual case? The answer can be found in the opinions of Rosmini’s advocates and opponents.

2. The life and work of Antonio Rosmini

Antonio Rosmini was born in 1797 in Rovereto, an Italian village that had formed part of the Eastern Hungarian Empire at that time. The Rosmini family maintained an affluent lifestyle owing to their involvement in the silk manufacturing industry. (Note 9) Rosmini’s father was Baron Pier Modesto Rosmini-Serbati, the member of a wealthy aristocratic family of long standing. His mother was Countess Giovanna dei Formenti who came from Riva, along the lake of Garda. His parents were persons of culture, generosity and piety who zealously advanced the interests of the church. They had four children: Margherita (who became a nun), Antonio, Guiseppe and Felice, the youngest who died at an early age. (Note 10)

Rosmini completed his tertiary education in theology at the University of Padua and was ordained as priest in 1821. Because of his unique writing ability and with the encouragement of his colleagues, he spent his time writing books of theology rather than fulfilling his obligations as priest. (Note 11) His publications made a considerable impression in ecclesiastical and philosophical circles. His esteem within the church rose to such an extent that Pius IX considered promoting him to the rank of cardinal. (Note 12)

3. Rosmini’s influence on his followers

During his lifetime and even several years after his death, Rosmini remained a controversial figure in Italy. Notwithstanding his reputation in Italy, he was relatively unknown in Europe.

W.J. (pseudonym) expresses the opinion that the magnitude of Rosmini’s work in his relatively short lifetime accords him a place amongst the big thinkers and entitles him to a partnership with a small group of intellectuals. W.J. consequently places Rosmini on the same level as Aristoteles, Aquinas, Leibnitz, Kant and Hegel. He believes that Rosmini’s views are of particular importance and considers him to be an “intellectual wonder”. (Note 13) He states as follows regarding Rosmini: “... because he is alive, and writes for readers taught by all their Lockian and Protestant education to treat the kind of thing that Rosmini represents... thoroughgoing, concatenated, and systematic ontologizing and theologizing by the conceptions of principle and term, substance and essence and act...” (Note 14)

The writer, Thomas Davidson, highly appraises Rosmini’s work. He considers Rosmini to be the most important philosopher of the nineteenth century and likens him to ancient philosophers such as Plato and Aristoteles. (Note 15)

According to Davidson, Rosmini's work deserves to receive greater exposure and study since it makes a unique contribution to theology, philosophy, fundamental rights and human society. (Note 16)

Davidson believes that Rosmini's work is also of relevance outside Thomistic circles, not only with regard to theology, philosophy and fundamental rights, but also in respect of other scientific disciplines. (Note 17) He states that Rosmini's intellectual work provides clear parallels and cultural tangents with Thomistic and non-Thomistic schools of thought. (Note 18)

4. Proponents and opponents or critics of Rosmini

This article examines the diverse interpretations given to Rosmini's viewpoints. Both the opinions of those who supported Rosmini and those who criticised him will be discussed. Rosmini's advocates argued that he attempted to introduce innovative thinking to the Thomistic tradition. They emphasised neo-Thomism and believed that Rosmini belonged to this category of philosophical thinking. However, Rosmini's opponents upheld traditional or classical Thomism and were adamant that Rosmini could not be classified in terms of this grouping.

4.1 Rosmini's proponents

Whereas the doctrine of Thomas Aquinas absolutises human reasoning, Rosmini states in his writings that such a theory is both subjective and flawed. (Note 19) Similarly to Thomas Aquinas, the British empiricists and German Romantic school absolutised reasoning, ignoring the illumination of faith. (Note 20) Davidson is of the opinion that Rosmini obviates the dangers of the absolutisation of subjective human reasoning by concentrating instead on the "light of divine reason" which is objective. (Note 21)

The writer, Beales, is of the opinion that the distinction between the "light of reason" and the usage of reason as found in Rosmini's *Nuovo Saggio sull' Origine delle Idee* (New Essay on the Origin of Ideas), constitutes an important expansion of Thomism. (Note 22) He points out that Rosmini became unpopular in ecclesiastical circles because his writings tended at times to run contrary to the Thomistic tradition. (Note 23) Later, two of his most well-known works were placed under censorship. (Note 24) One of these censored pieces, *Delle Cinque Piaghe della Santa Chiesa* ("The Five Wounds of the Holy Church"), which deals with the relationship between the church and the state, serves as an example of Rosmini's criticism of Thomistic doctrine. (Note 25)

The latter work is of particular importance for contemporary society and presents solutions to theological and philosophical issues faced by the church and state today. (Note 26) Irrespective of the considerable value of Rosmini's works and their theological and philosophical truths, they were placed on the *Index Librorum Prohibitorum* (Index of Forbidden Books) at the insistence of the Jesuits who presumably upheld the classical Thomistic doctrine of the Catholic Church. (Note 27) As Aubrey states in respect of the Jesuits' animosity towards Rosmini: "... his works were placed on the Index at the instigation of the Jesuits, then apparently released, and have been a subject of controversy ever since as to their ecclesiastical standing..." (Note 28)

Rosmini's Jesuit critics used his divergence from ecclesiastical viewpoints to discredit his writings. (Note 29) Since the Jesuits were one of the oldest orders of the Catholic Church, and since, according to Pesch, they maintained the strictest adherence to traditional Thomism as the official doctrine of the church, they called for a review of Rosmini's theological, philosophical and legal works. Rosmini's critics' *modus operandi* was the upholding of classical or traditional Thomism. (Note 30) Their desire was to see Rosmini's works placed back on the Index of Forbidden books after previously having been removed from this list. After Pius IX refused to accede to the demands of the Jesuits, Leo XIII, his successor, granted them their request. (Note 31) Pesch writes: "... but hardly had a new and more pliable Pope ascended the throne, when they applied to him for a remedy against Rosminianism, in the shape of a rehabilitation of Thomism, pure and simple, as the philosophy of the Church..." (Note 32) Leo now launched a desperate attempt to reappraise the works of Rosmini to be in keeping with traditional Thomism as evident in his encyclical, *Aeterni Patris*, in 1879. (Note 33)

