

ISSN 1913-9047

# **JOURNAL OF POLITICS AND LAW**

**Vol. 2, No. 1  
March 2009**



**Canadian Center of Science and Education**

# Editorial Board

Ann-Claire Larsen	Edith Cowan University, Australia
Cindy Xu	Canadian Center of Science and Education, Canada
Hamimah Adnan	Universiti Teknologi Mara, Malaysia
Jackson Nyamuya Maogoto	University of Manchester, UK
Jennifer Anne Westaway	Curtin University, Australia
Konstantinos Komaitis	University of Strathclyde, UK
Louise Mallinder	Queen's University Belfast, UK
Malcolm L. Rigsby	Ouachita Baptist University, USA
Michael Doherty	Dublin City University, Ireland
Noelle Higgins	Dublin City University, Ireland
Omer Elagab	City University London, UK
Qi Zhou	The University of Sheffield, UK
Rahmah Ismail	Universiti Kebangsaan Malaysia, Malaysia
Robert Guthrie	Curtin University of Technology, Australia
Ubong E. Effeh	University of Sunderland, UK
Vicky Conway	University of Limerick, Ireland
Zhao Yun	University of Hong Kong, Hong Kong



## Contents

The Often-Vexed Question of Direct Participation in Hostilities, A Possible Solution to a Fraught Legal Position?	2
<i>Dewi Williams</i>	
On the Construction of Modern University System and the Transformation of Government Functions	10
<i>Fan Lvbing</i>	
Ambiguity in Contemporary Market Definition Statute in the Australian Jurisdiction: A Critical Examination from Two Australian Case Studies	16
<i>Edward Sek Khin Wong</i>	
Petition and Judicial Integrity	24
<i>Zhuoyan Xie</i>	
The Concept 'Development' Revisited towards Understanding: in the Context of Sub-Saharan Africa	31
<i>Brian-Vincent IKEJIAKU</i>	
New Challenges to the Traditional Principles of the Law of War Presented by Information Operations in Outer Space	39
<i>Jia Huang</i>	
Historical and Current Legislations of Taman Negara National Park Peninsular Malaysia	44
<i>Pakhriazad., H.Z., Mohd. Hasmadi, I., Aida, H.M.K &amp; Kamaruzaman Jusoff</i>	
Study on the County-level City in China	50
<i>Hongxiang Wang &amp; Zhijun Han</i>	
Crime and Income Inequality: The Case of Malaysia	55
<i>A.H. Baharom &amp; Muzafar Shah Habibullah</i>	
Study on the Small and Middle-Sized Enterprises Credit Guarantee Legal System	71
<i>Guohua Zhang</i>	
The Concept of Mahathiriskonomisme: An Economic Recovery Model during Crisis	75
<i>Md. Shukri Shuib, Mohamad Faisol Keling &amp; Mohd Na'eim Ajis</i>	
Regulation by Law on Recycling Economy at the Enterprise and Ecological Industrial Park Level	86
<i>Boyu Zhu</i>	
On Hayek's Spontaneous Order in Perspective of "Financial Tsunami"	91
<i>Ligang Zhang</i>	
Judicial Review—A Regulator of American Society	100
<i>Zipeng He</i>	
Research on Indictability of Criminal Investigation Behavior — in the Background of Criminal Judicature Reform	105
<i>Lin Jin</i>	



## The Often-Vexed Question of Direct Participation in Hostilities

### A Possible Solution to a Fraught Legal Position?

Dewi Williams

The school of Law

Staffordshire University

United Kingdom. LLM.Res (Lancaster) 2003, LLM (Hons.)

Ireland 2002, LLB (Hons.) Wales 1999

#### Abstract

The issue of whether or not a civilian is culpable for having directly participated in hostilities, as per Article 51(3) of the First Additional Protocol to the Geneva Conventions is a complex and highly controversial issue. Further complexity is faced when considering the issue of targeting, and whether an individual may be legitimately targeted for his/her direct participation in hostilities. The aim of this paper is to examine the issue and to pose an alternative mechanism so as to provide a practical test to determine an individuals' status. It also calls upon International jurists to provide much needed guidance.

**Keywords:** Civilian, Hostilities, Individual, Issue, Practical test, International jurists

#### 1. Introduction

The August conflict between the Russian Federation and Georgian Government in the disputed regions of Abkhazia and South Ossetia brought into sharp focus not only the actions of regular combatants, but also the behaviour and conduct of those civilians who engaged directly in the hostilities. Media reports concerning the activities of a variety of Abkhazi and South Ossetian militiamen, bandits and armed gangs appears to highlight, yet again, the '*democratisation of violence*' that features so commonly in such inter-ethnic conflict.

Such alleged conduct does, however, give a practical example to illuminate the current circuitous debate at the International Committee of the Red Cross (ICRC) regarding the precise meaning of the phrase direct participation in hostilities.

The reality of civilians participating directly or otherwise in hostilities is of course nothing new; phrases such as *guerrilla*, *franc tireur*, *levee en masse* and unprivileged belligerent (Baxter, 1951, p. 323) or combatant (Dormann, 2003, p. 45) bear witness to the fact that civilian 'soldiers' have played a significant role in warfare throughout modern history. McLaughlin (2007) who appreciates and acknowledges that reality neatly encapsulates this conundrum:

The armed conflict paradigm permits the use of lethal force against certain categories of people outside the situations of self-defence. It permits offensive operations (attack) where the use of lethal force is authorised against a person or a group who may permissibly be targeted within the bounds of IHL. Provided that the requisite assessments are made, considerations balanced and precautions observed, the 'enemy' – be they formed units, *levee en masse*, militias, dissident organised armed groups or civilians taking a direct part in hostilities – may be attacked and killed. (p. 404).

The '*democratisation of violence*', however, which emerges in the Post-Cold War World increases the incidence and awareness of the phenomenon. The significance of this is epitomized by the concept of asymmetric conflict, arguably the very hallmark of the current 'war on terror', in which regular members of a state's armed forces engage and indeed are, in turn, engaged by, irregular, often non-state forces. These forces are loosely described as terrorists, militiamen or insurgents. Significantly such concerns should not be viewed exclusively through the paradigm of the 'war on terror'. Perhaps the most tragic example of a civilian who participates directly in hostilities is the child soldier, those youngsters deliberately recruited to undertake heinous acts with unflinching loyalty. Consequently the potential of a civilian engaging, for whatever reason, in direct combat was specifically recognised by Article 51 (3) of the First Additional Protocol, which provides that: "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities." As Best (1997) appreciates:

Civilians are advised that they will retain their protected status “unless and for such time as they take a direct part in hostilities”, i.e. in the event of their so taking part in guerrilla warfare and living to tell the tale, they can go back to being civilians afterwards. (p. 255).

The phrase direct participation in hostilities appears, of itself, a simple and sufficiently innocuous phrase, but what, if any, situation(s) does it envisage precisely? Is it equitable that certain behaviour conducted by civilians is regarded as constituting direct participation in hostilities, whilst other, apparently similar, behaviour is not? Consider the following scenario as an example:

Night has fallen; a chill wind blows and eerie animal calls resonate across the open prairie. The inhabitants of the cavalry outpost in the lonely timber fort suddenly realise that hostile forces, renegade Indian braves or desperate bandits (depending on the title of the movie) surround them. The soldiers and traders attend to the defence of the fort; the older women nurse the frightened children, whilst the plucky younger women however assist their men folk by loading and re-loading their rifles.

This of course is a scene so familiar to the Western film genre that it achieves cliché status, but whom, if anyone, in this scenario has taken a direct part in hostilities? In seeking this determination a series of questions are posed which require some considerable analysis. The first issue to address is whether such a conflict is subject to the provisions of the First Additional Protocol, only then can one contemplate whether a nexus has, or needs, to be established between the hostilities and a wider armed conflict. Eventually we begin to consider the actions, and perhaps even the intentions, of those involved and seek to evaluate whether or not a sufficient causal link has been established so as to determine if they have participated directly. In loading the weapons have the women ‘directly participated’? In assisting the soldiers in the defence of the fort have the traders done so? In tending to the soldiers minor wounds, so that they can then return to their posts, have those providing medical aid also directly participated in the hostilities? These are all issues which have been debated at great length by the Experts convened by the International Committee of the Red Cross and have informed present thinking on the nature of direct participation.

## 2. The Current Debate Concerning Participation

It appears that determining the scope and nature of the term direct participation in hostilities is as elusive as pinning down the description of baldness. As Lindley (1986) acknowledges, “[W]e know what perfect baldness would consist of. ...It would be idle to attempt a precise definition of how many hairs, or what proportion of hair, a person must have lost in order to be correctly described as bald.” (p. 69-70)

This, admittedly flippant, comparison seeks to highlight the fundamental problems for practical application, faced by both humanitarian and military lawyers and perhaps most significantly by commanders on the ground, posed by musing the phrase direct participation in hostilities.

Whilst the fundamental basis of international humanitarian law is the principle of distinction, between belligerents (combatants) and non-belligerents (civilians and those rendered *hors de combat*), this distinction may become blurred in certain, albeit limited, circumstances. The aim of this paper is, therefore, to examine the current debate and to highlight the problematic and apparently insurmountable concerns and issues, which emerge from the debate concerning the term direct participation in hostilities. This author would seek to propose an alternative approach, which aims to bring a greater degree of clarity and certainty and also calls upon International Courts and Tribunals to provide much needed practical guidance in this area.

As Rogers (2004) acknowledges the question of who constitutes a member of the enemy’s armed forces is increasingly complex, “[I]n a conventional conflict between states such as the Falklands War of 1982, this is not difficult. It is difficult when guerrilla tactics are adopted or irregular militias, paramilitary groups or resistance movements are involved in the fighting.” (p. 31).

The significance of this issue was recognised in the Summary Report of the Third Expert Meeting (2005), which acknowledged that:

Counter-insurgency operations targeted mainly persons not military objectives. Therefore the notion of DPH was of utmost importance in situations of non-international armed conflict. In practice most targeting decisions had to be taken in a ‘split second’ by an individual soldier, who had no time to seek additional guidance. However, correct targeting was not only in the interest of the civilian population but also of the armed forces, because the erroneous killing of a peaceful civilian wholly alienated the civilian population and created new enemies. (p. 42).

Last summer’s well documented attack by the United States Air Force on a suspected Taliban stronghold, which led to the deaths of ninety civilians, including sixty children highlights, yet again, the grave concerns raised when a targeting decision proves erroneous, (Page, 2008, p. 1).

The technical complexities and legal challenges posed when making targeting decisions are regularly faced not only by coalition forces in Iraq and NATO-led forces in Afghanistan, but also by Russian Federation and Georgian forces in

Abkhazia and South Ossetia in which the ‘farmer by day, fighter by night’ scenario is significantly more than an exercise in academic curiosity. Such apparent behaviour by civilians exposes and then seems to exploit the phrase *‘for such time’* contained within Article 51(3). This ‘revolving door’ (Parks, 1990, p. 118) phenomenon appears to present a considerable degree of frustration to the efforts of the experts assembled by the ICRC to deliberate on the meaning of the term direct participation in hostilities. Similar difficulties also arise from the activities of those ‘civilians’ employed by private military companies and engaged by state governments, NGO’s or multinational corporations in Iraq and elsewhere. Are such ‘mercenaries’, participating directly in hostilities by guarding installations, providing equipment and training others? Or, alternatively, are they engaged in everything but, their roles being merely auxiliary? (A position often advocated by those same companies and their clients.) It perhaps comes as no surprise that as a consequence of the ICRC convened meetings of experts the reams of materials, which have been produced in recent years concerning these prescient questions, appears to grow exponentially. Apparently very little, however, in the way of a definitive consensus emerges.

What may, therefore, be beneficial is a definitive set of practical legal principles from which lawyers and commanders can determine definitively whether or not a civilian has, or is, participating directly in hostilities? Such an evaluation process could then form the basis of a targeting decision or determination of detainee status following arrest or capture. Issues which if determined incorrectly can have widespread and lasting detrimental consequences not only for the military commanders on the ground, but also upon policy makers at home.

The guidance currently available to both lawyers and military commanders is however far from being either adequate or satisfactory. As Kretzmer (2005) acknowledges, “[T]he ICRC Commentary on Additional Protocol I merely states that “direct” participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.” (p. 192).

Elements within the Experts Second Meeting (2004) believed that the consensus reached at the Diplomatic Conference was that direct participation in hostilities consisted of actual shooting and war fighting and that everything else did not constitute direct participation in hostilities. One could surmise however, from the Commentary, that a host of activities and individuals could be determined as participating directly in hostilities, if one was to read the phrase *‘acts of war...likely to cause actual harm’* liberally (p. 42). This conclusion is of course a result of not only a broad interpretation of the Commentary, but also an acknowledgement of the ever-changing nature of warfare and weapons systems. ‘Total war’ is just one example in which one could argue that a state’s entire population is in essence participating directly in hostilities.

More practically, an increasing number of sophisticated weapons systems rely heavily on civilian contractors to not only maintain, but also to operate them. Orakhelashvili (2007) cautions though that:

If anything or anybody that is potentially or prospectively viewed as a military target or unlawful combatant can be attacked, then any civilian target can be attacked because it can always potentially become or has in the past been part of combat action. This is not an outcome that humanitarian law can accept. (p. 167).

Whilst naturally one would agree with the author that such a sweeping, universal definition is to be avoided, Orakhelashvili fails to provide any actual guidance as to how such a distinction, between a military target and non-military facility, is to be made. So as to ensure that such an all-embracing conclusion of legitimate targeting is not reached Rogers (2004, p. 11) provides examples of the problem and lists the activities of civilians, which do constitute direct participation in hostilities. Whilst illustrative such examples do not provide a practical test, as the Experts (2005) appreciated the assessment of:

Direct participation in hostilities had to be made from the perspective of the soldier confronted with the situation and had to be linked to that soldier’s reasonable evaluation that the civilian in question, represented an actual threat to himself or his fellow soldiers. (p. 11).

And that whilst such civilians should be accorded the benefit of the doubt,

In urban warfare, a soldier confronted with armed civilians could not be expected to draw the distinction between plunder, looting and robbery but must be allowed to directly attack any civilian carrying a weapon, even if that civilian was only trying to loot a supermarket. (p. 12).

Similarly the Experts (2005) appeared cognisant of the fact that making such a distinction was increasingly difficult:

Particularly in societies where inter-clan rivalries escalated to the level of non-international armed conflict. In such situations, all clan members of fighting age had the tendency to get involved in atrocities against fellow civilians including women and children, acts that could well be regarded as direct participation in the hostilities. The difficulty was exacerbated in situations of failed states, where it could be next to impossible to establish a specific act of inter-civilian violence was carried out on behalf of an identifiable party to the conflict. (p. 12).

The activities of South Ossetian militiamen in seeking to 'ethnically cleanse' their villages of their Georgian neighbours is only one example of such a dilemma. The Experts (2005) did however conclude that:

Groups such as gangsters, pirates and mafia often operated in a grey zone where it was difficult to distinguish them from those involved in an armed conflict. Clearly, groups could engage in hostilities for political or even purely economic interests that were beyond mere "private gain". Such groups could not be regarded as ordinary mafia, but should be regarded as directly participating in hostilities. (p. 37).

Whilst the tribal warlords in Afghanistan, North Western Pakistan and Darfur may provide examples of such groups, do the South American drug cartels, Somali pirates or the *Cosa Nostra*?

Perhaps the most regrettable feature of the debate was the position adopted by the International Criminal Tribunal for the Former Yugoslavia in its judgment in the case of *Blaškić*, whereby the Trial Chamber appeared to declare itself, '...content to define a civilian as the opposite of a combatant.' In invoking Article 51(3) of the First Additional Protocol, Delmas-Marty (2007) noted that, "...the Court derives the following definition: A civilian unlawful combatant is one who takes part in hostilities, directly, for such time as he or she does so." (p. 590). Whilst this remains consistent with the ICRC Commentary, one would suggest that this does not provide much in the way of any assistance to those concerned with the practicalities of applying Article 51(3). Furthermore one would also stress that this was very much a missed opportunity by such an eminent institution, which has in previous cases appeared to act teleologically, if not perhaps in a spirit of judicial activism, to bring about much clarity and guidance to the discipline. One would of course concede that such an opportunity might arise in future, in particular in relation to the case of Thomas Lubanga currently before the International Criminal Court. Without such guidance a potentially fatalistic approach of 'I know it when I see it', in relation to direct participation, may develop with potentially very grave consequences for all concerned.

#### Indirect Participation

The debate concerning direct participation in hostilities thus far appears to achieve little but to further complicate and obfuscate already murky legal waters, whilst frustrating those whose lives and those of their subordinates are threatened by civilian fighters who appear inviolate.

What exactly constitutes direct participation? This central question remains unresolved. The Experts (2005) appear to have acknowledged that:

When interpreting the notion of "direct participation in hostilities" it was preferable to remain as close as possible to actual fighting, because the more difficult it was to identify the decisive criteria in practice, the wider the interpretation of the notion of "direct participation" would be. (p. 32).

This author naturally agrees with such a general principle, but would propose that rather than attempting to establish a decisive criteria relating to direct participation in hostilities, an alternative is considered, namely indirect participation in hostilities. Such indirect participation is in practice far more frequent and could easily be argued to cover the activities of religious and medical personnel in addition to munitions workers, civilian defence company contractors, entertainers, (the USO Show celebrities for example), as well as the families of service personnel. It would also include those civilians whose real participation in the hostilities is at greatest only marginal and ancillary, such as caterers, cleaners and the like. Consequently those deemed to have participated only indirectly would avoid the perils of Article 51(3).

To determine such indirect participation one might suggest that the test may be gleaned from domestic criminal law, in particular the inchoate offences and specifically the law of attempt, whereby only those acts, which are, '*more than merely preparatory*', to the commission of the offence are proscribed, as according to the provisions of the UK Criminal Attempts Act, 1981 c1 § 1(1).

An analogy may therefore be drawn in which an individual, or group of individuals, who are engaged in those acts which are merely preparatory are deemed to have participated only indirectly in hostilities and, are accordingly, to be treated as civilian non-combatants. Such a position would therefore allow civilians to undertake relatively ancillary, auxiliary tasks, with a degree of certainty that their activities cannot be regarded as being direct participation in hostilities. Such activity could include "Bob" the truck driver, so beloved of the Experts in the course of their deliberations, and so allow him to deliver his supplies to the front and return safely. In determining which acts are merely preparatory, and which are more akin to direct participation the Experts (2004) provide some guidance. They suggest in relation to the distinction between ordinary crime and direct participation in hostilities that, an evaluation and assessment, "...should be made based on the objective intention behind the act which can be objectively deduced from the way a conflict is being waged." (p. 4). Equally such an equation could provide a practical test from which to determine whether an individual had participated directly or indirectly in hostilities.

This author would suggest that with some further development, including perhaps the notion of "but for" causation advocated by Prof. Michael Schmitt (Second Summary Report, 2004, p. 11). Such a concept may be most useful, *post*

*facto*, in determining whether an individual had in fact participated directly in hostilities. Furthermore the notion of indirect participation has the potential to provide a non-exhaustive list and practical test which would satisfy the Experts (2003) who advocated that, “[A]ny potential list should be used to identify criteria implementable on the battlefield and as an illustration of the general definition.” One is of course conscious of the potential backlash that may be experienced if certain commanders conclude that military necessity and effectiveness is in any way hampered or impeded by an additional layer of ‘lawfare’ (Dunlap, 2008, p. 146).

The notion of indirect participation does not however alter the legitimacy of targeting installations of military significance. If read cynically, the targeting of a weapons factory or ammunition shipment would still be deemed a legitimate target, with the resulting civilian deaths being deemed mere collateral damage. However, by demonstrating the concept of merely preparatory acts, the notion of indirect participation emphasises the fact that direct participation in hostilities, with respect to the actions of individuals, is limited only to actual combat as opposed to the plethora of surrounding supporting roles and tasks. This may consequently possibly mitigate, as the Experts (2003) recognised, the almost Orwellian idea of treating some civilians “as more civilian than others” (p. 1), a concern which is perhaps more concerning in relation to the temporal issue contained within Article 51(3).

### 3. The Temporal Scope

The Experts (2006), who questioned whether, “...members of organised armed groups are “civilians” and thus subject to direct attack only for such time as they directly participate in the hostilities”, (p. 41), identified the nub of this concern. As Orakhelashvili (2008) identifies:

The temporal limitation included in Article 51(3) of Additional Protocol I is absolutely crucial to maintaining intact the entire system of the civilian/military targets distinction. In order to be workable, this distinction must draw straightforward distinction in terms, which targets can be attacked and which cannot. (p. 167).

Yet again an apparently simple phrase, ‘and for such time’, leads to incredible feats of military legal contortions, as noted above, though the ‘revolving door’ argument leads to serious practical concerns for both lawyers and commanders on the ground. Faced with such questions the Supreme Court of Israel in the case of *The Public Committee Against Torture in Israel et al v. The Government of Israel*, (Ben-Naftazi, 2007, p. 329), examined the issue of whether suspected terrorists can be deemed to be legitimate targets according to Article 51(3). The Court held that, “[R]egarding the scope of the wording “and for such time” there is no consensus in the international literature ... with no consensus regarding the interpretation of the wording “for such time”, there is no choice but to proceed from case to case.” Ben-Naftazi (2007) declares that:

The analysis of the third, temporal, element (‘For such time’) is the least satisfactory: The Court does not, in fact, offer a standard by which that time is measured. Instead, it stipulates guidelines carrying a deterrence effect on future operations. (p. 329).

A debate therefore emerges as to whether the ‘revolving door’ even exists. Kretzmer (2005) notes that:

Professor Cassese is adamant (in his opinion before the Israeli Supreme Court) that this term must be given a narrow meaning. Consequently it is only while the persons are actually engaged in carrying out their hostile acts that they may be targeted. As soon as they have completed the hostile act, they once again enjoy the same protection as every other civilian. (p. 108).

Kretzmer also identifies the fact that such a position is supported by the Commentary.

Others seek to differ; significantly The Inter-American Commission on Human Rights expressed a contrasting opinion. As Kretzmer (2005) acknowledges:

In discussing Art. 51(3) of Additional Protocol I the Commission stated that non-combatants who take a direct part in hostilities temporarily forfeit their immunity from direct individualized attack during such time as they assume the role of combatant. The Commission added: “It is possible in this connection, however, that once a person qualifies as a combatant, whether regular or irregular, privileged or unprivileged, he or she cannot revert back to civilian status or otherwise alternate between combatant and civilian status. (p. 101).

A position which Parks also advocates, (1990, p. 118). Parks claims that an individual once engaged directly in combat cannot revert to his/her previous civilian status. Surely this position is also subject to criticism of its temporal scope; in a protracted conflict of many years duration is it right that an individual whose participation was some considerable time in the past is still subject to targeting based on his previous direct participation in hostilities?

It may, therefore, be preferable to address the notion of ‘for such time’, as the Israeli Court suggests, on a case-by-case basis, as opposed to adopting a universal, perhaps utilitarian approach, which favours one position above another. Equally, it may prove beneficial to view the temporal element purely from a *post facto* perspective when dealing with individuals who have directly participated in hostilities, so as to determine their detainee status after the event. Following on from this, this author would suggest that in relation to targeting decisions the temporal issue is wholly



eliminated from the decision, therefore permitting the targeting of individuals only for so long as they are actually directly participating in hostilities. This does not, however, permit them the benefit of the revolving door, rather the contrary.

This approach appreciates the guidance found in the Israeli Supreme Court's judgment, which introduces the possibility of exploring alternative means of eliminating the potential threat posed by individuals who do engage in hostilities. The Court suggests that prior to a lethal attack other non-lethal means are first exhausted, such as arrest, investigation and prosecution. Similarly military commanders and law enforcement officials are entitled to seek the arrest of individuals known to have committed, or to be suspected of having committed, acts of violence or perfidious conduct. Should it be necessary such law enforcement and/or military elements may resort to lethal force in order to defend themselves whilst seeking to affect the arrest of such an individual(s). This approach may as a consequence reduce unnecessary civilian casualties and so reduce the potential for further hostility.

In disaggregating the two concepts the practical application of Article 51(3) may become possible.

Is there a potential role for International Courts or Tribunals in determining status?

The lack of further guidance as to the precise meaning and nature of the term '*direct participation in hostilities*' allows an increasingly broad interpretation of the phrase, which may prove problematic in its potential to incorporate within its ambit, those activities which may be, in reality far, more marginal to military operations than they first appear.

Such a concern is seen in the response to the judgment in the case of *The Public Committee Against Torture*. Schondorf (2007) suggests that in:

Applying the elements of Article 51(3), the Court adopted a relatively expansive interpretation of the term 'taking direct part in hostilities', including in its ambit "a person who collects intelligence for the army, whether on issues regarding the hostilities ... , or beyond those issues ... ; a person who transports unlawful combatants to or from the place where hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation or provides service to them be the distance from the battlefield as it may. (p. 307).

Furthermore as Kretzmer (2005) similarly notes:

In the commentary on the Joint Services Regulations of the Bundeswehr, the term (direct participation in hostilities) is widened to include "civilians who operate a weapons system, supervise such operation, or service such equipment", as well as "preparation for a military operation and intention to take part therein", provided they are directly related to hostilities and "represent a direct threat to the enemy". (p. 192).

As one noted above, the increasing role played by civilian contractors in supporting modern weapons systems creates a significant grey area which appears, from the quotation above, to place even the humblest maintenance technician in harms way. Such an interpretation may appear expedient to some; the consequences of targeting such individuals may prove far more controversial.

Such positions, as those quoted above, appear to reflect the opinions of some of the Experts (2005, p. 14), who suggest that direct participation in hostilities does not necessarily have to cause death, injury or destruction, therefore the concept of direct participation in hostilities would not be limited to traditional war fighting scenarios. One would therefore repeat, what therefore does constitute direct participation in hostilities? This lack of clarity may ultimately prove to be wholly counterproductive, as military lawyers and commanders may fail to agree on a working definition or practical test. In such circumstances it could be that a small number of commanders simply ignore advice, or are unable to communicate it effectively to front line personnel. Consequently war crimes and other grave breaches, which may have otherwise have been avoided, may occur and so further incite an insurgency. This event could then have potentially devastating consequences to the prosecution of the conflict and wider implications for international opinion and relations.

It must be imperative upon the various International Courts and Tribunals to provide much needed guidance on this issue, guidance which avoids all possible allegations of overly complex notions of '*lawfare*' and that provides individual soldiers and commanders a basic, practical framework in which to conduct operations. The Experts (2005) appeared to have reached a similar conclusion, when they acknowledged that:

After all, the criteria for "direct participation in hostilities " not only had to be sufficiently precise to allow the prosecution of the civilians in question after capture, but also simple and clear enough to remain understandable for the persons actually confronted with an operational situation. (p. 30).

As Best (1997) appreciates, "[W]hat is oversimplified may be a better humanitarian working-tool than what has become endlessly complicated." (p. 262). In embracing simplicity and avoiding complexity much may be achieved.

#### 4. Conclusion

It remains a depressing reality that civilians form the greatest proportion of victims in any contemporary armed conflict. Best (1997) acknowledges that, "...protection" is in fact a term of legal art", and that:

Civilians at large, civilians in general: How far they can actually enjoy the protection it promises must largely depend, as it always has done, on circumstances, politics, personalities, accident, luck and so on; things which the soldier never forgets, but the civilian hardly ever remembers. (p. 256).

However, despite such pessimism, it must also be acknowledged that an increasing number of civilians are consciously choosing to participate directly in hostilities and that this phenomenon appears to be growing with every new conflict. Furthermore such individuals, who for any number of reasons avoid direct membership of, or integration into, regular armed forces, often conduct hostilities in flagrant disregard to the laws and customs of war, as was witnessed, for example, in the case of *Tadic*. Despite his best efforts, to appear a 'big man', before the ICTY, Tadic, and his comrades, remained little more than a group of vicious thugs, who imagined themselves 'soldiers' but yet chose to operate outside the realms of the laws and customs of war.

As the Experts (2005) noted, the *raison d'être* of Article 51(3) was to recognise that:

Maximum protection for civilians was an important, but by no means the only purpose of the rule on direct participation in hostilities. More particularly, the aim of the rule was also to strengthen the principle of distinction by keeping civilians away from the battlefield. This was achieved by depriving any civilian of his or her protection against direct attack if he or she got involved in activities intended to harm the adversary. (p. 20).

Whilst admirable, this distinction becomes increasingly difficult, if not practically impossible, in an age where the changes to the nature of armed conflict occur at such a rapid rate. Changes not only to the equipment and personnel employed by the state, but also the impact of the '*democratisation of violence*' in which the civilian fighter is an increasingly common feature necessitate an urgent re-assessment of legal rules, which now appear as outdated as a Great War recruitment poster in which a young girl sits on her father's knee and asks her vacantly staring father the question, '*Daddy, what did YOU do in the Great War?*' The father, if he himself questions whether he participated directly in the hostilities, may wish to first telephone his lawyer before providing her with a definitive answer.

## References

- Baxter, Maj. R. R. (1951). So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs, *British Yearbook of International Law*, 323.
- Best, G. (1997). *Law and War Since 1945*, Oxford: Clarendon Press.
- Delmas-Marty, M. (2007). The paradigm of the war crime: Legitimizing inhuman treatment? Vol. 5 *Journal of International Criminal Justice*, 590.
- Dormann, K. (2003). The Legal Situation of "Unlawful/unprivileged Combatants", Number 849 *International Review of the Red Cross*, 45.
- Dunlap, Maj. Gen. C. J. Jr. (2008). Lawfare Today: A Perspective, *Yale Journal of International Affairs*, 146.
- Kretzmer, D. (2005). Targeted killing of suspected terrorists: Extra-judicial executions or legitimate means of defence? Volume 16 *European Journal of International Law*, 171.
- Lindley, R. (1986). *Autonomy (Issues in Political Theory)*, London: Palgrave Macmillan.
- Mc Laughlin, R. (2007). The legal regime applicable to use of lethal force when operating under a United Nations Security Council Chapter VII mandate authorising "all necessary means", Vol. 12 *Journal of Conflict & Security Law*, 389.
- Orakhelashvili, A. (2008). The interaction between rights and humanitarian law: fragmentation, conflict, parallelism, or convergence? Vol. 19 *European Journal of International Law*, 161.
- Page, J. (2008, August 25). 89 Afghan Civilians Die, in 'tragic' US air strike, *The Times*, p. A1.
- Parks, H. (1990). Air War and the Laws of War, Vol. 1 *Air Force Law Review*, 118.
- Rogers, A. P. V. (2004). *Law of the battlefield*. Manchester: Manchester University Press.
- Schondorf, R. S. (2007). The targeted killing judgment: a preliminary assessment, Vol. 5 *Journal of International Criminal Justice*, 301.
- Summary Report of the First Expert Meeting on Direct Participation in Hostilities under International Humanitarian Law, Convened at Geneva, 2<sup>nd</sup> June 2003, at page 2. Available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf).
- Summary Report of the Second Expert Meeting on Direct Participation in Hostilities under International Humanitarian Law, Convened at The Hague, 25 – 26 October 2004, at page 42. Available at

[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2004\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2004_eng.pdf).

Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities, Convened at Geneva, 23 – 25 October 2005, at page 42. Available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2005\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf).



## On the Construction of Modern University System and the Transformation of Government Functions

Fan Lvbing

School of Politics and Public Affairs

Southwest University of Political Science and Law

301 Xing Zhen Bao Shen Street, Chongqing 401120, China

E-mail: [fanlvbing@126.com](mailto:fanlvbing@126.com)

### Abstract

The key to institutional construction of the modern university is to straighten out the relationship between the government and college and to make clear the position of the government's the role and the transformation of the government functions. Based on the prominent problems including inadequate fund supply, excessive administrative intervention and ineffective legal supervision during the process of our government management toward university, it is necessary to clearly define the position of government's role as the organizer, the operator and the supervisor of the university, to achieve the shift from traditional direct management which mainly rely on administrative means to indirect management which rely on the comprehensive management means such as legislative, funding, assessment and supervision etc. It is also important to provide a favorable environment for the construction of modern university system.

**Keywords:** Modern university, Institutional construction, The role of government, The transformation of the government functions

### 1. The Definition of Modern University System

With the accelerated building process of democracy and the legal system, the improvement of the socialist market economic system as well as the continuous development of the reform of the educational system, how to create a modern university system, and promote higher education in health, sustainable way has become a hot issue of education reform. China's educational reform and development program issued in 1993 pointed out that it is necessary to gradually establish community-oriented institution of higher education and the education system mainly relying on the government's macroeconomic management. Subsequently, Education Law and Higher Education Law have formulated higher education management system and university autonomy. 2003-2007 Education Development Plan of the Ministry of Education has stated explicitly that college and universities must deepen the reform of the internal school management system, improve the legal system of schools and explore the establishment of the modern school system. Modern College System is the management system and the operational mechanism which fit to the need of democracy and the rule of law, market economy and globalization of education, the government's macroeconomic management and society (market)-oriented self-management of university.

The university system with modern sense is a product of the system civilization which needs to be suitable for institutional environment. At the formation and development process of the university, the universities in the Middle Ages were mainly lead and controlled by church, which aim to cultivate the clergy and a small number of secular officials. Accompanied by the process of education nationalization, the modern university transfers its control from church to the secular regime under the background of the rise of nation-state. The government has become the leading force of affecting and constraining the development of the universities. Since the 20th century, especially after the Second World War, the university has to endure the double impact of the government and market forces with the rapid development of higher education. Although the university's logic or the strength of academic is so weak, the core values of university autonomy has not been changed. It is still the border of the government intervention and market penetration as well as the basis of rationality of modern university system.

The government management and the self-running of the university have formed the conflict and the paradox, which

has become an important influence of construction of the modern university system. The well-known Dutch scholar Fan Zweigert thinks that higher education system that government leads can be divided into two main traditional: State-controlled (or intervention) model and the national supervision (or promoting) model. State-controlled model regards higher education as a same career so the government tries to control all aspects of higher education system. On the contrary, in the state supervision model, the government influence is very weak. The basic decision-making including courses, degrees, recruitment and finance have left to their own institutions. The facts have proved that higher education will be more innovative and easy-react if the institution has been given the responsibility of making their own mission and objectives within the clear governmental guidance. (Frans Van Vught, 2001, P.414)

The universities of China with modern sense first appeared at the end of the 19th century. It is built on the basis of the west university system. After the founding of the PRC, it mainly draw on the experience of the former Soviet Union's university system, which represents strict national control of the university under the highly centralized management system through such administrative means as planning. The university is defined as a public institution -- quasi-national organizations which have the strong feature of administrative organization. Since reform and opening up, China's higher education management system has undergone the corresponding reform. Nevertheless, the nature of university as a government subsidiary bodies has not been fundamentally changed, the status of university as an independent legal entity has not been fully reflected. Therefore, the key to China's current construction of the modern university system is to straighten out the relationship between universities and the government, to make clear the role of the government and management functions, to stimulate the government management mode of university changing from the national control (intervention) mode to the national supervision (or promoting) mode, in addition to providing the necessary institutional environment for the establishment of modern university system.

## **2. The Typical Problems in University Management Process of Our Government**

At present, the typical problems in the university management process of our government can be summarized as insufficient supply of funds, excessive administrative intervention and ineffective supervision of the law.

China's education funding mode is the education funding system mainly depending on state funding supplemented with other multi-channel financing. The sources of college funding are very narrow, which mainly rely on the state's financial allocation in addition to tuition income. Since reform and opening up, China's economy has grown sustained, but the government funding for education has a long-term stagnancy. China's educational reform and development program issued in 1993 explicitly promise to realize the national financial spending on education accounting for 4 percent of GNP in 2000. On September 2003, Commissioner of the United Nations Tomasevski inspected the educational situation of China. He found that China's education fund just accounted for 2% of GDP. In recent years, the total input of China's higher education has increased but the input of each student has decreased dramatically because of the influence of enrollment expansion. The inadequate governmental inputs has seriously constrained and influenced the development of institutions of higher education, which indirectly leading to such problems as tuition increase even the arbitrary tuition collection, an excessive burden of students and parents as well as the strong social sensation.

Under the planned economy system and the highly centralized administrative system, because of totalitarian government habitual thinking and the lags of transformation of government functions, the government accustomed to intervene and command the internal management of university on a microscopic level and manage colleges and universities through administrative measures. The government combined the role of the university Organizers, operators and managers. That is to say that the government put the fund into establish and organize public universities, directly control and intervene school internal activities through such ways as approving the establishment right, the power of appointments and removals, majors authority, the right of admission scheme and the right to allocate funds. The government is not only the player but also the referee. The powers and responsibilities relationships between the government and university are not clarified. The university lacks of the autonomy and self-discipline. The quality of school system is rigid and the efficiency is low. "The government's administrative management of colleges and universities including the internal system of colleges and universities compress the free game space of academic strength, restrain academic innovation and the development impetus of academic value." (Wang, Jianmin 2008, P.10) This is the important reason why the university lacks of self-management and innovation capacity.

Since reform and opening up, China's educational legal system has made considerable progress, education legal system with Chinese characteristics has been basically established. A series of educational laws and regulations provided an important legal guarantee for the development of higher education, such as Education Law, Teacher's Law, Higher Education Law, Private Education Promotion Law and so on. However, the current education law especially regulations of the Higher Education Law about modern university system are relatively principle-based and lack of operability. At the same time, government's education management department has not established educational administration enforcement mechanisms. Education judicial channels have not been got through. Therefore, the offense in the field of higher education lacks of effective legal supervision and sanctions. It is hard for colleges and universities as well as its

own staffs and students to remedy legitimate rights and interests through judicial channels.

### 3. The Construction of Modern University System and the Transformation of Government Functions in Our Country

The key to the construction of the modern university system is to realize the separation of government's roles as the organizers and the operators of the university, and to realize the transformation from the traditional direct management which mainly rely on administrative means to the indirect management which rely on the comprehensive management means such as legislative, funding, assessment and supervision etc. "The government is the only sponsor for a long time, there are no clear legal provisions for the position and power of the sponsor who generally use administrative measures. So it is hard to distinguish administrative functions from the position and power of the sponsors." The government as the sponsor of public school, whose primary functions is to provide adequate education funding for universities. (Chen, Enlun, 2008, P. 31) As a sponsor, the government should not involve in internal management of university. It should give the autonomy of running schools to university in accordance with the law instead. At the same time, as a university administrator and macro-supervisor, government functions mainly lie in guidance, assessment, law enforcement supervision and so on.

#### 3.1 Government as a sponsor of university exercise its funding functions, guarantee the funding supply of university

Education is the most important public utilities of modern country. Modern national education including higher education is non-profit and public. If the compulsory education is pure public goods, the university education should be quasi-public goods. In higher education, through the organization of public university and financing of private universities, the government provides adequate education funding so as to guarantee citizens to receive higher education and improve the overall quality of citizens and meet the needs of national economic development and social progress. "The government regulations on education should mainly embody at the macro aspects. It should establish a sound public financial allocation system and provide equitable educational opportunities for the community." (Lao, Kaisheng, 2008, P.7)

Fund management functions of the government's education include the preparation of education budget, financing of education funding, the formulation of distribution and use system of education funds etc. The government undertakes the task to be the main source of fund, while taking full advantage of social resources and establishing multi-channel sources of fund system. For example, Resolution on country rejuvenation by education issued by the Russian Federation government explicitly states that education belongs to the scope of responsibilities and interests of government and school. The government provides funds for educational institutions in accordance with the law, while encouraging non-state investment in education including the privileges on the aspects of tax and other aspects, which the legislation give to the legal persons and natural persons who participate in the education development. Article 60 of China's Higher Education law states that the country should establish the system which mainly rely on financial allocation supplementing with a variety of financing channels of higher education funding so as to make the development of higher education suit for the economy and the development level of economy. According to article 55 of education law, State Council and People's Government of provinces, autonomous regions and municipalities directly under the Centre government should ensure the gradual growth of higher education funding. Article 61 of education law issues that sponsors of institutions of higher learning should guarantee the stable sources of funds for running a school and must not withdraw the funds he put in running the school. It makes clear the responsibility of the government financial allocation, which the sponsors of public university should have.

After exploring, developed countries (regions) have established a fair, scientific and effective funding mechanism in the allocation way of university education fund. It is worth our study. For example, Hong Kong SAR Government takes the UK model for reference. It provides the financial assistance for public universities through University Grants Committee – an advisory and fund agent completely independent from the government structure, whose targets are to maintain the independent operation of the university, avoid universities fund intervened by political factors, ensure the university's academic freedom and a high degree of autonomy. Its main function is just to provide the advices of the higher education development and allocation instructions for the government. The members of University Grants Committee are appointed by Chief Executive of Hong Kong Special Administrative Region. All of them are local and overseas celebrities. University Grants Committee usually draws up the plan of university recurrent grants in a period of 3 years. In addition, UGC considers non-recurrent grants once a year.

The allocation of China's higher education fund has always been a means of planned distribution. It has been authorized standards by educational administrative departments according to such factors as administrative relationship of university and students scale. It lacks of fair and transparent procedures and seldom considers school performance. In recent years, the reform of higher education fund mechanism has begun to be explored. Takes 211 Project and 985 Project for examples, they combined project performance evaluation with funding. This approach is beneficial for strengthening the government's macro-guidance of colleges and universities, promoting self-management and self-restraint of colleges and universities, improving the efficiency of funds and the quality of school. According to

limited financial conditions of China's education funding, besides financial allocation, the government should provide university funding and conditions for running schools through such preferential policies as land and taxes.

*3.2 The government provides an institutional guarantee for Self-Running of university and fair competition through the formulation of laws and policies.*

Legislative and policy are the important reflection of education legalization and the important ways which the modern countries use to adjust and control higher education. The value orientation of modern education's legislation and policy is to respect and guarantee citizens' the right to receive education. As a manager or referee of higher education should make clear the boundary between government management and university autonomy, provide an institutional guarantee for public university and private university to run community-oriented schools on their own.

First, it is necessary to make clear the functions and the scope that government manage higher education, strictly control the government authority to examine and approve, guarantee the government management of higher education neither offside nor absent. In order to prevent the autonomy of the university from the government's arbitrary interference by the right of educational administrative examination and approval, according to the provisions of Administrative Licensing Law, the government should further clean up matters of educational administration approval and realize the change from the advance control to the results control. For instance, in 2007, Chongqing Municipal Education Commission cleared up again twenty administrative examination and approval projects that reserved in 2003. Eight of them have been cancel, reserved twelve projects have been regulated and announced including the approval criteria, the approval conditions, approval procedures, the administrative authority, approval time limit and the approval responsibility. While limiting the content of government management, Chongqing Municipal Education Commission innovated management methods and changed the methods from mainly relying on administration plan to mainly relying on legal means, economic means, information services, evaluation and supervision, realized the transformation from the direct behavior management to indirect macro-management.

Second, the legal status of university should be clearly defined. The university autonomy should be implemented. China has formulated the Higher Education Law but the government designed the system from the aspect of how to manage the university. In addition, the autonomy this law provides for the university has been offset by a number of government policy documents. The administrative feature of public university is still very strong. According to the administrative levels, the university endowed with different autonomy of running schools in such aspects as the enrollment, the specialty setting, the title evaluation and so on. So it is hard to form a fair competitive environment. At the same time, because of the university's status of quasi-executive body, the management system and operational mechanism are seriously rigid, lack of the spirit of reform and innovation and the vitality to run the school. In this aspect, the direction and trends of administrative corporation reform of Japan's national and public universities deserve our attention and study. In recent years, in order to change such problems as the rigidity of national university system, management inefficiencies and the lack of personnel training creativity, through the means of legislation and policy guidance, Japanese government promoted national university merger and restructuring, implemented the corporate campaign of the national university, gave the key support according to third-party evaluation. Japanese Government also implemented the tenure system to promote the rational flow of university teachers, increased the competitive fund to enhance the autonomy of universities and self-development competitiveness of universities.

*3.3 The government guarantees university quality through the means of educational assessment and law enforcement supervision*

The government provides the condition guarantee for construction of the modern university system through sufficient funds investment and suitable system design. However, modern university "output results" is the quality of higher education, which directly relates to the effectiveness of public expenditure, the educated and the public interest of community. As the spokesman of the public interest, the government should do the assessment and the supervision through the necessary means.

German higher education development proposals issued by Germany's North Rhine – Westphalia Expert Advisory Committee pointed out that the government and university have reached a basic political commitment. That is to say government should grant universities more autonomy and introduce the total budget approach to undertake its own responsibility when fund is using. After running the school independently, it is necessary to develop and use a kind of tool so as to provide the help when school leadership and professional fields implement quality guarantee within the university and cross the university. Without the persistent quality examination, it is impossible to achieve the transition from the input regulation to the increasing results-oriented regulation, maintain competitiveness of university in the national level and international level. (2004, p.305)

France as a centralized state, the relationship between its government and university is mainly embodied by administrative contract. The country undertakes the adequate fund that the school development plans need, and ensures the autonomy of university. At the same time, education evaluation as the natural antithesis of university autonomy,

university should regularly accept the assessment of ASE and receive financial assistance according to their performance complied with the contracts. By the committee composed of university teachers, researchers, managers, corporate personnel, the higher assessment firm assess the quality of higher education institutions, produce and publish the evaluation report completely independently in accordance with the statutory standards.

The Australian Government has adopted a series of quality assurance system for higher education in order to ensure the international reputation of higher education and the graduates with world-class skills. For example, through the Australian University Quality Assurance Committee (AUQA), the federal government examines the situation of all university including school situation of various universities overseas. At the same time, AUQA entrusts the Australian Council of Graduate Employment to do GDS and CEQ and announce the investigation results in written and electronic form. Australian Council of Educational Research has developed the GSA for Federal Government, which used to test the general skills of graduates in logical thinking, critical reasoning, written communication, interpersonal communication and so on.

China's current university evaluation includes Undergraduate Teaching Assessment lead by government educational and administrative departments as well as the non-governmental activities of university rankings at the exploratory stage. Undergraduate Teaching Assessment System of the Ministry of Education aims to resolve the quality problem of undergraduate teaching brought by college expansion.

Practice has proved that this system has the positive guiding and promoting effect for ensuring the quality of undergraduate education. It is an important macro-control means of china's higher education. However, "the institutionalization of the quality assessment mechanism of every country seems to have two main problems existing danger: The first one is about the extent that countries (or state) quality assessment institutions should independent from the government and higher education institutions. Second, somebody worried that the institutionalization of quality assessment will strengthen the consistency of the higher education system and consequently restrain its diversity." (Frans Van Vught, 2001, P.434) From the practice of educational assessment in recent years, China's undergraduate teaching level assessment system need to be improved in some aspects. For example, the administrative feature of assessment is so strong. The scientificity and adaptability of the evaluation criteria need to be improved. The results of the assessment should be linked to resource allocation of the education.

The Government supervises the quality of university education through educational assessment. At the same time, it should strengthen law enforcement supervision to the university running. In recent years, with the continuous deepening reform of the education system, interest contradictions are more obvious in the field of education. In addition, the education legal system is unsound. There are some violations of laws and regulations not only in the process of public school running activities but also in the process of private school running activities. There are some problems such as school enrollment unauthorized, false advertising, junk diploma, arbitrary collection of fees as well as the corruption in the field of admission, examinations, finance and infrastructure. All these problems will bring chaos to education order, which need to be regulated and supervised by strengthening law enforcement of education. In that case, Education governed by law and the university managed by law can be achieved.

#### 4. Conclusion and Suggestions

The aim to construct modern university system in China is to enhance the capabilities of self-restraint, self-improvement and self-development of the University, so that university could be run autonomously towards society and market according to the law, and meet the socio-economic development and people's demand for higher education. The key to achieve this aim is to straighten out the relationship between the government and college and to make clear the position of the government's the role and the transformation of the government functions. During the process of amending the Higher Education Law and making the relevant policy and law, it is recommended to further clearly define the position of the central and provincial local government's role as the organizer, the operator and the supervisor of the university, the duties and powers of government in the protection of university funding, the promotion of the education quality and the supervision of the university running etc. It is also recommended to further implement the autonomy of university as an operator and the responsibilities relationship between the self-management of the university and the government supervision. It is necessary to actively promote the transformation of the government functions in managing university, to form the positive interaction between the government and the university and to provide a favorable environment for the construction of modern university system.

#### References

- [Holland] Frans Van Vught, (Ed.) & Wang, Chengxu. (2001). transl., *Higher Education Policy An International Comparative Perspective*. Zhejiang education press, p. 414.
- [Holland] Frans Van Vught. (Ed.) & Wang, Chengxu. (2001). transl., *Higher Education Policy An International Comparative Perspective*. Zhejiang education press, p. 434.
- Chen, Enlun. (2008). *Reflection on the legislation of School Act*: Journal of Higher Education, (Phase 6), p.31.



Lao, Kaisheng. (2008). *Development of the Educates Legislative in 30 years of reform and opening up*: Journal of Education, (Phase 11), p.7.

National Education Development Research Center. (2004). transl. *Movements and Trends of Developed Countries' Education Reform (Chapter 7)*: People's Education Press, (2004): p.305.

Wang, Jianmin. (2008). *Management mode of projected construction of higher education: problems and countermeasures*. Journal of Higher Education, (Phase 10), p.10



## Ambiguity in Contemporary Market Definition Statute in the Australian Jurisdiction: A Critical Examination from Two Australian Case Studies

Edward Sek Khin Wong  
Faculty of Business & Accountancy  
University of Malaya  
50603, Kuala Lumpur, Malaysia  
E-mail: edwardwong@graduate.uwa.edu.au

### Abstract

This paper investigates and critical analyses the market definition issues in *News Ltd v Australian rugby Football League Ltd* (19960 ATPR 41-466 and in *Regent Pty Ltd v Subaru (Aust) Pty Ltd* (1998) ATPR 41-647. Here the author examines the application of the provisions of the Trade Practices Act 1974 (Commonwealth) particularly sections 4, 45, 46 and 50 in relation to 'market definition in Australia'. By attempting to critically analyse the issues of market definition within the *per se* rule and the rule of reason in an Australian legal sense, the author seeks an explanation to outline the key elements one needs to establish under the 'substantial lessening of competition test', 'the notion of substitution', 'otherwise competitive with,' and 'the time factor' in relation to market definition.

**Keywords:** Market definition, Notion of substitution, Australian Trade Practice Acts, Competition law.

### 1. Introduction

The purpose of this paper is to critically analyse the market definition issues in *News Ltd v Australian rugby Football League Ltd* (19960 ATPR 41-466 and in *Regent Pty Ltd v Subaru (Aust) Pty Ltd* (1998) ATPR 41-647. Initially we need to examine the application of the provisions of the Trade Practices Act 1974 (Commonwealth) particularly sections 4, 45, 46 and 50 in relation to 'market definition in Australia'. Within this context, this paper is proposed to outline the key elements one needs to establish under the 'substantial lessening of competition test', 'the notion of substitution', 'otherwise competitive with,' and 'the time factor' in relation to market definition.

The definition of market under section 4E of the Act refers to: -

*"Market means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services."*

The questions that arise in this paper are explored in five sections.

Firstly, I deal with the *per se* rule and the rule of reason in an Australian legal sense. From this, the author discusses the facts of the Superleague and Regent's case in relation to issues of market definition. The author also outlines the *per se* prohibitions which consists of conduct that is so likely to damage competition and it is prohibited absolutely without requiring any evidence as to its effect on competition. For example the exclusionary provisions under section 45 involving contracts, arrangements, or understandings in restraint of trade or commerce. The rule of reason is confined to measuring the effect of conduct on competition in a market on a 'with and without' basis.

The second section discusses the concepts and definition of market in Australia. From this, the author outlines the concept approach to market definition and the four important elements that define a market. For example, the elements are the product, geography, levels of function, and time factors.

The third section of this paper introduces the concepts of close competition and strong substitution to the process of defining the relevant market.

The fourth section address the concept of section 45-substantial lessening of competition, section 46- misuse of market power and inducing breach of contract to the process of defining of a market.

The fifth section deals with the summary and this paper's conclusion.

### 1.1 The facts of the Superleague's case

The New South Wales Rugby League (NSWRL) has administrated and promoted the game of Rugby League since 1908. They changed their name to the Australia Rugby League (ARL) on 3 May 1986. The administrators of ARL have extensive control over the Clubs who participate in the annual premiership competition. The Clubs employ the individual players and support personnel, such as coaches, aides, and medical staff.

In 1994, News Ltd decided to form a new organisation called the Superleague. ARL responded by requesting "Commitment Agreements" from each of the 20 Clubs in the premiership competition and maintaining and demanding that those clubs must remain loyal to the ARL until the year 2000.

After hearing that News Ltd's new organisation (Superleague) would involve ARL participation, the ARL decided to undertake further arrangements with other Clubs by getting them to agree to sign a more extensive loyalty agreement that made up the 20 clubs bound to the ARL. In response to this News Ltd then decided to sign new players and coaches for its Superleague.

News Ltd instituted court action on ARL's loyalty and commitment agreements on the following grounds:

- it contains exclusionary provisions in breach of section 45, and
- it constituted a contract, arrangement, or understanding for the purpose and the effect of substantially lessening competition, and
- ARL was misusing its market power to prevent or deter competition in breach of section 46.

The ARL counter-claimed that News Ltd had influenced other clubs to contravene and breach their loyalty agreements by forming the alternative Superleague to be in competition with the ARL in the market. The grounds of legal attack raised by News can be addressed by the exclusionary provision under the TPA.

### 1.2 Exclusionary provision under the doctrine of ancillary restraints.

According to Mr Eddie Scuderi of Forrs Chambers Westgarth (Note:1), "an exclusionary provision occurs where two or more competitors arrive at, or propose a contract, arrangement, or understanding which has the purpose of preventing, restricting, or limiting the supply or acquisition of goods or services to or from particular persons or classes of persons, or to or from those persons in particular circumstances or on particular conditions."

Mr Justice Burchett rejected News Ltd argument in relation to the exclusionary provisions on the following grounds (Note: 2)-

- 1) These loyalty agreements were individual agreements between the individual clubs and the ARL. No actual communication of intent among or between each of the clubs signing the agreement as a restraint of trade within the market.
- 2) The 20 Clubs were in joint commercial venture with ARL and were not in competition with each other's market, as the market though segmented by individual supporters of a particular club, was only a part of a larger market being the sum of its segments.
- 3) No establishment that the Clubs were in competition under the TPA by seeking to maximise prize money, gate receipts, sponsorship returns and merchandising rights through the joint venture with the ARL.
- 4) No contravention of the TPA in relation to the signing of players between Clubs because the TPA excludes employment contracts.

In this case, the goal of the loyalty agreements was to have a high quality competition and establish long term sponsorships for all of the Clubs. From this we would consider that Mr Justice Burchett favors a wider market definition. He referred to the doctrine of ancillary restraints by saying that this restraint generally would appear to be anti-competitive in a narrow market. However, when considered in the wider market for sports, they were merely an ancillary to an intra-ARL pro-competitive and in-the-market competition supportive goal. That is, they were to assist the league to compete against the other codes of football and also other sports such as basketball and cricket.

### 1.3 The Regents Pty Ltd v Subaru (Aust) Pty Ltd.

Regents Pty Ltd was an authorised Subaru dealer. Its franchise was terminated when it failed to sell sufficient numbers of Subaru cars. Before termination, Regents applied to Subaru to supply it with genuine spare parts for Subaru motor vehicles and appoint it as an authorised dealer. Regent pleaded for a wholesale market for Subaru cars. It also requested Subaru to allow it to carry out repairs and service to Subaru cars. In relation to market definition, his Honour Nicolson agreed with Burchett J. in adopting a wider market definition than a narrow market definition. "His Honour stated that the refusal to supply spare parts to Regents was ancillary to a pro-competitive purpose on the part of Subaru to enable it to compete in the broader market for the supply of motor vehicles". (Note:3).

From this, His Honour, Nicholson J. was applying the comprehensive rule of reason than the truncated rule of reason. The comprehensive rule of reason is confined to the effect of the conduct impacting the market on a 'with and without' basis.

The court finally rejected the notion of a single brand market for Subaru spare parts, holding that it was a submarket within an overall cars and parts market in Australia.

Another example of the rule of reason is what Mr. Justice Burchett considered in his judgement in the Superleague's case-

*"...the judgements are much concerned with the Rule of Reason, under which it may have been appropriate to start with a narrowly defined market, and then to consider a wider market in the context of the pro-competitive colour it might give a practice. It appeared anti-competitive in the narrower setting.....it would be perverse not to remember, when selecting the market boundaries appropriate to a particular case, that the purpose of the Act is the preservation and promotion of competition. That is, the purpose in the implementation of choice of a market is to be instrumental. Therefore, situations where an American court would apply the Rule of Reason because a restriction would actually strengthen a sports league in its endless competition with other sports are cases where an Australian court should consider whether both realism..., and policy requires the selection of a wider sports market."*

In the next section, the author discusses the four elements of a market.

## 2. What is the market?

In order to determine whether a conduct has any effect in a market, one needs to determine what a market is and what it is not.

Another definition of market from Queensland's case (Note:4) was:-

*"A market is the area of close competition between firms.... The field of rivalry between the parties... Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices...in determining the outer boundaries of the market we ask a quite simple but fundamental question: if the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction."*

In Regent's case, His Honour Nicholson J. in his judgement referred to the capacity of Subaru to change the mix of products in response to various market pressures. He concluded that the market should be defined very broadly in relation to the supply of motor vehicles, parts and ancillary services (Note:5). As a result, the degree of substitutability in defining the relevant product market would establish understanding the market concept. For example, one needs to recognise the importance of and industry's production flexibility in determining the relevant market.

In the next section, the author discusses the concept of a market.

According to Professor Maureen Brunt, a market needs products, space, function, and a time dimension. She observed:

*"...between what set of products can customers and suppliers switch? Including, within what geographic space? Is the focus to be on the selling function or the type of buying function, and how many levels or stages of production and distribution is it appropriate to distinguish in order to assess the scope for substitution through trade? Finally, how much time is needed for customers and suppliers to make their adjustments in response to economic incentives?"* (Note:6).

### 2.1 The product dimension

The product dimension refers to the range of goods or services (including substitutes for them) which will satisfy customer requirements within a market. Hence, price changes are important issues as customers would respond to these issues in making a buying decision. It is also the clue to determine whether the products are in the same market.

In News' case, Swan, an economist discovered that there was zero or minimum correlation between rugby league and other sports such as rugby union. Swan also discovered that the correlation could only be determined by changes in the customer buying price and not consumer preferences.

Another aspect in relation to the product factor would be the degree of close competition. For example one needs to look into the demand substitutability by customers and supply substitutability by producers.

In News' case, His Honour Burchett J. found that *"...the relevant authorities which require only close substitutes to be included in the relevant market, but failed to apply them. His Honour considered a great deal of evidence of competition between sports for spectators at games given by witnesses associated with the clubs. The sports included rugby league, rugby union, Australian rules football, basketball, and soccer."* (Note:7)

Another aspect in relation to whether rugby league could be substituted for other sports by a television station, His Honour Burchett J said, *"...rugby league was a desirable but essential part of a station's programming mix. From this*

*he concluded that rugby league was substitutable for other sports, as far as television programming was concerned. Once again, it seems he has confused substitute products and complementary products: rugby is seen as a complement to other programs; it is needed to provide a balance for viewers, and for the demographic group it offers to advertisers. Diversity may well be essential, as the judge notes, but if this is so, then each sport possesses an important element of monopoly power as it helps the television stations deliver that diversity to its viewers and sponsors.”(Note: 8).*

From this we concluded that His Honour Burchett J identified that if each professional sport to be included in the same market would result to be too broad a definition of a market (Note:9). According to Corones (Note: 10), a more realistic market definition would be that each professional sport was a distinct market. He further emphasised that if we include all sports to be in the same market would result too broad for a product market definition. Product market definition involves the notion of substitutes that are available to consumers.

In the next section the author discusses the issues of otherwise competitive, in relation to the definition of a market under S4E.

## 2.2 What is ‘Otherwise competitive?’

The notion of ‘otherwise competitive with’ was associated to the market elasticities and the notion of product substitution in providing a complete explanation to the definition of a market under Section 4E.

In the News’ case, His Honour Burchett J found that: *“It would be simplistic and misleading, in many cases, to see the market as confined to the product produced by the undertaking in question. The Act, following economic theory, embraces this, and was deliberately amended in 1977, to ensure that it did so, to include other goods or services that are substitutable for, or otherwise competitive with that product. See S4E. As a matter of statutory interpretation, the addition of the words **or otherwise competitive** with emphasis, as does the whole provision added by the amendment, the legislative intention is to specify a wider rather than a narrower market. There is good reason for this, since too narrow a delineation of the market will exaggerate the power of a relatively large firm within it, perhaps bringing down on that firm, inappropriately, harsh sanctions so as to cripple its ability to compete in the wider real market in which it actually does business.”* (Note:11).

From this we conclude that the price and product elasticities and the concept of product substitution do not provide a full resolution of the definition of a market.

As in the Regents case, His Honour Nicholson J had to rely upon the same approach of News’ case where he rejected the narrow market argued for by the applicant (Subaru). Counsel for Subaru insisted that market should be confined to the wholesale and retail market of a single brand for Subaru parts.

## 2.3 The Geographic Dimension

The geographic dimension refers to the geographic area within a product is traded. As in News’ and Regents case the geographic area was Australia-wide.

## 2.4 The Functional Dimension

The functional dimension refers to the particular market level at which a company operates.

## 2.5 The Time Factor in Market Definition.

The time factor refers to the time required for suppliers or customers to switch products or for services to change in price. As in News’ case, His Honour Burchett J found that:-

*“...the market in which rugby league competes cannot be identified only by short term consideration...The league’s recent growth has been rapid, but there is evidence that rugby union and basketball have also, though even more recently, made some strides, and that soccer has a strong hold on the young. A snap-shot picture of the competitive forces involving these sports in the short term might be very misleading. Long term prospects that can be more or less clearly foreseen are, to that extent, a present reality, from the point of view of identifying the constraints upon commercial action. This fact emphasizes the importance of the principle stated in Tooth; Toohey (supra), and in other cases cited earlier in these reasons, that substitution possibilities in the longer run may be significant for market delineation.”* (Note:12).

In light of this, it would not be surprising to see that His Honour Nicholson J adopted this approach to market definition in the Regent’s case. (Note:13).

## 3. What is submarket?

According to Professor Brunt, a submarket is a segment within a larger market. Its role is to further the analysis of the functioning of the market as a whole (Note:14). On the other hand a single market exists by a brand named product in a position substantially to control that market.

In *Regents Pty Ltd v Subaru (Aust) Pty Ltd*, His Honour Nicholson J commented that “...the relevant market was for the supply of motor vehicles, parts and ancillary services and that market for Subaru parts was merely a submarket for this broader market.” (Note:15). He further stated that “...such a market may exist where the evidence supports a finding that consumers purchase the products solely in reliance upon its brand name and not in reliance its physical qualities.”

In conclusion, His Honour Nicholson J. held that “Subaru franchises are a package of new car sales and the supporting parts, service and warranty supply. Subaru was found to have two purposes: first, to promote competitive conduct in the market for cars; and secondly to preserve the competitiveness of the market.” (Note:16)

In the next section the author discusses the concepts of substantial lessening of competition using section 45, misuse of market power using section 46 and inducing a breach of contract.

### 3.1 Section 45 – Substantial Lessening of Competition.

The term ‘substantial’ is used in the TPA when related to the following scenarios-

- 1) in the deciding whether a merger would result in a substantial lessening of competition, and
- 2) in the determining whether a corporation has misused its market power, where found, must be a case that the corporation has a substantial degree of power in the relevant market.

As Justice French (Note:17) said “...to work out whether competition is being substantially lessened, there must be a purpose, effect, or likely effect of impugned conduct on competition which is substantial in the sense of meaningful or relevant to the competitive process.”

As a result, the notion of the purpose of the contract, arrangement, or understanding is more relevant to its anti-competitive effect, which comes under Section 4D.

In *News’ case*, His Honour Burchett said “...the ARL’s purpose in procuring the clubs to execute the Commitment and Loyalty Agreements was to preserve the quality of its rugby league competition through the joint participation of all clubs.”

Another argument from His Honour Burchett J in addressing the issue of pro-competitive under Section 4D was that “...the agreements were not entered into for an anti-competitive purpose, but to enable it to establish a rival league. Rather, they were entered into for a pro-competitive purpose, namely, to improve the quality of rugby league as a spectator sport and to enable it to compete more effectively with other spectator sports such as rugby union, Australian Rules football, and soccer.” (Note:18).

An additional attack was brought forward by *News* in its use of Section 45 as it argued that the Loyalty agreements were competition lessening within the Rugby League market.

This argument was rejected by Mr. Justice Burkett, as he found (Note:19)-

- 1) there was no contract, arrangement, or understanding between the Clubs or collusion of the managements of the clubs as a cartel or unity, and that each club individually and voluntarily entered into these agreements irrespective of the actions of any other club, and
- 2) as a result, there could be no lessening of competition within the Rugby League marketplace.

### 3.2 Section 46 – Misuse of market power.

Section 46 prohibits what is described as monopolisation or misuse of market power. This relates to conducts by powerful corporations that unfairly reduces or eliminates competition within its marketplace.

Section 46 has equivalents in other international jurisdictions. The counterparts to S 46 in other systems of competition law are linked as follows:

- 1) In the United States, Section 2 of the Sherman Act 1890, which deals:

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a misdemeanor....”

- 2) In the European Economic Community, Article 86 of the Treaty of Rome 1957, which deals:

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in ....”

In Australia, according to Wilcox J in *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) ATPR 41-128, “...section 46 seeks to protect against damage from its competitors. Yet it is one of the series of provisions designed to foster, not limit, trading competition; and it is axiomatic that effective competition activity by one market participant inflicts damage on other participants. The more competitive the market the more the principles underlying Part IV are applied, the greater the damage likely to be sustained by less efficient participants – it seems evident that something

*more than competition, something more than ill-considered competition or aggressive competition, is required before S 46 is offended."*

In order to breach section 46, one needs to establish three elements:-

- 1) a legal person possesses a substantial degree of power in a market;
- 2) the legal person has used that market advantage;
- 3) the legal person acted for at least one of the following illegal purposes – damaging a competitor, deterring or preventing entry to the market, or deterring a person from competing.

As in Regent's case, His Honour Nicholas J. addressed that *"...by denying Subaru spare parts to Regents, it was alleged that Subaru precluded the competitive check on its price in the Subaru car service market which Regents could provide and thereby gain the power to price above competitive level."* (Note:20) As a result, the court needs to look into two questions. First, did Subaru have substantial power in relation to its spare parts? Secondly, was its refusal to supply spare parts to Regents so that Subaru would gain power to sell at a price above the competitive level?

As regards to the first question, His Honour held that there was no a separate market for Subaru spare parts because there was cross-elasticity of demand and cross-elasticity of supply.

R D Nicholson L stated:

*"If the price of Subaru parts was raised, buyers (retailers of parts) may switch their patronage to other marques of cars/parts or to non-genuine parts. On the supply side, the manufactures of Subaru parts and non-genuine parts can adjust their production plans. In the case of the Subaru parts, the respondent – as a member of a group having a number of automobile distributorships in Australia – could change to other marques. There is both cross-elasticity of supply and demand."* (Note:21)

As regards to the second question, His Honour held that *"...it was not trying to exploit those who had already purchased Subaru cars by charging excessive prices for parts and service, rather, its purpose was to sell more Subaru cars. Regents had performed poorly and the termination of its dealership was commercially justified."* (Note:22).

In light of this, Subaru did not have a substantial degree of market power and therefore could not breach section 46.

In News' case, News' counsel attacked the Commitment and Loyalty Agreements on the basis that the ARL had a substantial degree of market power, and that the ARL has also taken advantage of its power to prevent the entry of another legal person into the market or to deter or prevent competitive conduct, which they considered ARL had contravened Section 46.

News argued that the rugby league was in a market of its own making and control.

However His Honour Burchett said, *"...had the applicant proved the existence of one of the markets it put forward, questions would have arisen as to whether the League has 'a substantial degree of power' in that market, and whether it has taken advantage of that power for the purpose of doing any of the things specified in S 46. It is impossible to consider whether the League has a substantial degree of power in the market until a market that exists has been delineated, and evidence has been given about it. But it can be said that the power to exclude teams from competition, on which the applicant's submissions placed reliance, arose out of the functions of the League within a co-operative venture, the constitution of which committed this power to its use for the mutual advantage of all participants and so that, inter alia, the hard decisions could be reached. However the market is delineated, there is a difficulty in regarding the exercise of this power, assuming it was exercised, as amounting to take advantage of market power."* (Note:23) His Honour concluded that ARL did not have a substantial degree of market power and therefore could not breach section 46.

By attacking the Loyalty Agreements under section 46, News Ltd's argument was that the market power of the ARL was such that it prevented the entry of competitors either directly or indirectly due ARL's size and ability to control the Rugby market to the detriment of potential and real competitors, and this clearly violated Section 46.

The effect to this argument, logically meant that the ARL was a monopoly as it was the sole provider of its goods and services to the market concerned. This argument was supported by further argument emphasising the dominance of the ARL in the major Rugby centred states of Queensland and New South Wales, the lack of a substitutable product in these states, the near monopoly prices gained from the selling of television rights and merchandising, the lack of saleable television rights of the other Rugby codes in these and other markets, and the use of an American precedence that stated that a single code of sport could constitute and single market. Furthermore, the lack of any action to counter initiatives of other sports indicated that the ARL did not have to consider these initiatives as their market strength made them almost unassailable.

Mr Justice Burchett (Note:24) in rejecting all of these arguments established that these arguments did not apply in respect to what constitutes this market. Firstly, the ARL was not motivated by profit, but for the good of the game of Rugby league. It acted as the central promoter and preserver of the highest levels of the game, which is the

championship competition, and as such bore no relationship to any other competition or competitive sport. From this, it has been shown from subpoenaed advertising and marketing material that the ARL competed equitably with other sports and other forms of entertainment, and all of this was supported by argument by the ARL. Also, the relevance of the American precedent was rejected because of the simple social and economic differences with the Australian social and legal model.

From this, the conclusion was reached by His Honour, that the ARL competed with all sports and entertainment and that as such this showed that the ARL did not have substantial market power that could be defined and so could not breach Section 46 (Note:25).

As concerning the Loyalty Agreements, they were not restraints of trade but necessary for the co-operative nature of the league and for the necessary support of the competition and for the mutual benefit of each club.

#### 4. Inducing breach of contract

Following on from the above decision and the flow of its legal logic, Mr Justice Burchett also found for the ARL in its counterclaim against News Ltd for inducing breaches to the Loyalty Agreements by various clubs. These breaches are sourced in the terms that News Ltd demanded from the members of its Superleague. These terms were the yielding of actual playing grounds, requiring the Superleague clubs to encourage sponsors to change or to get new sponsors to support the new Superleague that the Superleague clubs were to have different names and club logos, and the release of players from any contractual obligations to the old club.

##### 4.1 The Judicial Conclusion to this Case

Mr Justice Burkett (Note:26) then made a series of orders against News Ltd to restore to the ARL to its previous situation, that is, prior to the Superleague. The result was that News Ltd's Superleague ceased to be a business entity in Rugby League as a result of these orders.

The orders declared that all contracts with players and coaches were of no effect, that the Superleague clubs direct players to play for the ARL, that all shares, player contracts, and trademarks owned by News Ltd were to be held on trust for the ARL, and that News Ltd was prohibited from organising, sponsoring television broadcasts, or advertising any Rugby League game until the year 1999.

#### 5. Conclusion

The above list of factors may allow one to address the approach in relation to the market definition. In this article, the author has identified the shortcomings in the concept of relevant market, particularly the key elements one needs to establish under the 'substantial lessening of competition test', 'the notion of substitution', 'otherwise competitive with,' and 'the time factor' in relation to market definition.

Should the court establish any loss or damages suffered by a business customer as a result of the conduct in a business transaction by the supplier, the business customer would seek remedies under the Trade Practices Act (Section 82 Damages; Section 87 Specific Relief).

However, when analysing the effect of S. 4E and S. 46 of TPA in a commercial setting, the events must meet three tests.

First, there has to be a proved instance of a misuse of market power by the decisions made by a firm. This usually raises the process of defining the relevant market involved. That is, whether the courts favour a broad markets or a narrow markets process. As to Smith and Walter (1997), "...the process of market definition involves value judgments about which there is some room for legitimate differences of opinion. It involves a question of degree... which precludes any dogmatic answer." (Note:27)

Second, consideration of whether the conduct is anti-competitive against a claimed public benefit.

Third that the constraints on the production and selling policies of the respondent, in relation to the regulation of access to services, are in contention with the Act (Part IIIA and XIC).

As His Honour Mason CJ and Wilson J in their joint judgment in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*, their Honours stated:

*"In identifying the relevant market, it must be borne in mind that the object is to discover the degree of the defendant's market power. Defining the market and evaluating the degree of power in that market are part of the same process, and it is for the sake of simplicity of analysis that the two are separated. Accordingly, if the defendant is vertically integrated, the relevant market for determining degree of market power will be at the product level, which is the source of that power... After identifying the appropriate product level, it is necessary to describe accurately the parameters of the market in which the defendant's product competes; too narrow a description of the market will create the appearance of more market power than in fact exists; too broad a description will create the appearance of less market power than there is."*



Finally, in regard to the statement of “Do you think that the approach taken in these cases results in a market definition that is too broad to undertake any meaningful analysis of competition?” The author agrees with the judgment of His Honour Mason CJ and Wilson J that too broad a description will create the appearance of less market power than exists. That is, in defining the market power one needs to identify the parties involved and the particular anti-competitive conduct at issue.

As was stated previously, firstly a market must exist and then be established and losses suffered or to be suffered due to illegal actions of competitors. The law is to support competitive and free markets so that the price of a good or service to a given market is just and equitable for all parties, customers and suppliers. This does not mean that market power cannot be used or abused; it only means that the abuser of such power is vulnerable to the law whereas in previous times they were not. Consequently, it is not the determination of market size, but the actions of the dominate players that is the source of judicial actions under this legislation.

## References

### Notes

Note 1. Trade Practices; the Superleague Decision, Business Law Section Newsletter, Law Council of Australia July 1996, 9-10.

Note 2. Ibid p 2

Note 3. See Corones S G “Competition Law in Australia” 3rd Ed LBC Information Services, p 45.

Note 4. See Queensland Cooperative Milling Association Ltd/Defiance Holdings Ltd, repropoed merger with Barnes Milling Ltd (1976) ATPR 40-012.

Note 5. See Corones S G “Competition Law in Australia” 3rd Ed LBC Information Services, p 92.

Note 6. See Brunt, “Market Definition Issues in Australia and New Zealand trade Practices Litigation” (1990) Australian Business Law Review, 86-133.

Note 7. Ibid p101.

Note 8. Ibid p 102.

Note 9. See Corones, ‘The Impact of Trade Practice Law Dispute Involving a Sports League and its Members’ (1997) 25 Australian Business Law Review 406.

Note 10. Corones, The impact of Trade Practices Law on Disputes Involving a Sport League and its Members.

Note 11. Ibid p 103.

Note 12. See Sweeney, ‘Professional Sports Leagues and the Competition Laws’ (1997) 4 Competition & Consumer Law Journal (1996) 173, p 198-200.

Note 13. Regents Pty Ltd v Subaru (Aust) Pty Ltd (1998) ATPR 41-647.

Note 14. See Brunt, “Submarkets as competition law markets: the appropriate approach to the submarket concept in market definition” (1998) 6 Competition and Consumer Law Journal 156.

Note 15. See Regents Pty Ltd v Subaru (Aust) Pty Ltd (1998) ATPR 41-647.

Note 16. Ibid

Note 17. Stirling Harbour Services Pty Ltd v Bunbury Port Authority (2000) FCA 38, ATPR 41-752.