Boelaars explains the propensity that Pius had for traditional Thomism as follows: "... *Paus Leo XIII verborg van de begin af zijn voorliefde voor de wijsbegeerte van den H. Thomas niet. Reeds enkele malen had hij er blijk van gegeven, toen den 4 Augustus 1879, als derde zijner encyclicken, de wereldbrief Aeterni Patris verscheen: De philosophia christiana ad mentem sancti Thomae Aquinatis Doctoris angelici in scholis catholicis instauranda; over het herstel van de christelijke wijbegeerte naar den geest van den engelachtigen leeraar, den H. Thomas van Aquino, in de katholieke intichingen van onderwijs.*" (Note 34) Boelaars alleges that Leo XIII recommended in an encyclical of June 1880 with the title *Dum Vitiatae* that the doctrine of Thomas Aquinas was to be followed according to the exegesis of Cajetan, Ferrariensis, Liberatore, Sanseverino and Zigliara, and that Rosmini's doctrine was to be avoided. (Note 35) Leo XIII's revision of Rosmini's works ended with the condemnation of forty propositions from Rosmini's posthumous works. (Note 36) The decree, *Sacred Congregation of the Index*, was ratified on 6 June 1849 by Leo XIII. The condemnations listed in the *Sacred Congregation of the Index* are usually given in one of the following formulae, namely *prohibeatur*, *prohibeatur donec corrigatur aut expurgetur* and *dimittantur*. (Note 37)

Rosmini's works were later released from censorship through the last-mentioned formula, the *dimittantur*, by a ruling of Pius IX in 1854 and could not be placed under censorship again. (Note 38) The *dimittantur* exonerated Rosmini's works from heresy, but made it clear that his works were to be considered dangerous or detrimental to the interests of the church: "... merely by their liability to misinterpretation in consequence of peculiar expressions and the particular temper of the times." (Note 39) Following the exoneration of Rosmini's works by means of the *dimittantur* of Pius IX, Leo XIII was only able in his decree, *Post Obitum* of 1887, to pronounce that forty propositions contained in Rosmini's prohibited works, *Delle Cinque Piaghe della Santa Chiesa* ("The Five Wounds of the Church") and the *Costituzione Secondo la Giustizia Sociale* ("Constitution on Social Justice"), were not in agreement with Catholic truths: "*catholicae veritati haud consonae videbantur.*" (Note 40)

Reaction against the encyclical, *Aeterni Patris*, came from various quarters. The most impressive argument against the *Aeterni Patris* was that the pope was endeavouring to return civilisation to the Middle Ages. Boelaars considers the speech of Leo XIII of 7 March 1880, *Pergratus nobis*, to reflect this line of thought. Speculation followed Leo XIII's statements of the time and it was alleged that his preference for the Middle Ages led to the deduction being made that he wished to elevate the non-Christian Aristoteles above Christian philosophers such as St Augustine and Thomas Aquinas. Notwithstanding the allegations levelled against Leo XIII, the latter expressively campaigned for the execution of Thomistic philosophical education. (Note 41)

After Leo XIII's fervent campaign for a Thomistic tradition in the church (at the request of the Jesuits), Rosmini's 40 propositions stood no chance of being accepted by mainstream Catholic thinkers. Neither were his propositions in a position to penetrate the rest of the world. Now that attitudes towards Rosmini have changed as a result of the dedicated work of a few persons who believed in Rosmini's "system of truth" at the time of his vilification or persecution, it is the hope of this research that Rosmini's works will receive the general acceptance and credit that they deserve. (Note 42)

Sheldon believes that Giuseppe Morando made the assumption that Leo XIII was placed under pressure by the Jesuits and that this led him to subject the works of Rosmini to censorship – something which he would not otherwise have done. Sheldon is also of the opinion that Rosmini's propositions were in fact in keeping with healthy theological and philosophical teachings of the time and can be considered to be in accordance with Catholic standards. (Note 43)

Furthermore, Sheldon believes that as an adherent of Rosmini, Morando defended Rosmini's philosophical views. (Note 44) He remains convinced thereof that the rejection of Rosmini's philosophy was an injustice and expresses his dismay at the antagonistic references found in textbooks which discredit Rosmini's philosophy. According to Sheldon, Morando was thoroughly convinced that Rosmini was in no way guilty of disregarding the Catholic Church's doctrines. In this regard he refers to a quotation of Morando in which Pope Gregory XVI showed great regard for Rosmini: "... *virum excellenti ac praestanti ingenio praeditum, egregiisque animi dotibus ornatum, rerum divinarum atque humanarum scientia summopere illustrem.*" (Note 45)

Sheldon believes that the rejection of Rosmini's teachings by the pontificate of Leo XIII was the consequence of improper influence on the part of the Jesuits and their political considerations. (Note 46) Some writers believe that Rosmini's teachings can be brought into relation with the viewpoints of Galileo. Sheldon explains that: "... over against an Inquisition which has committed the two greatest possible errors in the field of physical science and in that of metaphysics, in condemning Galileo and Rosmini, the rebels of today are the truest Catholics of tomorrow." (Note 47)

Sheldon also cites another advocate of Rosmini, Giuseppe Morando, who states that Rosmini's viewpoints are not at all contrary to Catholic opinions and that "... each of the forty condemned propositions can be justified as being in harmony with sound philosophy and theology, and agreeable to Catholic standards." (Note 48) In Morando's opinion Rosmini was not guilty of any serious divergence from church dogma.

The writer, Norman St John-Stevas, believed that Rosmini's theological and philosophical views would eventually replace Thomism as the official philosophy of the Catholic Church. (Note 49)

4.2 Rosmini's opponents

It is characteristic of Thomism to make a connection between theology and philosophy since these two fields supplement one another. (Note 50) In consideration hereof, Rosmini's views on theology and philosophy fall within the ambit of traditional or classical Thomism.

Rosmini believes that, although the soul possesses both a corporeal (natural) and a divine nature, it forms a unity that reaches maturity in humanity. (Note 51) Rosmini assumes that the good and divine nature of humankind will ultimately conquer the corporeal (natural) and that in this way mankind obtains participation in God, the Highest Being. This participation in the Godly, however, demands strict adherence to natural law. This view shows some parallel interpretations with the Thomistic *analogia entis* and participation theory. (Note 52)

The debate as to whether Rosmini's view of God or his theological viewpoints lead to pantheism, is a salient issue in view of the investigation to determine whether Rosmini's school of thinking belongs to neo-Thomism rather than

traditional (classical) Thomism. Keeping this in mind, particular attention has been paid to specific doctrines of Rosmini. Proposition 20 of Rosmini's doctrines states that the human soul multiplies through generation: "... *non repugnat ut anima humana generatione multiplicetur.*" (Note 53) This apparently deviates from the Thomistic viewpoint contained in the *Summa contra gentiles* which reads as follows: "... *quod anima humana non traducatur cum semine.*" (Note 54) It should be kept in mind that Rosmini attempts in his doctrine to indicate that the human soul through development becomes one/unites with the *esse initiale* in the course of time. On the grounds hereof, Rosmini's viewpoint (Proposition 20) deviates from the Aristotelian-Thomistic doctrine in so far as the soul is concerned. (Note 55)