Note 18. See Corones S G “Competition Law in Australia” 3rd Ed LBC Information Services, p 163.

Note 19. Trade Practices; the Superleague Decision, Business Law Section Newsletter, Law Council of Australia July 1996, 9-10.

Note 20. See Corones S G “Competition Law in Australia” 3rd Ed LBC Information Services, p 371.

Note 21. Ibid p 372

Note 22. Ibid p 373

Note 23. Ibid

Note 24. Trade Practices; the Superleague Decision, *Business Law Section Newsletter*, Law Council of Australia July 1996, 9-10.

Note 25. Ibid p 9

Note 26. Ibid

Note 27. See Smith and Walter, ‘Commercial Reality versus Substitution in Market Definition’ (1975) 5 *Competition & Consumer Law Journal*, 17-18.



## Petition and Judicial Integrity

Zhuoyan Xie

School of Law

China University of Political Science and Law

Beijing 102249, China

E-mail: cherylxy@gmail.com

### Abstract

The petition system (*Xingfang*) is one of the greatest dilemmas in China's legal framework. Chaos was created as a result of the clash between it and the judicial system. This article is divided into three sections to analyze the interaction between petition practice and judicial integrity. The first section will identify the factors limiting judicial independence in mainland China, which is the main reason for the swelling number of petitions. Further, the characteristics leading to the failure of the petitioning system will also be explored. In the second section, the author will go on to explain the inherent conflict between the petitioning system and judicial integrity. In conclusion, the article draws together all the above strands into an overall analysis contending that the misplaced functions of petition practice should be redefined and a comprehensive reform is imperative.

**Keywords:** Xinfang, Judicial independence, Social grievance

### 1. Introduction

Raging debates are going on in mainland China about the petition system (*Xingfang*), one of the greatest dilemmas in China's legal framework.

As an indigenous cultural and legal tradition in China, the petitioning system was reestablished by the Chinese Communist Party in the 1950s. Since 1990s, a web of regulations has been passed by the Chinese authorities to govern petition practice. Despite the developments, petitioning practices still exist uneasily alongside with China's formal legal institutions because the two means of redress often parallel, overlap with each other in resolving individual grievance. (Note 1) By saying formal legal channels, here they mean judicial redress, administrative litigation, and other legal forums whose authorities and decision are primarily based on formal law and legal norms. On the contrary, the petition system derives their influence mainly from the political power of individuals. (Note 2) In imperial China, petition is premised on appeals by commoners to the better nature of their rulers, a plea for the protection of one's superiors. (Note 3) As the modern version of petition system, *Xinfang* is multi-purposes political governance tool, rather than an institution of popularized justice based legal norms. (Note 4)

Nevertheless, given the institutional weakness of China's judicial system, *Xinfang* remains a popular channel for dispute resolution. However, such a phenomenon generates enormous chaos that threatens the foundation of judicial independence.

Fundamentally, Petition practice comprehensively reflects the problems of China's legal and political framework concerning state accountability and legitimacy. However, this article will focus on the interaction between petition practice and judicial integrity, which the author considers the major source of contradictions.

The article is divided into three sections. The first section will identify the factors limiting judicial independence in mainland China, which is the main reason for the swelling number of petitions. Further, the characteristics leading to the failure of the petitioning system will also be explored. In the second section, the author will go on to explain the inherent conflict between the petitioning system and judicial integrity. In conclusion, the article draws together all the above strands into an overall analysis contending that the misplaced functions of petition practice should be redefined and a comprehensive reform is imperative.

### 2. Petition or Litigation?

Although, petition practice is just one of the many forums to redress grievance, however, in reality, the petition system is commonly viewed as a special power superior to formal legal channels. (Note 5). Nowadays, *Xingfang* practice permeate almost very government institutions, including those based on formal legal norms, like courts and procuratorates (Note 6).

Statistics show that the number of petitions has consistently exceeded that in judicial process. In the first nine months of

2002, letters and visits to Party and government *xinfang* bureaus at the county level or higher totaled 8,640,040, corresponding with an annual rate of 11.5 million per year. (Note 7) In comparison, the entire Chinese judiciary handles six million legal cases annually. (Note 8) Even within the judiciary, use of *Xingfang* also outweighs formal procedures. According to the 2003 Work Report of the Supreme People's Court, the entire Chinese judiciary handled forty two million petitions during the preceding five years, compared with approximately thirty million formal legal cases. (Note 9)

### *2.1 Reasons for Petitioning: All about Judicial Independence*

There are two reasons for people to turn to petition when their grievance could have been resolved in courts. The first reason is that the systematic lack of fair trials in China has led to a widespread lack of faith in the court system. Some petitioners said they did not even attempt to take their cases to court because they did not believe the court can maintain its impartiality and independence. (Note 10) Ironically, the other reason for people to petition is to take advantage of the lack of independent in judicial system. Petition system offers petitioners a possibility to influence court rulings before, after, or in the middle of the judicial proceedings.

#### *2.1.1 Seeking Alternative after Frustrations with the Lack of Judicial Independence.*

Although the constitution prescribes that "the people's courts shall, in accordance with law, exercise judicial power independently", (Note 11) the factors limiting independence of the courts are apparent.

From the personnel management point of view, although the judges shall be elected by the people's congress in accordance with law, (Note 12) the common practice is that they are nominated and appointed by their own courts or government units. What the people's congress usually does is simply rubber-stamping nominations approved by the party. In no case are judges elected by ordinary citizens. (Note 13) Furthermore, there is no life tenure for judges, Communist party's personnel office has the power to discipline or dismiss the judges for violation of party's cardinal regulation. (Note 13) Rules Governing the Behaviors of Judges also prescribe that judges shall have a steady political view, in which supporting the leadership of the Party is of outmost importance. (Note 14) The worst side of such supervision is that it is not carried out based on law nor has formal procedures, which eventually leaves the judges' work scrutinized by only a handful of men who might be in the interest of intervening court process. The courts often refused to act when the case is so sensitive that it might render the judges vulnerable to contradictions with government interests.

Another factor that undermines the independence of judicial system in China is regional power. As a matter of fact, local governments control the budgets of local courts, and very often a judge is appointed by local government units as I mentioned before. A study of hundreds of legal cases over 20 years, from 1979 to 1999, revealed that a court ruling was more likely to favor the local party when the lawsuit also involved a party from a different region. Minxin Pei, senior associate and co-director of the China Programme for the Carnegie Endowment for International Peace, conducted the study. (Note 15) Therefore, a systematic dysfunction of the judicial system is created due to the lack of independence. As a result, more and more people turn to the petitioning system when their cases should have been dealt with by the courts.

#### *2.1.2 Taking Advantage of the Lack of Independence.*

Talking of the lack of judicial independence, it immediately brings to mind images of influential senior officials making persuasive calls to judges. The cynical scenario often occurs in reality. Despite repulsion in the eye of scholars and other intellectuals who understand the significance of judicial independence, such a phenomenon are often applauded rather than frowned upon by the public. For example, when the case broke in Guangzhou that a graphic student Sun Zhigang was beaten to death during his custody at a police-affiliated clinic, intervention from higher authorities put pressure on the court so that justice was served in favor of the politically powerless migrant worker rather than the local police. Very few media commentators saw it as an erosion of judicial independence. Instead, they deemed it a variation of "divine intervention". Tian Wenchang, a defense lawyer, wrote many letters appealing to various government agencies to intervene on behalf of his client. "I'm against administrative intervention and all for judicial independence. Everyone knows that intervention is bad for justice. But when one runs out of other forms of recourse, one has to rely on it. This is a vicious circle and it is sad," he complains. (Note 15)

Moreover, existing laws governing judicial system provide incentives to petition practice when citizens are unsatisfied with court decisions. Firstly, there is an expansive and ill-defined retrial procedure known as trial supervision process. This procedure allows multiple actors, including parties, the procuratorates, and higher courts, significant leeway to request or compel the reopening of final court decisions. (Note 16) Secondly, a judicial "responsibility system" analogous to those in government organs create incentive structures conducive to petitioning behavior. Commonly known as "responsibility systems for wrongly decided cases" (*cuo an zeren zhuijiu zhi*), this internal disciplinary codes punish judges for a wide range of behavior, one of which is the repeated petitions o higher-level authorities. Lots of petitioners try to utilize such a mechanism to press the judges to rule favorably on their behalf by petition up the

hierarchy. (Note 17) Finally, the constitution of PRC specifies that the petition bureaus are in charge of supervising the work of both courts and administrative organs. In practice, these petition bureaus may also avail themselves of the power of supervision to affect the disposition of court cases. (Note 18) All these factors manifest that China's judicial system is severely tainted by external influence, which is also the reason why petition practice proliferates.

## 2.2 *Is Petition an Alternative?*

The number of petitions continues to swell over years, most of which should have been resolved and finalized by the courts. Therefore, the petition system's major functions are gradually displaced as an alternative to judicial relief, a role that is impossible for it to fulfill. The reason is straightforward. When the constitutionally mandated independence is not built into the judicial system, there is little chance that the petitioning system, an institution based on personal power, can ever ensure justice in redressing grievance. In this section, the genetic flaws of *Xinfang* will be elaborated.

### 2.2.1 Lack of Substantive Rules

First of all, the petitioning system lacks substantive rules to make it function effectively. Although a national regulation passed in 2005 does establish a procedural framework, which includes time frame, ways of responses, and penalties. (Note 19) Still, little guidance is provided on how petition bureaus are expected to resolve individual petitions that are transferred to them. Critical issues are left unaddressed, including, the substantive and procedural criteria one should apply to the review process, the ability of administrative agencies to compel compliance from other entities during the process, the rights of the petitioners, and the actual effect of any decision reached. (Note 20) According to the observation of some scholars, the *Xinfang* institution is not even designed to resolve individual grievance on a regular basis, rather, it is designed only to respond to certain types of petitions—in particular, organized, repetitive, or large scale ones. (Note 21) However, none of the terms therein mentioned is clearly defined. In the words of one municipal public security official, “.....leadership directives, administrative orders, and internal digestion remain the main methods for carrying out *xingfang* work.” (Note 22)

### 2.2.2 Lack of Impartiality and Independence.

Further, the petitioning system is doomed to fail because it does not have the necessary elements of impartiality and independence. In practice, the system encompasses petitions offices for a number of government agencies at every level of the country. They can be a separate office inside a government bureau or Communist Party office, or merely a desk within a local government. (Note 23) Officials in charge often have a disincentive to process complaints about their misdeeds or those of their colleagues. That is why success for petitioners is quite rare. A 2004 study by a Chinese professor, Yu Jianrong of the Chinese Academy of Social Sciences, found that of the two thousand petitioners surveyed; only three had their problems resolved. Less than two out of a thousand petitioners who take their cases to national-level petitioning offices ever receive a written response. (Note 24) Moreover, there are no publicly established criteria upon which decisions are made, no system of publishing decisions with legally sound explanations. All of these factors made it impossible to ensure fairness.

### 2.2.3 Lack of Effective Remedies

Moreover, there are hardly any effective remedies from petition practice. The *xinfang* regulations only grant *xinfang* bureaus a degree of “soft” dispute resolution power, which include the authority to engage in mediation of disputes raised in petitions, (Note 25) and to propose corrective measures and administrative punishments for government agencies and individuals' derelict in their handling of petition work. (Note 26) The responses normally take the form of letters from a higher authority to a lower one. However, it is generally acknowledged that such a response has absolutely no actual power to compel action. Although China's government is hierarchical, and local authorities must answer to their superiors, on matters that are not considered a governmental or Party priority, national-level authorities often have little direct control over low-level officials at the county, township and village level. A letter from a superior authority to a local official does not compel a response, and some local officials simply choose to disregard them.

However, the failure of *Xinfang* to serve as an alternative to judicial relief does not point to the conclusion that it should be strengthened, or be made a real political entity with greater power. In fact, from the perspective of establishing the rule of law in China, the petitioning system does more harm than good even if it is formalized. Just as a scholar suggests, “the petitioning system is inborn with the rule of man”, (Note 27) and the expansion of it would only further erode the feeble judicial integrity in China

## 3. *XINGFANG* does more harm than good

Some people argue that *Xinfang* should be kept in place and strengthened because China's legal system is not in a good shape. However, the existence of *xinfang* actually makes the chance to establish an independent judiciary even smaller. The reasons are as follows.

### 3.1 *Xinfang* Renders Judicial Process More Vulnerable to Manipulation

To begin with, the petitioning system renders judicial process even more vulnerable to manipulation. As I have

mentioned in the II part of this article, one of the reasons for the swelling number of petition is because of the external influence that *xinfang* has on judicial process. Many provincial Xinfang regulations explicitly provide that the petition bureaus have the authority to review court, government and procuratorate decisions.(Note 28) In practice, *xinfang* serves as an appeal process in addition to the normal judicial procedures, which weakens the finality of judicial process. As a principle, the judicial process in mainland China only allow one appeal to the next higher level court of the first trial, of which the decision will be binding and final.(Note 29) However, a “trial supervision process” could be initiated if a serious flaw was found, which is supported by the judicial principle “to seek the facts and always redress the wrongs”.(Note 30) Furthermore, under existing law, the incentive for the courts to find such a flaw is unclear. In practice, an ultimate verdict could be overthrown by a decree of a higher authority, be that from a court or procuratorate of a higher level, an agency of legislative branch, or one from the administrative branch. And all of the above authorities have *xinfang* bureaus that the petitioner could turn to. Such a loophole is constantly exploited by petitioners. Therefore, people who get unfavorable ruling from the courts will try every desperate mean to get higher official to their side. Moreover, if petitioners are unsatisfied with the response to a petition they have the right to continue up the chain of petition bureaus all the way from the village level to the township, county, provincial, and national levels. After the ruling is overturned, the winner of the case becomes loser, who might go further up the hierarchy in petitioning system seeking another resettlement. *Xinfang* renders the outcome of judicial process even more unpredictable, and makes judicial system further tainted by unethical influence. Ultimately, it would lead to a breakdown of the overall credibility of the courts.

### 3.2 *Xinfang* Undermines the Rule of Law

Furthermore, the petitioning system undermines the foundation of the rule of law, which is a precondition for judicial independence. Although the petitioning system seems to have maintained hope for disadvantaged people who have suffered injustices, but as a matter of fact, it is like drinking poison to quench a thirst. Instead of being devoted to constructing a unified legal basis, it always tries to create exceptional precedence. (Note 31) One event that got enormous media coverage in 2003 was that Premier Wen Jiabao helped a migrant laborer get back defaulted wages. The kindness of our premier was highly sang again because of this story, which also leads petitioners to believe, as long as they can reach a high ranking official, they can get their problem solved. But in fact, no matter how wise and loving our senior officials are, they can only handle very limited number of cases and there is no guarantee for the fairness of such handling. Sadly, the chance of getting exceptional personal attention is exactly what the petitioning system is premised on. As a well-acknowledged principle, the foundation of judicial independence is a set of rules that does not only solve individual cases but also offers a legal basis for ruling on other cases.(Note 31) Only if that is in place can the judicial system function independently, using its own logic to judge cases without influenced by external power. But as a relic from feudal society, the petitioning system is basically about getting personal favor from a monarch or senior official. Despite its positive effect on a few cases, the side effect is tremendous; it pushes our judicial system further away from the rule of law, but closer to the rule of man. (Note 31)

## 4. Conclusion

As a conclusion to this paper, this section will point out the major problems concerning the relation between *Xinfang* and judicial independence, and a general solution will be proposed hereinafter.

### 4.1 What Goes Wrong?

Vicious circles are formed as a result from the interaction between *Xinfang* and the judicial system in China, which aggravates social tension and leads to a breakdown of the overall credibility of the government.

#### 4.1.1 From an Institutional Prospective

Due to the absence of judicial independence in China’s legal system, a systematic lack of fair trials has resulted in an uncontrollable proliferation in petitions, which is viewed as an alternative path to justice. Unfortunately, given the characteristics differing significantly from what might be expected from rule of law, *Xinfang* is by no mean a competent substitution to formal legal channels of redress. Even worse, *Xinfang* practice renders judicial process even more vulnerable to manipulation, which concentrates to become another disaster to the feeble judicial integrity in China.

Consequently, a vicious circle is formed:

The Lack of Fairness in Judicial Process → Proliferation of Petitions → Further Erosion on Judicial Integrity

#### 4.1.2 From a Social-State Perspective

Mainstream discourse has all along proclaimed that the petition system aims at easing social tension, however, social grievance are actually amplified instead of eased.

As I have mentioned before, *Xinfang* lacks the essential ingredients to make it function as an institution of popularized justice. However, people turn to it in hope of have their grievance solved effective, which normally ends up in frustration. And accumulated frustration could be a major threat to social stabilities.

Moreover, the existing petition system maintains unreasonable hope for people who suffer injustice, examples include *Xinfang's* power to influence or to overthrow court rulings. Many petitioners spend years of their lives trapped in the petitioning system in the belief that a decision in their favor will justify the time spent in the effort. Some families become petition dynasties, doing nothing but petitioning. Accumulated grievance eventually turns into obsession. Devastating psychological effect resulted from prolonged lawsuits is not unique to China. Contemporary parallels exist in many countries: a U.S. reporter writing about long-term appellants for alimony in New York City observes, "In their seemingly endless court battles, litigants on both sides often become overwhelmed, depressed, or if they are going to become at all successful, obsessed." (Note 32) It is reported that raging anger towards government grows increasingly strong in mass petitioners.

On the side of government, although it is proclaimed that *Xinfang* is "a bridge for the party and government to connect with the masses, a window to listen to the voice of the masses, and an important channel for reflecting the sufferings of the masses;" Yet the government and Party display an increasingly contradictory and inconsistent attitude towards petitioners. Human right violations are widely reported in government's dealing with petition, (Note 33) which turns petition system into a new creator of social conflicts.

However, in a country without a free media or an accountable judicial system, petition remains a popular channel for expressing grievance. Therefore, another vicious circle is formed, which could lead to an overall breakdown of government credibility.

Intensive Social Tension → Proliferation of Petitions → Amplification of Social-State Conflict

#### 4.2 Suggestions

It is no easy task to untangle the deadlock resulted from the clash between *Xinfang* and the judicial system in China. Considering the political complication, the author does not aspire to give a detailed plan of reform, instead, a general solution will be proposed.

Fundamentally, a flawed judicial system can only be remedied by a reform of its own, instead of being substituted by an even less accountable mechanism like the petitioning system. In regard to a judicial reform in China, the most important aspect is to restore independence to the judiciary. And the key to independence is to have law as the only basis for trialing cases, and to keep the external influence to the minimum.

In China, it is very important to make sure that the supervisions over the judges are conducted with most prudence. As I have mentioned in the second part of this essay, most disturbances to the neutrality of the judges are in the name of supervisions, especially those from the Communist Party. Most of these supervisions lack transparency and are not conducted in accordance with substantive law or formal procedures. Consequently, it is very convenient for a supervisory body to affect the disposition of a court case by exerting pressure on the judges. Therefore, in order to restore fairness and independence to the judicial process, I recommend formalize supervision over the judges. In particular, supervision of the judges needs to be restricted to an appropriate extent, and it should be conducted strictly on the basis of law instead of some personnel disciplines or political standards.

Moreover, *Xinfang's* influence on judicial process needs to be restricted. As I have mentioned in the second section of this article, many people turn to petition trying to take advantage of such a loophole. To be more specific, the conditions for initiating the retrial procedure should be restricted in order to ensure the predictability and authority of judicial decisions. Just as I have pointed out previously, such an endless appeal process can only renders the judicial process more vulnerable to manipulation and amplify social tension.

Further, the misplaced functions of the petitioning system need to be redefined. According to Carl F. Minzner, *Xinfang* is a critical multi-purposes governance tool for an authoritarian state, whose functions include connecting the government with the people. (Note 34) Given the limited freedom of expression and public participation in China, *Xinfang* remains a very important mechanism to meet those needs. However, it is not suitable to serve as a substitution to the judicial process.

Ultimately, no serious progress towards judicial independence will be possible without fundamental reform. Essentially, all the problems therein mentioned are the result of a close political framework without grass root democracy. Therefore, Local and national governance structures have to be radically changed to allow for more popular participation and public accountability, which is a political decision that has to be taken at the highest levels of the government and Party.

#### References

- Albert P. Melone. (1981). Judicial Independence in Contemporary China, *Judicature*.
- Beijing Time, External Influence Complicates Court Ruling on Chinese Manfian Kingpin, <<http://en.chinaelections.org/newsinfo.asp?newsid=18691>> accessed on Nov 15, 2008.
- Carl F. Minzner. (2006). *Xinfang*: An Alternative to the Formal Chinese Legal System, *Stanford Journal of*

*International Law*, vol. 42:1.

Chen Guidi and Chun Tao, (2004) *An Investigation of China's Peasantry*, People's Culture Press.

Cai Dingjian. (2004). The Basic Situation of LPC Individual Case Supervision. <<http://www.rdyj.com.cn/2004/rdqk-3-2.html>> accessed in 2005.

He Weifang. (2005). Judicial Independence Should Come First, <<http://boke.xizhengren.com/15514/>> accessed on Nov 18, 2005.

Human Rights Watch interview with Cai, Beijing. (2005). in "We Could Disappear at Anytime", <[http://www.hrw.org/reports/2005/china1205/4.htm#\\_ftn22](http://www.hrw.org/reports/2005/china1205/4.htm#_ftn22)> accessed on Nov 1st, 2008.

Interview with Zhou Zhangshun, Director of State Bureau of Letters and Calls, *Bimonthly Discussion* <<http://www.china.org.cn/chinese/2003/nov/446032.htm>> accessed on Nov 2003.

Leslie Eaton. (2005). Coping: Up the courthouse steps, and still climbing, *New York Times*, August 14, 2005, Section 14.

Liao Yiwu. (2005). *Shantytown for Supplicants: Reports on China's Victims of Injustices*, Hong Kong: Mirror Books.

Nanping Liu. (1999). A Vulnerable Justice: Finality of Civil Judgment in China, 13 *Columbia Journal Asian Law*.

Xu Jianying, Some Thoughts on Realizing Rule of Law in Xinfang Work, 6 *J. Zhejiang Police C. Pub. Security Sci. J.*

Yu Jianrong, (2005). A Survey of the Xinfang System and Thoughts on Reform, *Analysis and Forecast on China's Social Development*.

Yu Jianrong, Critique of the Petition System <<http://www.yannan.cn/data/detail.php?id=4842>> accessed on July 10, 2005.

Yi Jianrong. (2008). Who bears the costs of intercepting petitioners? <<http://en.chinaelections.org/newsinfo.asp?newsid=18648>> accessed on Nov 18th, 2008.

2002 Supreme People's Court Work Report.

1982 Constitution of the People's Republic of China.

1983 Organic Law of the People's Courts of the People's Republic of China.

2005 Rules Governing the Behaviors of Judges, PRC.

2005 National Regulations on Letters and Visits

2003 Heilongjiang Province Xinfang Regulations.

2004 Xinfang Regulations of Zhejiang Province, PRC.

1991 The Civil Procedure Law of PRC.

## Notes

Note 1. Carl F. Minzner, (2006) Xinfang: An Alternative to the Formal Chinese Legal System, *Stanford Journal of International Law*, vol. 42:1, page 104.

Note 2. Carl F. Minzner, (2006) Xinfang: An Alternative to the Formal Chinese Legal System, *Stanford Journal of International Law*, vol. 42:1, page 139.

Note 3. For more on petitioning and related subjects, see, for example, Carl F. Minzner, *Supra* note 1; See also Liao Yiwu, *Shantytown for Supplicants: Reports on China's Victims of Injustices*, (Hong Kong: Mirror Books, 2005); as well as Chen Guidi and Chun Tao, *An Investigation of China's Peasantry* [People's Culture Press (Renmin Wenxue Chubanshe), 2004]; See also Kevin O'Brien, "The Politics of Lodging Complaints in Rural China," *China Quarterly* (1995).

Note 4. Carl F. Minzner, *supra* note 1, page 107.

Note 5. Yu Jianrong, (2005) A Survey of the Xinfang System and Thoughts on Reform, *Analysis and Forecast on China's Social Development*, page. 212, 214-15.

Note 6. The Chinese procuratorate is a rough equivalent of 'district attorney office'; theoretically, they are independent from the government.

Note 7. Interview with Zhou Zhangshun, Director of State Bureau of Letters and Calls, *Bimonthly Discussion* <<http://www.china.org.cn/chinese/2003/nov/446032.htm>> accessed on Nov 2003.

Note 8. 2002 Supreme People's Court Work Report.

Note 9. 2003 Supreme People's Court Work Report.

Note 10. Human Rights Watch interview with Cai, Beijing, 2005, in “We Could Disappear at Anytime”, <[http://www.hrw.org/reports/2005/china1205/4.htm#\\_ftn22](http://www.hrw.org/reports/2005/china1205/4.htm#_ftn22)> accessed on Nov 1st, 2008.

Note 11. 1982 Constitution of the People’s Republic of China, art 126.

Note 12. 1983 Organic Law of the People's Courts of the People's Republic of China, art 35.

Note 13. Albert P. Melone, (1998) Judicial Independence in Contemporary China, *Judicature* 81, page 257, 258.

Note 14. 2005 Rules Governing the Behaviors of Judges, PRC, art 1, (2).

Note 15. Beijing Time, External Influence Complicates Court Ruling on Chinese Mafia Kingpin, <<http://en.chinaelections.org/newsinfo.asp?newsid=18691>> accessed on Nov 15, 2008.

Note 16. Nanping Liu, (1999) A Vulnerable Justice: Finality of Civil Judgment in China, 13 *Columbia Journal Asian Law*.

Note 17. Carl F. Minzner, *supra* note 1, page 139.

Note 18. See generally Cai Dingjian, The Basic Situation of LPC Individual Case Supervision (2004), <<http://www.rdyj.com.cn/2004/rdqk-3-2.html>> accessed in 2005.

Note 19. See generally 2005 National Xinfang Regulations, PRC.

Note 20. Carl F. Minzner, *supra* note 1, page 127.

Note 21. For example, *ibid*, page 108.

Note 22. Xu Jianying, Some Thoughts on Realizing Rule of Law in Xinfang Work, 6 *J. Zhejiang Police C. Pub. Security Sci. J.*, page 137.

Note 23. Regulations on Letters and Visits, *supra* note 16, Article 6.

Note 24. Yu Jianrong, Critique of the Petition System <<http://www.yannan.cn/data/detail.php?id=4842>> accessed on July 10, 2005.

Note 25. 2004 Xinfang Regulations of Zhejiang Province, PRC, art 19.

Note 26. 2005 National Xinfang Regulations, art 37.

Note 27. He Weifang, Judicial Independence Should Come First, <<http://boke.xizhengren.com/15514/>> accessed on Nov 18, 2005.

Note 28. 2003 Heilongjiang Province Xinfang Regulations, art 23, 33.

Note 29. See for example, 1991 The Civil Procedure Law of PRC, art 158.

Note 30. See for example, *Ibid*, art 179.

Note 31. He Weifang, *supra* note 27.

Note 32. Leslie Eaton, Coping: Up the courthouse steps, and still climbing, *New York Times*, August 14, 2005, Section 14, page 1.

Note 33. Yi Jianrong, Who bears the costs of intercepting petitioners? <<http://en.chinaelections.org/newsinfo.asp?newsid=18648>> accessed on Nov 18th, 2008.

Note 34. See generally, Carl F. Minzner, *supra* note 1.





## The Concept 'Development' Revisited towards Understanding: in the Context of Sub-Saharan Africa

Brian-Vincent IKEJIAKU

Research Institute for Law, Politics and Justice  
Keele University, Keele, Staffordshire, ST5 5BG, UK

Tel: 44-79-4476-5923

E-mail: b.v.o.ikejiaku@ilpj.keele.ac.uk OR ike.bvo06@yahoo.com

### Abstract

There has been lingering contention on what development means in the African context. The meaning of development in the African context is crucial in order to know whether Africa is developing or not, particularly since 1970. This debate becomes critical when it is appreciated that Africa appears as the least developed continent in the world. *This paper conceptualises 'development'*; in doing this, the paper considers both economic and political development, and looks into the complex question: Must economic development precede political development in Africa or vice-versa? In an attempt to address these issues, the paper considers and examines the views of many scholars and studies on these subject matters. While the paper recognises the rise and importance of recent global development paradigms, such as feminism, and green-environmentalism, it however, applies the long traditional approaches – modernisation, liberalism, dependency and Marxism in analysing the meaning of development in Sub-Saharan African context. This is because this paper is concerned with *the real development stage* of this Sub continent of Africa, and not merely an intellectual exercise. The paper finally proffers a definition of development, which it believes to be germane in the context of real developmental stage of Sub-Saharan Africa.

**Keywords:** Political cum economic development, Green-environmentalism, Feminism, Liberalism, Modernisation, Marxism, Democracy, Sub-Saharan Africa

### 1. Introduction

In much of Africa, it seems that very little economic growth has occurred over the past fifty years. Some countries also appear to be even poorer today than they were thirty years ago. Thirty years ago, for example, the average income in Sub-Saharan Africa was twice that of both East-Asia and South-Asia, yet, despite the fact those regions hold 60 percent of the developing world's population, the crisis of world poverty now appears to be in Africa (Report of the Commission for Africa 'RCA', 2005). More so, economic growth in some parts of Asia has been more than double the average figure for all countries. Growth rates for 2008 are projected to be above 5% for South Asia. This region, like Africa, particularly Sub-Sahara Africa, faced economic challenges forty to fifty years ago, but unlike Africa, South Asia now enjoys sustainable long-term economic growth, helping to reduce their rate of poverty (Marke, 2007). Average African incomes are now well below that of East Asia, where the number of people living on less than one dollar a day has fallen dramatically since 1981. Increasingly we see a similar story in India and South Asia (RCA, 2005: 103). Other indicators are equally depressing: average life expectancy in Africa is only 46 years, compared with 63 years in South Asia, 69 years in East Asia and 73 years in advanced affluent countries. Access to clean water in Africa has also fallen behind the levels in the rest of the developing world, for example, 50 per cent in Africa in 2002, compared with 84 per cent in South Asia (ibid). The term Africa is used in this paper for clarity and convenient sake and therefore means the developing countries of Sub-Saharan Africa.

### 2. Theoretical Overview of the Concept - Development

While this paper recognises the rise and importance of recent global development paradigms, such as feminism and green-environmentalism; however, it will employ the long traditional approaches – modernisation, liberalism, dependency and Marxism in its analysis of the meaning of development in the context of Sub-Saharan Africa. This is because this paper is concerned with *the real development stage* of this Sub region of Africa, and not merely an intellectual exercise. Feminist scholars, for example simply argue that the concept development is lacking or even meaningless if it does not project women's concerns and relevancy in the mainstreams of development activities. This is emphasised on the field of women in development (commonly tagged as WID), as emerged in the 1970s and 1980s, made prominent the pivotal and central role of women as subsistence producers and providers of basic needs in

developing countries and developed communities (Burchill et al, 1996). Globally, 'male development planners have seen WID as instrument not a goal, as a means for lower population growth, higher economic growth and more successful political mobilisation' (Newland, 1988: 507). However, in spite of the seeming usefulness of this development approach, the relegated position of women in development pattern of Sub-Saharan African countries is pronounced (WOCON, 2004: 4), and therefore reduces the relevancy of this development model in the real development stage of the Sub region.

Green-environmentalists see development in the present dispensation as the conglomeration and vital nature of ecosystem and environmental group, pointing out that the root cause of the current global development problems, particularly environmental crises, is mainly because of the exceptional economic growth experienced during the last two centuries (Patterson, in Burchill, op cit). This approach emphasises on the crucial nature of protecting the 'global commons' ... (Eckersley, 1992) for sustained economic development. However, scholars, such as Sachs (1993) are extremely critical of the term 'sustainable development' in widespread use in green-environmental circles, contending that this basically serves to make it easier for global ruling elites to coopt environmentalism. Thus, since the effects of globalisation (controlled by the global ruling elites) have been most critical on developing countries of Africa, this paper is yet to see the 'active character' of green-environmental approach in the context of Sub-Saharan Africa. Therefore, any application of these and other recent approaches in the analysis of the real development stage of the Sub-Saharan Africa is basically, a mere intellectual exercise. This is because the practicality and impact of these development ideas is yet arid, barren or infertile in the present development pattern of Sub Saharan Africa.

Against this backdrop, this paper 'applies' (not discusses) the long traditional approaches – modernisation, liberalism, dependency and Marxism in its analysis of the meaning of development in Sub-Sahara African context (for a detailed discuss and application of these traditional approaches, specifically liberalism and dependency, see Ikejiaku, 2008).

### 3. Economic and Political Development

Sequel to the above submissions, it appears that Africa is the least developed continent in the world. This paper therefore revisits the meaning and understanding of the concept 'development', particularly as it relates to the African context. The concept 'development', as many writers (Schaefer, 2005; Abu-Ghaida and Klassen 2004; McLean 1996; Sen and Dreze 1995; Omolayole, 1991; Adebo, 1991; Olowu, 1990; Ofiong 1980 and Seers, 1969) have noted lacks one single generally accepted definition. This is because, in the words of Ndegwa (1986: 1) 'what is referred to as development is actually, a complex subject'; therefore, the significance of considering economic and political development.

#### 3.1 Economic development

In order to understand the term 'development', particularly as it relates to the African context, it will be helpful to consider briefly one critical matter of debate in this area. In one of his contributions to what development means, Nnoli (1981: 21) opposed seriously what he refers to as 'Artefacts of Development', which some African leaders (example Nigeria's Gowon, early 1970 and Tanzania's Nyerere, late 1970) and scholars (example Akinyotu, 1979) have favoured to be real development. He argues that the widespread view, within and outside Africa, that Nigeria and some other African countries are developing is unsound, ill conceived and misguided. 'It is based on a notion of development that commits us to a wholesale imitation of others and therefore, to a wholesale repudiation of our state of being' (ibid). Nnoli further points out that the often stated goal is to catch up with the West. And in effect such a goal permits us to want passionately goods and services that we cannot create for ourselves with the resources at our disposal, and it causes us to neglect our basic needs (such as food, water and housing) and local resources (such as agricultural products and casting). The view of a developing country, which these leaders share, is one of a country that is increasingly acquiring more and more artefacts of the type found in the Western countries and Japan and which are created by financial industrial leaders of these foreign countries. These foreign societies are regarded as developed, and they have a large number of cars, roads, hospitals, computers, television sets, technicians, educated people, good houses, airways, iron and steel complexes, agricultural machinery, a fashion industry, efficient managers, and an advertising industry and so on (ibid).

The meaning of Nnoli's view is that Nigeria and some African leaders are still viewing their nation's development in terms of striving to actualise many of the conditions of the good life in the developed world. These according to Nnoli, include industrialisation, economic affluence, military hegemony, advanced technology, urbanisation, and a parliamentary political process. Thus, the concept of development involved here is that of a checklist of artefacts (ibid).

However, contrary to Nnoli's position, there are different views in relation of development in Africa. One of such views, which are crucial, is: There is a strong belief that the economy of some African countries (such as Nigeria and South Africa) has passed the stage of economic take-off and reached that of self sustaining growth (Akinyotu, 1979).

Rostow's theory of the Stages of Economic Growth offers a categorisation of the five epochs in the economic development of human societies. The five stages which correspond to the levels of industrialisation of societies briefly

are: (1) the Traditional Society – here the production functions are limited this is a society that has pre-Newtonian science as well as pre-Newtonian attitude to the physical world. (2) Pre-Take-Off – the stage where the society is getting ready to take off, it is a society in transition. (3) Take-Off – a stage when the society is becoming economically independent, independent industries begin to emerge. (4) Maturity – the society at this stage has taken off and is driving to maturity, economic growth now supersedes population growth. (5) High Mass Consumption – at this stage the society has achieved maturity and it emphasises the production of consumables (Rostow, 1960).

The major criticism here is that though most African countries are developing countries, the proponents and scholars of a development model, in relation to developing countries, have left us with no stipulated criteria for assessing the relative weight to improvements in some areas of life or the deteriorating of state of affairs in other sectors. This is necessary in order to allow us in determining if a country like Nigeria, South Africa, Kenya, Sudan, Zimbabwe and other developing countries are really developing or not. In other words, sometimes I wonder whether most African states have even reached the ‘take-off stage’. When the rate of economic growth in Africa is compared to its population, and when its GDP is assessed, this (economic development stage) of African states becomes very doubtful; particularly if a comparative work is made with Asian countries as argued above. As a reminder: Thirty years ago, the average income in Sub-Saharan Africa was twice that of both East-Asia and South-Asia, yet, despite the fact those regions hold 60 percent of the developing world’s population, the crisis of world poverty now appears to be in Africa (RCA, op cit). More so, economic growth in some parts of Asia has been more than double the average figure for all countries. Growth rates for 2008 are projected to be above 5% for South Asia. This region, like Africa, particularly Sub-Sahara Africa, faced economic challenges forty to fifty years ago, but unlike Africa, South Asia now enjoys sustainable long-term economic growth, helping to reduce their rate of poverty (Marke, op cit). Average African incomes are now well below that of East Asia, where the number of people living on less than one dollar a day has fallen dramatically since 1981. Increasingly we see a similar story in India and South Asia (RCA: 103).

For Africa, between 1980 and 2002, the population of Sub-Saharan Africa has grown from 383 to 689 million people, which is an increase of 80 percent (RCA, 2005: 112). In contrast, in much of Africa, very little economic growth has occurred over the past fifty years. Some countries are even poorer today than they were thirty years ago. Sub-Saharan Africa has had the lowest Gross Domestic Product (GDP) for decades. Statistics confirm that Africa has a population of about 600 million, more than double that of the United States, yet it is estimated that average real GDP per capita, which is 11% in Africa is lower today than it was in 1970 (Marke, 2007). Africa urgently needs economic growth than the rest of the world. In order to close the gap with the wealthy nations, Africa, particularly the Sub-Saharan Africa must achieve sustained high rates of real growth in GDP for decades. A joint study by African Development Bank (ADB), African Economic Research Consortium, Global Coalition for Africa, Economic Commission for Africa and World Bank warned few years ago that ‘five percent annual growth is needed simply to keep the number of poor from rising... (and that)... halving severe poverty by 2015 will require annual growth of more than seven percent, along with a more equitable distribution of income’ (World Bank, 2000). However, Schaefer points out that rather than very much needed economic growth, the countries of Sub-Sahara Africa as a region witnessed a decline in per capita GDP from \$575 in the 1980 to \$524 in 2003 (Schaefer, 2005: 2).

Again, any socio-economic indicator suggests that Sub-Saharan Africa lags behind the rest of the developing regions in the world. Example, among the 49 countries classified by the UN as ‘least developed’ in the year 2001, sadly, Sub-Saharan Africa had 34. Since 1975 precisely, the region has been backwards economically, while the rest of the developing regions are making accelerated advancement. In the periods 1960-73 the growth rate of the region cannot be differentiated with those of both East and South Asia. Ghana, for example at independence in 1957, was more flourishing than the Republic of Korea, however, between 1975 and 1995 Ghana’s exports increased by four times, compared to more than 400 times in the Republic of Korea. Nigeria, in 1965 had economic output approximately that of Indonesia, but by 1997 Indonesia’s output was as high as eight times that of Nigeria (Regional Survey of the World, 2002: 12). Scholars have also argued that ‘Takeoffs’ could be said to be rare in most African countries, but most plausibly limited to the Asian success story (Schaefer, 2005).

Other scholars have defined development from different and wider perspectives. McLean (1996: 137) defines development as a ‘multi – dimensional process that normally connotes change from a less to a more desirable state’. He holds that development is considerably more of a ‘normative concept’, hence the inadequacy of any attempt at a single definition. It is in this connection that some writers have argued that development must be relative to time, place and circumstance. Included in this school of thought is Adebo (1991: 3), who defined development as ‘a process concerned with people’s capacity in a defined area, over a defined period, to manage and induce positive change; that is to predict, plan, understand and monitor change; and reduce or eliminate unwanted or unwarranted change’. By way of elaboration, the more people develop themselves, the more they would become instruments for further change. Education is therefore identified as the key to people’s ability to manage and induce change (ibid). Suffice it to say that Education is a means to fulfilment of an individual, transfer of values from one generation to the next and critical for economic growth and healthy population. World Bank study in seventeen Sub-Sahara African countries shows a clear correlation

between education and lower HIV and AIDS infection rates (Abu – Ghaida and Klassen, 2004). Drez and Sen (1995: 13) argue ‘education can be an important promoting factor in determining the ability of individuals to make use of economic opportunities’.

The view is therefore held that any good definition of economic development should make resources and the objective of their exploitation its central concern; hence Walter Rodney’s socio-economic definition of development as quoted by Omolayole (1991), ‘as a process of increasing the ability, capacity and capabilities of a people to exploit the resources of their environment, so as to satisfy their needs at any given time’. Other writers have looked at development from the point of view of increased economic efficiency, expansion of productive capacity of the nation’s economy, technology advance, economic, and industrial diversification. These are seen as necessary conditions for sustainable development (Ndegwa, 1986, Omolayole, 1991).

In an attempt to understand what is meant by the concept ‘development’, it is important to stress that there is a difference between socio-economic and political development. For example, Salih (2003) argues that Africa has made tremendous achievement in political development, as opposed to socio-economic development. Ndegwa (1986) contends that Africa must be aware of the fact that apparent development in terms of ‘per capita incomes’ could be achieved while the country comes even under imperialistic neo-colonialism. He cites professor Adebayo Adedeji, the former Executive Secretary of the United Nations Economic Commission for Africa, ‘the African region cannot escape the retreat into economic colonialism which now threatens it without bold and imaginative measures to build – at national and multi – national levels – the political capabilities to develop and exploit (its) resources itself... And it is only by facing up to this task that Africa can realise its long – term economic prospects’ (ibid: 8). The Commission for Africa (2005: 106) notes that Africa cannot continue to face weak governance and poor capacity building by its leaders, which hinder socio-economic development. Based on the above views, it will be helpful to consider briefly the distinction between political development and economic development.

### *3.2 Political Development*

Political development concerns the improvement of the political sector that will help in achieving socio-economic development. Nnoli (1981) for example, notes that political development focuses on political stability and the institutionalisation of political goals and the means for achieving them; ‘sometimes it is also seen as the increase in the various capabilities of the system to solve such problems as the extraction and distribution of resources and the regulation and integration of the society...’ (ibid: 21).

Other scholars Soremekun (2000), Oji, (1997), Clapham (1996), Ake, (1982), Milbrath, and Goel, (1977) argue that political development involves elements such as political mobilisation, political participation, party politics, the rule of law, a free press and universal suffrage. Milbrath and Goel (1977) argue that for a political system to be taken as developing politically there is the need for the citizenry to participate in the act of governance. This is because the whole essence of the state, and, therefore government, is to regulate the conduct of individuals in the society and provide security and the good life of the people. The participation of the people is therefore a ‘sine qua non’ for political progress and good governance. They note that this participation can be either direct, in the sense of being involved in governance, particularly at the local level or indirect, by observing and making contributions to government, including exercising voting rights. Political participation obviously is accommodating in a democratic regime than in a military regime, because in a democratic setting, people are freer to express themselves and they recognise the power of their votes. Oji (1997) therefore, points out that the presence of alternative competing parties that allows the populace choice of candidates, and free press are essential tools of political development.

Ake (1982), points out that political development should not be confused with the politics of development. In the latter case, there exists a developmental relationship among nations in which one nation due to its technological and managerial advantage agrees to develop the economy of another less advantaged nation, for example through technological transfer. Political development on the other hand, involves the entirety of the developmental process of a nation. It aims at classifying societies in terms of their level of political modernisation. Precisely, this includes the level of educational attainment, the level of political awareness, mobilisation and participation, the practicability of the electoral process based on universal suffrage or unrestricted franchise and the holding of free and fair election, with a free press and the effectiveness of bureaucratic structures, the judicial system and ability to relate with and understand one another in the social strata. Soremekun (2000) provides us with a good example: the high level of political participation in both Botswana and India suggests that these two countries are politically developed and quality governance is enshrined in them, comparatively Kenya and Nigeria (that share the same British colonial heritage with the former set of countries), there is low level of political participation and democracy. This negatively affects their level of political development. Besides, while the neo-colonial or external factor(s) cannot be completely disregarded, Botswana and India clearly indicate that psychological and cultural variables contribute to differing outcomes in places like Nigeria and Kenya on the one hand and Botswana and India on the other.

### 3.3 The relationship between Economic Development and Political Development

Economic development stresses economic growth. Seers (1969) defined economic development as the increase of economic wealth of countries, pointing out that achieving economic growth, an aspect of economic development is an increase in the national income. There is a general acceptance by economists that 'socioeconomic progress' is measured by two indicators, which are – economic growth as reflected by the annual growth of the GNP, and the distribution of its benefits (Olowu, 1990).

The questions that come to mind with respect to the definitions above are: what is the exact relationship between political development and economic development? Must economic modernisation lead to political modernisation as some have argued (Rostow, 1971, Emerson, 1971)? The lessons of economic history in the West, the East, and most recently the breakthroughs in the Far East (e.g. South Korea, Singapore, and Taiwan) suggest that socioeconomic transformation in terms of rapid economic growth is a prerequisite for political participation or political development (Emerson, *ibid*).

Some political scientists, such as Huntington (1968), see political development as the ability of the political leadership to exert control and 'mobilise' the people in a given state. Economic development theorists have also premised authoritarian control as indispensable for the management of the path to economic growth (Riggs, 1970). The apparent ease with which some socialist or communist and the newly industrializing countries in Asia and Middle East carried out accelerated industrialization and development of their economies provides full proof and support to this position. The case of Singapore is a good example, Singapore, with a population of 4.5 million (July 2007 estimate), which became a British colony in 1867 is not poor and it is very developed, this is evidenced by her GDP per capita (US\$), which rose from 2,450 in 1975 to 31,400 in 2006 (Marke, 2007). It came to be generally accepted that some sort of authoritarian coercion is essential for economic growth and economic development in developing world (Goran, 2000; see also Rostow, 1971 and Ward, 1971). Again, there is a conviction shared by both some of the intelligentsia in the Third World and their foreign advisers and aid providers that economic development requires political stability which only authoritarian governments could guarantee (Goran, 2000).

However, political scientists and sociologists who have contributed to this debate such as Dankwart Rustow, Gabriel Almond and Sidney Verba, and Seymour Martin Lipset differ in their positions. For example Rustow (1970) argues that democracy can only flourish when a country attains a certain level of economic development. On the other hand, Almond and Verba (1963), provide the cultural factors essential for democracy. They contend that only 'civic culture', typified by a high predisposition by citizens to participate or involve in politics and high level of confidence and tolerance, is favourable to the emergence and growth of democracy.

Yet, a slight deviation in the debate about the relationship between economic and political development is epitomized by the international donor community pioneered by the World Bank and the IMF. This school posits that economic development can best be achieved in a liberal political setting. If sustainable development is to occur, a predictable and transparent framework of rules and institutions for the conduct of private and public business must exist. In other words, political development is a *sine qua non* for economic development (Wayande 2000: 241). The current thinking of the donor community is that economic development (in the form of market oriented reforms) and political development (in the form of political reforms with the emphasis on transparency, accountability, governmental responsiveness to popular will, rule of law and press freedom) should go hand in hand (*ibid*).

All of these views are open to question. First, on the issue of authoritarian control, trends of events in Africa suggest that in countries where authoritarian control has been adopted, economic development has not followed; for example in Kenya under Arap Moi (1978), in Nigeria under Babangida (1985) and in Uganda under Museveni (1986). In Moi's Kenya for example, President Moi demonstrated a shift back to a pre-reform period by restricting political freedom, imposing arbitrary resolutions with far reaching political implications and denouncing constitutional reforms to reflect the multiparty system politics that began in Kenya in early 1992, thus continuing to challenge calls for changes that agree with democratic ideals and in line with elements of political development (Wayande, 2000). Then, what happened? This authoritarian control had bad economic consequence on Kenya, since GDP continued to decline from 2.1% in 1991 to 0.5% in 1992 and 0.2% in 1993 (Okafor, 2004: 67, Ikejiaku, 2009). An Aid embargo was also imposed on Kenya for lack of governance in the early 90s (*ibid*). Even in countries like Ghana, President J. Rawlings (1982) (who arguably performed well during his administration) could not continue with authoritarian control. Clapham (1996: 248), for example argues that Rawlings in Ghana and Museveni in Uganda who tried to regulate economic activities, turned out to become two of the leading African exponents of economic liberalisation. The major problems with authoritarian control are that it creates opportunities for radical social change and political and bureaucratic corruption (Olowu 1990), particularly under 'malevolent' leaders. It works against the tenets of good governance and democratic principles. On this contentious issue, Olowu and Wunsh (1990: 310) argue:

'A belief that authoritarianism is essential to development helps explain trends toward centralisation and the personalisation of power and authority in Africa. Yet the consensus of many of those who have carried out careful

analyses of the African development effort is that the authoritarian models imposed in much of Africa, either of the military or civil variety, have hindered rather than fostered development'.

Again, on that presents problems for leaders in Africa such as Moi of Kenya, Babangida of Nigeria, Museveni of Uganda, P. Botha of South Africa, Mobutu of Zaire, Bokassa of Central African Republic, Mugabe R. of Zimbabwe to mention but a few. Even though such leaders cherish economic reforms, they are very uncomfortable with liberal political values such as transparency, accountability, political participation, free press, and responsiveness to popular will. Obviously, liberal political values (and therefore political development) threaten their use of office for personal gain (for corruption or personal gain/enrichment of African leaders while in political office, see Ikejiaku, 2009). Thus, Hyden (2000: 246) argues:

'The current African malaise can be best understood by a critical examination of governance in Africa. By 'governance' we mean here the use of political authority to promote and enhance societal values – economic as well as non-economic – that are sought by individuals and groups'.

#### **4. Other Conceptualisation or Interpretations of 'Development'**

Writers have attached several additional ingredients in the conceptualisation of development. Offiong (1980: 21) also defined development 'as a type of social change in which new ideas are introduced into a social system in order to produce higher per capita incomes and levels'. In some interpretations, the increase in general social welfare goes beyond economic aspects of welfare, to embrace for instance, spiritual and cultural attainments; individual dignity and group esteem. Again, in respect of 'individual dignity', Drez and Sen (1995: 10) submit that 'one way of seeing development is in terms of the expression of the real freedoms that the citizens enjoy to pursue this objective they have reason to value, and in this sense the expansion of human capability can be, broadly, seen as the central feature of the process of development'. The problem here is that most countries of Sub-Saharan Africa still lack the developed governance institution to provide the necessary social and political freedoms to the people. There is unavoidable connectivity between unbridled (unrestrained or participatory) democracy, poverty and development. Development cannot thrive for all citizens unless citizens enjoy certain basic rights (Azinge, in Okafor, 2004), such as rights to food, minimum wage-income, health, education and political participation.

Ake notes that development also involves equality, in the sense that the countries with seemingly 'inferior culture' try to catch up with the more developed countries in terms of technological growth and individual socio-political enhancement. And the capacity of such nations to develop or adopt a culture of development aimed at harnessing its technological endowments for the ultimate good of its citizens (Ake: 1982). However, trends of events in Sub-Saharan Africa have convinced us that the doctrine of 'catch up' as it applies to developing countries of Sub-Saharan Africa, closing the gap with the technological advanced nations has been futile all 'these decades'. Just as Sanbrook (1982) submits the industrial base of the wealthy nations is so great, their technological capacity so advanced, and their consequent advantages so immense that it is unrealistic to expect that the gap between the rich and the poor nations will narrow at the end of the century. Every indication is that it will continue to grow.

Yet other conditions that have been induced in the interpretation of the concept of development, particularly by Marxist scholars (such as Baran, 1957; Frank 1971; Sweezy 1978) are increasing national self-reliance and self-determination predicated on the notion that development is something a country does itself and that it involves a reduction in dependency (Ward, 1962). It is from the above perspective that Offiong (1980:21) defines development as 'the coincidence of structural change and liberation of men from exploitation and oppression perpetuated by the international capitalist bourgeoisie and their internal collaborators'. Therefore, it follows that real development involves 'a structural transformation not only of the economy, but also of the society, polity and self-perpetuating use and development of the people's potentials' (ibid: 21). Similarly, the said structural transformation of the economy and global system is still begging.

Therefore, the definition of the development is a phenomenon undergoing improvement processes. In other words, development now emphasises people and attainment of political goals, as distinct from just growth in the volume of goods/commodities. Thus, pointing out the separation between political and economic development. However, scholars such as Baran (1957) and Frank (1971) have in varying degrees approached political development as the political prerequisite of economic development.

#### **5. Summaries and Conclusion**

In summation therefore, generally, all the definitions as presented above point towards achieving either one or more of the three different goals of development, that Todaro (1981) identifies:

- producing more 'life sustaining' necessities such as food, shelter, and health care and broadening their distribution
- raising standards of living and individual self esteem
- expanding economic and social choice and reducing fear.

Based on the above considerations, this paper sees development as ***an increase in economic growth; properly harnessed by leaders toward both economic and political enhancement of the citizens***. This definition is germane to Africa's present level of development, because Africa not only needs economic growth, but also a reliable political sector that will harness its growth for both political and economic benefits of the populace. This is why having political aspect or consideration of political development is important. Thus, a political system must be capable to mobilise the citizens, allow for a competing political parties, regular and free election, free press and association, an acknowledgement that politics is rightfully a mechanism for solving problems and not an end in itself and finally an acceptance of some form of mass participation (Lucian, 1966).

This agrees with Seers (1969), who argues that development is about positive outcomes. That is, development is not just high economic growth, but in addition what the governments or leaders are doing with the said growth in order to positively transform the lives of the people (essentially the provision of basic needs, such as food, water, shelter, health and literacy). This is crucial to many countries of Sub-Saharan Africa.

## References

- Abu – Ghaida and Klassen. (2004). the Cost of Missing the Millennium Development Goal in Gender Equity. *IZA discussion paper*, No. 1031, February.
- Adebo, O. (1991). 'Leadership and the Concept of Development' in Olusegun Obasanjo and Akin
- Ake, C. (1982). *Social Sciences as Imperialism: The Theory of Political Development*. Ibadan University Press: Ibadan.
- Almond, G. and Verba, S. (1963). *The civic culture; political attitudes and democracy in five nations*. Princeton University Press: Princeton.
- Burchill, S. and Linklater, A. (1996). *Theories of International Relations*. Macmillan Press (London).
- Commission for Africa (2005). *The Report of the Commission for Africa*. CA.
- Dreze J. and Sen, A. (1995). *India Economic Development and Social Opportunity*. Delhi Oxford University Press: Bombay Calcutta Madras.
- Eckersley, R. (1992). *Environmentalism and Political Theory: Towards an ecocentric approach*. London.
- Huntington, S. (1968). *Political Order in Changing Societies*. Yale University Press: New Haven.
- Ikejiaku, B. (2008). Africa Debt Crisis and IMF, with a case of Nigeria: Towards Theoretical Explanations. *Journal of Politics and Law*, Vol.1, No.4, Dec. 2008 pp2-8.
- Ikejiaku, B. (2009). The Relationship between Poverty, Conflict and Development. *Journal of Sustainable Development*, Vol. 2, No. 1, March 2009.
- Ilchman, W. and Bhagarva R. (1970), 'Balanced Thought and Economic Growth', In Riggs, F. and Durham, N. (1970). *Frontiers of Development Administration*. eds., Duke University Press: Duke pp.247-273.
- Mabogunje (1991). eds., *Elements of Development*. A.L.F.Publications: Abeokuta Nigeria, pp. 17-28.
- Marke, D. (2007). *'Will Africa Ever Be Able To Replicate Successful Economies?'* Standard Times Press: West Virginia.
- Milbrath, L. and Goel, M. (1977). *Political Participation*. Rand McNally: Chicago.
- Ndegwa, P. (1991). *Africa's Development Crises and Related International Issues*. Heinemann: Nairobi.
- Newland, K. (1988). 'From Transnational Relationships to International Relations: Women in Development and the International Decade for Women'. *Millennium*, 17, 3: p.507.
- Nnoli, O. (1981). (ed.) *'Path to Nigeria Development'*. Zed Press California: USA.
- Offiong D. (1980). *Imperialism and Dependency, Obstacles to African Development*. Fourth Dimension Publishers: Enugu.
- Oji, O. (1997). *Introduction to Political Science*. Marydan Publishers: Enugu, Nigeria.
- Okafor, C. (2004). *Neo-Democracy and Poverty Management in Africa*. Mercury Bright Press: Awka, Nigeria.
- Olowu, D. (1990). Centralisation, Self-Governance, and Development in Nigeria, in Wunsch, J. and Olowu, D. (1990). eds. *The Failure of the Centralised State; Institution and Self Governance in Africa*. Westview Press Boulder: San Francisco USA, pp. 193-244.
- Regional Survey of the World, Africa and Sub-Sahara (2002). Europa Publishers: Britain.
- Rostow, W. (1960). *The Stages of Economic Growth*. Cambridge University Press: Cambridge.
- Rustow, D. (1970). *Transitions to democracy: toward a dynamic model*. Lynne Rienner Publisher: Boulder.
- Sachs, W. (1993). *Global Ecology A New Arena of Political Conflict*. London.

Salih, M. (2003). *Governance, Information and the Public Sphere*. United Nations, Economic and Social Council, Economic Commission for Africa: Addis Ababa, Ethiopia.

Schaefer, B. (2005). *How the Scope of Government shapes the Wealth of Nation*. 'Heritage Lectures No 925 Delivered December 1, 2005: Heritage Foundation, March 7, 2006.

Soremekun, K. (2000). The International Dimensions of Governance, In Hyden, G. Okoth-Ogendo, H. and Olowu, B. (Eds.) (2000). *African Perspectives on Governance*. Africa World Press: Trento NJ pp.267-293.

Todaro, M. (1981). *Economic Development in the Third World*. 2<sup>nd</sup> edition: New York; also available at [http://encyclopedia.calendarhome.com/cgi-bin/encyclopedia.pl?p=Economic\\_develop...](http://encyclopedia.calendarhome.com/cgi-bin/encyclopedia.pl?p=Economic_develop...) (05/05/2007).

Women's Consortium of Nigeria. (2004). *Nigeria NGO Report of the Decade of Review of the Implementation of Beijing Platform for Action* (Beijing + 10). Final Version, prepared by (WOCON) August 2004: Lagos Nigeria.

World Bank. (2000). *Can Africa claim the 21<sup>st</sup> century*. World Bank: Washington D.C

World Bank. (2005). *World development indicators*. World Bank: Washington D.C.





## New Challenges to the Traditional Principles of the Law of War Presented by Information Operations in Outer Space

Jia Huang

Graduates' Team

School of Humanities and Social Sciences

National University of Defense Technology

47 Yan Wa Chi Street, Changsha 410073, China

E-mail: huangjia1231@gmail.com

### Abstract

With the rapid development of space information technology and constant advancement of militarization of outer space, the legal aspects of information operations in outer space have aroused the attention of international community. Information operations in outer space have brand-new features and means, which are apparently different from those of traditional operations, thus challenging almost all major aspects of the traditional principles of the warfare law. This paper makes a pilot study on challenges to the traditional principles of the law of war against the background of information operations in outer space from the following three aspects of the regulations in the law of war: Jus ad Bellum, Jus in Bello and neutrality.

**Keywords:** Information operations in outer space, The law of war

### 1. Introduction

The law of war is a branch of international law. It is a combination of promissory principles, regulations and systems that adjust the relationship between each side of belligerents and between belligerents and nonbelligerents, regulate the conduct of operations during the process of war and armed conflict. The current principles and regulations of the law of war are mainly embodied in the system of "Hague Law", "Geneva Law" and the U.N. Charter. The Hague Conventions and Geneva Conventions established the basic principles of the law of war such as military necessity, discrimination, proportionality, avoiding superfluous injury and unnecessary suffering, prohibition against indiscriminate weapons, prohibition against perfidy, and protecting the rights and interests of neutral powers and persons. And the U.N. Charter creates a broad prohibition against the use of force within the international community.

As a domain of war, information operations in outer space must be subject to the related regulations in the law of war. However, the information operations in outer space have brand-new features and means, which are apparently different from those of traditional operations, and thus challenged almost all major aspects of traditional principles of the warfare law.

### 2. Jus ad Bellum: Does information attack on space assets constitute a "use of force"?

The Jus ad Bellum provides necessary conditions that justify a nation's resorting to arms. In modern society, the Jus ad Bellum is mainly embodied in the U.N. Charter. The principal tenet of the United Nations is to maintain the global peace and security. Following the Pact of Paris of 1928, the U.N. Charter creates a broad prohibition against the use of force within the international community which is embodied in Article 2(4): "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". However, the U.N. Charter doesn't prohibit all kinds of wars. Article 51 states: "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security", so the legitimacy of self-defense wars is approved by the U.N. Charter. The Charter also approves of the operations authorized by the U.N. Security Council for the purposes of maintaining or restoring international peace and security, which is embodied in Article 39, 41 and 42 of the Charter. Except for the articles in the U.N. Charter, the international society also approves of the legitimacy of wars

for the national independence and liberation. Besides these 3 conditions mentioned above, the threat or use of force in international relations is illegal.

The U.N. Charter has created a broad and strict restriction against the “use of force”. It can be affirmed that the rules on the use of force during peace times set out by the U.N. Charter apply fully to activities in outer space. Thus nations are obliged not to use force in their relations with each other unless they are acting in self-defense or when authorized to do so by the U.N. Security Council. However, the current international laws haven’t given any definite definition of the term “use of force” and the information operations in outer space have brand-new features which are apparently different from those of traditional armed conflicts characterized by the mass of troops and armaments and the invasion of territory. So, we have to consider what actions by or against objects in space will be considered to be uses of force. The international community would probably not hesitate to regard as a use of force the destruction of a satellite by a missile or a laser. It would probably react similarly if it could be proven that one nation took over control of another nation’s satellite by electronic means and caused it to fire its retro rockets and fall out of orbit. In such a case, the consequences will probably matter more than the mechanism used. The reaction of the international community to lesser kinds of interference is hard to predict. For example, if one nation were able by electronic means to suspend the operations of another nation’s satellite for a brief period, after which it returned to service undamaged, it is likely that the international community would consider such an action as a breach of the launching nation’s sovereign rights, but not as a use of armed force. (Office of General Counsel, 1999, p.27) However, the difficulty in characterizing certain forms of information operations against space assets as “force,” “war,” or “aggression” under international law does not mean that international legal institutions cannot respond to such attacks. Chapter VII of the U.N. Charter gives the U.N. Security Council the authority and responsibility to determine the existence of any “threat to the peace” or acts of aggression and the Council can recommend and lead an appropriate response. An information attack on space assets that may not constitute “force” or “aggression” may be considered a threat to the peace and thus subject to Security Council action, including the use of military force. Because Security Council actions are subject to international political negotiation, any response would not likely be quick or a significant deterrent to an aggressor. (Ellis, 2001, p.8)

When a state can tie an attack on its space asset directly to a foreign government, the offended state may retaliate to terminate the ongoing attack. The retaliation may be justified as part of its right to self-defense under Article 51 of the U.N. Charter. (Ellis, 2001, p.11) However, if an aggressor uses information techniques to conduct the operation and inflicts little or no physical destruction, whether this kind of attack can be regarded as “armed attack” is disputable. If an information attack cannot be characterized as an “armed attack,” then a conventional response may not be warranted. A conventional response, in this case, may in fact be considered the “armed attack” under Article 51. A response alike would not constitute an “armed attack”, but there are still at least 3 obstacles for the retaliation side as follows. Firstly, it is difficult to identify the attacker. Information attack in outer space has the characteristics of long-range and anonymity and the attacker can conduct information attack against space assets in or through foreign countries. Information can flow across international borders while a nation’s military, judicial and security agencies can not carry out investigations in a foreign country at will and this kind of investigation may be considered as spy so it can’t gain cooperation from related countries. Secondly, it is difficult to produce evidence. Space assets are in an abominable environment characterized by intensive radiation, extreme temperature and micro-gravity. Occasionally, they may be stricken by small meteors or space debris which runs at high speed. So they may be damaged by the natural cause. A space asset usually consists of many complex systems and there are frequent malfunctions and program errors. Because of these factors, the offended state can’t produce sufficient evidence that it has suffered from intentional attack. Finally, even though the attacker can be identified and proven to be supported by a foreign government, this foreign country may lack the space information infrastructure that would make it vulnerable to a response alike. To conduct information attacks against space assets doesn’t need complex technology and even cult organizations such as “Falun gong” can grasp them. Apparently, North Korea and Iran have the ability to conduct information attack against American satellite while America can’t find an appropriate asset of these countries to retaliate in like manner.

### **3. Jus in Bello: How will the principles of discrimination and proportionality be carried out with regard to the dual-use nature of space assets?**

Jus in Bello refers to the laws regulating the conduct of states once armed conflict between them has begun and they can be divided into 2 main branches. The first branch refers to regulations governing the means and methods of warfare. As these regulations were mainly set down during the 2 peace conferences at Hague, they are called “Hague Law”. The other refers to the regulations governing the protection of war victims, civilian people and properties. As these regulations are mainly set down during all previous Geneva meetings, they are called “Geneva Law”. The *Protocols of 1977 to the 1949 Geneva Conventions* have combined the “Hague Law” and the “Geneva Law” as a whole, which is now entitled “humanitarian law” or “law of armed conflict”. The essential of humanitarian law is to balance the principle of military necessity and the principle of avoiding unnecessary suffering and it deals with the problem of justice in the conducting of operation.

Information operations in outer space have presented significant challenges to the traditional principles of international laws concerning the conducting of operations, especially the principle of discrimination. *The 1899 Laws and Customs of War on Land* (Hague Convention II) and *the 1949 Relative to the Protection of Civilian Persons in Time of War* (Geneva Convention IV) as well as the *1977 Protocol I to the 1949 Geneva Conventions* have established the most fundamental principle of the humanitarian law: the principle of discrimination. According to this principle, the lawful use of force should make distinction between servicemen and civilians, combatants and war victims, military targets and civilian assets. The most basic rule of this principle is that civilians and civilian objects must not be made the object of direct attack. Therefore, space objects that are used solely for civilian purposes must not be attacked. However, Article 51(3) of the 1977 Protocol I provides that a civilian non-combatant who takes a direct part in hostilities loses his status as a protected civilian. He then becomes a legitimate object of attack. Therefore, once a civilian space object is used in a military capacity, it automatically loses its right to preclusion from attack.

In the area of information operations in outer space, one of the greatest conundrums of international law relates to the issue of dual-use technology. As the space assets are very expensive and many military and civilian space assets have the same functions, for example, the remote sensing, communication, meteorological, navigation and position satellites can be used for both military and civilian purposes, states and entities recognize that it is more economically viable to develop satellites for dual use rather than to confine them to a single purpose. The dual-use nature of space technology makes it difficult to choose a legitimate target. A functionalist approach is required here. A civilian space asset must not cross the line and become involved in military activities. If it takes part in the conduct of hostilities, despite its original civilian status it then becomes a legitimate object for the use of military force. (Goh, 2004, p.271)

The advancement of modern science and technology provides technical possibility for precision striking and may raise expectations and later legal standards for discrimination. Just as in the battlefield of land, sea and sky, precision striking means should be and can be used in the information operations in outer space. Because of the dual-use nature of space assets, the characteristics of these precision striking means are different from those of traditional precision guided munitions. Not all parts of dual-use satellites are involved in the armed conflicts and the attackers can target only those circuits or programs that are lawful targets, for example, the transmitters or bands in a communication satellite used by the military. The attackers can also develop a kind of special computer virus that only targets at those program codes used for supporting combat. Dual-use satellites such as navigation and position, remote sensing satellites provide different services with different level of precision to military and civilian users, so an attacker can make a subtle attack that may degrade the accuracy below the level useful for military demands, but maintain a level necessary for civilian necessities.

Closely connected with the principle of discrimination, the principle of proportionality means that in the course of a legitimate attack, the collateral injury and damage to noncombatants and civilian property must be proportionate to the purpose of the attack. Article 57 of *the 1977 Protocol I to the 1949 Geneva Conventions* states that those who plan or decide upon an attack shall: "...Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated", "an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated". The principle of proportionality used to be a custom law of war and the Protocol I developed it into a treaty law thus enhanced this basic principle of the law of war.

Information operations in outer space also challenge the principle of proportionality. It is difficult to correctly assess the collateral effects brought about by the attacking on the dual-use space assets on the civilian life and property as well as their daily life. For example, attacking on dual-use communication satellites may only bring inconveniences to civilian life while it also may severely endanger the flying airliner. It is very hard for the commander who decides upon an attack to accurately and roundly discover related information and it is even harder for him to correctly assess the long-term and collateral effects. Besides these, just as it is difficult to determine whether an information attack on space assets is an "armed attack," it is equally difficult to determine what would be a proportionate response to the attack, especially when the attack inflicts little or no physical destruction.

#### **4. Neutrality: How will established legal principles related to national sovereignty be affected by information operations in outer space?**

In the law of war, the term neutrality mainly refers to wartime neutrality, which is the legal status that a nation chooses not to participate in war and not to assist either side. International laws concerning neutrality are the principles, regulations and systems that adjust the relationship and prescribe the rights and obligations between belligerents and nonbelligerents. They are mainly embodied in *1907 Rights and Duties of Neutral Powers and Persons in Case of War on Land* (Hague Convention V), *1949 Relative to the Protection of Civilian Persons in Time of War* (Geneva Convention

IV) and its 1977 *Protocol I*, etc. Under the framework of current U.N. collective security regime, the principle of neutrality is still in effect but it must submit to relative articles in the U.N. Charter.

According to the law of war, nations not engaged in a conflict may declare themselves to be neutral. A neutral nation is entitled to immunity from attack by the belligerents, so long as the neutral nation satisfies its obligation not to assist either side. If a neutral nation is unable or unwilling to suspend the use of its territory by one of the belligerents in a manner that gives it a military advantage, the other belligerent may have a right to attack its enemy in the neutral's territory. There is considerable support for the argument that the concept of neutrality has no application during a conflict in which one of the belligerents is a nation or coalition of nations authorized by the U.N. Security Council to use armed force to protect or restore international peace and security. Rights and duties of neutral powers and persons in case of war also apply to the information operations in outer space. If a neutral nation permits its information systems to be used by the military forces of one of the belligerents, the other belligerent generally has a right to demand that it stop doing so. If the neutral refuses, or if for some reason it is unable to prevent such use by a belligerent, the other belligerent may have a limited right of self defense to prevent such use by its enemy. It is quite foreseeable, for example, that a belligerent might demand that a neutral nation not provide satellite imagery of the belligerent's forces to its enemy, or that the neutral cease providing real-time weather information or precision navigation services. (Office of General Counsel, 1999, p.10)

However, it seems that there is a limited exception to this principle for communications relay systems. The primary international agreement concerning neutrality, the 1907 *Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, states in Articles 8 and 9 that "A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraph apparatus belonging to it or to companies or private individuals," so long as such facilities are provided impartially for both belligerents. The plain language of this agreement would appear to apply to communication satellites as well as to ground-based facilities. (Office of General Counsel, 1999, p.10) There is nothing in this agreement, however, that would suggest that it applies to systems that generate information, rather than merely relay communications. These would include the satellite imagery, weather, and navigation systems mentioned above, as well as other kinds of intelligence-producing systems such as signals intelligence and hydrophonic systems. For example, if a belligerent nation demanded that the U.S. government deny GPS navigation services to its enemy, and if the U.S. were unable or unwilling to comply, the belligerent may have the right to take necessary and proportional acts in self-defense, such as jamming the GPS signal in the combat area. (Office of General Counsel, 1999, p.10)

Above analyses mainly aim at the government of a neutral nation while the neutral does not have to forbid the supply of war materiel by resident individuals or companies, nor is it required to stop the passage of such goods across its territory. Subject to any national regulations, neutral nationals may continue trading with either or both belligerents. With respect to information operations in outer space, this means that a neutral is under no obligation to ensure that its nationals or companies do not provide materiel from their space assets to one or both belligerent parties. This means that individuals or companies in neutral states may, for example, sell high-resolution remote sensing imagery to either or both belligerent states. (Goh, 2004, p.271)

International consortia present special problems. Information systems built around space-based components require such huge investments and access to such advanced technology that even developed nations prefer to share the costs with other nations. Where an international communications system is developed by a military alliance such as NATO, few neutrality issues are likely to arise. Other international consortia, however, provide satellite communications and weather data that are used for both civilian and military purposes, and they have a breath of membership that virtually guarantees that not all members of the consortium will be allies in future conflicts. (Office of General Counsel, 1999, p.11) There exists the possibility that one or some of the co-owner of these space assets may illegally make use of these assets for their own interests during armed conflicts, thus making the assets involved in an armed conflict and become lawful targets of armed attack. Some international consortia have attempted to solve this problem by limiting the use that may be made of the system during armed conflict. The INMARSAT agreement, for example, states that the mobile communications service provided by the system may be used "exclusively for peaceful purposes." This provision provides less than a perfect solution; however, since the member nations and the INMARSAT staff have concluded that this language permits use of INMARSAT by U.N. peacekeeping or peacemaking forces acting under the auspices of the U.N. Security Council, even if they are engaged in armed conflict to accomplish their missions. (Office of General Counsel, 1999, p.11)

## 5. Conclusion

Information operations in outer space have significantly challenged the traditional principles of the law of war. These challenges are essentially determined by the characteristics of law and technology. Law is inherently conservative while technology is constantly advancing, and the speed of technological advancement far surpasses that of the legal system. More than 50 years has passed since the first manmade satellite went into the space and the classical space warfare is

still not in existence up to now. But the existing and foreseeable techniques of information operations in outer space have already challenged almost all fundamental principles of the warfare law. It is unlikely that the international legal community will soon meet these challenges and generate a comprehensive, coherent body of international law concerning the information operations in outer space. Even if the international legal community eventually deals with the issue and is able to develop a coherent set of guidelines, it is imperative that we realize law itself will not guarantee our interests and security in outer space. Struggle in outer space, especially military struggle in outer space, can only be the competition of strength. The international law concerning the information operations in outer space can critically aid our diplomatic and military struggles.

### References

Ellis, Bryan W. (2001). The international legal implications and limitations of information warfare: what are our options?. [Online] Available: [http://www.iwar.org.uk/law/resources/iwlaw/Ellis\\_B\\_W\\_01.pdf](http://www.iwar.org.uk/law/resources/iwlaw/Ellis_B_W_01.pdf) (January 8, 2009).

Goh, Gerardine Meishan. (2004). Keeping the peace in outer space: a legal framework for the prohibition of the use of force. *Space Policy*, v.20, i.4, 259-278.

Office of General Counsel, U.S. Department of Defense. (1999). An assessment of international legal issues in information operations. [Online] Available: <http://www.iwar.org.uk/law/resources/DOD-IO-legal.doc> (January 8, 2009).