As already mentioned, Rosmini alleges in Proposition 22 that two soul constituents are present in the human body – one corporeal (natural) and the other divine (intellectual). (Note 56) In the human body these two soul constituents are joined together to form a unity so that the human body ultimately only has one soul. Winterton shows by means of a quotation from the works of Rosmini that the latter was an advocate of the idea that the two distinguishable soul constituents unite in the human body: "... God might possibly separate the intellectual principle from the animated body, without the latter ceasing to be animate: but if animate, there must remain some sort of anima or other. Was it there before, or not? If not, where does it come from now? If so, then there were two souls in man, existing together." (Note 57)

The Aristotelian-Thomistic theological viewpoint on the soul differs from that of Rosmini in so far as it advocates three soul constituents as opposed to Rosmini's two. Both Rosminianism and Thomism thus adopt the point of view that the human being possesses more than one soul constituent, the main difference between the two views being that Thomism under the influence of Aristoteles and Plato distinguishes three parts of the soul. The latter forms part of the theory of hylomorphism which means that an earlier form of the soul will be replaced by a later more developed form of the soul since "... generation requires corruption." (Note 58) Thomas Aquinas alleges that: "... when a more perfect form comes on, the prior is corrupted, but in such a way that the following form has whatever the first had, and still more." (Note 59) This in effect means that the vegetative soul constituent degenerates and is replaced by a more developed soul constituent, the sensitive soul part, which in turn further degenerates/becomes corrupt and is subsequently replaced by a rational soul constituent. (Note 60)

Rosmini argues that ultimately there is only one soul that remains in the human being, namely the rational soul constituent. He does not support the hylomorphistic view of Aristoteles and Thomas Aquinas and maintains that two soul constituents interact with each other in the human being rather than undergo a process of replacement whereby one soul constituent degenerates and is replaced by another. Rosmini believes that two soul constituents exist simultaneously. Hylomorphism, on the other hand, assumes a process of generation and constant degeneration/corruption. (Note 61)

According to Winterton, Rosmini's theological view on the soul is incorrect and the Thomistic view should be upheld as the valid one since it carries the support of the ecclesiastical *magisterium*. He supports his argument by stating that Rosmini in his Proposition 24 adopts the assumption that the soul does not constitute the substantial form of the body, but instead is the cause thereof. Winterton considers this statement to be contrary to Thomism with regard to the Aristotelian-Thomistic doctrine of form/matter whereby humanity is typified as the form of the soul. (Note 62)

Winterton later recuses his opinion on Rosmini and instead argues that Rosmini's ideas were interpreted out of context. He believes that it was as a result of political considerations that Rosmini was done an injustice and that he would never have published the propositions as it later became apparent. (Note 63) Hereby Winterton confirms that Rosmini upheld traditional Thomism and that hostile political influences should be left out of the picture.

According to Thomas Guarino, when John Paul II juxtaposed Rosmini's theology and philosophy with that of neo-Thomists such as Gilson and Maritain on the one hand, and with that of orthodox philosophers such as Florensky and Lossky on the other hand, this created a dilemma for some of the clergy. Although John Paul II wished to reconcile Rosmini with Thomism, Guarino states that Leo XIII in his encyclical, *Aeterni Patris*, expressed the opinion that Rosmini's theological views were divergent from those of Thomism. (Note 64) Leo XIII (supported by Ratzinger), according to Guarino, made the following statement: "... the adoption of Thomism created the premises for a negative judgement of a philosophical and speculative position like that of Rosmini because it differed in its language and conceptual framework from the philosophical and theological elaboration of St. Thomas Aquinas." (Note 65)

Guarino believes that owing to the divergent or heterodox interpretations accorded to Rosmini's work, Ratzinger came to view some of Rosmini's viewpoints as ambiguous and confusing. According to Guarino, Ratzinger considered Rosmini's theological views to be insufficient and inadequate and not in keeping with traditional (classical) Thomism. (Note 66) Notwithstanding Ratzinger's rejection of Rosmini's theological views, John Paul II declared in his encyclical, *Fides et ratio*, that Rosmini was one of the most recent writers to establish a fruitful relationship between theology and philosophy. With these words John Paul II implied that Rosmini's views were in no respect contradictory to traditional (classical) Thomism and that his theological and philosophical systems should rather be seen as a means of further

developing classical Thomism. Rosmini's theological system accordingly affords Thomism with new opportunities to overcome challenges presented by modern-day thinking. John Paul II in effect provides scope in his *Fides et ratio* for the reinstatement of Rosmini's theological views. According to Guarino and Winterton this is unnecessary because Rosmini's posthumous works have not been interpreted in context. They argue that Rosmini was an adherent of traditional or classical Thomism. (Note 67)

5. Conclusion

In his encyclical, *Aeterni Patris*, Leo XIII upheld Thomism as the official point of view of the Catholic Church. Davidson states that Rosmini continued the Thomistic tradition in the nineteenth century, while relating the traditional and classical form thereof to modern tendencies. According to Davidson, however, Thomism was not always exempt from criticism. (Note 68) This explains why Rosmini's theological views received considerable attention, placing him on an equal footing with Thomism. In the event of a difference of opinion between the views of Thomas Aquinas and Rosmini, the latter's views should be accepted as the correct ones in the opinion of Davidson, because Thomism did not advocate a fixed theory. (Note 69) Davidson states as follows: "... they speak as if St. Thomas had settled all his views, before he began to write. Consequently, when they find contradictions in his writings (and these are not rare), they try, by what they call a 'benign interpretation,' to explain them away. Unfortunately, a benign interpretation generally means a disingenuous interpretation, and how far such interpretations may be carried may be seen in a little work by Father Cornoldi on St. Thomas's views with regard to the *Immaculate Conception*, in which that zealous Jesuit tries to show that St. Thomas meant exactly the opposite of what he said. The Saint's views on the *Immaculate Conception* were anything but orthodox. It is but fair to say that Cardinal Zigliara, in the volume before us, shows no tendency to benign interpretations, and that he treats his opponents, when speaking of them individually, with becoming respect..." (Note 70)

In summary, Rosmini's views differ in some respects from those of Thomas Aquinas. As already mentioned, Thomism has its shortcomings. Rather than acting in an offensive way towards Thomism, Rosmini makes an important contribution towards the further development thereof.

It can be seen from Rosmini's theological viewpoints that he endeavoured to uphold the fundamental truths of traditional (classical) Thomism while expanding on it in the light of the prevailing social and political contexts of the era. He applied the points of departure of Thomism in such a way that they gained a new and dynamic actuality. In this respect Rosmini's views also fall into the category of neo-Thomism, in addition to the traditional or classical Thomism.

In consideration of the above, it may be understood that the false dilemmas postulated by Rosmini's critics or opponents with regard to his position within Thomism, are of lesser importance for the time being.

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Notes

Note 1. Van der Vyver 1974: 66.

Note 2. Robbers 1951: 83.

Note 3. Robbers 1951: 56.

Note 4. Robbers 1951: 56.

Note 5. Robbers 1951: 50.

Note 6. Robbers 1951: 79.

Note 7. Robbers 1951: 53.

Note 8. Davidson 1882: xxvii-xxviii.

Note 9. Davidson 1882: xxvii.

Note 10. Leetham 1982: 125. Cardinal Morozzo warned Rosmini not to devote his attention to other matters, but to reflect on the words of Pius VIII spoken to him. The Vicar General, Monseigneur Scavini, cited the words of Pius VIII to Rosmini as follows: "... that he should not undertake that part of the ministry, but that he should attend to the more important work of study and writing books for the benefit of religion and good morals."

Note 11. Rosmini 1861: 125. The plans of Pius IX were obstructed by his self-imposed exile to Gaeta. Pius IX would later be influenced by other unfavourable circumstances to launch an investigation into Rosmini's works. Hereby Rosmini's promotion to the Cardinalate was suspended.

Note 12. Giulio Andreotti 2007: 35.

Note 13. W.J. (pseudonym) 1885: 130.

Note 14. See W.J. 1885: 130.

Note 15. See Blau 1955: 525.

Note 16. One such work of Rosmini bears the title *Sistema Filosofico* (The Philosophical System of Rosmini). In this piece Rosmini discusses theology, philosophy, rights and human rights and their respective social contexts.

Note 17. Davidson 1883: 616.

Note 18. Davidson 1883: 614.

Note 19. Rosmini 2001: xii. Rosmini believes that human reasoning is prone to error because it is an act of the will rather than the product of the intellect.

Note 20. Davidson 1882: 400-404. Davidson explains that Rosmini considers the Kantian form of human reasoning as subjective since it is material/substantive and not formalistic, a posteriori and not a priori. Through his principle of the objectivity of the first principle, Rosmini formulated a twofold system to ward off the criticism of Hegel, Fichte and the English school of thought. This system deals respectively with Rosmini's teaching of self-consciousness and his theory of perceptions. By means of this twofold system, Rosmini could determine that the being was the object of the intellect, the principle of observation – "that which is."

Note 21. Rosmini 2001: viii.

Note 22. See Beales 1957: 91. Beales believed that Rosmini's deep insight into the modern outlook of the nineteenth century enabled him to bridge the schism between the Christian tradition and contemporary thinking.

Note 23. Schlumpe et al. 2001: 11. David McClaurin alleges that owing to the publication of Rosmini's theological work, *Delle Cinque Della Santa Chiesa*, even years after his death Rosmini was held in contempt by Thomism and its adherents. Even to this day Rosmini is still subjected to humiliation. Schlumpe and Schorn cite Mc Claurin himself: "... (Rosmini's) posthumously published works were picked over..." and "... in what must surely be one of Church history's most shameless acts of character assassination..."

Note 24. Rosmini 1992: 14. The works placed on the Index were *Delle Cinque Piaghe della Santa Chiesa* (Of the Five Wounds of the Holy Church) and *La Costituzione Civile Secondo la Giustizia Sociale* (Constitution on Social Justice).

Rosmini 1882: xxxvi-xxxvii, xxxix.

Note 25. Rosmini 1987: 1-194. Rosmini mentions the state's interference in ecclesiastical affairs under the fourth wound of the church. He argues that the nomination of bishops should not lie in the hands of the civil authorities. The nomination of bishops remains the exclusive mandate of the church.

See Leetham 1982: 362-71.

Note 26. Rosmini 1861: 119-20.

Rosmini 1987: 67-132. Using allegory Rosmini analogises the five wounds of Christ as typical examples of how harm is being inflicted on the church. The five wounds of the church are regulated by Rosmini's *Delle Cinque Piaghe della Chiesa* ("Of the Five Wounds of the Church"). The fourth wound specifically is indicative of the relationship between the church and the state and deals with the nominations of bishops by the state. Stately nominations of bishops culminate in the enslavement of the church to the state. The church is a free society and has the right to elect or nominate its own officials. Rosmini believes that when the state interferes in church matters the personal interests of the clergy are influenced to such an extent that they neglect their apostolic work: "... it was not possible that having become the king's men they should have it equally present to their minds to remain the men of God." The church then finds itself in alliances with state officials (princes) who negotiate for concessions that are detrimental to the church. Arising from the dissatisfactory condition or position of the church, Rosmini proposes the immediate and complete liberation of the church from any partnerships with the state.

Note 30. Leetham 1982: 368-370. Rosmini states that nominations of bishops were made from the fifth century after Christ "per clerum et populum". Up to and including the twelfth century, popes were able in terms of this formula to declare invalid the nominations of bishops who failed to meet the requirements of the formula. Thereafter, a system of papal reservation applied during the French pope's stay at Avignon. In the fifteenth century the nominations of bishops were removed from the clergy and placed in the hands of the See Encyclopaedia Britannica vol.19: 633.

<http://web 3.epnet.com>, 1.

See Britannica Biography Collection.

Note 27. See <http://www.jstor.org/view>, 2.

Note 28. See Aubrey 1934: 369.