## Historical and Current Legislations of Taman Negara National Park Peninsular Malaysia

Pakhriazad., H.Z., Mohd. Hasmadi, I. & Aida, H.M.K

Faculty of Forestry

Universiti Putra Malaysia

Serdang 43400, Selangor, Malaysia

Tel: 60-3-8946-7225 E-mail: asato40@hotmail.com

Kamaruzaman Jusoff (Corresponding author)

Yale University

School of Forestry & Environmental Studies

205 Prospect St, New Haven, CT 06511-2104, USA

Tel: 203-676-7761 E-mail: jusoff.kamaruzaman@yale.edu

*This research is funded by Universiti Putra Malaysia (sponsoring information)*

### Abstract

The study was conducted to discuss the historical and current legislation pertaining to the establishment and administration of the Taman Negara National Park, Peninsular Malaysia. Established in 1938 and 1939 as King George V National Park, the park was named Taman Negara National Park after independent in 1957. Estimated to be 130 million years old and with an area of 4,343 sq kilometers, the highest mountain in the peninsular, Gunung Tahan (2,187 meter) is allocated in the area. Taman Negara National Park is a combination of three protected areas in three states, Taman Negara Pahang National Park, Taman Negara Kelantan National Park and Taman Negara Terengganu National Park. Currently all the three states has its own legislation, namely Taman Negara Enactment (Pahang) No.2, 1939 [En.2 of 1938], Taman Negara Enactment (Kelantan) No.14, 1938 [En.14 of 1938] and Taman Negara Enactment (Terengganu) No.6, 1939 [En.6 of 1358]. In Malaysia, some laws are federal legislation. Others are state enactments. Not all legislation enacted will apply to the whole Peninsular, the state of Sabah and Sarawak. To provide for the establishment and control of National Parks and for matters connected herewith, the Federal National Parks Act (Act 226) was introduced in 1980. This federal act shall not apply to the three states. Since this is the constitutional position, constraints especially on uniformity of laws either to promote or enforced, particularly in respect matters stated and List 1 Federal List (Ninth Schedule of Article 74, 77 Legislative Lists), List II – State List (Article 95B (1) (a) and List III – Concurrent List (Article 95B (1) (b) often exists. Thus, there are some matters which the National Parks fall under the legislative authority of both the Federal and State Governments. However, forestry and land fall under the jurisdiction and legislative authority of the state in accordance with the Concurrent List of the Ninth Schedule. The areas of jurisdiction of Federal and State Governments as defined in the Constitution lead to non-uniform implementation of rules and regulations between states. The objective of this paper is to review the laws and legislation pertaining to the management of the National Park in Peninsular Malaysia. Specifically the constraints arises between the federal and states jurisdiction toward the management of land and conservation of the protected area.

**Keywords:** Taman Negara National Park, Protected areas, Historical, Legislations, Gazettement

### 1. Introduction

The Federation of Malaysia is divided in two geographical areas, Peninsular Malaysia (PM) in the west and the State of Sabah and Sarawak in the east<sup>(1)</sup>. The states of Federation shall be Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor and Terengganu (Section 2, Federal Constitution). In PM,

protected areas include national and state parks, protection forest of the Permanent Reserves Forest (PRF), wildlife reserves and sanctuaries<sup>(2)</sup>. The history of managing conservation areas in the PM started in 1894 when the first law namely the Straits Settlement Ordinance No.3 of 1894 was passed (Elagupillay 1993). The first protected area, the Chior Games Reserve was created in 1903 with the passing of the Wild Animal and Birds (Perak) Enactment in 1902. While the protection of forest remains under the state lists, the protection of wildlife and national parks fall under the federal lists.

The other Federated Malay States passed a series of their own legislation. The most significant being the passing of three similar enactments namely the Taman Negara enactments of Kelantan, Terengganu and Pahang between 1938 and 1939 which led to the creation of the tri-state Taman Negara National Parks (TNNP). Theodore Hubback of the British Colonial office researched the potential of establishing a national park for extensive protection of the biological resources for scientific, recreational, and educational interests (Steven, 1968). In 1938, His Highness the Sultan of Pahang, Kelantan and Terengganu have declared their desire jointly to commemorate the silver jubilee of the accession to the Throne of the Majesty King George V of Britain by the dedication of certain land situate in each of the said States which shall constitute together as National Park [Gazette (*Kelantan Section*) Notification No. 2, 3<sup>rd</sup> January, 1952]. During the period, the gazettment of the land is in perpetuity for the propagation, protection and preservation of the indigenous flora and fauna of Malaya. The preservation of objects and places of aesthetic, historical or scientific interest shall herewith relevant to any contiguous lands dedicated, set aside or reserved for similar purposes within the tri-states of Kelantan, Terengganu and Pahang to constitutes the TNNP. The King George V National Park Taman Negara Enactment (Pahang) No.2, 1939 [En.2 of 1938], Taman Negara Enactment (Kelantan) No.14, 1938 [En.14 of 1938] and Taman Negara Enactment (Terengganu) No.6, 1939 [En.6 of 1358] was gazetted as an Enactment to provide for the dedication of the lands in the respective states as part of the TNNP. The National Park has been gazetted as the State Park together to constitute the Taman Negara as agreed by His Highness the Sultans of the three States and His Excellency the High Commissioner as constituted by the Enactments of the respective states. The State Park shall vest from time to time jointly in such persons as shall be fulfilling the duties and exercising the powers of the Sultans of the respective state and of the Yang di Pertuan Agong (the Supreme Ruler of Malaysia) respectively who shall hold and administer the said lands as Trustees.

## 2. Methods and materials

### 2.1 Study area

The present study was conducted in the Taman Negara National Parks related areas in the State of Pahang (2, 477 sq. km or 57%), Kelantan (1, 043 sq. km or 24%) and Terengganu (853 sq. km or 19%), Peninsular Malaysia (PM) in February and Mei 2008 (Fig.1) The State of Pahang which is located in the East Coast state in PM is the largest state with 2,071,585 ha of forested area (Pakhriazad, 2004) and having the largest portion of the TNNP. The PM is located between latitudes 1°20' to 6°45' north of the Equator and longitudes 99°40' to 104°20' east, with the total land area of 132 million ha.

### 2.2 Data collection

Three methods were employed to collect the data, the review of the official documents, interviews and survey. The reviewed documents included the federal and state government official reports and gazettes on the policies, administration and legislation of TNNP and the conservation of state land. The interviews were carried out with the relevant state authority, Federal and State Forestry Department, other related agencies such as Wildlife Department, Natural Resources and Environment Department, state subsidiaries and representatives. The interview focused on investigating the state authority policies with regard to the administration on the areas. Field study and area observation was also conducted during two expeditions at TNNP in order to understand the actual situation of the relevant agencies responsibilities on managing the areas.

## 3. Results and discussion

### 3.1 Establishment of legislation in Pahang, Kelantan and Trengganu

As stated in the First Schedules to the Taman Negara (Pahang) Enactment 1939 [En.2 of 1938], The King George V National Park (Pahang) was gazetted (Pahang Section) as TNNP in 1939 which covers an area of 2,477 sq km or 57% of the total area. Majority of the land area is mountainous with peaks such as Gunung Teku, Gunung Tangga Dua Belas and Gunung Tahan. The Tahan River, which originates from Gunung Tahan is the main river that create the drainage system in Taman Negara Pahang National Park. The vegetation of Taman Negara Pahang National Park is made up of dipterocarp and montane forest and rich in fauna diversity like large mammals and endemic wildlife. The administrative centre at Kuala Tahan is the main entrance to the Taman Negara Pahang National Park. The second entrance is located at Sungai Relau, Merapoh with several enforcement posts at park boundary of Kuala Yu, Kuala Terenggan, Kuala Kenyam.

The description of boundaries of the part of Taman Negara National Park in Pahang includes all the area of land

amounting to 2, 477 sq km more or less in the Daerah of Lebir in the District of Ulu Terengganu bounded as follows; commencing from Gunung Rabong (5040) and proceeding in a direct line, bearing approximately  $109^{\circ}15'$ , to a point about one mile due south of Kampong Pakoh, thence in a direct line, bearing approximately  $77^{\circ}15'$ , to Kuala Manis on the true right bank of the River Ibu Lebir, above Kuala Ampul; thence by the true right bank of the River Manis for one mile from Kuala Manis, thence north-easterly to Kuala Alor, a tributary of the River Pertang, thence by the true right bank of the River Alor following the ancient Pagan track to near the source of the River Alor and to the Terengganu-Terengganu boundary; thence south easterly following the Pahang-Pahang boundary; and southerly and westerly following the Pahang-Terengganu boundary to Gunung Tahan ( $7186'$ ); thence north-westerly following the Terengganu-Pahang boundary to a joint where it meets the Daerah Lebir boundary (Ulu Sungai Ngeram); thence in a direct line to the point of commencement (Ahmad-Nordin,, 1951).

As for the state of Kelantan, in the exercise of the powers conferred by section 10 of the King George V National Park (Kelantan) Enactment 1938, His Excellency the High Commissioner and His Highnesses the Sultan of Kelantan, as Trustees under the said Enactment of the State Park, hereby cited the Rules of the King George V National Park (Kelantan) Enactment No. 14 of 1938 [*En.14 of 1938*] and King George V National Park (Kelantan) Rules 1951 for the purpose of the administration of the State Park. Whereas it is expedient to make provision for the dedication and administration accordingly of so much of the land as is situated in the State of Kelantan, it is hereby enacted by His Highness the Sultan in Council that the National Park can be defined as the State Park together with the other areas in Pahang and Terengganu as may be constituted by Enactments in those States together to constitute Taman Negara (Section 2, Enactment No. 14 of 1938). The State Park shall vest from time to time jointly in such persons as shall be fulfilling the duties and exercising the powers of the Sultan of Kelantan and of the Yang di Pertuan Agong (The Supreme Ruler of the Federation) respectively who shall hold and administer the said land as Trustees. His Highness the Sultan in Council on the application of the Trustees may by notification amend the schedule in respect of the boundaries of the State Park as therein set out and described provided that such amendment is in the opinion of the trustees necessary or desirable in order to secure greater ease of description or demarcation of the said boundaries or greater ease in the administration of the State Park and provided that such amendment does not result in any substantial decrease in the total area of the State Park (Section 4, Enactment No. 14 of 1938). Taman Negara Kelantan National Park covers an area of 1,043 sq. km or 24% of the total area of TNNP. Located on the southwest of Kelantan, Taman Negara Kelantan National Park forms the northern portion of TNNP. The terrain is made up of mountain and valley with several peaks such as Gunung Rabong and the Gunung Tahan Range. Taman Negara Kelantan National Park is drained by four major river systems; Sungai Relai on the west, Sungai Aring and Sungai Lebir in the middle and Sungai Badong on the east. The administrative centre for Taman Negara Kelantan National Park is located at Kuala Koh

The description of boundaries of the part of Taman Negara National Park which lies in Kelantan includes all the area of land amounting to 198, 300 acres more or less in the Daerah of Lebir in the District of Ulu Kelantan bounded and commencing from Gunung Rabong (5040) and proceeding in a direct line, bearing approximately  $109^{\circ}15'$ , to a point about one mile due south of Kampong Pakoh, thence in a direct line, bearing approximately  $77^{\circ}15'$ , to Kuala Manis on the true right bank of the River Ibu Lebir, above Kuala Ampul; thence by the true right bank of the River Manis for one mile from Kuala Manis, thence north-easterly to Kuala Alor, a tributary of the River Pertang, thence by the true right bank of the River Alor following the ancient Pagan track to near the source of the Kelantan-Terengganu boundary and southerly and westerly following the Pahang-Kelantan boundary to Gunung Tahan ( $7186'$ ); thence north-westerly following the Kelantan-Pahang boundary to a point where it meets the Daerah Lebir boundary (Ulu Sungai Ngeram); thence in a direct line to the point of commencement (Ahmad-Nordin, 1951). As provisions to the like effect exist in the law of the State of Pahang or of the State of Terengganu respectively if any person is known reasonably suspected to have done in any part of the TNNP lying within the State of Pahang or within the State of Terengganu respectively any act which if it had done in the State of Kelantan would have constituted an offence against the Enactment or against any rule made there under and such person is found within or immediately on his arrest has been done brought into the State of Kelantan such person may be dealt with in all respects as if such act had in fact been done within the State of Kelantan. In addition to the provisions to the like effect exist in the law of the State of Pahang or of the State of Terengganu respectively any person who has done within the State of Kelantan any act which constitutes any offence against this Enactment or against any Rule made there under and who is found within or immediately on his arrest has been taken into the State of Pahang or the State of Terengganu respectively may within the State be dealt with in all respects as if such persons had in fact been done within such state (Section 13, Enactment No. 14 of 1938).

Meanwhile for the case of Terengganu state, the King George V National Park (Terengganu) Enactment [*En.6 of 1958*] was gazetted (Terengganu Section) by Notification on No.2, 3<sup>rd</sup> January 1952. In exercise of the powers conferred by section 10 of the King George V National Park (Terengganu) Enactment 1938, His Excellency the High Commissioner and the Highness the Sultan of Terengganu as trustee under the said Enactment of the State Park, hereby make the rules and Enactment namely the King George V National Park (Terengganu) Rules 1951 and the King George V National Park (Terengganu) Enactment, 1938. Taman Negara Terengganu National Park with an area of 853 sq. km is the



smallest component of TNNP. The area consists of water bodies, limestone outcrops and mountainous are covered by natural forests. Some of the highest peaks in this part of the park include Gunung Gagau, Gunung Mandi Angin, Gunung Sembilu and Gunung Gemuk. This park is drained by Sungai Chinchin, Sungai Chendana, Sungai Mentong, Sungai Pertang and Sungai Terenggan. A portion of Tasik Kenyir lakes juts into the park. The main entrance to the park is located in Tanjong Mentong.

The description of boundaries of the part of TNNP which lies in Terengganu includes all the area of land amounting to 198, 300 acres more or less in the Daerah of Lebir in the District of Ulu Terengganu bounded as follows; commencing from Gunung Rabong (5040) and proceeding in a direct line, bearing approximately 109°15', to a point about one mile due south of Kampung Pakoh, thence in a direct line, bearing approximately 77°15', to Kuala Manis on the true right bank of the River Ibu Lebir, above Kuala Ampul; hence by the true right bank of the River Manis for one mile from Kuala Manis, thence north-easterly to Kuala Alor, a tributary of the River Pertang, thence by the true right bank of the River Alor following the ancient Pagan track to near the source of the River Alor and to the Terengganu-Terengganu boundary; thence south easterly following the Terengganu-Terengganu boundary; and southerly and westerly following the Terengganu-Pahang boundary to Gunung Tahan (7186'); thence north-westerly following the Terengganu-Pahang boundary to a joint where it meets the Daerah Lebir boundary (Ulu Sungai Ngeram); thence in a direct line to the point of commencement (Ahmad-Nordin, Z., 1951).

### *3.2 Federal-State and the Legislation of the Taman Negara National Parks*

Federal-State relationships with emphasis on natural resources management at TNNP and protected area has been described in many reports (Shafruddin, 1987). Nevertheless, the subject continue to generate much interest as the relationship is dynamic and continually evolving particularly in response to changing social, political, economic and environmental, is the emergence of new institutional arrangements especially at the level of the state in the establishment and management of TNNP in the PM. Issues on lack of coordination among the Federal and the State governments, conflicting targets and mandates on the managing of the areas are often exists (Cheryl, 2005). The integration and consolidation of the laws and administration structures are further tied up to the country's constitution and the federal and states relationship (Musa, N., 2000). In Malaysia, the Federal Constitution provides for a system of levels of government (federal and state) which are separate, yet interdependent. It specifies jurally relationship should be expressed and the boundaries of federal and state jurisdictions. It is however silent about the real political operations within which federalism operate (Shafruddin 1988). Some laws are federal legislation. The others are state enactments. Not all legislation enacted will apply to the whole Peninsular, the state of Sabah and Sarawak. Since this is the constitutional position, the question of how uniformity of laws may be promote or enforced, particularly in respect matters which fall under state jurisdiction need to be properly addressed. This is specified by the Federal Constitution, under the List 1 Federal List (Ninth Schedule of Article 74, 77 Legislative Lists), List II – State List (Article 95B (1) (a) and List III – Concurrent List (Article 95B (1) (b). Subject matter of federal and state laws stated that without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State Lists, the Second List set out in the Ninth Schedule or the Concurrent List (Article 74 (2), Federal Constitution). Thus, there are some matters, for example the National Parks fall under the legislative authority of both the Federal and State Governments in accordance with the Concurrent List of the Ninth Schedule. However, there are some matters which fall under the legislative authority of the state for example forest and agriculture. National Forestry Act 1984 (Amend. 1993) is a federal legislature for the purpose of promoting uniformity of laws of two or more states under Article 76 (1)(b) of Federal Constitution – however its applicable to the state upon its adoption and hence become a state law. The National Land Code 1965 is a federal legislature for ensuring uniformity of law and policy under Article 76(4) of the Federal Constitution.

The areas of jurisdiction of Federal and State Governments as defined in the constitution lead to a uniform implementation between states. The legal mechanism under the respective state and federal laws serves to complement each other and its legal framework envisages that the state and federal government integrating in achieving the common goal. To provide for the establishment and control of National Parks and for matters connected herewith, the Federal National Parks Act 1980 (Act 226)<sup>(3)</sup> and National Parks (Amendment) Act 1983 was later introduced by the federal government. However, the Act shall not apply to the states of Sabah and Sarawak in the East Malaysia and the State Parks of Kelantan, Pahang and Terengganu which together constitute the Taman Negara as described in the Schedule to the Taman Negara Enactment (Kelantan) No.14, 1938 [En.14 of 1938], Taman Negara Enactment (Pahang) No.2, 1939 [En.2 of 1938], and Taman Negara Enactment (Terengganu) No.6, 1939 [En.6 of 1358] (Section 1(2) National Parks Act 1980). Differ from the British occidental laws of the National Parks establishment, the current objective of the establishment of National Parks is for the preservation and protection of wild life, plant life and objects of geological, archaeological, historical and ethnological and other scientific and scenic interest and through their conservation and utilization to promote the education, health, aesthetic values and recreation of the people. The other legislation pertaining to this act is the Protection of Wildlife Act 1976 which is repealed to pro-Merdeka law which consolidated all State Enactments/Ordinances on protection of wild life and birds especially in a protected area such as Taman Negara

National Parks. The earliest of wildlife reserve established in the Peninsular Malaysia (PM) is the Chior Wildlife Reserve, Perak, which was gazetted in 1902. It is the first wildlife reserve in the country. The same area was gazetted as a forest reserve in 1914 and therefore overlapping status as wildlife reserve and forest reserve. The original area was 4,330 ha but was decreased gradually as some areas were degazetted to agriculture and other uses. The remaining area stands at 689 ha. Bukit Kutu Wildlife Reserve, Selangor was established in 1922. The area is located 24 km south of Kuala Kubu Bharu. The area is steep, reaching up to 1,053 meters at its highest level. Part of its 1,493 ha overlaps with forest reserve. The largest wildlife reserve in Peninsular Malaysia is allocated is Krau Wildlife Reserve, located at Gunong Benom in the district of Temerloh, Pahang. Established in 1923, the area is irrigated by Sungai Krau, Sungai Lompat and Sungai Teris. The altitude in the reserve ranges from 43 meters in Kuala Lompat to 2,107 meters at the peak of Gunung Benom. Sungkai Wildlife Reserve area of 2,468 ha which is located in the Southern part of Perak was established in 1928. The 4.5 ha Batu Gajah Wildlife Reserve, Perak was established in 1952 under Perak State Gazette Notification 766. Another area is the 1,335 ha of Pahang Tua Wildlife Reserve which was established in 1954 under Gazette No. 402 to protect doves. It is located between the Pekan-Kuantan which covers a few mangroves islands along Sungai Pahang Tua. The 4,330 ha of Sungai Dusun Wildlife Reserve, Selangor was established in 1964 under the Selangor State Government Gazette No. 359. The reserve is located approximately 120 km north of Kuala Lumpur. Generally, the reserve is made up of lowland dipterocarp and peat swamp forest with the highest elevation at 253 meters above sea level. Sungai Dusun and Sungai Tenggi form the boundary of the reserve in the north and south respectively. A canal on the west of the reserve connects Sungai Tenggi to Sungai Bernam. Bukit Fraser Wildlife Reserve, Pahang covers the ecotourism area that borders the Selangor-Pahang boundary. At an elevation of 1,219 meters, it adjoins another reserve in Selangor. This reserve overlaps the local authority area and parts of it overlaps with forest reserve.

In Malaysia, some laws are federal legislation. The others are state enactments. Not all legislation enacted will apply to the whole Peninsular, the state of Sabah and Sarawak. To provide for the establishment and control of National Parks and for matters connected herewith, the Federal National Parks Act (Act 226) was introduced in 1980. This federal act shall not apply to the three states. Since this is the constitutional position, constraints especially on uniformity of laws either to promote or enforce, particularly in respect matters stated and List I Federal List (Ninth Schedule of Article 74, 77 Legislative Lists), List II – State List (Article 95B (1) (a) and List III – Concurrent List (Article 95B (1) (b) often exists. Thus, there are some matters which the National Parks fall under the legislative authority of both the Federal and State Governments. However, forestry and land fall under the jurisdiction and legislative authority of the state in accordance with the Concurrent List of the Ninth Schedule. The areas of jurisdiction of Federal and State Governments as defined in the Constitution lead to non-uniform implementation of rules and regulations between states. The management of the National Parks faced several problems such as unclear border demarcation, absence of buffer zones and uncoordinated development at the adjacent areas (Law, 2000). The decisions related to gazetting, de-gazetting of protected areas, appear to be related primarily to economic factors, which are a powerful influence in land use policy, particularly at the state level. The policy statement of The National Policy on Biological Diversity is to conserve Malaysia's biological diversity and to ensure that its components are utilized in a sustainable manner for the continued progress and socio-economic development of the nation (NPCBD, 1994). The other multiple-values may include social (Gumai and Tan 1992, Lim et al. 1999), economic (Burkhill 1935, Awang 1995), ecological (Salleh and Manokaran 1994, Lim and Chin 1994) and spiritual (Hood 1994, Zakiah 1994).

#### 4. Conclusion

In this paper, the historical and current legislation pertaining to the establishment and administration of the Taman Negara National Park in Peninsular Malaysia were assessed. The King George V National Park was then established in 1938/1939. The park is made-up of a tri-state area within the states of Pahang, Trengganu, and Kelantan. It was established to commemorate King George V of England. In 1960, following the independence of Malaya, the name of the park was changed to Taman Negara National Park. The administration of Taman Negara National Park is within the jurisdiction of the Trustees who are the Sultans of the states of Pahang, Kelantan and Trengganu, and the Yang Pertuan Agong. Taman Negara National Park is a combination of three protected areas in three states, Taman Negara Pahang National Park, Taman Negara Kelantan National Park and Taman Negara Terengganu National Park. Currently all the three states have its own legislation, namely Taman Negara Enactment (Pahang) No.2, 1939 [En.2 of 1938], Taman Negara Enactment (Kelantan) No.14, 1938 [En.14 of 1938] and Taman Negara Enactment (Terengganu) No.6, 1939 [En.6 of 1938]. Not all legislation enacted will apply to the whole Peninsular, the state of Sabah and Sarawak. To provide for the establishment and control of National Parks and for matters connected herewith, the Federal National Parks Act (Act 226) was introduced in 1980. This federal act shall not apply to the three states. Since this is the constitutional position, constraints especially on uniformity of laws either to promote or enforce, particularly in respect matters stated and List I Federal List (Ninth Schedule of Article 74, 77 Legislative Lists), List II – State List (Article 95B (1) (a) and List III – Concurrent List (Article 95B (1) (b) often exists. Thus, there are some matters which the National Parks fall under the legislative authority of both the Federal and State Governments. However, forestry and land fall under the jurisdiction and legislative authority of the state in accordance with the Concurrent List of the Ninth

Schedule. The areas of jurisdiction of Federal and State Governments as defined in the Constitution lead to non-uniform implementation of rules and regulations between states.

**Footnotes**

<sup>(1)</sup> Since December 1989, "West Malaysia" shall be construed as reference to Peninsular Malaysia (Interpretation Acts, 1967).

<sup>(2)</sup> Federal protected areas in Peninsular Malaysia refer to national parks, wildlife reserves, wildlife sanctuaries, marine parks, and other protected forest reserves that were gazetted by federal legislation since the early 1900s. However, the establishment of federal protected areas was limited by states' right over land ownership. (DWNP et al. 1996).

<sup>(3)</sup> Date of Gazette on 28 February 1980 and Enacted as Act 226 on 29 February 1980.

<sup>(4)</sup> Date of Amendments of Act A571 on 28 November 1983 (Dlm.I.N. (S) 5/2 Jld. II dated 3 December, 1983).

**References**

Ahmad-Nordin, Z. (1951). In: Taman Negara National Park Enactment No.6 of 1939 Government of Terengganu. Clerk of Councils, Government of Terengganu.

Awang, N.G. (1995). Economic Valuation of Genetic Resources. Paper presented at the Workshop on Prospects and Problems of Biodiversity Prospecting, UKM, Malaysia.

Burkill, I. (1935). A Dictionary of Economic Products of the Malay Peninsula. Vol.192.

Chery, R.K. (2005). National Ecotourism Plan: Assessing Implementation of the Guidelines for Marine Parks. Centre for Coastal & Marine Environment, Maritime Institute of Malaysia, p.17.

DWNP, EPU, and DANCED. (1996). Capacity building and strengthening of protected areas system in Malaysia: A master plan. Department of Wildlife and National Parks, Kuala Lumpur, Peninsular Malaysia.

Federal Constitution. (1957)

Gumai, M. and S.S. Tan. (1992). Some Aspects of Social Forestry in Sarawak. Paper presented at the 11<sup>th</sup> Malaysian For. Conf., Kota Kinabalu, Sabah.

Hood, S. (1993). Rimba Sebagai Persekitaran. Paper presented at the Conference of Eco-tourism in Malaysia: Prospect and Potential Impact. Kuala Lumpur.

Law, H.D. (2000). In: The Workshop on the Management and Conservation of Protected Areas; Administrative and Legislative Issues, Kuala Lumpur. 4-5 July 2000.

Lim, M.T. and T.Y. Chin. (1994). A Practical Approach to Conservation of Genetic Diversity in Malaysia: Genetic Resource Area. Paper presented at the IUFRO Symposium on Measuring and Monitoring Biodiversity in Tropical and Temperate Forests, Chiang Mai, Thailand.

Musa, N. (2000). In: The Workshop on the Management and Conservation of Protected Areas; Administrative and Legislative Issues, Kuala Lumpur. 4-5 July 2000.

National Technical Committee on Biological Diversity (NTCBD) (1994). The National Policy on Biological Diversity. Draft, 20 August 1994.

Shafruddin, B.H., (1988). Malaysian centre-state relations by design and process. In. B.H. Shafruddin and Iftikhar A.M.Z Fadzli (eds.) Between Centre and State: Federalism in Perspective. Kuala Lumpur, Institute of Strategic and International Studies.

Salleh, M.N. and N. Manokaran. (1994). Monitoring of Forest Biodiversity: policy and research issues. Paper presented at the IUFRO Symposium on Measuring and Monitoring Biodiversity in Tropical and Temperate Forests, Chiang Mai, Thailand.



## Study on the County-level City in China

Hongxiang Wang & Zhijun Han

School of Economics and Management

Nanjing University of Science and Technology

Nanjing 210094, China

Tel: 86-25-8431-5400 E-mail: jtkjwhx@163.com

### Abstract

In this article, we studied the county-level city in China which was the special type in the city development of the world. Through the research about the concept and the origin of the county-level city, we found that the county-level city was different to the current “dot” city in the world, and it was a sort of town system on the “sphere” in the wider area. For China with 0.8 billion farmers, the county-level city for urban and rural certainly possesses special functions in the urbanization and the new countryside construction of China.

**Keywords:** County-level city, Urbanization, New countryside construction

US economist Joseph E Stiglitz who was the Nobel economic prize winner in 2001 said that, as the biggest developing country in the world, the urbanization of China and the high-tech development of US would be two important topics which would profoundly influence the human development in the 21st century (Xie, 2003). In the tendency of the industrialization and the urbanization, many agricultural counties in former days in China are turning into the modern cities, and the farmers in former days are changing to modern citizens. In this process, above three hundred county-level cities from counties are strong performers in Chinese about two thousand counties (cities), and they have a long lead on the developments of the economy and the society, and they are the fresh troops for the city development of China, and in 655 cities, there are 368 county-level cities. The development of the county-level city has been the special view in the historical picture that China turns into the modern urban society from the traditional rural society.

### 1. Definition of the county-level city

There is not the special concept of the county-level city in the urban geography and the urbanization research outside China. Only in the administration system of China, there are the municipality directly under the Central Government, the sub-provincial city, the prefecture-level city and the county-level city, and the “food coupon” sub-prefecture-level city. Through the analysis about many definitions of the city and the comparison researches about the foreign and domestic city classification, combining with the facts of China, we thought that the county-level city in China was the city from the county, and it was the town system integrating points and sphere which took the former county area as the city area, took the county town as the center, took the town and villages as the crunodes. This definition endows the county-level city with three layers meanings. First, the formation of the county-level city takes the administrative measures as the symbols. Second, the county-level city is not a point, and it inherits the sphere of the county area. Third, the county-level city is not an independent central city, and it is a town system containing towns and villages.

Because of the special meanings of the county-level city, the urbanization route of the county-level city is different to the general development of the large and middle sized cities, and the construction of small towns. Based on the special meanings and charms of the county-level city, we studied the urbanization of the county-level city which was researched by few scholars, ascended the evolvement of the dweller points and the production of the county-level city, estimated the urbanization process of the county-level city, searched after the economic support and the system innovation of the growth for the county-level city, and proposed the policy advices for the growth and the development of the county-level city.

### 2. Origin of the county-level city

Though China was one of the countries which first generated the cities in the world, but the occurrence of modern city system was late in China until the year of 1921. In Republican China, the city system followed the international conventions, i.e. the city was the city-type administrative unit, and it was the administrative district on the assembled “point” with dense population, and most of its denizens were citizens who engaged in the second industry and the third industry (i.e. the nonagricultural population). After 1949, the city system that New China first performed basically continued the system of the Republican China, and afterward, with the extension of the suburb, the city leded the counties, and the prefecture and the city were united, and the county was turned into the city, and the organizational city

especially the county-level city was gradually evolved into a sort of administrative organizational system on the “sphere” in the wider area.

The generation of the county-level city was the special content in the urbanization of China. The city forming from the county begun in 1979 after the reform and opening-up, and in that year, three cities such as Zhuhai, Shenzhen and Leshan was founded. To 1983, the mode forming city from county formed the first high tide, and in that year, there were 39 counties to be turned into cities. Most of these cities are county-level cities except few cities such as Shenzhen, Zhongshan and Dongguan. As the most active part in Chinese city system, the mode forming city from county was fully developed in about 30 years of the reform and opening-up, and the quantity of the county-level city increased quickly, and the meaning of the mode was continually enriched, and in 1996, the quantity achieved 445 which occupied 66.8% of the total number of the city in the whole China. Along with the situation that the city founded the district or the county-level city ascended to the prefecture-level city, the quantity of the county-level city begun to decrease, and this number is 368 now (Liang, 2008).

The standards forming the city from county in China are continually perfected with the developments of the economy and the society. At 3 Feb1986, the Chinese Ministry of Civil Affairs reported “the Report about Adjusting the City Establishment Standards and the Conditions that City Leads the Counties” to the Chinese State Council, and the Chinese State Council replied and tried out the report by the document of “Sate Council (1986) No. 46” in 19 April. The report of the Chinese Ministry of Civil Affairs thought that the urban and rural statuses had been changed at present, and to adapt these new statuses, not only the town which had achieved the standard should be changed to the city (i.e. the mode of “forming city from town”), but also the county which accorded with the conditions should be changed to the city (i.e. the mode of “forming city from county”). In 1993, Chinese State Council perfected the establishment standards of the county-level city, after that, tens of county-level counties were founded till to the middle and late of 1990s, but there was not one city which was formed from the town. The basic substitute of the mode of “forming city from county” from the mode of “forming city from town” indicated that the county-level city has been changed into a sort of institution in the wider area from the city-type administrative institution (Yu, 1999, P.78-79).

According to the establishment standards of Chinese State Council of 1993, there are four phases for the mode of “forming city from county”.

(1) The proposition of the mode of “forming city from county”. The proposition is generally from the development layout of the county government or the county party committee, and it is also from civilian voice, especially from the members of the National Committee of CPPCC.

(2) The report program. Once the county party committee and the county government complete the self-measurement, and they think the conditions have been basically possessed, the work of “forming city from county” enters into the report program. First, ask for instructions to the county government. The county bureau of civil affairs draws up relative documents (including three affixes, i.e. the county administrative map, the town administrative map in the station of the county government, and the town layout map in the station of the county government), and asks for instructions of “forming city from county” by the name of the county government to the superior government, and makes a copy for the superior bureau of civil affairs. Second, ask for instructions to the prefecture-level city. Third, ask for instructions to the provincial government. Fourth, ask for instructions to the Ministry of Civil Affairs. When the Ministry of Civil Affairs receipts the documents and the conditions accords with the requirements, the Ministry of Civil Affairs asks for the reply to the State Council. Taking Jintan County in Jiangsu Province as the example, the article of the Ministry of Civil Affairs was “the article about replying to establish Jintan City and remove Jintan County for Jiangsu Province (Ministry of Civil Affairs [1993] No.83)”, and the article included “Report the sketch reply and ask for examining and approving”. Thus, the report program ends.

(3) The reply program. After the State Council examines and approves the examination opinions and sketch reply proposed by the Ministry of Civil Affairs, and makes the decision of “forming city from county”, and the concrete relay is wrote by the Ministry of Civil Affairs. The reply of the Ministry of Civil Affairs to the Jiangsu Province Government was that “The Ministry has received the “the another requirement for forming Jintan City and removing Jintan County”. After the State Council authorized, the Ministry agreed to remove Jintan County and establish the Jintan City (county-level city), and the former administrative region of Jintan county was the administrative region of Jintan City”. Jiangsu provincial government replied the Changzhou City which replied Jintan county government.

Three replies were little different, and the Ministry only administrated the regional and administrative organizational system, and the provincial government increased the contents about management and confirmed the management directly under the jurisdiction of the province, didn’t increase the organization of the institutions and the personnel, and emphasized to dominate by the prefecture-level city temporarily, and avoided the problem that the law reference was not sufficient, and the replay of Changzhou City obviously avoided many sensitive factors such as direct jurisdiction and the special designation in the state plan.

(4) Subrogation of city and county. Generally, the subrogation of city and county needs a ceremonious ceremony, and it includes institution name change, leaders' title change, seal usage and special designation in the state plan. Because of the selfish departmentalism of the prefecture-level city, the special designation in the state plan is halfway, and it is the result of the haggle between the county-level city and the prefecture-level city to some extents.

Thus, a county administrative district leaves the county system and enters into the city system.

### **3. Urban and rural characteristics of the county-level city**

Generally speaking, the county with higher urbanization level can apply for establishing the city and removing the county, and the urbanization development of the county-level city still has certain bases. After establishing the city and removing the county, in virtue of the powerful drive of urbanization by the government and the powerful drive of the flourish developments of the second industry and the third industry, the urbanization of the county-level city developed very quickly, especially the county-level cities in Yangtze River Delta and Pearl River Delta.

In 2000, the urbanization level of Jiangsu Province was 41.5%, and the urbanization level of the counties in the province was 19%, and the urbanization level of the county-level cities was 24.3%. Through three years' developments, up to 2003, the urbanization level of Jiangsu province achieved 46.8%, and the urbanization level of the counties in the province was 22.3%, and the urbanization level of the county-level cities was 28.6%. In these three years, the urbanization level of the county-level city enhanced 4.3% which was close to the urbanization level of the whole province, i.e. 5.3%, and the number was higher 3.3% than the urbanization level of the county-level city. Up to 2005, there were many county-level cities such as Zhangjiagang City in Jiangsu Province which have achieved or exceeded the provincial urbanization level of 50.5%. The comprehensive development levels of the economy and the society of the county-level city were continually enhancing, and in 2005, there were 17 national top 100 counties including 16 county-level cities. Though the county-level city administrated the wider rural regions, but the power to drive the urbanization development was large, and in the urbanization strategy that China developed the large, middle and small cities at the same time, the develop of the county-level city developed very quickly.

However, the establishment standard of the county-level city decides that the county-level city possesses dense rural characters. According to the document of "State Council [1983] No.38", the standards (seen in Table 1) include following aspects (Department of Urban and Rural Construction Economy of Chinese Social Science School Graduate College, 1999, P.28).

The standards included two parts. The first part was the station of the county government, i.e. the county region which was called as the county town, and it was one point of the core. The second part was the whole county which included wider villages and towns, and it was one sphere of the wider region. We call the county town and the towns with developed economy as the town, but the area of the town is still small, and the area of the villages still occupies above 90%. The population in the town is not sufficient, and the agricultural population occupies 60% or 70%, and even in the developed county-level city, the agricultural population still occupies 40% or 50%. Of course, the economic gross of the town is large, and it almost occupies 80% or 90%, but the agriculture is still coarse and original, which is the special "dualistic structure" in China. From county to city, the administration organizational system transforms, but the attributes of the rural economy and the rural society through several thousands years are still extending, and the habit of the small agriculture economy still goes round. Therefore, from three main factors such as the village, the agriculture and the farmer, the rural characters of the county-level city are still obvious, and which is one of factors to drive the new socialist country construction in China from 2006.

### **4. The construction of new countryside and the development of county-level city**

As viewed from the backgrounds of Chinese urbanization process and the regional economic development, the urbanization of the county-level city and the new countryside construction are an interactive process between the urban and the rural region, and they are two aspects of one problem. The new countryside construction will enhance the modernization level of the village in the whole county, and realize the rural and urban integration. The urbanization is the main route to transfer farmers, and it is the final attribute of the new countryside construction, and it is the meaning of "forming city from county". From the development course of the county-level city, we can understand it from following aspects.