Note 29. Pesch 1880: 424, Davidson 1883: 144-7. Pesch believes that about a century ago when philosophy in Europe came under the attack of sensism, criticism and Hegelianism and the Jesuits were imposing a form of materialism on the church, Rosmini strove to restore dignity to reason and to elevate reason to the foundation of religion or theology. He did this by focusing on the traditional philosophy of the church – Thomism. Pesch states that Rosmini was successful in his attempt and that the Jesuits wished to bring him over to their side. When they ascertained that Rosmini employed an entirely different philosophical and theological system to theirs and that he would not allow himself to be used for their own profit, the Jesuits started to discredit Rosmini's works. After they failed to have Rosmini's works placed on the Index, the Jesuits attempted through private slander to create the impression that Rosmini's works contained erroneous doctrines and convinced the church to restore Thomism in a way that excluded Rosmini's proposed improvements to Thomism. During the pontificate of Pius IX the Jesuits were unsuccessful in their attempts to have Rosmini's works placed on the Index. Parkinson states that when Leo XIII, who was a more pliant pope, ascended the throne, the Jesuits advocated a remedy against Rosmini's works in the form of the rehabilitation of Thomism as the church's philosophy: "... and a distinct condemnation of its improved form (Rosminianism)." He feels that Leo XIII failed to restore Thomism: "... because his hands were tied by a decree of the Congregation of the Index which had declared Rosmini's words free from censure." Parkinson states that the Congregation of the Index never gave the decree "nihil censura dignum", but rather the "dimittantur." He believes that the "dimittantur" in no way served to give approval to Rosmini's works and that in his opinion a decree of the Congregation of the Index could be revoked by the pope. According to Parkinson, the pope's hands were not actually tied by the decree of the Congregation of the Index. He states that after the encyclical, *Aeterni Patris*, the Jesuits flooded the world with books in order to confirm the doctrines of Thomism as the official doctrines of the church (*secundum principia S. Thomae Aquinatis*). Parkinson explains that the Jesuits' views corresponded more with those of Rosmini than with those of Thomism: "... the Jesuits are... emphasizing views that are often quite as much at variance with those of St. Thomas as with those of Rosmini, against which they were directed."

Davidson 1882: 146.

Note 30. Burke 1977: 600. Burke is of the opinion in his book discussion of Mc Cool that the latter supported the maintenance of classical Thomism and states as follows: "... and Mc Cool points out, he was also crucial to the development of Thomism into a seedbed for pluralistic theology in the age of Vatican II." Burke's approach is contrary to the neo-Thomistic tradition. Rosmini shows a strong disapproval for the nineteenth century secular rationalism and instead shows a desire to uphold classical Thomism while at the same time enabling adjustment to new changing circumstances. Rosmini's ideas could thus serve as a bridge between classical Thomism and neo-Thomism.

Note 31. See Pesch 1880: 425.

H. Boelaars 1948: 12. Pope Leo declared in his encyclical, *Dum vitatae* of 21 June 1880, that the doctrine of Rosmini should rather be avoided: "Dit werd in Italië zeer goed begrepen, want in meerdere adhaesiebetuigen van Italiaansche bisschoppen en seminarieprofessoren werd onder aanhaling van deze woorden de belofte gedaan de leer van den H. Thomas te onderwijzen volgens den uitleg van Cajetanus, Ferrariensis, Liberatore, Sanseverino, Zigliara, en de leer van Rosmini te vermijden."

Note 32. See Pesch 1880: 752.

Note 33. See Pesch 1880: 424-5.

Note 34. Boelaars 1948: 9.

Note 35. Boelaars 1948: 12.

<http://mb-soft.com/believe/txoneothomi.htm>, 1. In the early nineteenth century in Italy certain scholars in the Thomistic school considered the doctrines of Aquinas to be basic principles that could resolve the problems created by Kantianism, Hegelian idealism, British empiricism, rationalisation, skepticism and liberalism. During 1850 neo-Thomism and neo-Scholasticism were reflected in the works of Gaetano Sanseverino in Naples and Matteo Liberatore in Rome. The publication of Leo XIII's *Aeterni Patris* in 1879, which was known as the "charter of neo Thomism", took their endeavours to a new climax. By means of ensuing encyclicals, Leo XIII emphasised the application of Thomistic ideas as a means of affording solutions to contemporary problems. Successive popes, including John Paul II, stressed the importance of a Christian philosophy based on Thomistic principles.

Note 36. Boelaars 1948: 12.

Note 37. Rosmini 1861: 125. The first formula, *prohibeatur*, was used when a book was condemned as a result of heretical and immoral doctrines. The second formula implies that a book, although considered to be detrimental, was still capable of undergoing change. Such book should, however, not be offensive to the Catholic faith. The third formula is indicative of the acquittal or exoneration of a book.

Note 38. *Encyclopaedia Britannica*: 561.

Note 39. Rosmini 1861: 126.

Note 40. Rosmini 1992: 69. Under the decree of Leo XIII, *Post Obitum*, forty of Rosmini's works from his lifetime and also from his posthumous works were censored. Under the suspicion that Rosmini's works were *catholicae veritati haud consonae videbantur* (hardly in agreement with Catholic truths), Rosmini's propositions were condemned as being *reprobandae*, *damnandae* and *proscribendae* (condemned, censored and banned). Notwithstanding these negative interpretations attached to Rosmini's works, his works were not considered to be heretical, offensive to the pious ear, or in any way damnable. Cleary believes that there were three reasons why Rosmini's works were condemned. Firstly, the charge against some of the propositions as being *catholicae veritati haud consonae* was theologically motivated rather than philosophically based. No other opinion or explanation can be given to the phrase "catholic truth". Secondly, the first 24 propositions concern philosophical issues; especially the question as to the intellectual relationship between humanity and God. It was the opinion of the Sacred Congregation of the Index that Rosmini's view on such a relationship should be undermined from the very outset. Thirdly, Rosmini's proposition cited from his *Teosofia* is a concentration of views taken from various writings that comprise several pages and more than one volume of the book. Rosmini's reference on this is clear: "Finite reality is not, but he (God) makes it be by adding limitation to infinite reality" (*Teosofia*, volume 1, no. 681); "Initial being... becomes the essence of every real being" (*ibid.*, no. 458); "Being, which actuates finite natures, joined with these by being cut off from God..." (vol. 3, no. 1425).

Cleary alleges that the practical impossibility of giving meaning to these words without reference to their contexts is self-indicative of the difficulties encountered by the writers in their attempt to prove that Proposition 12 shows that Rosmini may be accused of pantheism. Cleary believes that Rosmini's actual viewpoint against pantheism is evident in his commentary on the Gospel of John: "... when there is questions of the modes in which the divine subsistence is limited, we do not mean that the divine substance receives, or can receive limitations. However, the divine substance is being, and consequently being which, as its concept shows, is able to be in two modes, unlimited and limited. Unlimited and unchangeable being is proper to the divine substance; limited being is proper to the creature. The divine substance contains therefore the possibility of creatures because in it is to be found being which can be limited. But the creature is not present in the divine substance. What is present – because being is present, and being contains in its concept the possibility of limitation – is the reason underlying the creature's possibility of existence. The possibility proper to creatures is, however, twofold; logical and physical. The logical possibility is the idea, or the reason underlying creaturehood; the physical possibility is the power, or efficient cause of the creature, that is, the creative power. Absolute being, therefore, contains in its concept both the idea of limited being, that is, of the creature, and the power to produce the creature, that is, to render real and subsisting the limited being manifest in the idea. In a word, the absolute being possesses all that is needed to make itself creator, creator of limited being, of the creature, by making the creature real and subsistent."

Rosmini 1861: 125-6.

Note 41. Boelaars 1948: 13.

Note 42. Rosmini 1992: 71.

Note 43. See Sheldon 1905: 583, 584. Sheldon believes that as a result of the injustice of rejecting Rosminian philosophy, Morando was prepared to challenge the authority of the church. He alludes to three allegations as to why the authority of the church could be challenged. Sheldon states first of all that there was division as to the rejection of Rosmini's works. While Gregory XVI expressed his praise for Rosmini's philosophical works, the Jesuits did everything in their power to have Rosmini's works placed under censorship. There also appeared to be a lack of consensus between Pius IX and Leo XIII on Rosmini's works. Sheldon believes that Pius IX was of the opinion that the two censored books of Rosmini, namely *Delle cinque Piaghe della Santa Chiesa* of 1848 ("Of the Five Wounds of the Church") and the *La Costituzione secondo la Giustizia Sociale* of 1848 ("Constitution of Social Justice"), in no way diminished the merits of the theological and philosophical system of Rosmini. According to Sheldon the censorship of Rosmini's works under the pontificate of Leo XIII was a case of: "... pope and congregation being at variance with pope and congregation..."

Secondly, Sheldon alleges that Morando's contempt of the church's authority was the result of mistakes made at the time of the Inquisition and the pope's support of these mistakes. He quotes Morando himself as referring to: "... over against an Inquisition which has committed the two greatest possible errors in the field of physical science and in that of metaphysics, in condemning Galileo and Rosmini, the rebels of today are the truest Catholics of tomorrow."

Sheldon believes that the third allegation levelled against the authority of the church and also the reason why Morando could not accept with resignation the censorship of Rosmini's works, was his assumption that Rosmini's works did not attack Catholic doctrines. Morando rejected the charge of pantheism used by Rosmini's critics against him and alleged that Rosmini had not deviated from Catholic dogma.

Note 44. Sheldon 1905: 583. "... Professor Morando gives expression in the whole body of his work, namely, the conviction that the teaching of Rosmini offends against no genuine Catholic premise... he maintains, each of the forty condemned propositions can be justified as being in harmony with sound philosophy and theology, and agreeable to Catholic standards... Morando adequately refutes the charge of pantheism, which evidently was uppermost in the minds of the censors, and makes it plain that on most of the points embraced in the passages selected for reprobation Rosmini was not guilty of any serious divergence from Catholic dogma."

Note 45. See Sheldon 1905: 583. He considers Rosmini to be a person of exceptional quality blessed with an outstanding intellect and someone who was passionate and imbued with an extraordinary ability to relate divine matters to human science with much tolerance.

Note 46. See Sheldon 1905: 583-4.

Andriotti 2007: 35. Cardinals who were well disposed towards Austria, such as Giacomo Antonelli for example, opposed Rosmini.

Note 47. See Sheldon 1905: 584.

Note 48. See Sheldon 1905: 584.

Note 49. John-Stevas 1953: 83.

Note 50. Rosmini 2004: 36.

D'Entrèves 1965: xiii. Thomism also maintains that the fields of theology and philosophy should fundamentally be in harmony with one another: "Gratia non tollit naturam sed perficit."

Note 51. Rosmini 1991 (a): viii-ix. Rosmini states: "The human being is 'an animal subject endowed with the intuition of indeterminate, ideal being and with the perception of its own corporeal, fundamental feeling, and operating in accordance with animality and intelligence... intellect and reason on the one hand, and will and freedom on the other, are respectively the active and passive faculties that constitute the human spirit.'"

Note 52. Van der Vyver 1975: 66. The concept analogia entis is an outcome of attempts of Thomism to include God and His creation. The most general term adopted by Thomism is that of the being. The similarities between God and creation are analogous. The analogia entis thus points out that God and the world find a common foundation in the being, but in such a way that God and the world vary from each other. On the basis of the analogia entis humanity participates in the being of God and carries something divine (the transcendentalia) within.

Note 53. The human soul does not multiply by means of generation.

Note 54. Because the human soul is not transposed through procreation.

Note 55. See Pasnau 2002: 110-111. The doctrine on hylomorphism states that the soul is only infused when the foetus has developed adequately. Rosmini's perception is that it is a long time after the soul first comes into being and only after its unification that it reaches incorporeality. The Aristotelian-Thomistic perception would appear to be the most correct conclusion. Rosmini does not provide an elaborate system for the perception of incorporeality.

Note 56. Winterton 1888: 625. "... two souls, one sensitive and the other intellectual..."

Cf. Rosmini 1991 (a): ix.

Note 57. Winterton 1888: 625.

Note 58. Pasnau 2002: 124.

Note 59. Pasnau 2002: 125

Summa Theologiae I, q. 118, a. 2 ad 2.

Note 60. Pasnau 2002: 122. "... the vegetative soul comes first, when the embryo lives the life of a plant. Then it is corrupted, and a more complete soul follows, at once both nutritive and sensory, and then the embryo lives the life of an animal. But once this is corrupted, the rational soul follows, introduced from without."

See Rickaby 1950: 169.

The discourse over the soul constitutes the basis of the ethics in Rosmini's study on the civil societas and is dealt with in the appropriate chapter.

Note 61. Pasnau 2002: 123 "Aquinas,... contends that generation involves constant, radical discontinuity."

Note 62. Winterton 1888: 626. Winterton alleges that the propositions contained in Rosmini's posthumous works would have undergone a completely different formulation had Rosmini still been alive.

Winterton 1888: 625. Rosmini alleges contrary to Catholic dogma that the soul does not constitute the substantial form of the body, but is rather the cause of that substantial form: "Forma substantialis corporis est potius effectus animae,

atque interior terminus operationis ipsius: propterea forma substantialis corporis non est ipsa anima. Unio animae et corporis proprie consistit in immanenti perceptione, qua subjectum intuens ideam affirmat sensibile, postquam in hac ejus essentiam intuitum fuerit.” (The substantial form of the body is rather the result/effect of the soul, but the internal activity of the soul is its own: therefore the substantial form of the body is not the soul itself. Unity of the body and soul is forged with great magnitude whereby the two are subjected to the same inner sensory perception and that unity is perceived as essentiality/materiality.)