First, the new socialist countryside construction is the significant advance of the urbanization of the county-level city. It is the important supplement for the urbanization of the county-level city. Because China was restricted by the rural and urban dualistic structure for a long time, large numbers of agricultural population and surplus labor force stayed in the villages, and the urbanization is the necessary tendency of the modernization in China. The mode of "forming city from county" is a sort of urbanization push in China. Because it takes the former county region as the city region, there are large numbers of villages, which is the focus in the theoretical dispute about the urbanization. Chinese Communist Party Central Committee proposed the policy to construct the new socialist countryside (CPC Central Committee, 2006, P.2), which faced the weak aspect, i.e. the villages in the county-level city, more comprehensively drive the urbanization

process of the county-level city from bottom to top through the whole village modernization construction. However, the new countryside construction strategy makes up the deficiencies of the urbanization theory of the county-level city. The new socialist countryside construction is the former training of the urbanization of the county-level city. From the rule and the tendency of the world urbanization, the final object of the urbanization is that the agricultural population is transferred and centralized to the city. Up to 2020, about 0.3 billion of agricultural population will transfer to the city in China. If there are not enough employment supports and proper civilization edification, the “city illness” formed by large numbers of farmers who enter into the city will be hard to avoid. In the urbanization process of the county-level city, there are farmers to transfer to the city. Through the new countryside construction, we can gradually train farmers’ labor skills and cultural qualities, ensure the agriculture population after training will gradually enters into the city and enhance the population quality of the city, reduce the social costs of the urbanization and increase the humanism concern for farmers. The new socialist countryside construction extends the urban function of the county-level city. Under the drives developing cities with villages, developing industry with agriculture and developing city and villages, the new countryside construction develops continually, and the urban function is increasingly perfect, and the urban and rural integration will gradually be realized. The new countryside construction could further enhance the development space, resident condition and natural views for the city. The modern agriculture forms beautiful ecological view, adds economic and convenient leisure locales, and enriches denizens’ tables.

Second, the urbanization is the necessary attribute of the new countryside construction for the county-level city. The development history of modern civilization is the development history of the urbanization. In modern world, more and more population enters into the city, and implements the economic activity with higher efficiency, and enjoys the civilization of modern city. The new socialist countryside construction is impossible to breach this historical tide. Chinese Communist Party Central Committee proposed the mode of whole plan to drive the rural and urban development, which indicated the urbanization direction of the new socialist countryside construction. The new countryside construction practice driving the villages by the urbanization, enhancing the agriculture by the industrialization, and enriching farmers by the industrialization all includes the contents of the urbanization. Because the measures of the new countryside construction in the county-level city are more skilful and efficient, the process of the urbanization is more obvious. Therefore, the new countryside in the county-level city constructs better, the urbanization process develops too quicker.

There are many expressions for the relationship between the new countryside construction and the urbanization development, but the attribute of the urbanization is certain. The thirty years’ development of the reform and opening up proved the active effect of the development of the county-level city. The improvement of the new countryside construction will further prove the predominant advantage in Chinese urban and rural development. For the harmonious development of Chinese urbanization and the new socialist countryside construction, we must highly emphasize the city group of the county-level city, and fully develop the special function of the county-level city in the industrialization, urbanization and modernization of the city.

## References

- CPC Central Committee. (2006). Many Opinions about Pushing the Socialism New Countryside Construction by the State Council. *Communication of General Office of the CPC Central Committee*. No.1. P.2.
- Department of Urban and Rural Construction Economy of Chinese Social Science School Graduate College. (1999). *Urban Economics*. Beijing: Economic Science Press. P.28.
- Liang, Ping. (2008). Sociologist: 4000 Billions May Raise the New Tidal Wave of Urbanization. *China Youth Daily*. Dec 11, 2008.
- Xie, Ranhao. (2003). How to Walk on the Urbanization Road. *Economic Daily News*. April 2, 2003.
- Yu, Mingchao. (1999). The Variance and Expectation of Chinese City System. *Strategy and Management*. No.5. P.78-79.

Table 1. Standards of the county-level city in China

	Population density (per sq. km.)	>400	100~400	<100	
In the station of the county government	Nonagricultural population (ten thousands)	12	10	8	
	The nonagricultural population with nonagricultural registered permanent residence (ten thousands)	8	7	6	
	Tap water dissemination rate (%)	65	60	55	
	Paved rate (%)	60	55	50	
	The basic establishments in the city zone are perfect and the drainage system is normal				
In the whole county	Nonagricultural population (ten thousands)	15	12	10	
	The proportion of the nonagricultural population in the total population (%)	30	25	20	
	Industrial production value above villages and towns (0.1 billion Yuan)	15	12	8	
	The proportion of the industrial production value above villages and towns in the total industrial production value (%)	80	70	60	
	GDP (0.1 billion Yuan)	10	8	6	
	The proportion of the third industrial production value in GDP (%)	20	20	20	
	Local budget	Total value (ten thousands Yuan)	6000	5000	4000
		Per capita (Yuan)	100	80	60
	Financial revenue	Assume certain obligation to turn over budgetary revenues			





## Crime and Income Inequality: The Case of Malaysia

A.H. Baharom

Department of Economics

Faculty of Economics and Management

Universiti Putra Malaysia

43400, Serdang, Selangor

Tel: 60-3-8946-7751 E-mail: baharom@econ.upm.edu.my

Muzafar Shah Habibullah (Corresponding Author)

Department of Economics

Faculty of Economics and Management

Universiti Putra Malaysia

43400, Serdang, Selangor

Tel: 60-3-8946-7635 E-mail: muzafar@econ.upm.edu.my

### Abstract

This paper examines the causality between income inequality and crime in Malaysia for the period 1973-2003. Autoregressive Distributed Lag (ARDL) bounds testing procedure is employed to (1) analyze the impact of income inequality on various categories of criminal activities as well as to (2) analyze the impact of various categories of criminal activities on income inequality. Interestingly our results indicate that income inequality has no meaningful relationship with any of the various categories of crime selected, such as total crime, violent crime, property crime, theft and burglary. Crime exhibits neither long-run nor short run relationships with income inequality and they are not cointegrated. It cannot be denied that there is ambiguity in the empirical studies of crime economics regarding various income variables leading to often mixed and contradicting results, which might be a good explanation of this finding.

**Keywords:** Malaysia, Bounds testing, Crime, Income inequality

### 1. Introduction

Crime or more specifically criminal and violent behavior has become a major concern in recent years across the world and have gained considerable popularity in term of the number of researches being conducted and results being debated. Crime rates vary enormously across countries and regions. Recently there have been more and more studies, quantitative studies in comparative criminology to investigate the effects of societal development on crime trends and types of crime. Arguably, crime literature originally proposed by Becker (1968) and Ehrlich (1973) have been considered as the most important seminal work in rejuvenating the interest in crime studies. Norms that promote fairness such as equity and equality are sometimes considered to be closely related to level of criminal activities. Many economists agree that rising inequality makes problems like poverty and crime more intractable and undermines the political base of democratic capitalism. The belief that income inequality and crime rates are positively related is consistent in both the literature of economics and criminology.

As mentioned by Lee (cited in to Chisholm and Choe (2005)) there is ambiguity in the empirical studies of crime economics regarding various income variables used to proxy the expected net gains from crime and as a result empirical findings are often mixed or contradictory to one another. The possible explanations for cross country differences are many, ranging from distinct definitions of crimes and different reporting rates (percentage of the total number of crimes actually reported to the police), to real differences in the incidence of crime and even to different cultural aspects. No matter how we look at it, it is still an utmost important subject due to its large impact on a psychological aspect as well as economical aspect. Its pernicious effects on economic activities and more generally on the quality of life of people contribute to the emerging fact that crime is merging as a priority in policy agendas worldwide. Due to the complexity of the phenomenon and lack of consensus among policy makers or scholars, research on this issue continues to be conducted in many areas. These generates interest and motivates this study

The impact of crime on an economy can be segregated into, primarily the prevention cost, and secondarily the correctional cost and the lost opportunity of labor being held in correctional facility. Costs acquainted with crime preventions, such as private investment for crime prevention gadgets such as anti theft or anti burglary equipments, or government expenditures such as campaigns and education on safe society and police personnel expenditure. The correctional cost refers to cost such as correction facilities cost and prison personnel, while the lost opportunity refers to the lost of potential labor contribution due to being in correction facilities. Crime results not only in the loss of property, lives and misery, they also cause severe mental anguish. Imrohoroglu et al. (2006) mentioned that according to United Nations Interregional Crime and Justice and Justice Research Institute, people victimized by property crime (as a % of the total population) varied between 14.8% in New Zealand to 12.7% in Italy, 12.2% in U.K., 10.0% in U.S., and 3.4% in Japan.

Madden and Chiu (1998) mentioned that it seems reasonable to expect that the level of property crime will be influenced in some way by the distribution of income (and wealth) while Teles (2004) reiterated that monetary and fiscal policies have impacts on crime. More analysis are being done recently linking income inequality to crime such as Fajnzylber et al. (2002a, 2002b), Chisholm and Choe (2005), Imrohoroglu et al. (2006), Choe (2008), Lorenzo and Sandra (2008), Magnus and Matz (2008), to name a few.

However not many papers was written on the subject of crime in Malaysia, except by Sidhu (2005) which was a descriptive research on the trends of crime in Malaysia, and also by Habibullah and Law (2007) on the relationship between crime and financial economic variables. Habibullah and Eng (2006) was able to show that underground economy Granger causes criminal activity in Malaysia. They employed vector error-correction model (VECM) in their analysis. It cannot be argued that crime is an utmost important subject of study; the fact that the nation and public gripped with fear due to the rising statistics of criminal activities and media, both electronic and print, highlighting it on a daily basis.

This paper is organized as follows. In the next section we discuss some prior evidence on the effect of macroeconomic variables especially income inequality on criminal activity. In section 3, we present the unit root, cointegration and *Granger* causality tests in the ARDL bounds testing framework used in the study. In section 4, we discuss the empirical results and the last section contains our conclusion.

## 2. A review of related literature

As explained in the early part of this paper, it cannot be denied that the seminal paper by Becker (1968) and Ehrlich (1973) have been considered as the most important work in rejuvenating the interest in crime studies. While Becker (1968) emphasizes on the cost and benefit of crime, Ehrlich (1973) extends Becker's crime model by including the role of opportunity cost between illegal and legal work. Madden and Chiu (1998), Fajnzylber et al. (2002a) and Choe (2008) discussed about the relationship between income inequality and crime. Madden and Chiu (1998) was more specific, since he only researches about burglary, Choe (2008) tested income inequality on various type of crime while Fajnzylber et al. (2002b) studied about the causes of violent crime.

Madden and Chiu (1998) presented a theoretical model which traces a potential link between worsening income inequality and increases in the number of burglaries, and his most powerful result (Theorem 3) says simply that increases in relative differential inequality increase the level of crime. Fajnzylber et al. (2002b) strongly reported that increases in income inequality raise crime rates (violent crime), in their study on several developed and developing countries for the period 1970-1994. The same kind of result was also obtained for Mexico in a study by Lorenzo and Sandra (2008) whereby they found that wage inequality has an important impact on crime. Another study which shares the similar result is a study by Nilsson (2004) on Sweden, and found a strong relationship between income inequality and crime (robbery/theft).

This is in contrary to the finding of Choe (2008) who could not find any significant relationship between crime rates (violent crime and property crime) and income inequality. Mehanna (2004) shared the same result, whereby they found that income inequality has no important impact on crime in their study for United for the period 1959-2001. Magnus and Matz (2008) went a step further whereby they separated the effects of permanent and transitory income, diverting from the traditional aggregated measures. They reported that while an increase in inequality in permanent income yields a positive and significant effect on total crimes and property crimes, an increase in inequality in the transitory income and traditional aggregated measures yields insignificant effect.

Brush (2007) conduct and compare cross-sectional and time series analyses of United States counties, interestingly, the results are in contradiction, income inequality is positively associated with crime rates in the cross section analysis, but it is negatively associated with crime rates in the time-series analysis. Habibullah and Law (2007) utilized Vector Error Correction Model (VECM) in their study about crime and financial economic variables in Malaysia, and generally their result suggests that criminal activity in Malaysia cannot be explained properly by real income per capita, financial wealth and interest rate.

### 3. Overview of crime rates in Malaysia

Figure 1 illustrates the crime statistics by various categories of crime selected, such as total crime, violent crime, property crime, theft and burglary in Malaysia for the period 1973-2003. It can be seen here that the trends are more or less the same across categories showing similar upward and downward trend throughout the three decades, peaking at 2000. Figure 2 illustrates the growth rate of crime by various categories of crime selected, such as total crime, violent crime, property crime, theft and burglary in Malaysia for the period 1974 - 2003. Again it can be observed that the trends are more or less the same across categories. Figure 3 illustrates the income inequality in Malaysia for the period (1974 – 2003), and it can be observed that income distribution was getting better towards 1980, and then it worsens till 1986 and back on track to betterment and stabilizes in early 2000.

### 4. Methodology

Bound testing procedures developed by Pesaran et al. (2001) within an autoregressive distributed lag (ARDL) framework was chosen due to its main advantage that is the bounds test approach is applicable irrespective of whether the underlying regressors are purely  $I(0)$ , purely  $I(1)$  or mutually cointegrated. Apart from that, unrestricted error-correction model (UECM) is likely to have better statistical properties than the two-step Engle-Granger method because, unlike the Engle-Granger method, the UECM does not push the short-run dynamics into the residual term (Banerjee et al. 1998). To implement the bounds testing procedure, we estimate the following conditional ARDL unrestricted error-correction model as follows

$$\Delta CRIME_t = \alpha_0 + \alpha_1 CRIME_{t-1} + \alpha_2 INCOME_{t-1} + \sum_{i=1}^m \alpha_{3,i} \Delta CRIME_{t-i} + \sum_{i=0}^n \alpha_{4,i} \Delta INCOME_{t-i} + \varepsilon_t \quad (1)$$

$$\Delta INCOME_t = \beta_0 + \beta_1 INCOME_{t-1} + \beta_2 CRIME_{t-1} + \sum_{i=1}^m \beta_{3,i} \Delta INCOME_{t-i} + \sum_{i=0}^n \beta_{4,i} \Delta CRIME_{t-i} + \mu_t \quad (2)$$

Whereby  $\alpha_0$  and  $\beta_0$  are constant terms and  $\varepsilon_t$  and  $\mu_t$  are the disturbance terms. When a long-run relationship exists the  $F$ -test indicates which variable should be normalized (Narayan and Narayan, 2005).

The null hypothesis for no cointegration among the variables in Eq. (1) is ( $H_0 : \alpha_1 = \alpha_2 = 0$ ) denoted by  $F_{\text{crime|inequality}}$  against the alternative ( $H_1 : \alpha_1 \neq \alpha_2 \neq 0$ ). Similarly, for Eq. (2) the null hypothesis for no long run meaningful relationship among the variables is ( $H_0 : \beta_1 = \beta_2 = 0$ ) as denoted by  $F_{\text{inequality|crime}}$  against the alternative ( $H_1 : \beta_1 \neq \beta_2 \neq 0$ ).

The asymptotic distribution of critical values is obtained for cases in which all regressors are purely  $I(1)$  as well as when the regressors are purely  $I(0)$  or mutually cointegrated. Because the critical value of the test depends on the order of integration of the variables,  $I(d)$ , where  $0 \leq d \leq 1$ , the test utilizes a critical range such that values exceeding the range are evidence of rejection, values less than the range are evidence of non-rejection, and values within the range are inconclusive. In other words, if the test statistics exceed their respective upper critical values (assuming purely  $I(1)$  regressors) we can conclude that a long-run relationship exists. If the test statistics fall below the lower critical values (assuming the regressors are  $I(0)$ ) we cannot reject the null hypothesis of no cointegration. Inconclusive results achieved when the test statistics fall within their respective bounds.

#### 4.1 Sources of Data

Data for the income inequality for Malaysia, for the corresponding period was obtained from University of Texas, which are estimates of gross household income inequality, computed from a regression relationship between the Deininger and Squire inequality measures and the UTIP-UNIDO pay inequality measures. As for the data on various categories of crime for the period 1973 to 2003, it was obtained from the Royal Malaysian Police (PDRM). Categories selected are total crime, burglary, theft, violent crime and property crime. Throughout the analysis, all variables were transformed into natural logarithm.

### 5. Empirical Results

Before testing for cointegration by using the ARDL bounds testing procedure, we test for the order of integration for all categories of crime and inequality variables. Table 2 show the results of the unit root test for the test of the order of integration of the economic time series under investigation. Clearly the augmented Dickey-Fuller test (Dickey and Fuller, 1981) statistics indicate that all categories of crime and income inequality economic series in Malaysia are stationary after first differencing ( $I(1)$ ) Table 1 reports the summary statistics of all the variable chosen for this study

Having noted that all series are of the same order of integration, that is they are all  $I(1)$  processes, our relevant critical values are the upper bound of purely  $I(1)$  regressors. These results are tabulated in Table 3. When the various categories of crime is used as the dependent variable, the null hypothesis of no cointegration cannot be rejected in all the cases and *vice versa*, when income inequality is used as the dependent variable, in all cases the null hypothesis of no cointegration cannot be rejected. Both these results suggest that there are no long-run relationships between income inequality and the crime variable, namely; total crime, burglary, violent crime, property crime, theft for the case of Malaysia.

Figure 4 to Figure 8, display the results of the impulse response function of the five criminal activities chosen with income inequality *vice versa*, again the results are robust and shows that any shocks in the crime variable does not constitutes any shocks to income inequality. On the other hand, any shock to income inequality also does not constitute any significant changes to crime. We can conclude that the variables do not respond to changes of the other variable.

As for variance decomposition, the results shown in Table 4 to Table 8 are similar to prior finding whereby showing the same pattern of results, there are no meaningful relationship between these variables (crime and income inequality. In fact percentage changes that contributed to the other variable are too small and it stabilizes after a few periods. These results are very consistent in nature

## 6. Conclusion

Though in this study we incorporated an advanced estimation technique, the autoregressive distributed lag ARDL, we still fail to find any meaningful relationship between income inequality and crime. In this study the autoregressive distributed lag (ARDL) bounds testing procedure was employed to investigate the long-run relationship between income inequality and various categories of crime namely total crime, burglary, violent crime, property crime and theft. A bivariate analysis on the impact of income inequality on the five categories of crime mentioned earlier, *vice versa* the impact of the criminal activities chosen on income inequality was conducted. The sample period was 1973 – 2003 and the data was annual. All the data went through log-log transformation so that the estimates will be less sensitive to outliers or influential observations and also in order to reduce the data range.

The results suggest that all the variables chosen are  $I(1)$  or in other words they are non-stationary variables and achieved stationarity only after first differencing. The cointegration analysis using the ARDL bounds testing approach clearly indicates that none of the criminal activities chosen are cointegrated with income inequality. The robustness of the results are further supported by the impulse response function and variance decomposition ( both based on VAR ( vector auto regression)). Though these results are interesting and in contradiction to the prior findings of Madden and Chiu (1998), Fajnzylber et al. (2002a, 2002b), Lorenzo and Sandra (2008) who all found significant relationship between income inequality and crime, it is not surprising because there are a number of studies who could not find meaningful relationship between income inequality and crime such as Choe (2008), Mehanna (2004), Magnus and Matz (2008) and Brush (2007). Although this study fails to find any significant relationship between income inequality and various categories of crime namely total crime, burglary, violent crime, property crime and theft, it is still an important finding. It shows that for the case of Malaysia no causality runs between the variables mentioned.

From a policy perspective, when initiating crime reduction policies, the government should shift from the current “income inequality induces crime” to encompass other socioeconomic factors that could be part of broader system of crime causation. The results should not be misconstrued, while income inequality is an important economic aspect of interest, the results shows that it is not cointegrated with the level of criminal activities in Malaysia. There are other factors, other socio-economic variables ( might be cointegrated with criminal activities) that worth to be explored and researched.

## References

- Banerjee, A., Dolado, J. & Mestre, R. (1998). Error-correction mechanism tests for cointegration in a single equation framework. *Journal of Time Series Analysis*, 19, 267-283.
- Becker, G.S. (1968). Crime and punishment: An economic approach. *Journal of Political Economy*, 76, 1169-1217.
- Brush, J. (2007). Does income inequality lead to more crime? A comparison of cross-sectional and time series analyses of United States countries. *Economic Letters*, 96, 264-268.
- Choe, J. (2008). Income inequality and crime in the United States. *Economic Letters*, 101, 31-33.
- Chisholm, J. & Choe, C. (2005). Income variables and the measures of gains from crime. *Oxford Economic Papers*, 57(1), 112-119.
- Ehrlich, I. (1973). Participation in illegitimate activities: A theoretical and empirical investigation. *Journal of Political Economy*, 38(3), 521-565.
- Fajnzylber, P., Lederman, D. & Loayza, N. (2002a). What causes violent crime? *European Economic Review*, 46, 1323-1357.

- Fajnzylber, P., Lederman, D. & Loayza, N. (2002b). Inequality and violent crime. *Journal of Law & Economics*, 45(1), 1-41.
- Habibullah, M.S. & Eng, Y.K. (2006). Crime and the underground economy in Malaysia: Are they related?. *The Journal of Global Business*, 2(1), 138-154
- Habibullah, M.S. & Law, S.H. (2007). Crime and financial economic variables in Malaysia: Evidence from a vector error-correction model. *Journal of Social and Economic Policy*, 4(2), 263-276
- Imrohoroglu, A., Merlo, A. & Rupert, P. (2006). Understanding the determinants of crime. *Journal of Economics and Finance*, 30(2), 270 – 283.
- Lorenzo, B. & Sandra, M. (2008). Sources of crime in the state of Veracruz: The role of female labor force participation and wage inequality. *Feminist Economics*, 14(3), 51- 75.
- Madden, P. & Chiu, W.H. (1998). Burglary and income inequality. *Journal of Public Economics*, 69, 123-141.
- Magnus, G. & Matz, D. (2008). Inequality and crime: Separating the effects of permanent and transitory income. *Oxford Bulletin of Economics & Statistics*, 70(2), 129-153.
- Mehanna, R.A. (2004). Poverty and economic development: Not as direct as it may seem. *Journal of Socio-Economics*, 33, 217-228.
- Narayan, P.K. (2005). The saving and investment nexus for China: Evidence from cointegration tests. *Applied Economics*, 37, 1979-1990.
- Narayan, P.K. & Narayan, S. (2005). Estimating income and price elasticities of imports for Fiji in a cointegration framework. *Economic Modelling*, 22, 423-438.
- Pesaran, M.H., Shin, Y. & Smith, R.J. (2001). Bounds testing approaches to the analysis of level relationships. *Journal of Applied Econometrics*, 16, 289-326.
- Sidhu, A.S. (2005). The rise of crime in Malaysia: An academic and statistical analysis. *Journal of the Kuala Lumpur Royal Malaysia Police College*, 4, 1-28.
- Teles, V.K. (2004). The effects of macroeconomic policies on crime. *Economic Bulletin*, 11(1), 1-9.

Table 1. Descriptive Analysis

	INCOME INEQUALITY	BURGLARY	PROPERTY	VIOLENT	THEFT	TOTAL CRIME
Mean	0.40221	124.5621	445.8017	61.2753	321.2396	507.077
Median	0.39802	121.1846	451.5979	54.69127	312.9099	510.406
Maximum	0.435552	162.6594	651.5103	93.1616	493.2717	744.672
Minimum	0.379018	77.25022	304.1563	28.22281	209.7682	354.1379
Std. Dev.	0.019489	22.39909	94.29154	17.29077	81.41265	108.2592
Skewness	0.350199	-0.035182	0.386013	0.501967	0.605738	0.50474
Kurtosis	1.673783	2.045011	2.508635	2.281272	2.51021	2.536053
Jarque-Bera	2.905484	1.184401	1.081725	1.969086	2.205612	1.594302
Probability	0.233928	0.553109	0.582246	0.37361	0.331938	0.450611
Sum	12.46851	3861.427	13819.85	1899.534	9958.427	15719.39
Sum Sq. Dev.	0.011394	15051.58	266726.8	8969.123	198840.6	351601.4
Observations	31	31	31	31	31	31

Table 2. Results of ADF unit root test

Crime rate category	Level (Intercept and Trend)	First difference (Intercept)
Total Crime	-2.35	3.24**
Violent Crime	-2.75	3.71***
Property Crime:	-2.29	-3.19**
Theft	-2.84	-3.23**
Burglary	-2.19	-3.21**
Income Inequality	-1.52	-3.56**

Notes: \*\* and \*\*\* denotes significant at 5% and 1% respectively. Based on automatic lag selection (AIC)  $k = 7$  for all the variables

Table 3. Bounds test results for long-run relationship

Critical value bounds of the $F$ -statistic: intercept and no trend						
	90% level		95% level		99% level	
$T$	$I(0)$	$I(1)$	$I(0)$	$I(1)$	$I(0)$	$I(1)$
29	3.303	3.797	4.090	4.663	6.027	6.760
Calculated $F$ -statistic:						
Types of crime	Fcrime (crime inequality)			Finequality (inequality crime)		
Total Crime	3.6625			2.9875		
Violent Crime	2.9623			3.6545		
Property Crime:	3.5698			2.7894		
Theft	3.5766			2.8794		
Burglary	3.5144			3.6231		

Notes:  $t$  statistic showing none of them statistically significant even at the 10% level. Critical values are taken from Narayan (2005).

Table 4. Variance Decomposition Of Inequality and Violent Crime

	Variance Decomposition of LI:				Variance Decomposition of LV:		
Period	S.E.	LI	LV	Period	S.E.	LI	LV
1	0.019124	100.0000	0.000000	1	0.098142	1.689669	98.31033
		(0.00000)	(0.00000)			(6.45709)	(6.45709)
2	0.030362	99.87055	0.129451	2	0.145609	2.539530	97.46047
		(2.34707)	(2.34707)			(7.71387)	(7.71387)
3	0.037629	99.81030	0.189702	3	0.170787	1.849457	98.15054
		(4.25950)	(4.25950)			(8.20204)	(8.20204)
4	0.042015	99.82024	0.179764	4	0.185614	3.614033	96.38597
		(5.63628)	(5.63628)			(10.4373)	(10.4373)
5	0.044542	99.84004	0.159955	5	0.198459	9.755484	90.24452
		(6.76396)	(6.76396)			(15.6090)	(15.6090)
6	0.045969	99.83169	0.168309	6	0.212103	18.49108	81.50892
		(7.78857)	(7.78857)			(20.2681)	(20.2681)
7	0.046787	99.78947	0.210531	7	0.225823	27.02699	72.97301
		(8.70534)	(8.70534)			(22.8378)	(22.8378)
8	0.047278	99.72653	0.273470	8	0.238183	33.90411	66.09589
		(9.49334)	(9.49334)			(23.9862)	(23.9862)
9	0.047593	99.65937	0.340626	9	0.248347	38.93185	61.06815
		(10.1297)	(10.1297)			(24.4866)	(24.4866)
10	0.047810	99.59936	0.400643	10	0.256194	42.44080	57.55920
		(10.5984)	(10.5984)			(24.6822)	(24.6822)

Note : Standard Errors: Monte Carlo (100 repetitions)

Table 5. Variance Decomposition Of Inequality and Theft

	Variance Decomposition of LI:				Variance Decomposition of LTH:		
Period	S.E.	LI	LTH	Period	S.E.	LI	LTH
1	0.019177	100.0000	0.000000	1	0.091461	1.674753	98.32525
		(0.00000)	(0.00000)			(5.41495)	(5.41495)
2	0.030495	99.98203	0.017971	2	0.146526	3.430165	96.56983
		(1.47821)	(1.47821)			(8.51508)	(8.51508)
3	0.037763	99.97441	0.025591	3	0.178065	2.609666	97.39033
		(2.95848)	(2.95848)			(10.1306)	(10.1306)
4	0.042257	99.97819	0.021812	4	0.195952	3.333270	96.66673
		(4.58607)	(4.58607)			(10.0582)	(10.0582)
5	0.044991	99.97786	0.022144	5	0.210762	9.156809	90.84319
		(6.53842)	(6.53842)			(11.6626)	(11.6626)
6	0.046632	99.96314	0.036862	6	0.227331	19.07895	80.92105
		(8.56311)	(8.56311)			(15.4658)	(15.4658)
7	0.047597	99.93425	0.065753	7	0.245130	29.44671	70.55329
		(10.3409)	(10.3409)			(18.5250)	(18.5250)
8	0.048144	99.89765	0.102345	8	0.261848	37.90182	62.09818
		(11.6696)	(11.6696)			(20.0988)	(20.0988)
9	0.048439	99.86068	0.139324	9	0.275786	43.97006	56.02994
		(12.5237)	(12.5237)			(20.8628)	(20.8628)
10	0.048586	99.82845	0.171551	10	0.286362	48.03036	51.96964
		(13.0295)	(13.0295)			(21.2578)	(21.2578)

Note : Standard Errors: Monte Carlo (100 repetitions)



Table 6. Variance Decomposition Of Inequality and Total crime

	Variance Decomposition of LI:				Variance Decomposition of LTC:		
Period	S.E.	LI	LTC	Period	S.E.	LI	LTC
1	0.019138	100.0000	0.000000	1	0.085717	1.887642	98.11236
		(0.00000)	(0.00000)			(4.88368)	(4.88368)
2	0.030231	99.99429	0.005713	2	0.134223	3.997877	96.00212
		(2.67181)	(2.67181)			(8.11754)	(8.11754)
3	0.037447	99.93727	0.062726	3	0.159176	3.278697	96.72130
		(5.50168)	(5.50168)			(9.84848)	(9.84848)
4	0.042030	99.78920	0.210797	4	0.171093	3.820781	96.17922
		(7.80096)	(7.80096)			(10.6663)	(10.6663)
5	0.044885	99.55983	0.440171	5	0.180482	9.341179	90.65882
		(9.69661)	(9.69661)			(13.2317)	(13.2317)
6	0.046604	99.29389	0.706110	6	0.191866	18.83654	81.16346
		(11.3735)	(11.3735)			(16.5174)	(16.5174)
7	0.047582	99.03991	0.960088	7	0.204538	28.50959	71.49041
		(12.7382)	(12.7382)			(18.9203)	(18.9203)
8	0.048094	98.83058	1.169422	8	0.216269	36.03529	63.96471
		(13.7162)	(13.7162)			(20.4124)	(20.4124)
9	0.048333	98.67837	1.321631	9	0.225588	41.08572	58.91428
		(14.3547)	(14.3547)			(21.3153)	(21.3153)
10	0.048428	98.58007	1.419932	10	0.232134	44.16496	55.83504
		(14.7170)	(14.7170)			(21.8993)	(21.8993)

Note : Standard Errors: Monte Carlo (100 repetitions)

Table 7. Variance Decomposition Of Inequality and Burglary

	Variance Decomposition of LI:				Variance Decomposition of LB:		
Period	S.E.	LB	LI	Period	S.E.	LB	Li
1	0.017962	3.541312	96.45869	1	0.090816	100.0000	0.000000
		(7.49357)	(7.49357)			(0.00000)	(0.00000)
2	0.026962	7.201380	92.79862	2	0.140971	98.73171	1.268292
		(10.0442)	(10.0442)			(4.03282)	(4.03282)
3	0.033661	14.78468	85.21532	3	0.163716	98.07825	1.921754
		(13.7776)	(13.7776)			(7.08736)	(7.08736)
4	0.039426	23.76707	76.23293	4	0.170278	98.10315	1.896850
		(16.7831)	(16.7831)			(8.83333)	(8.83333)
5	0.044196	31.27887	68.72113	5	0.171159	98.00517	1.994827
		(18.8961)	(18.8961)			(9.66513)	(9.66513)
6	0.047670	36.45345	63.54655	6	0.171795	97.34258	2.657423
		(20.3276)	(20.3276)			(10.7321)	(10.7321)
7	0.049855	39.62209	60.37791	7	0.173458	96.33153	3.668465
		(21.2931)	(21.2931)			(12.0475)	(12.0475)
8	0.051025	41.36959	58.63041	8	0.175631	95.37697	4.623027
		(21.9842)	(21.9842)			(12.9116)	(12.9116)
9	0.051543	42.21136	57.78864	9	0.177615	94.69387	5.306126
		(22.4715)	(22.4715)			(13.2568)	(13.2568)
10	0.051718	42.53874	57.46126	10	0.179060	94.29527	5.704731
		(22.7449)	(22.7449)			(13.3364)	(13.3364)

Note : Standard Errors: Monte Carlo (100 repetitions)

Table 8. Variance Decomposition Of Inequality and Property Crime

	Variance Decomposition of LI:				Variance Decomposition of LPRO		
Period	S.E.	LI	LPRO	Period	S.E.	LI	LPRO
1	0.019112	100	0	1	0.087162	1.719255	98.28074
		0	0			(-5.64565)	(-5.64565)
2	0.030144	99.9983	0.0017	2	0.136819	3.928723	96.07128
		(-1.47687)	(-1.47687)			(-8.35303)	(-8.35303)
3	0.03729	99.944	0.055999	3	0.162638	3.315245	96.68475
		(-3.62136)	(-3.62136)			(-9.42812)	(-9.42812)
4	0.041835	99.76431	0.235691	4	0.174909	3.602059	96.39794
		(-5.90319)	(-5.90319)			(-9.63437)	(-9.63437)
5	0.04469	99.45556	0.544442	5	0.184035	8.390198	91.6098
		(-7.89071)	(-7.89071)			(-12.225)	(-12.225)
6	0.046429	99.07582	0.924184	6	0.194757	17.10258	82.89742
		(-9.50939)	(-9.50939)			(-15.7746)	(-15.7746)
7	0.047428	98.69795	1.302051	7	0.206755	26.34102	73.65898
		(-10.7367)	(-10.7367)			(-18.3252)	(-18.3252)
8	0.047953	98.37601	1.623988	8	0.218045	33.75676	66.24324
		(-11.6928)	(-11.6928)			(-19.765)	(-19.765)
9	0.048196	98.13515	1.864852	9	0.227187	38.84587	61.15413
		(-12.6492)	(-12.6492)			(-20.4627)	(-20.4627)
10	0.048291	97.97589	2.024114	10	0.233738	41.99109	58.00891
		(-13.6384)	(-13.6384)			(-20.7555)	(-20.7555)

Note : Standard Errors: Monte Carlo (100 repetitions)

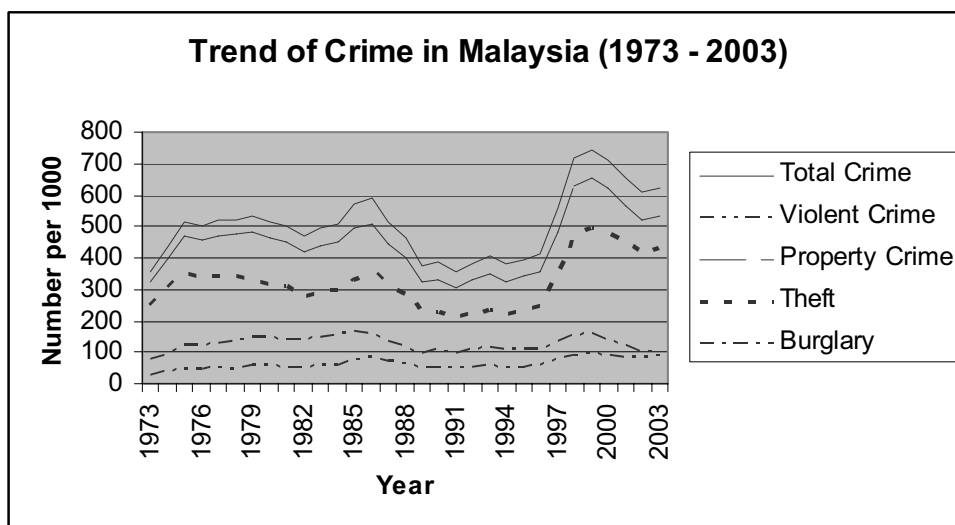


Figure 1. Trend of Crime in Malaysia (1973 – 2003).

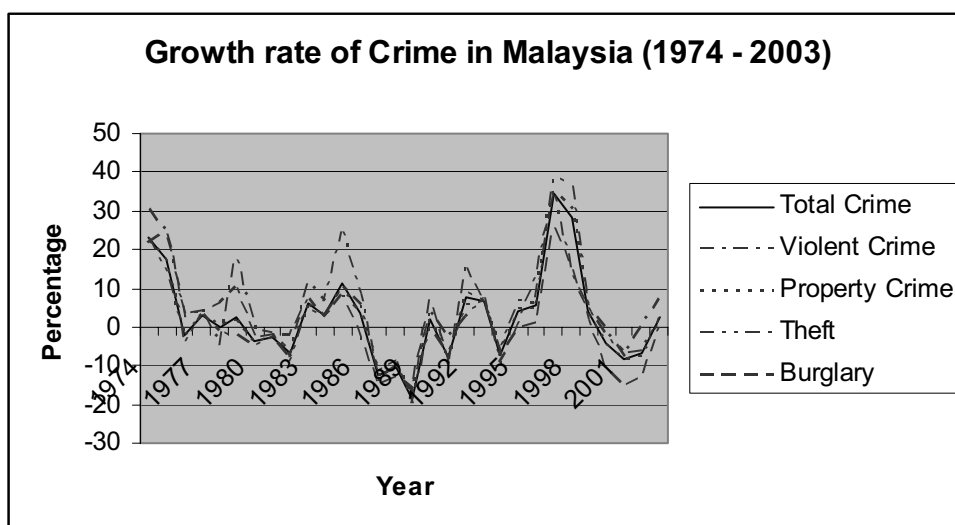


Figure 2. Trend of Growth rate of Crime in Malaysia (1973 – 2003)

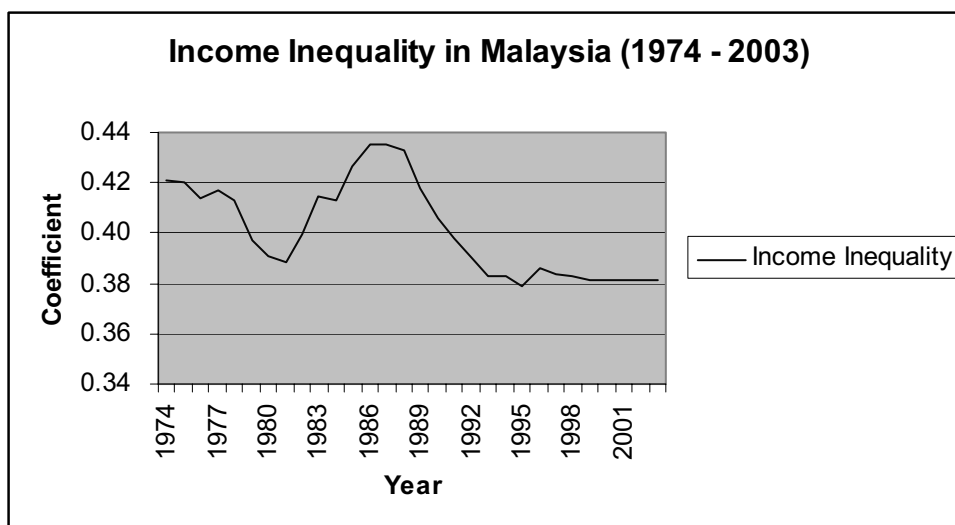


Figure 3. Trend of Income Inequality in Malaysia (1974 – 2003)

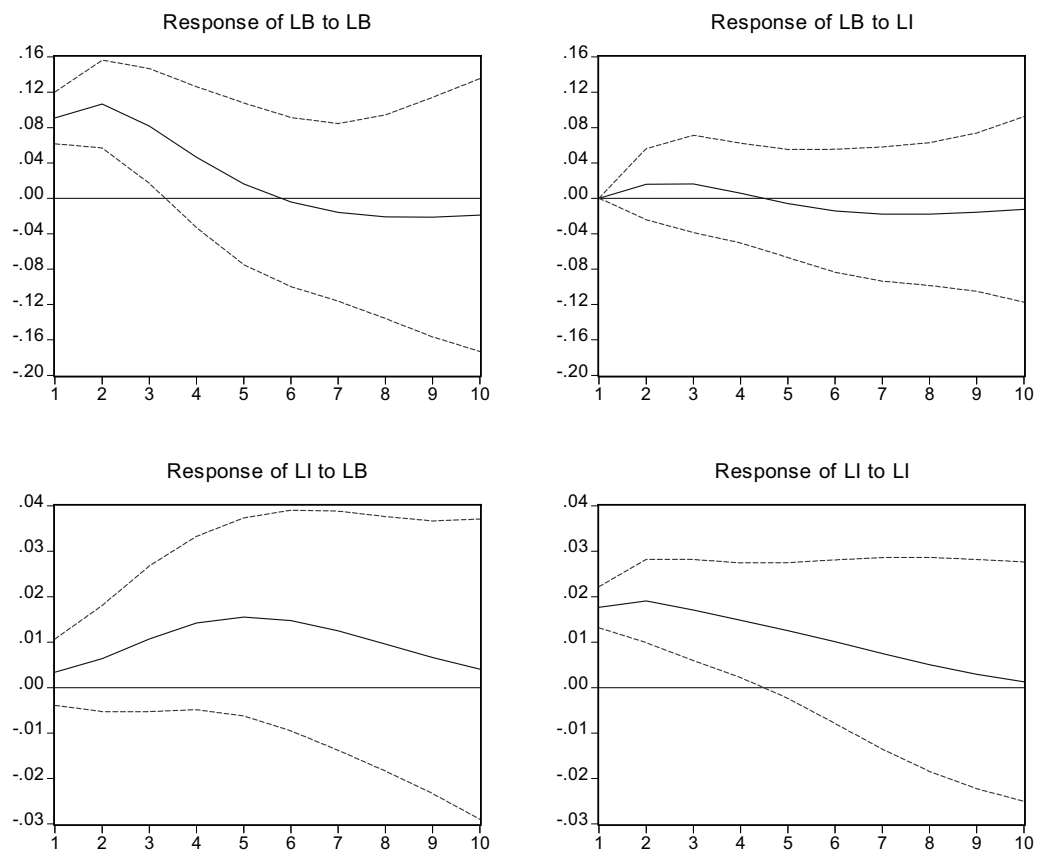
Response to Cholesky One S.D. Innovations  $\pm 2$  S.E.

Figure 4. Impulse response function between Inequality and Burglary

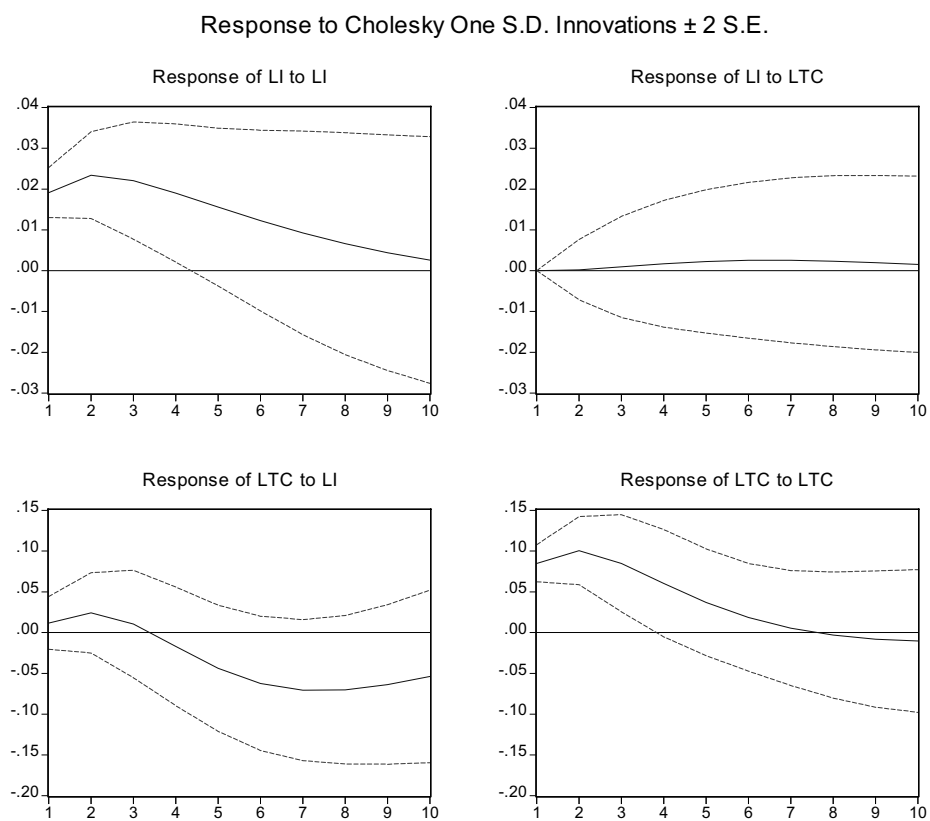


Figure 5. Impulse response function between Inequality and Total Crime

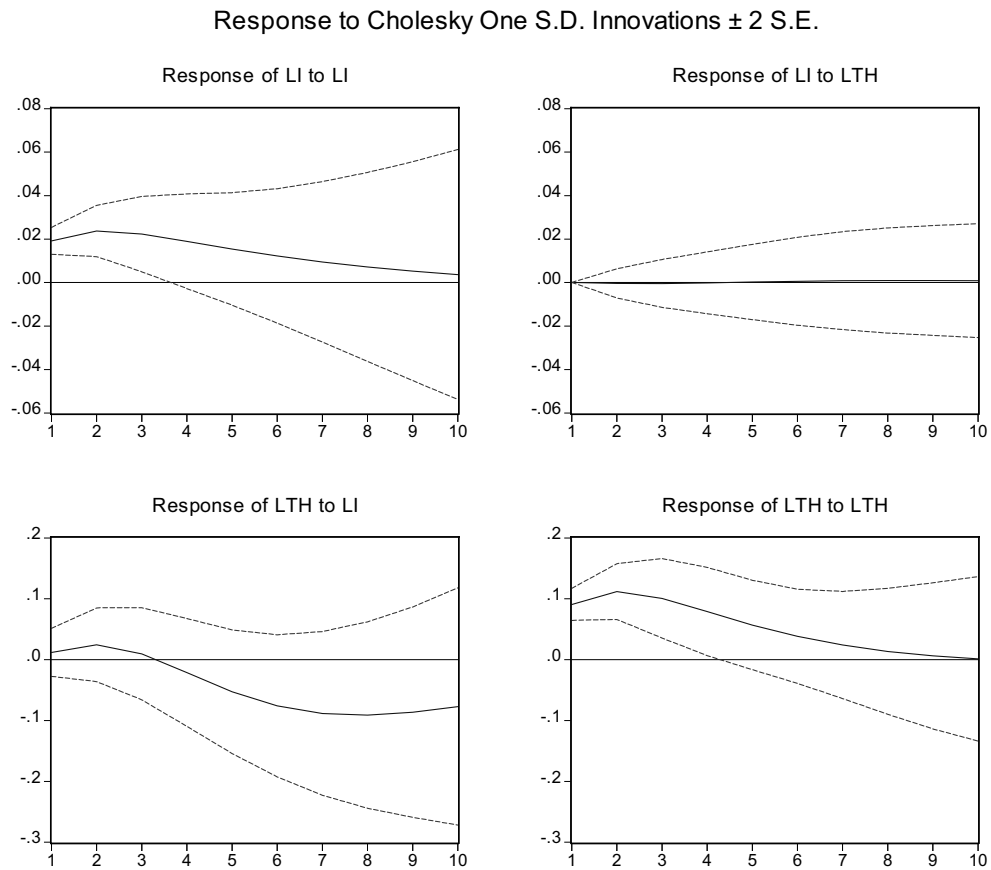


Figure 6. Impulse response function between Inequality and Theft

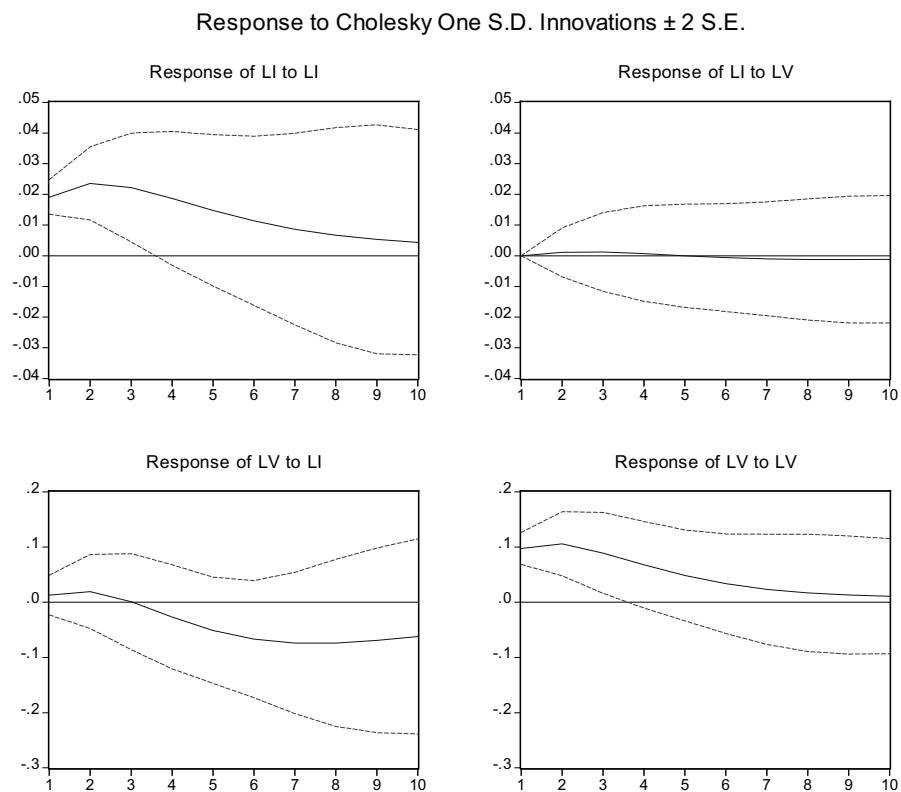


Figure 7. Impulse response function between Inequality and Violent Crime

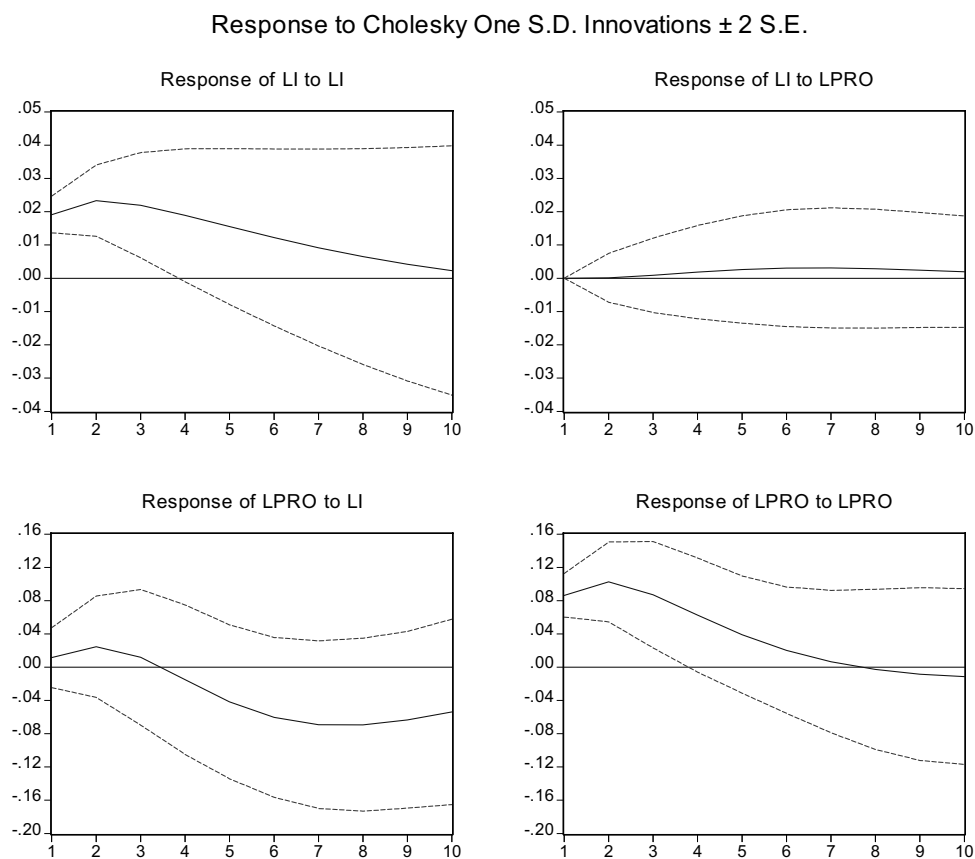


Figure 8. Impulse response function between Inequality and Property Crime





## Study on the Small and Middle-Sized Enterprises Credit Guarantee Legal System

Guohua Zhang

College of Humanities and Law

Tianjin Polytechnic University

Tianjin 300384, China

E-mail: [susan17zhang@126.com](mailto:susan17zhang@126.com)

### Abstract

In this article, we put forward the small and middle-sized enterprises (SMEs) credit guarantee is the effective measure to solve the financing difficulty for SMEs. Through the analysis of the actuality of Chinese SMEs credit guarantee legal system, we try to find the shortages such as the deficiency of the SMEs special guarantee legislation, the unreasonable capital financing structure, the risk prevention and control system without legal references, and the imperfect credit legal system. According to present shortages, we put forward corresponding advices, i.e. constituting basic law of the SMEs credit guarantee and perfecting the credit laws system.

**Keywords:** Small and middle-sized enterprise (SMEs), SMEs credit guarantee, Legal system

### 1. Actuality of Chinese SMEs credit guarantee legal system

Both the Guarantee Law of the People's Republic of China enacted in 1995 and the judicial interpretation of the guarantee law enacted in 2000 are adapted to credit guarantee, but the inherent deficiencies of the guarantee law can not offer good legal criterions for the SEMs credit guarantee. The Promotion Law of China's Small and Medium Sized Enterprises enacted at Jan 1 2003 is the first special law about SMEs, and it is the law with the highest power layer which can be followed to establish the credit guarantee system for SMEs at present. Comparing with guarantee law, it has large advancement, but it still lacks in the maneuverability, and the policies and regulations matching with it still don't come into being. Because the credit guarantee institutions of SMEs exist by the form of the legal person, so the modified "the Company Law" is applied, but the guarantee institutes also possess characteristics which are different to general companies, so the company law can not be completely applied. Though the new "Property Law" perfects the shortages in the guarantee law, but it still can not completely regulate the behaviors of credit guarantee. Since 1999, relative departments successively enacted some administrative rules, local rules and policy documents aiming at credit guarantee and promoting the development of the guarantee industry. The existing credit guarantee legal rules of China lacking in professionl, systematic, perfect and healthy SMEs credit guarantee legal system are too dispersive and disorder, and it doesn't still form the system, and the legislation layer is low, which make Chinese credit guarantee system lack in powerful legal guarantees.

### 2. Problems existing in Chinese SMEs credit guarantee legal system

#### 2.1 Problems of capital financing

In the "Instructional Advices", the guarantee capitals and operation charges of SMEs credit guarantee mainly depend on governmental capitals, and the guarantee charge incomes are only supplements. At present, the capital financing system in China adopts the multiple-mode which takes the governmental capitals as the main body and adopts the common financing mode including financial institutions and other castes and civilian multiple financing modes. The governmental guarantee is in the absolutely main status in the whole guarantee system. For the guarantee institution quantity and the guarantee loan sum, the governmental guarantee share is too much higher, and the civilian capital guarantee proportion is seriously deficient. Thus capital financing structure will produce two sorts of conflict. First, as the macro control and market manager, the government needs to utilize its main financial power to supervise and control the market, and it has no enough financial power to support the credit guarantee system of SMEs, and on the contrary, many civilian capitals lack in proper investment direction. Second, the quantity of SMEs is increasing continually and the scale is continually expanding, but the guarantee capitals of the government are limited, and the

SMEs credit guarantee which gives priority to the governmental investment has not fulfill the actual demand of the SMEs financing guarantee.

Therefore, the existing SMEs credit guarantee system can not make the government investments exert their efficiencies and the civilian investment can not become into the effective supply, which induces the serious unbalance of the demand and the supply in the SMEs financing and guarantee market and the low total efficiency. The financing difficulty in the SMEs development is mainly induced by the insufficient civilian capital guarantees.

## *2.2 Problems of risk prevention*

At present, China mainly adopts following measures to prevent the risks of SMEs credit guarantee, i.e. the credit guarantee limitation management mechanism, the proportional guarantee implementing in guarantee institutions, the counter-guarantee and there-guarantee system. But some problems exist in these systems.

First, one of tenets of the credit guarantee institution is to disperse the risk of SMEs loans, and it doesn't assume all loan risks. The credit guarantee institution, bank and SMEs should assume the risks together, and the single institution should not assume all risks. Or else, the "moral risk" of the bank will occur. Therefore, the credit guarantee institutions should guarantee the risk according to certain proportion of the loan. But in the practice, the bank occupies the predominant status in the credit guarantee, and according to the guarantee contract offered by the bank, all guarantee institutions will implement sum guarantees. In this way, under the situation without risk and responsibility, the bank will obtain the loan interests, but the credit institutions will assume large guarantee risks only depending on slender guarantee charges. The risk asymmetry will increase the risk of the guarantee institutions, and seriously restrict the developments of the guarantee institutions and the guarantee industry.

Second, the article four in the guarantee law definitely regulates that "when the third person offers guarantee to the creditor for the debtor, he can require the counter-guarantee", and the "Instructional Advices" also regulates that the enterprise accepting the guarantee service should offer securities with same amount to the guarantee institutions, which are legal proofs for the guarantee institutions to require counter-guarantee for the guaranteed enterprises. But it is not feasible to offer counter-guarantees for all SMEs accepting guarantee services, because the properties of SMEs which can be bonded are not too much, and the matching counter-guarantee condition may refuse some enterprises with good foregrounds and breach the original idea of the SMEs credit guarantee system, and the third person can not be found to offer guarantees, so the essential problem of the difficult financing will occur again, and the SMEs guarantee institutions become into the "scapegoat" of the loaner, and the function of developing the financing can not be really exerted.

Third, at present, China only regulated the re-guarantee system principally in relative policies, and the re-guarantee system is not definitely regulated on the legislation layer. In the practice, one national re-guarantee institution is absent, which not only seriously limit the guarantee ability of single guarantee institution, but induce the unequal cooperation relationship between the guarantee institution and the bank, so in the guarantee practices, many guarantee institutions can not only assume sum guarantee, but also assume 100% suretyship of joint and several liability. That is relative with the deficiency of the credit ability of the guarantee institutions. Therefore, it is very important to establish the national guarantee institutions and comprehensive and effective re-guarantee system.

## *2.3 Problems of guarantee institution*

2.3.1 The guarantee market system is not complete and the quantity of the guarantee institution with single variety is short

Some places only have policy SMEs credit guarantee institutions and have not mutual guarantee institutions and commercial SMEs guarantee institutions generated in the market. Some places have not SMEs credit guarantee institutions, and the re-guarantee institutions have not been founded up to the present. The mechanisms of operation cooperation and risk dispersion among various guarantee institutions still have not formed.

2.3.2 The market orientation of the guarantee institution is not specific

Considering the benefit and development, most guarantee institutions of China put the profits on the important position, and they always incline to the enterprise with many assets mortgages when selecting the guarantee enterprises, and some enterprises which most need the guarantees can not obtain the guarantee because they can not fulfill the effective mortgages of the bank.

2.3.3 The capital scale of the guarantee institution is small, and the guarantee ability is deficient congenitally

At present, almost all capital sources of Chinese guarantee institutions come from the financial appropriate funds of the government, and most local finances in China can not fulfill the demands of SMEs to the guarantee funds, which will induce a series of problems such as small capital scale of the guarantee institution, insufficient guarantee ability, the bad anti-risk ability, high financing cost and single operation sort.

#### 2.3.4 The guarantee institutions lack in standard interior management system and risk management mechanism

Chinese SMEs guarantee institutions universally lack in many interior management systems such as the guarantee security system, the counter-guarantee system, the re-guarantee system and the collective auditing system, and the risk management systems such as standard operation mechanism, interior risk control mechanism, risk alarming mechanism and compensation transfer mechanism. The administrative order guarantee and human feeling guarantee happens often, and they will reduce the credit of the guarantee institutions and increase the risk. In addition, there are not organizational structures and supervision institutions restricting each other in the interiors of the credit guarantee institutions, which can not supervise the guarantee institutions and their behaviors.

#### 2.4 Problems of credit system

##### 2.4.1 The important status of the integrity principle has not be established in the market economy construction

Chinese “General Provisions of the Civil Law” and “Contract Law” all regulate the integrity as one basic principle, but in the judicial practice, because it is not a concrete legal rule, it mainly depends on judges’ free appreciation, and the legal compulsory function can not be fully exerted. So the restriction power that only depends on parties’ self-discipline to standardize his behavior is limited.

##### 2.4.2 The legal systems about the credit management are deficient

The guarantee institution is the professional credit guarantee institution, and whether the information are exact, complete and timely is very important for the guarantee institutions. At present, the acquirement, evaluation, development and issuance of the credit information resources lack in legal references, and the legal regulations about the credit industry are still deficient. Because the credit information of enterprises and individuals are not opening, that seriously influences the quality of the credit report, and the guarantee institutions can not obtain enough guaranteed enterprise information. The problem of the information asymmetry makes the credit guarantee industry become into one of industries with the largest risk.

### 3. Perfecting the SMEs credit guarantee legal system of China

The establishment of Chinese SMEs credit guarantee faces the deficiency of the system environment, which are mainly embodied in lacking in healthy legal systems and regulations according with the requirement of the market economy, so many credit guarantee activities can not depend on laws under many situations. Therefore, we need quicken the legislation process, adjust corresponding legislation contents and form a set of complete and uniform guarantee laws to standardize SMEs credit guarantee activities.

#### 3.1 Unveiling the “SMEs credit guarantee administrative measures” as soon as possible

The countries which emphasize the development of SMEs all have established the SMEs credit guarantee laws, such as the “credit guarantee funds law” of Korea and the “SMEs credit guarantee association law” of Japan, and China should enact a special law about the SMEs credit guarantee as soon as possible. Though Chinese “SMEs credit guarantee administrative measures” (“measures”) is brewed for a long time, but it still has not enacted. To solve above problems, the “measures” should include following contents.

##### 3.1.1 Credit guarantee institution

In the SMEs credit guarantee system, the SMEs credit guarantee institutions are in the core statues, and they are the policy support institutions that the governments indirectly support the developments of SMEs, and they belong to the non-financial institutions, and they can not engage in the financial operation and finance credit, and they should be supervised by the governmental department. The “measures” should regulate the market admittance condition, legal status, exit system, operation range, operation flow and the legal form of the credit guarantee institutions. And the legal form should take the business entity as the principle, and take the enterprise entity and juridical association as the supplements. The credit guarantee institutions should be operated according to the complete marketization.

##### 3.1.2 Service objects

The service objects of the SMEs credit guarantee system are not all SMEs, and it should aim at the SMEs which can not offer the mortgages required by the bank and possess development potentials. Japanese SMEs credit guarantee plans mainly take the governmental industrial policies in every term as the references, and offer guarantees for the items which accord with the industrial policies. China can refer to this way, constitute corresponding SMEs guarantee plan according to the economic development demands in different terms, and support the SMEs according with the present industrial policies to embody the legislation attention and exert the economic lever function of the credit guarantee.

##### 3.1.3 Capital financing system

The capital sources of the SMEs credit guarantee system should form the financing mechanism with multiple channels and quantities. For the SMEs credit guarantee institutions, except for the governmental investment, we should actively encourage the civilian capitals to participate in order to improve the capital financing structure, expend the guarantee

ability of the credit guarantee institution, balance the supply and demand of the SMEs financing guarantee market, and exert its highest efficiency.

#### 3.1.4 Re-guarantee system

The State Council of China can authorize the civilian capitals to establish the Chinese credit re-guarantee sharing Ltd which will be the only national re-guarantee institution in China. The national re-guarantee institution will not compete with various guarantee institutions to control and partake in the management risk of other guarantee institutions, and enhance the guarantee ability of other guarantee institutions. The national re-guarantee institution gives priority to the marketization re-guarantee operations and carry on various political re-guarantee capital trusteeship, and the re-guarantee institution will partake in certain proportional loss. In this way, after confirming the legal status of the re-guarantee institutions, the legislation could fully exert the important functions utilizing the market mechanism and economic measures to standardize various management behaviors of the guarantee institutions, control the risks of the guarantee industry and perfect the national guarantee system.

#### 3.1.5 Governmental harmony and supervision mechanism

At present, there is still not a national supervision management department of SMEs credit guarantee institution, and the provincial supervision department is still not complete. In the world, almost all credit guarantee institutions have perfect supervision mechanisms such as the Minor Enterprise Management Bureau of US which was founded according to the "Minor Enterprise Law". China can refer to this way and confirm the SMEs credit guarantee supervision mechanism in the "measures", establish the administrative institution which mainly manage the national credit guarantees, make concrete regulations for the responsibility, limitation and supervision procedures of the administrative institution by the legal form, establish and perfect the supervision mechanism of Chinese SMEs credit guarantee institution.

#### 3.2 Perfecting Chinese credit system and legal system

The development of the SMEs credit guarantee system is related with the establishment of the social credit system, but the lagged credit legislation has been the bottleneck to construct Chinese social credit system, so we should quicken relative legislations works for Chinese social credit management. The social credit system includes the government credit, enterprise credit and individual credit. Under present situation, the social credit system legislation about credit guarantee should include three aspects. First, constitute the laws or regulations limiting the opening range of information, and these laws regulations should include opening data source and the responsibility of the supervision institution. Second, starting from developing the credit management behaviors, China should enact laws or regulations to limit the range of the data secrecy as soon as possible. Third, constitute relative legal regulations to strictly standardize the behaviors of the institutions and organizations relating to credit record, usage and activity.

Referring to international experience and combining with Chinese concrete situation, we should institute the legal regulations including following contents such as standardizing the content and procedure that the government and the public department open the credit data, standardizing the supervision management measures about the enterprise credit information and enterprise credit institution, standardizing the supervision management measures about the individual credit information and individual credit institution, and standardizing the management measures about the credit institution and the credit service. In addition, we should also study and perfect the credit fault punishment mechanism as soon as possible and confirm the start and emphasis of the credit fault punishment mechanism design, the difference and legal boundary between credit fault and guilty, and the punishment form of the credit fault and the punishment degree, and the operation and implementation effects of the credit fault punishment mechanism. And the legal collection and diffusion approaches should be established for the "blacklist" public display system aiming at the credit fault enterprises.

#### References

- Chen, Naixing. (2004). *Credit Guarantee System of Small & Medium Enterprises*. Tianjin: Nankai University Press.
- Chinese National Congress of the Central Committee. (2003). *The Promotion Law of Chinese Small and Medium-sized Enterprises*. Beijing: The People's Court Press.
- Liu, Dinghua. (2002). *Monographic Study of Financial Laws*. Beijing: Beijing University Press.
- Liujin & Wu, Dongzuo. (2003). The Credit Guarantee System of Japanese Small and Medium-sized Enterprises and Its Enlightenments. *Financial Theory & Practice*. No.1. P.81-83.



## The Concept of Mahathiriskonomisme: An Economic Recovery Model during Crisis

Md. Shukri Shuib

College of Law, Government and International Studies  
Universiti Utara Malaysia, 06010, Sintok, Kedah, Malaysia  
Tel: 60-4-928-6668, 6012-5357913  
E-mail: [md.shukri@uum.edu.my](mailto:md.shukri@uum.edu.my)

Mohamad Faisol Keling

College of Law, Government and International Studies  
Universiti Utara Malaysia, 06010, Sintok, Kedah, Malaysia  
Tel: 60-4-928-6670, 6013-5840828  
E-mail: [m.faisol@uum.edu.my](mailto:m.faisol@uum.edu.my)

Mohd Na'eim Ajis

College of Law, Government and International Studies  
Universiti Utara Malaysia, 06010, Sintok, Kedah, Malaysia  
Tel: 60-4-928-4249, 6019-5721955  
E-mail: [naeim@uum.edu.my](mailto:naeim@uum.edu.my)

### Abstract

Mahathiriskonomism is a thought concept in an effort to save the economy under crisis and has proven successful. This model was a manifestation of idea and an action plan used by Malaysia during the economic crisis, which was an initiative of Tun Dr. Mahathir Mohamad during his reign as Malaysia's Prime Minister. With experience in handling two great economic crises, in 1982 and 1997, the birth of an economic management under stress by Tun Dr Mahathir can clearly be called as Mahathiriskonomism. Therefore, the thought perspective and idea with the actions that were used in 1997 was perceived as an important effective experiment in handling the economic crisis which has defied western believes, applied by the International Money Fund (IMF) and also the World Bank under the Washington Consensus. The global economic crisis 2008 made Malaysia an important subject as alternative management in economy under stress. In this ever challenging world, no country in this world can escape from menaces and threats. The threats that emerge can come in various forms. One of the threats and menaces that can manifest is in terms of economy and national development. Currently, in this globalised era, international institutions are also used as instruments to threaten and menace a country's sovereignty. The westerner's are supposed to use international institutions as agents, design to shake the stability and present an impact to the government of a country. Consequently the countries being threaten are compelled to accept the injection from the International Money Fund (IMF) which is perceived by some leaders and the public as a proxy to United State and westerners. The IMF had succeeded in confusing the local financial and political system. In the quest to defend the integrity and sovereignty of Malaysia, under the leadership of former Prime Minister, Y.Bhg Tun Dr. Mahathir Mohamad had successfully minimized the impact of threats and maintained economic management and national politic towards stability. Hence, this approach which can also be referred as 'Mahathiriskonomisme' is identified as a successful approach that amazed the world, furthermore it is observed and studied not only by economy and political researchers in Malaysia, but also international researchers.

**Keywords:** Mahathiriskonomism, Economic crisis, Economic management, Political economic

### 1. Introduction

Mahathiriskonomism derives from the combination of the name 'Mahathir' from Dr. Mahathir Mohamad, former Malaysian Prime Minister, with the word risk and economy, in addition the prefix 'ism' is attach to suggest a thought or

ideology (Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008). Therefore the term 'Mahathiriskonomism' is created, which by general definition is the paradigm and thought of Mahathir concerning the economic risk that Malaysia faced during his reign as Malaysia's Prime Minister from July 1981 to 31st of October 2003 (Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008). In this ever challenging world, no country in this world can escape from menaces and threats. Threats that appear can come in various forms. One of the threats and menaces that can manifest is in terms of economy and national development. Currently, in this globalised era, international institutions are also used as instruments to threaten and menace a country's sovereignty. The westerner's are seen to use international institutions as agents, design to shake the stability and present an impact to the government in a country (Md Hussin Nayan,1995:14; Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008)). This is indeed the current reality that the world is facing. Whether it is true or not, it depends on the perception and view of each individual. Remembering the economic crisis in 1997/98, many nations of the world that was threatened by the crisis were a result of the attack on their currency. Countries like Mexico, Argentina, South Korea, Thailand, Malaysia and Indonesia are among the countries that directly experienced the impact of the attack on the currency. The threat on the value currency caused it to fluctuate dramatically and became the source of economic chaos of the country. Every planning from national budget, company, business and also personal was troubled by the instability of the currency in the international market (Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008).

Consequently countries involved, were obliged to accept injection from the International Money Fund (IMF) which is perceived by many as a proxy to the United States and Westerners (Md Hussin Nayan,1995:14). IMF had successfully confused local financial and political system. This was the source of finance instability which affected the economy and spread on to disrupting political and law stability in a country. This is what happened to countries threaten by the crisis in 1997/98. Malaysia and Indonesia became a literature review of the new form dilemma of threat menacing national integrity and sovereignty. To defend integrity and sovereignty of a country, the 'Mahathiriskonomism' approach is perceived successful, respected by the world and now studied by not only political economy researchers in Malaysia, but even international researchers. Previously, there have been studies explaining Mahathir's approach, such as Mahathirism, and also Mahathironomics conducted by Prof Datuk Dr. Adnan Alias, and Md. Shukri Shuib (2007) had proposed the new term to describe on Mahathir success on handling economic crisis as 'Mahathiriskonomism'. Therefore, this paper intends to present another observation on Mahathir's analysis of risk and economic challenge that Malaysia faced during the financial turmoil in 1997/98.

## **2. Mahathiriskonomism a Regional Model**

Mahathir showed his willingness to take risk, which is to defy popularity. Initially, around the peak of 1997/98's economic crisis, on the 1st of September 1998 he decided on a political action that was unreasonable during a time the country is struggling with serious economic disorder; he sacked the Finance Minister who was also the Deputy Prime Minister and at the same time the number two leader after him within the United Malay National Organization (UMNO) and National Front (BN). Anwar Ibrahim was sacked and this was another challenge that Dr. Mahathir had to handle simultaneously with the economic crisis that struck the country. Subsequently, after creating a political dimension post Anwar, without the number two, on the 2nd of September 1998 he decided on a drastic measure that is restricting resource or instrument of speculation. For this purposes, he prevented offshore activities by controlling selected foreign exchange to stabilize short-term capital (Md. Nasrudin, 2000: 89; Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008)). Dr. Mahathir's decision was ingenious through his willingness to face uncertainty and achieve his objective. He created the '3R' formula that meant relax, respect and response.

With this approach Dr. Mahathir was clearly relaxed in handling any ordeal although sometimes it reduced his popular among the people and voters, because he hold firm to what he believes true and right. Respect means to respect and hope his leadership and country to have self-respect, he gives response to every action made accurately and implement the correct policy and action to enable the people and also international observer not just seeing the success of his actions but also to enjoy the success together. All along his administration, there existed various national policies which include elements of politics, economy and social either individually or collectively (Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008). The policies that have been implemented during his administration such as:

- i) Leadership by Example. The "leadership by example" policy was launched by the Prime Minister on the 19th of March 1983. The foundation to this policy success is the existence of an excellent leadership that can be of exemplary.
- ii) Clean, Efficient and Trust is a philosophy that believes noble values help increase quality, productivity and credibility and also trigger the spirit of working efficiently. This policy was launched in April 1982.
- iii) Islamic Values Application by application of Islamic values aims to form a happy country and to produce self-respected Malaysians respected by other nations.

iv) Malaysia Population towards 70 Million. The policy to increase the population to 70 million people had been suggested by the Prime Minister in the UMNO's Grand Assembly in September 1982. He believes that with a total population of 70 million within 115 – 120 year, the country would be able to be more successful. The suggestion was again proposed during the presentation of 4<sup>th</sup> Malaysian Planning on 29th of March 1984. In the efforts to achieve this objective, the government has unveiled several strategies, such as tax policy and labor benefits providing benefits to families having 5 children.

v) Privatization Policy. Privatization policy was first introduced in the year 1983 after the Malaysia cooperation policy. Through this privatization policy, the government had transferred power, interest and investments to certain private sector. By privatizing specific services, the government believed that it would enable to increase the sectors effectiveness and efficiency.

vi) Malaysian Cooperation Policy. Malaysian Cooperation Policy was proposed by the Prime Minister Dr. Mahathir Mohamad during the launching of the National Institute of Public Administration (INTAN) on the 25th of February 1983. This policy aims to stimulate the private sector's active engagement in national development. The key strategy of this policy is to enhance ties between public sector and private sector in various fields. The relationship among public and private sector will be improved which will help contribute to national development.

vii) Vision 2020. Dr. Mahathir, when presenting a paper work entitled "Malaysian: The Way Forward" at the first conference of Malaysian Trading in Kuala Lumpur on the 28th of February 1991, stated nine main challenges that Malaysia needed to face to become a new industrial nation and a developed country in year 2020. In year 2020, Malaysia will be a united country with citizens who are confident, high moral value and strong ethics, democratic, liberal and compromising, caring, fair in terms of economic distribution, progressive and prosperous and have full control over the competitive, dynamic, active and viscous economy.

viii) National Development Policy (DPN). National Development Policy (DPN) aims to attain a balanced development in establishing united and fair society. DPN stresses on to the growth with fair distribution enabling every Malaysian to participate in any principal economic activity. DPN is a continuity of the New Economy Policy (NEP) with a goal to eradicate poverty and reform society.