Note 63. Rosmini had numerous enemies amongst the Jesuits. Their jealousy caused them to distort Rosmini’s ideas after his death in order to bring him into opposition with Thomism.

Note 64. Guarino 2003: 46. Guarino is convinced that Leo XIII was influenced by the divergent or heterodox interpretations attached to Rosmini’s posthumous works: “... an apparatus capable of defining the precise meaning of the expressions and concepts used... this favored a heterodox interpretation of Rosminian thought as did the objective difficulty of interpreting Rosmini’s categories, especially when they were read in a neo-Thomistic perspective.”

Note 65. Guarino 2003: 45.

Note 66. Guarino 2003: 46. Ratzinger states that “... the philosophical-theological system of Rosmini was considered insufficient and inadequate to safeguard and explain certain truths of Catholic doctrine.”

Note 67. Guarino 2003: 56.

Winterton 1888: 626.

Note 68. Davidson 1882: 616.

Note 69. Davidson 1882: 616. With reference to the phrase: “... St. Thomas means exactly the opposite of what he said,” it may be deduced that Thomism did not uphold a fixed theory.

Note 70. See Davidson 1883: 616.

The author wants to express his gratitude towards Prof H.A. Wessels.



The Review and Forecast on Development History of IPR in the World

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The Work Was Supported by the Natural Science Fund Project, Serial number is: 70633003

Abstract

Intellectual property rights are private rights. Its legal regulation should apply to the general principles of private law. Since the first intellectual property system came into being in the West, humanity has passed through the course of nearly four hundred years. In the nearly four centuries of history, intellectual property rights have completed their conversion from feudal power to people's private rights. Today, it is necessary to summarize the history of intellectual property system and forecast its prospect.

Keywords: Review, Forecast, IPR, System

1. Introduction

Since the first intellectual property law was set up in the West, humanity had passed through the course of nearly four hundred years. In the nearly four centuries of history, intellectual property rights have completed their conversion from feudal power to people's private rights. Today, it is undeniable that the revolution brought by IPR not only has expanded the traditional content of property rights system, led to the intellectual property system become the world's most important property rights system, but also made a profound impact on mankind in the 21st century. However, the emergence of this new system is not a straightforward process. With the development of new technologies and human cognitive ability, as an implement to balance the private rights and public interests, the intellectual property system always encounter challenge and controversy.

2. The establishment and improvement of intellectual property system

Intellectual property rights were a general term of human rights based on the results of their intellectual and creative production. Thus, it is a collection of concepts. It covers copyright, patents, trademarks and so on. In different countries, intellectual property rights cover a slightly different content. As a social system promoting innovation, the intellectual property system has established in the Western countries at first, and later has been constituted in the world. Walking along with its historical development, the course of intellectual property system in Western countries has gone through three main stages which called as germination stage, development and internationalization stages.

2.1 The Germination stage of the intellectual property system

For the intellectual property rights system, Patent law is the first system in the world. The emergence of the patent system has built an outset to human intellectual property system. At the early in 13th century, the King of Britain had granted a license to the inventors a patent. At the 15th century, the Mediterranean Sea area was filled with the winds of technological innovation in which called on the Governments to establish a new legal system to protect technology. the Republic of Venice city constituted the first world's patent law in 1474. Soon after, the wave of the industrial revolution swept through whole Europe, some country have established a national patent system. The United States even established the principle of protection of proprietary technology in the Constitution, made patent protection to the height to constitutional level.

Copyrights have the same color with a strong monarchical power. Before the birth of the copyright system, various countries have had long-standing system of printing privileges. According to this franchise system, the king can grant a printed right to license the printer rather than the copyright owners. In 1709, Britain built the first modern copyright law - "the Queen Anne Act." Followed this, the United Kingdom, France and Germany establish the copyright system respectively. Under the influence of these countries as a pioneer, the copyright system has been gradually accepted by

Governments. Trademark is an intellectual property rights which is closely related to technology trade and trade in services. Trademarks originated in Spain. The trademark system in the modern sense began in the 19th century. In 1857, France set the first legal system to protect trade marks in world. Subsequently, the trademark system rapidly developed in the world.

2.2 Stage of stable development

During a long period time of that the framework of the intellectual property system which include of copyright, patent and trademark rights for the main modules has established. Many countries accepted a variety of forms of intellectual property rights in different attitude and progress. At the same time, new types of intellectual property rights have and continue to be gradually integrated into the system of intellectual property rights. All these developments demonstrate that the historical development of the intellectual property system has entered a stage of steady development. By the end of the 80's of the twentieth century, the new wave of civil legislation began to rise. Many countries try to develop the Code of intellectual property or integrate intellectual property law into the Civil Code. These activities set off a wave of codification of intellectual property rights. Issued the first "Intellectual Property Code" which collection of all the intellectual property system, France promoted the Code of the movement to a climax.

2.3 The international stage

Since the late 19th century onwards, along with the high-tech development and the expansion of international trade, intellectual property transactions in the international market have also begun with the formation and development. At the same time, there were a huge contradiction between international demand for intellectual property rights and regional restrictions. In order to resolve this contradiction, some countries have signed the International Convention for the protection of intellectual property, and set up a number of global or regional international organizations. A system of international protection of intellectual property rights has set up in the world. The convention of "Paris Convention for the Protection of Industrial Property"(which established by France, Germany, Belgium, and other 10 countries launched in 1883) is the first international convention in protecting Industrial Property. "Berne Convention for the Protection of Literary and Art" is the first international convention about copyright. The foundation of International Conventions indicated that the intellectual property system had come to the international stage. Among them, adopted under the framework of the WTO in 1993, "Trade-Related Aspects of Intellectual Property Rights Agreement"(TRIPS) succeed in conclusion during developed country and developing country, which heightened the national standards of protection of intellectual property rights to a unified higher platform. The agreement provides many principles and systems to other country's legal system. And TRIPS has greatly promoted intellectual property system into the integration process.

During the process of promoting the IPR into international stage, the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) can not be left unrecognized. WIPO was established in 1970, later became a subsidiary of United Nations specialized agencies. At the same time, WIPO was in charge of more than 20 international conventions relating to the protection of intellectual property rights. TRIPS agreement achieved the goal to link international trade with people's intellectual property rights. And the result is that it not only to expand intellectual property protection to the outside of the traditional areas of trade, but also penetrate into the technical trade and service trade, etc. all aspects of international trade ,and accelerate the international trade into a new trade pattern..

At the 21st century, intellectual property rights system is faced with new challenges. The adverse effects of intellectual property system appear gradually. In some developing countries, the protection of IPR has brought the high cost about some medical or necessities; the price of some product with IPR is so high that it can't meet the needs of people in trouble. The viewpoint of doubting on the intellectual property system was usual in the domestic and international. Some scholars even claim that the intellectual property system will be its end. This condition prompted people to start to reflect on their legislation about IPR in practice and theory. Similarly, since decades the implementation of TRIPS agreement has performed, many developing countries came to re-examine the impact of the national economy brought by the integration of intellectual property protection standards. At the same time, with the rapid development of biotechnology, engineering and new materials technology, society has brought a great number of problems about the intellectual property system to every country. To save these problems, developed countries have started a new round of amendments to the legislative activities of the intellectual property system. New laws and regulations continue to emerge, and the scope of intellectual property's objects has continued to grow.

In spite of this, the establishment of IPR system has become an irresistible trend. In today's world, many countries have a more full understanding of the social progress and political and economic interests from knowledge. Developed countries take its monopoly of advanced scientific knowledge as a magic weapon for technology leadership. Developing countries take the absorbing and creating knowledge as an important way to catch up with developed countries. It can be expected, the next era is not only to develop and possess social substantial resources, but also to develop and possess mortal knowledge resources. Moreover, with the deepening of global economic integration, the international process of intellectual property system will be further accelerated. Protection of intellectual property rights has not only become the necessary conditions of a country to promote for economic development, but also a

prerequisite as the maintenance of international competitiveness.

3. The establishment and development of Chinese intellectual property system

Compared with foreign countries, Chinese legal construction of intellectual property rights start to later. For China, the intellectual property system is an import. However, in a short period of time, China has completed legislative achievement in IPR within less than three decades which developed countries spent the course for 300 years. It is very rare for Chinese significant legislative achievements. From a historical development, the construction of the intellectual property system in China can be divided into three stages.

The first stage is the initial phase. From the late 70s of the last century, China started the early work to build the intellectual property system. The earliest statute law of intellectual property rights is the trademark law in 1982. The controversial legislative work is the patent system. After reform and opening up, the demand of economic development and relationship with foreign need set up a kind of system for the protection of IPR system. These requirements led to a big debate whether the patent system should be established. Until 1984, the first patent law in China was officially published. It opened up a new chapter in building intellectual property rights system in new China. In 1990, the copyright law was issued. About ten years later, the basic framework of Chinese intellectual property system has formed preliminary. The content of Intellectual property rights also has been greatly enriched.

The second stage is the integration into the international stage. From the early 90s in 20th century to early this century, it is a well-polished period of intellectual property system in china. During this period, China has not only enacted some law to protect the computer software and other relevant legal provisions, but also revised and improved continuously the established system. Today, China has joined in a number of International Convention for intellectual property protection. China's IPR protection has been fully met the minimum standards set forth in the Convention, in some areas there even existed the circumstances of "super-international standards".

The third stage is the period of strategic initiatives. In the few years after entered to the WTO, the Chinese government attached great importance to the protection of intellectual property rights. All aspects of the project about intellectual property rights have made great progress. Intellectual property rights cause has entered a period of strategic initiatives. In 2005, the development of IPR flourished in many aspects. In January of this year, the national IPR strategy leading group composed of the State Intellectual Property Office and other departments more than 20 components was established formally. This is the intellectual property system in China has entered the strategic initiative in view of the most typical signs. In June of the same year, the institution of Chinese IPS started his work officially. National intellectual property strategies as an opportunity to take the initiative to achieve the goal of improving the intellectual property system, China began a comprehensive revision of the intellectual property system. In 2008, the National Intellectual Property Strategy Outline was established.

4. The development and personnel training of Chinese intellectual property

Accompanied by the establishment and improvement of intellectual property system, the personnel training and scientific research about IPR is also gradually on the right track.

At present, the specialized personnel of intellectual property rights in China is divided into four groups such as the intellectual property management personnel, the intellectual property judicial personnel, the intellectual property service personnel and the intellectual property teaching or research personnel.

The intellectual property management personnel mainly refer to the people who manage intellectual property rights within their jurisdiction staff in enterprises and institutions units or government administration. For businesses, intellectual property management work is not only related to the emergence of independent intellectual property rights, the cultivation of creative ability, but also closely related to the protection, the use and application of intellectual property. In general, the gap of intellectual property management talent in Chinese enterprises is larger. Only some high-tech enterprises have established a relatively complete body of intellectual property management. Some enterprises do not even have set up full-time management of intellectual property rights, which led to a certain extent, the low level of intellectual property management. This situation needs to improve urgently.

Intellectual property judicial personnel refer to the new expertise administration of justice personnel to ensure accurate decision and maintain the legitimate interests of intellectual property rights. At present, there are about 2,000 judges to engage in the justice work of intellectual property rights.

Intellectual Property Services personnel are mainly experts who engage in intellectual property representation, or the promotion transactions, transfers and operations of intellectual property. Increasingly competitive in the international market incentives today, the competitiveness of enterprises have not only embodied in products and capital, but also more embodied in the ability of the operating intellectual property rights. In such circumstances, the role of intellectual property services can not be ignored. In view of the desire for intellectual property professionals as well as the good prospects of trading services on intellectual property rights, the intellectual property service industry is considered as

the sunny industry in services field.

In China, the scope of service personnel who engaged in intellectual property transactions is relatively broad, including not only patent agents, trademark agents, copyright agents, etc., also includes intellectual property lawyers. At present, there are generally more than 600 patent agencies, more than 1,500 trademark agencies. But the service personnel who engaged in copyright and technology brokerage transaction brokerage service is also rare talent.

At present, China has more than 20 universities and scientific research institutes have established specialized research or educational institutions of intellectual property, community transport a large number of high-end intellectual property professionals.

5. Conclusion

Review the past; China achieves great success in building the system of intellectual property rights. The work of personnel training on intellectual property rights is carrying through in full swing in every aspect. The proportion of the industrialization of intellectual property rights is improving. Intellectual property experts have been out of school gate and replenishing in all much-needed positions of the motherland. We have reason to believe that, in the concerted efforts of the Chinese government, corporate managers, academics, as well as all sectors of society, the cause of Chinese intellectual property rights will go to greater prospect.

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Publisher Canadian Center of Science and Education
Address 4915 Bathurst St. Unit #209-309, Toronto, ON. M2R 1X9
Telephone 1-416-208-4027
Fax 1-416-208-4028
E-mail jpl@ccsenet.org
Website www.ccsenet.org
Printer William Printing Inc.
Price CAD.\$ 20.00

ISSN 1913-9047