Simultaneous economic crisis with political challenges that Mahathir faced was also similar to the situation in Indonesia. At the time of economic crisis, the most populated country in ASEAN was also struggling with reformation. In Malaysia, Anwar also launched a movement comparable to Indonesia and used the same slogan. In Malaysia, in the development and prosperity creation perspective, Dr. Mahathir had put a strong foundation to the national economy system as one of the main priorities in Malaysia (Md. Shukri, August 2007: 50; (Md. Shukri, 2007; Md. Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008)). In the past, politics and military were the main priority of a country, but now economy has become a source of threat to the national security of a country if it is not manage and examine thoroughly and strategically (Md. Shukri, August 2007: 50; (Md. Shukri, 2007; Md. Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008)). In recalling the downfall of the currency in 1997/98, Dr. Mahathir had declared war and economy emergency by setting up National Economics Action Council. He introduced a method whereby the post as Finance Minister is hold by the Prime Minister and elected prominent local and foreign economic experts to tackle the economic problem (Md. Shukri, August 2007: 50; (Md. Shukri, 2007; Md. Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008)). This decision was taken to enable the problem relating to the national and international economic system could be monitored and take appropriate action so that the country is not unharmed in stability and prosperity (Md. Shukri, August 2007: 50; (Md. Shukri, 2007; Md. Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008)).

### 3. Features Mahathiriskonomism

Mahathiriskonomism is generally Mahathir's thoughts on dealing with the economical and political issues especially in facing national sovereignty threats during the economic crisis in 1997/98. It is identified that there exist several fundamental features of Mahathir's thoughts in determining a decision, according to Prof Adnan Alias (2003; Md. Shukri, 2007; Md. Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008), the basis of Mahathir's thoughts covers elements as follows:-

*First: Back to basic which is to question the fundamentals and find the simplest explanation to solving a problem*

*Second: Confront the flow, Dr. Mahathir dare to propose an idea that is obviously different from the trend or conventional.*

*Third: Make the right decision, this is usually a characteristic of a successful entrepreneur, every decision is not only base on the right or best way but also stresses the decision's need to be materialized until fruitful.*

Additionally, Mahathiriskonomism also include the courage to risk as a key element in achieving Mahathir's action in his response to face the financial crisis. Mahathiriskonomism's features also include elements of idealistic thoughts and actions and sometimes transcend time. Mahathir's thought are visionary and idealistic with strategies and specific

techniques to achieve success. One of the examples is clearly evident in the vision 2020 which stipulates Malaysia to be a distinctive developed nation in year 2020. Mahathir's thoughts can also be characterize as responsive to time or environment, and far from being futuristic. Mahathir's thought are able to adapt risks of political economical challenge, this is clearly seen through his idea by suggesting measures especially in anchoring the value of Malaysian Ringgit as RM3.80 to AS\$1, imposing capital control that was labeled as an innovative financial instrument by Tan Sri Nor Mohamed Yakcop (Malaysia's Finance Minister), which was the most significant measure in ensuring stability of Malaysia's financial system (Muhammad Azli Shukri, July 2007: 20). Measures that were carried out in the administration of Dr. Mahathir through the National Economic Action Council enabled Malaysia to face foreign speculator's attack which have capitals of over AS\$500 billion. Moreover, according to Tan Sri Nor Mohamed Yakcop, Malaysia is capable of providing a model that is the opposite of IMF's package to countries borrowing money from this monetary fund; that is with not raising the interest rate.

Malaysia instead lowered the interest rates to increase the number of liquidity or the amount of money in the market to stimulate economic growth, as a result the IMF loosen the conditions by granting the countries lower interest rates to inject liquidity to their economy so that Malaysia is not seen superior to those countries assisted by IMF (Muhammad Azli Shukri, July 2007: 20). A vision with merely idealistic idea can not guarantee in raching an objective, but with appropriate strategies and specific techniques, Tun Dr. Mahathir was able to response to the situation (Ahmad Naim Jaafar, 2003: 171). According to Ahmad Naim (2003) in responding to the technology progress, Multimedia Super Corridor was created and had since been develop in tandem with the current technological advancement. Dr. Mahathir is sharp in creating a situation and being able to provide an objective of his leadership with a clear action plan. This is what it called as leadership intelligence using the framing technique that mean that a leader possesses the leadership language and give directions to the organization (Ahmad Naim, 2003:179-180; (Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008)). This definition emerged and is used commonly after Dr. Mahathir's sayings such as "We can", "Malay tend to forget", "The struggle is not over". Other popular mottos in his effort to handle the economic crisis of 1997/98 are "currency speculator", "foreign speculator" and had also embedded patriotism though the slogans like "Our country is our responsibility" and "for you Malaysia" (Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008).

#### **4. The Perspective of Mahathir's Economy Game Plan**

Globalization comes with an open market. The globalization concept widely used around the world had also given the birth to the free market concept. This makes globalization work in tandem with financial and economic goals. While studying globalization, usually it can also be viewed as a world threat. Dr. Mahathir perceives globalization and free market progression as some superpower's weapon to disseminate their hegemony. The United States and other develop countries have succeeded in making globalization as an agent to propagate their market and economical power beyond the boundaries of their country (Rosazman Hussin,1999:161). Dr. Mahathir explanation of globalization can be viewed as a caution for Malaysia and other countries in the region to understand and be aware of the threats behind the concept of globalization and free market that the West have proliferate (Chandran Jeshurun,1993:72; Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008). According to Dr. Mahathir:-

*"Free market means that those who are bigger, stronger and have more capital are those who will conquer. The citizens will not receive special treatment. Foreign companies are free to enter any country to compete with the local business and bank. The small local companies will be destroyed by the big companies (western companies) and we (in the local country) will be merely low wage labors working for them. They promise that it will all depend on merit and not through an unjust competition since they are the biggest and most experienced. And finally they will conquer every aspects of the local economy."*(Berita Harian, 20<sup>th</sup> of June 2003)

Dr. Mahathir also demonstrated that economical instruments can become weapons to menace a nation's stability. This is validated by Stuart Harris (2000:499) an emeritus professor at Australian National University. He mentioned that through globalization, the financial system is the starting point that causes an economy crisis. In this context, it is evident that through the economy and financial system, it can be utilize as weapon to destroy a nation by disturbing its stability via a menace to one of the economic elements which can trigger a social disorder if the economy system becomes uncontrollable. In terms of nationalism, the concepts of regional and globalization can be perceived as an agenda that can inflict threat towards the sovereignty of a country. Globalization is especially assumed as the source of destruction. It can occur very fast if the country is unprepared to receive the free competition not only in the market but also in the free politics, economy and social which is highly connected with comprehensive security. This is because, in this era of globalization, the competition does not only happen outside the boundaries but also involves domestic competition inside the country. An imbalance competition between the rich and poor, the strong and weak will be an unjust competition. Additionally, in this global era with the notion of globalization, a rich world and foreign company who possess large capital will dominate the market and consequently monopolize the industry. In this world of globalization, monopoly will eventually prevail. The result is that the receiving country indirectly, without regulation control and protection from the



government will kill the national company. This is due to the inability of the national company of a country to counter all completion with different quality and price (Rosazman Hussin, 1999:143-159).

In the context of nationalism, it is normal for a country to defend the position of national company. But in this globalize era, very few people, including the leaders, view the protection of national company as important. This is the drawback of globalization seen through the viewpoint of nationalism. IMF had confessed its global mistake. But the negative effect should be fixed even though it had destroyed markets and capitals. Malaysia and other countries like Indonesia cannot avoid this global threat. In comparison, Malaysia had succeeded in defending the overall sovereignty, which is rejecting the injection of money from IMF sponsored by the West. Dr. Mahathir introduced the move to loan domestically, to stimulate the economy and encourage development (Md. Shukri, Ogos 2007:51). Institutions such as Employees Provident Fund (EPF), PETRONAS and other related government institutions became the centers of credit to recover national economy. The views from world finance and economy experts also supported Malaysia's move under the leadership of the then Prime Minister, Dr. Mahathir. Prof. Joseph Stiglitz and Prof. Steve Hanke explained their critical opinion on the expansion of global market and IMF threats to the sovereignty of a country in this era of globalization. Indonesia and Malaysia was chosen as an interesting model study case. Here it has clearly demonstrated the importance of the government's role in handling the global threat toward the nation's politic, economy and social stability. These three elements known as the global three functions namely politic economy and social are important elements in defending the security and sovereignty of a nation.

### 5. The Economy as a Tool and a Threat

The Asian crisis of 1997-98 had clearly transformed Indonesia and Malaysia. Economically, socially and politically the economy crisis and turmoil presented a significant effect. This change is not only acknowledged by Malaysian and Indonesian leaders but also by the Australians who is a neighbor of these Southeast Asian nations. Paul Keating, the former Australian Prime Minister (1991-1996) in his book entitled "Engagement", said:

*"Then, from the middle of 1997, the Asian economic crisis presented Indonesia with the sharpest economic decline in its history, one of the steepest anywhere in the world in modern times. The economy shrank by 20 per cent. Unemployment more than doubled. Inflation soared by 80 per cent. It was a crisis unlike any Indonesia had faced in the past, because it was taking place in a country that had been transformed. In 1966, when Suharto came to power, agriculture made up half the economy; now it was just 20 per cent. A large middle class of perhaps 1.5 million people had grown up. Most importantly, community expectations had changed. As a result of thirty years of development, the people of Indonesia expected their own lives, and the prospects for their children, to steadily improve."*

(Keating, 2000: 148-149)

Keating also wrote elaborately on what had happened in Indonesian during the peak of the economy crisis. Keating was known as the only Australian Prime Minister who had constantly tried to lessen the gap between Australia and other Asian countries. Keating perceived Indonesia's economy depended greatly on the United States, especially the value of rupiah compare to the US dollar that could harm Indonesia's economy. Thus if there is a change in the US economy, finance or currency policy, it will also affect Indonesia. This is the main cause of Indonesia's fall down, starting from the internal economic instability. Keating in his book mentioned that...

*"Indonesia's problem began when the government was unable to sustain the informal currency peg it had established between the rupiah and the US dollar. Indonesia had benefited greatly from this link. But although it helped bring in foreign investment, it also generated a huge offshore debt burden. Indonesian businesses borrowed US dollars at US interest rates rather than at the higher Indonesian rates and did not hedge their borrowings because they assumed they faced no exchange risk. The offshore debt was around US\$74 billion. Three-quarters of it was unhedged, and it was mostly short term. Suharto told me later that his government had no idea of the size of this private sector borrowing."*

(Keating, 2000: 149)

Because of Indonesian incapability to solve the soaring economy crisis, IMF became their foundation of hope.

*"The Asian crisis of 1997 hit Indonesia hard. The IMF responded by prescribing its standard medicine and Indonesia floated the rupiah on July 2, 1997. The results were catastrophic. The value of the rupiah collapsed, inflation soared and economic chaos ensued."*

(Hanke, 2003: 13)

The catastrophic effect that hit Indonesia due to instability of the currency, had destroyed and shattered Indonesia's economy. Australia the closest neighboring country in the southern hemisphere was aware and its Prime Minister, Paul Keating in a local newspaper The Australian, pointed out by Hanke, had announced that the United States recognized the collapse of Indonesia's economy that will crumple the government and leadership of Suharto. Hanke quoted Keating who said ... *"The [US] Treasury quite deliberately used the economic collapse as a means of bringing about the ouster of President Suharto"* (Hanke, 2003: 13). It should be reminded that on the 15<sup>th</sup> of January 1998, President Suharto had

signed a IMF package of US\$43 billion in the hope to rescue Indonesia's economy. This was witness by the Director General of IMF, Michael Camdessus, as describe by Keating *"I saw Suharto on 15 January 1998, the morning he was to sign a new, US\$43 billion, package of support with the IMF (the occasion later remembered for photographs of IMF Director General Michael Camdessus standing with folded arms as Suharto signed the papers)"* (Keating, 2000:151). Indonesia was compelled to accept the IMF package with every advice that IMF furnished concerning the reform of its economy *"The IMF's demand included not just measures to allow orderly economic adjustment but a complete reordering of the Indonesian economy, It seized the opportunity to impose an extensive and intrusive agenda of change"* (Keating, 2000:151-152).

The chaos of Indonesian government that time to defend the economy and market from further plummeting was viewed as a game by the US and IMF. *Suharto was told in no uncertain terms by US President Bill Clinton and the IMF's managing director Michael Camdessus that he would have to drop the currency board idea or forgo US\$43 billion in foreign assistance"* (Hanke, 2003: 13). The threat from US and IMF was seen a hindrance for Indonesia to save the economy and sovereignty of the country. According to Prof. Steve Hanke, an economic advisor for the White House during the reign of Ronald Reagan and also a professor of economics at John Hopkins University Baltimore, before receiving the IMF package on the 15<sup>th</sup> of January 1998, the Indonesian government under President Suharto, had try to counter the fall of the rupiah's value in the international market. Hanke described it by saying:

*"Following our first meeting in Jakarta, Suharto named me as his special counselor. Shortly thereafter, Suharto endorsed my proposed currency board for Indonesia. This sent the rupiah soaring. It appreciated by 28 per cent against the US dollar on the day the news was released. This did not suit the US government and the IMF"*

(Hanke, 2003: 13).

Joseph Stiglitz, the former Chairman of Economic Advisor Council to President Bill Clinton and also former chief economist of World Bank until January 2000, made a critical comment regarding the role of the United States in systematizing the economy activities and IMF assistance. Based on his experience as the economy advisor to the President of United States and also a prominent figure of World Bank, he wrote in the preface of his book entitled *"Globalization and Its Discontents"*,

*"As a professor, I spent a lot of time researching and thinking about the economic and social issues I dealt with during my seven years in Washington. I believe it is important to view problems in a dispassionate way, to put aside ideology and to look at the evidence before making a decision about what is the best course of action. Unfortunately, through hardly surprisingly, in my time at the White House as a member and then chairman of the Council of Economic Advisers (a panel of three experts appointed by the president to provide economic advice in the executive branch of the U.S government), and at the World Bank, I saw that decisions were often made because of ideology and politics. As a result many wrong-headed actions were taken, ones that did not solve the problem at hand but that fit with the interests or beliefs of the people in power"*

(Stiglitz, 2002: preface)

This writing show that the Washington's politic in painting the world economy follows US standard that is alleged to be global and indeed rational, right and proven. The direct effect of Washington's policy formulating process is felt globally, around the Southeast Asian region and also by the ASEAN countries. Furthermore, the Southeast Asian region received the greatest impact due to the indecisiveness of Washington's economic policies. Southeast Asian market's reliance on the United States, who clearly aspires to dominate the world, is seen as a threat to the elements of the global three functions. United States as the main business partner of Indonesia and Malaysia should have recognized and applied the prosper-thy-neighbor approach. But instead, Indonesia and Malaysia who are their biggest import and export partners was presented by a burden as a result of their politics during the value of the currency's down fall in the international market. This also demonstrate that Indonesia become a victim of the United States a superpower's political game, intended to weaken the stability and sovereignty of Indonesia. And ironically Indonesia was not the only country that was affected. Most of the countries in the region faced the organized threat.

Indonesia and Malaysia will always receive the effect, due to the geographical location and economy interdependence. Strategically, Malaysia is located in the center of the region, thus indirectly Thailand and Indonesia will affect Malaysia. Merton Miller, the Nobel Prize winner, said *"the US wanted to overthrow Suharto and that a currency board would spoil that plan"* (Hanke, 2003: 13). Because of the United States intention to disseminate its supremacy, IMF was use as the White House's tool, through the threat delivered by Michael Camdessus to Indonesia behind the loan. The Southeast Asian region was developing in such a way that this so called *"The rise of the East"* meant as an unsettling threat to the United States of America. Therefore, the act to destroy complete stability in this region of the East was conducted by this superpower so that the ASEAN Free Trade Area (AFTA) will not be accomplish and succeed. With the impact of the economic turmoil of 1997-98, ASEAN's cooperation with AFTA has not been performing effectively, because the

economic recession had shrank the region's economic level, slowing the process of development and destroying the eco-politics and social elements of the countries.

## 6. Mahathiriskonomism Saved Malaysia

For Dr. Mahathir, in his game plan to ensure Malaysia continuously will be able to succeed, the economic elements are the major foundation, with the economic progression, prosperity will be achieved, thus directly will ease the nation and encourage the development of business arena. Additionally, with a peaceful environment, the political stability will be established (Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008). It is no wonder that various policies on development and progression were stress by Dr. Mahathir's administration. Malaysia is not immune to threats that Indonesia had experienced, the economy turmoil of 1997-98 had presented several problems to the country. As describe by Md. Shukri Shuib (2007) in his article on Mahathiriskonomism, the outcome of Mahathiriskonomism revealed the bravery of Dr. Mahathir in taking risks concerning economic matters to generate absolute sovereignty. In brief Mahathiriskonomism had saved total sovereignty even though the forces of threats were troubling Malaysia's global three functions (Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008).

According to Weller and Hersh (2002), the main problem of Asian countries is the drastic capital flow. For 20 year the capital market had been flowing without control. This is evident through the increment of foreign capital from developed countries to developing countries. This increment can be compared to the increment of 1980 that only experience capital flow of US\$1.9 billion to US\$120.3 billion in 1997 (Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008). This clearly displays the financial trouble in the domestic market of Asian countries including ASEAN and Malaysia, which is the inability to hoard the drastic foreign capital out flow like what the foreign investors executed during the Asian financial crisis 1998. And amazingly, as soon as the Asian countries experience bankruptcy, the acquisitions of foreign companies from foreign investors have attracted new investors. In 1998 alone, there was still foreign investors interest to invest up to US\$56 billion in the domestic market of Asian countries (Md. Shukri, 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008). Malaysia identifies IMF not as an alternative for assistance in resolving the crisis. Japan as a friend was the alternative for Malaysia to assist the economic crisis. It is no wonder why Dr. Mahathir believes that East Asia has the potential in strengthening the regions market. Through ASEAN+3 (Japan, China and South Korea), and the collaboration of Southeast Asian and East Asia, Japan has the capability to take the role as regional super power. According to Dr. Mahathir, Japan through the success of Malaysia in managing the economy, had guarantee bon that Malaysia circulated in the international market. This was personally mentioned by Dr. Mahathir confirming that in times when Malaysia was in need to recover the economy crisis, Japan had offered its help.

*"Japan came to the rescue by making available substantial soft loans amounting to several billion US dollars. Japan was also prepared to guarantee any bond issue by the Malaysian Government. And so despite Moody's and Standard and Poor's low ratings, when the Government tested the American bond market in 1999, the issue was oversubscribed by three times."* (Mahathir, 1999).

Malaysia according to Prof. Stiglitz is ..

*"... only Malaysia was brave enough to risk the wrath of the IMF; and though Prime Minister Mahathir's policies- trying to keep interest rates low, trying to put brakes on the rapid flow of speculative money out of the country- were attacked from all quarters, Malaysia's downturn was shorter and shallower than that of any other countries"* (2002: 93).

Stiglitz also added,

*"Malaysia was severely criticized during the crisis by the international financial community. Though Prime Minister Mahathir's...many of his economic policies were a success"* (2002: 122).

IMF also recognize Malaysia's success in solving the economy and financial crisis of 1997-98, which they had announced clearly during the annual Group of Eight (G-8) in Evian, France on the 2<sup>nd</sup> of June 2003. The Chairman of IMF, Horst Kohler stated:

*"Malaysia has recapitalized its banks, its system is more transparent and the country has been able to deal with the non-performing loans"* additionally, *"Generally, Malaysia has improved the business climate"* (Kaur, 2003).

Even the former IMF chairman, Michael Camdessus, in Paris a week before said *"They are (Malaysia) within the rules of the IMF which has no objection"* (New Straits Times, 2003). Mahathiriskonomism approach is a success, this is because several years after the crisis Malaysia has recovered and improved the economy climate. In June 2003, Bank Negara Malaysia announced that the growth of NGP was 4%, revealing that Malaysia's economy is improving. This also supported the statement announced by the Minister of International Trade and Industry, Dato Seri Rafidah Aziz, that until April 2003 Malaysia had recorded a surplus in the international trade valuing of RM5.77 billion (US\$1.52 billion). Furthermore it enlightened that without the help of IMF, known to obstruct the financial freedom of loan receiving

countries, Malaysia accomplished success with its diversified resources. Hence, what Malaysia implemented in the economic crisis 1997/98 is now clearly accepted globally as an option to save the world economy from deteriorating. The developed world has also indirectly accepted Malaysian thinking and actions derived from Mahathiriskonomism applied as an economic policy during crisis. The success of the Mahathiriskonomism's model can visibly be seen through excellent record achievement showing sustainable economic managerial performance. It is evident, where in 1985 when the country faced critical economic state with a rate of just negative 1 percent in growth, Malaysia could overcome it and boost the growth to 1.2 percent (1986) and continue to increase and hit 8.7 percent (1988) (Md Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis, 2008).

Mahathiriskonomism's legacy of success has clearly been stated by Datuk Tajuddin Abdul Rahman, Barisan Nasional Parliament member of Pasir Salak, affirming Tun Dr. Mahathir's vast experience in economy which has proven successful in treating the economic stress in 1997 and has brought to Malaysian's success and therefore proposed that Dr. Mahathir be appointed as chief of National Economic Council (Utusan Malaysia, 21 November 2008: 8). A repetition of the economic crisis occurred which later hit Malaysia as a result of the regional Asia-Pacific crisis in 1997-98, again Malaysia with the distinctive model successfully encouraged positive growth where the decrement hit negative 7.5 percent in 1998, Malaysia with its 'Mahathiriskonomism' model that combines elements of Tun Dr Mahathir's ideas and thoughts in taking economic risks have successfully brought Malaysia to a growth as much as 5.8 percent (1999). The growth in 1999 was an increase of 13.3 percent from the previous year. Now, with a growth estimate still at 5 percent this year and 3.5 percent next year, Malaysia is still seen solid and is able to face crisis (Md.Shukri Shuib, 2008). The Malaysian Deputy Prime Minister and Finance Minister's statement, Datuk Seri Mohd Najib Tun Abdul Razak that the continuous lesson achieved due to a decade of economic crisis has caused Malaysia to place a concrete economic base which according to him 'continuous implementation of financial reformation since 1998 has made the country's financial sector long lasting' (Berita Harian, 21 November 2008) and is actually a management style that handles economic stress in the context and model implementation of Mahathiriskonomism.

Malaysia's effort under Dr Mahathir's leadership in 1998 that had restructured the financial institution by combining the involvement of 71 institutions with a capital between RM13.2 to RM6.6 billions to only allowing banking operation to just nine institutions, now enables each financial institution to have capital average of RM38.3 billions (Malaysian Business, November 16, 2008: 27). Profit of financial institutions have been positive where before tax profit in 2007 were on average RM17.7 billions compared to only RM7.4 billions in 1997 (Malaysian Business, November 16, 2008: 27). This altogether shows that Mahathiriskonomism has strengthened the structure and domestic financial system which is continuously feasible until today.

In generating the financial industry's competitiveness, the style or pattern in the agenda has gained profit, where formerly in 1997 it was merely dependent on profit based on lending especially corporate loans that moved in 2007 to a more based upon profit from diverse source that balanced the profit by loans. This gives a multi sources move to financial institutions which directly will profit people who saves their money in the country's domestic financial institution. Apart from that, having learned that currency can also be made as a weapon and a cause of a country's economy downturn, the effort to strengthen the ringgit's role in the local market was implemented and successful. The strength of local financial system is the fruit of Mahathiriskonomism's management style which has also made Malaysia possess bank assets and financial institution including insurance with 90 percent which is based on ringgit's denomination that is in local currency form namely Ringgit Malaysia and has enabled protection from the risk of devaluation of dollar (Berita Harian, 21 November 2008). Moreover, the Finance Minister's statement that all national financial institutions today are unexposed to collective debt securities sub prima mortgage like what happened in the United States, and has shown that the country since 1997 has been prepared to tackle any economic threat that drives from the weakness of the current financial market and institutions.

Malaysia's move modeled after the futuristic thought of Mahathiriskonomism's paradox clearly embeds the application in the national economic management and has visibly save the country's financial system and market from a crisis that has taken place in the developed countries and the U.S financial market today. Tun Dr. Mahathir leadership clearly states that in any market, economy and the development of a country, the function of a financial institution such as banks and public funds must be protected and feasible. In the Malaysian context, compared to the U.S, the failing of poverty level in Malaysia which has only a population of 27 millions, is not as great as what that largest capitalist country is facing. The record obviously shows that Malaysia even with only a developing country status, can afford to create a success in reducing poverty rate which is somewhat astounding. From a poverty rate of 49.3 percent in 1970 Malaysia has successfully reduced the rate to 16.5 percent in 1990, and the rate is continuously decline to only 3.6 percent in year 2007, compare to its decrement of 5.7 percent in year 2004.

What is happening in the U.S is a lesson to the world, showing that the liberal capitalist practice has created 'a country within a country', where the existence of a poor community as many as 36 million people are seen to be similar with the third world country's poor, especially Africa and Asia. What is most embarrassing is that the poverty level in US has

increased noticeably, in 1998 only 3.8 million people were categorized as poor, however now the statistic of 2008 shows that the rate of poverty has increased 9.5 times or 950 percent. Compared to Malaysia, it is certain that the performance of eradicating poverty in this country is greater compared to the efforts of the White House in Washington. Tun Dr. Mahathir statement regarding the prospect of global economic crisis 2008 effects has clearly stressed that 'Malaysia will not slips into full recession next year if the country economy is well managed by the government' (Bernama, 5 December 2008). In addition, it shows that the legacy of management and the economic thoughts under the Mahathiriskonomism's concept originated from Dr. Mahathir himself has brought success to Malaysia in the long-term. And it is obvious that from the national comprehensive security concept which includes economy and protection of market for national interest is not only accepted by Malaysia through the Mahathiriskonomism's approach, but even by the U.S and developed nations, who have acknowledged this fact and in the economic crisis of 2008 that hit wealthy countries has exempted some independent capitalist elements intended to save respective countries national interest.

## 7. Conclusion

It is clear that through globalization the threat towards a nation's sovereignty exists and can happen. The role of United States as the source of national threat through economy that can spread to the nation's politics, social and security is evident. United States role to use their regime and other global institutes are rational and concrete. Economy is regarded as a basis of national prosperity and should always be reminded it can also be the basis of national sovereignty destruction. With the national perspective of Dr. Mahathir thoughts, the national economy and development to achieve absolute sovereignty will be difficult to perturb by global threats. The Mahathiriskonomism approach had save Malaysia even though initially Dr. Mahathir's decision was strongly disapproved. But eventually Malaysia succeeded in recovering the economy and overall national sovereignty. Dr. Mahathir was the main actor in handling the nation's economy turmoil. Thus his effort and approach had proven successful and respected worldwide. Malaysia should be proud and bless to own such a brilliant thinker. The sustainability of Malaysia's sovereignty from global threats should constantly be protected. The development of Japan utilizing the Meiji Recovery program in 1868-1912 has been continuously studied and analyzed to this date. Thus Malaysia should be proud with Mahathir Recovery as the foundation to be a developed country in 2020. Mahathir's approach that dares to take risks in the economic environment has made Mahathiriskonomism a successful and worldly recognized approach to solve risk during politic, economy and social trouble threatening the stability of a country.

## References

- Ahmad Naim Jaafar. (2003). *Membina Karisma (The Charismatic Building)*, Kuala Lumpur: PTS Professional.
- Berita Harian. Krisis Kewangan Global Boleh Buka Peluang Baru (The New Opportunity for Global Financial Crisis), 21 November 2008: 25.
- Bernama. (2008). *Malaysia Will Not Slip into Full Recession says Dr M*, 5 December.
- Chandran Jeshurun. (1993). Dasar luar abad ke 21: Pilihan bagi Malaysia (Foreign Policy in 21 Century: Malaysian Option). *Jurnal Pemikir* (2). Oktober-Disember.
- Hanke, Steve. (2003). Suharto, Too, Was a Victim of Regime Change. *The Australian*. 29 April.
- Harris, Stuart. (2000). Asian Multilateralism Institutions and Their Response to the Asian Economic Crisis: The Regional and Global Implications. *Pacific Review*. Vol.13. August.
- Herman, Edward S. (1999). The Threat of Globalization. *Global Policy*. April. <http://smzakir.blogspot.com/2006/06/mahathirisme-vs-bahasa-melayu.html>.
- Kaur, Hardev. (2003). IMF Praises Malaysia's Financial Management. *New Straits Times*, 3 Jun 2003.
- Keating, Paul. (2000). *Engagement: Astralia Faces the Asia-Pacific*. Sydney: Macmillan.
- Mahathir Mohamad. (1999). Case Study For A Country Under Economic Stress. *Mainichi*: Tokyo. August 2<sup>nd</sup>.
- Mahathir Mohamad. (2003). Ucapan Dasar Presiden di Persidangan Agung UMNO ke 54: Mengenali Ancaman Terhadap Bangsa, Agama dan Negara (The Ground Speech of UMNO's President at the 54<sup>th</sup> General Meeting: Knowing the Threats on Race, Religion and State). *Berita Harian*, 20 June.
- Md Hussin Nayan. (1995). Strategi Barat dalam politik internasional pasca Perang Dingin: Perancangan Malaysia dalam menanganinya (West Strategy in Post Cold War International Politics: Malaysian Planning Againts it). Dalam Auliah Sikom (pnyt), *Malaysia dan politik antarabangsa*. Kuala Lumpur: Institut Perkembangan Minda (INMIND).
- Md.Shukri Shuib. (2007). *Mahathiriskonomism: Sorotan Krisis Ekonomi 1997/98 (The Mahathiriskonomisme: In 1997 and 1998 Economic Crisis)*. Paper work presented at The Seminar Internasional Memperkuat Landasan Hubungan Indonesia-Malaysia. Universitas Padjadjaran, Bandung, Indonesia, 15-16 Disember.

Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis. 2008. *The Concept of Mahathiriskonomism: A Significant Model For Economic Turnmoil*. Paper work presented at The International Conference on International Studies (ICIS) (2008). Institute Diplomacy and Foreign Relations (IDFR), Kuala Lumpur, 4-6 Disember.

Md. Shukri Shuib. (2007). *Kejayaan Tadbir Urus Ekonomi Malaysia: Model Inovasi Bertaraf Dunia (The Successful of Malaysia Economic Governance: The World Innovation Model)*. *Dewan Ekonomi*. July.

Md. Shukri Shuib. (2007). *Sepuluh Tahun Kejayaan Pasca Kegawatan 1997.(The 10 years success after 1997 economic downturn)*. *Dewan Ekonomi*. July.

Md.Shukri Shuib. (2007). 'Mahathiriskonomisme': mengekang ancaman kedaulatan negara melalui ekonomi (Mahathiriskonomisme: To protect State Sovereignty Threats through Economic). *Dewan Ekonomi*. August.

Muhammad Azli Shukri. (2007). *Apakah Yang Sebenarnya Berlaku Pada Julai 1997 (What was actually happened on July 1997)*. *Dewan Ekonomi*. July.

Rosazman Hussin. (1999). *Debat globalisasi dan budaya imperialisme (Globalization Debate and Imperialisme Culture)*. *Jurnal Pemikir* (16).April-Jun.

Stiglitz, E. Joseph. (2002). *Globalization and its Discontents*. Australia: Penguin Books, 2002.

Utusan Malaysia, Dr Mahathir di saran Pengerusi MTEN (Dr. Mahathir Urged to be the Chairman of National Economic Action Council), 21 November 2008: 8.

Table 1. Status of the country's financial sector in 1997 compare to 2007

Detail	1997	2007
Number of Banks	71	9
Average assets	RM 13.2 million to RM6.6 billion	RM 38.3 billion
Overall profit before tax	RM 7.4 billion	RM 17.7 billion

Source: Malaysian Bussiness, November 16, 2008: 27.

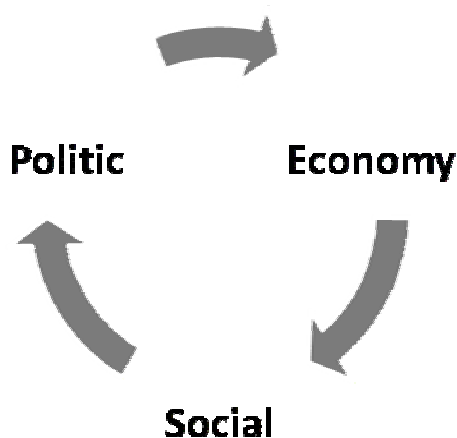


Figure 1. The Crisis Rotation of the Conventional Global Three Functions

Source: Md.Shukri Shuib. 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis. 2008.

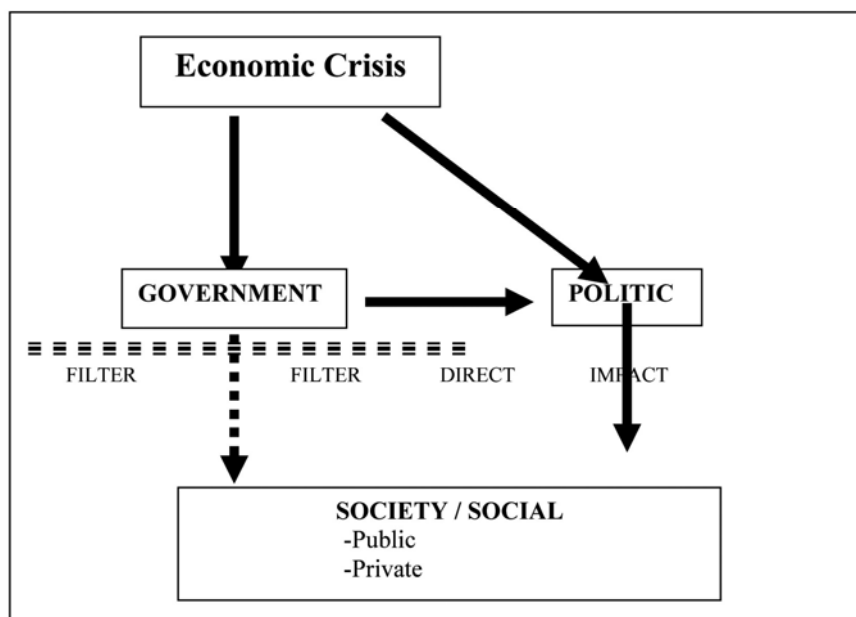


Figure 2. The Level of Impact of the Economy Crisis 1997 On Mahathir's Politic and Economy  
Source: Md.Shukri Shuib. 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis. 2008.

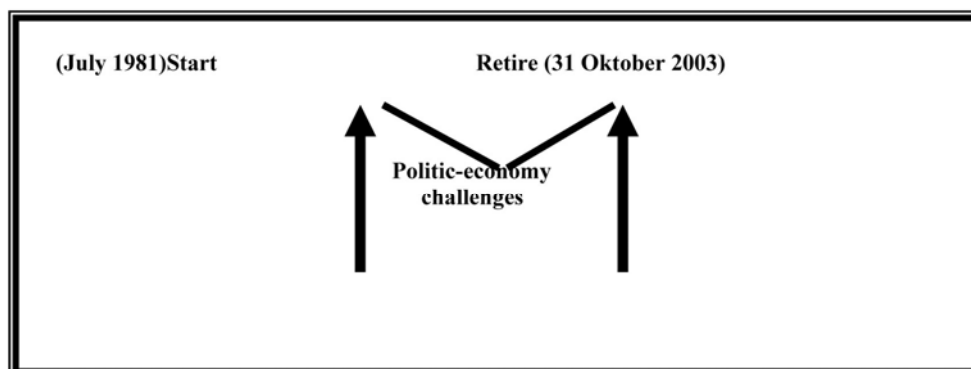


Figure 3. The Model 'M' Politic Economy Of 'Mahathiriskonomisme'  
Source: Md.Shukri Shuib. 2007; Md.Shukri Shuib, Mohamad Faisol Keling and Mohd Na'eim Ajis. 2008.



## Regulation by Law on Recycling Economy at the Enterprise and Ecological Industrial Park Level

Boyu Zhu

Law School

Shandong University of Technology

Zibo 255049, China

Tel: 86-533-2782 279 E-mail: zhubyu123@126.com

### Abstract

The regulation by law on recycling economy at the enterprise and ecological industrial park level serves as the base of leveled regulation by law on recycling economy. The recycle of enterprise internal sources is the key for developed countries developing recycling economy. Following the requirements of recycling economy, countries constitute relevant laws and regulations, offering an institutional warranty for achieving cleaner production. In China, a law and policy system that benefits the development of recycling economy is still an absence. However, the horizontal coupling and vertical closeness of ecological industrial parks, together with the interactive effects between enterprises, make the regulation by law a necessity. Complete and perfect policy and legal regulations are important warranties for the development of ecological industrial parks. Therefore, China should further perfect the legal mechanism for the internalization of environment costs; build up and perfect a legal warranty system for full green technologies; set up and perfect a special policy and law system for ecological industrial parks management.

**Keywords:** Recycling enterprise, Ecological industrial park, Recycling economy, Regulation by law

The leveled regulation by law on recycling economy is an important component of legal regulations on recycling economy. The leveled regulation by law on recycling economy is performed at four levels, namely the recycling enterprise, the ecological industrial park, the recycling city, and the recycling field. Thereof, the regulation by law on recycling economy at the enterprise and ecological industrial park level serves as the base, what has extremely important significance in practice, in order to drive the development of recycling economy, strengthening the construction of regulation by law on recycling economy at the enterprise and ecological industrial park level.

### 1. Regulation by law on recycling economy at the enterprise level

Building up recycling enterprises is the primary base of developing recycling economy. To set up laws and regulations on recycling enterprises is the start of leveled regulation by law on recycling economy (Boyu Zhu, 2007, p211).

#### *1.1 The recycling enterprise and characteristics of the recycling enterprise mode*

To develop recycling enterprises is to use the theory of recycling economy to guide enterprises' operations, apply the three principles of recycling economy to enterprises, make comprehensive researches on the relationship between enterprises and environment, as well on enterprises' products, by-products, and wastes, and realize the cleaner production and the integrated utilization of resources by depending on the development and application of modern production technologies and environment-protection technologies (Zhijun Feng, 2004, p206).

Characteristics of the recycling enterprise mode include: Firstly, recycling enterprises hold advanced management ideas, environment-protection ideas, and technological innovation ideas that transfer the industrial ideas from traditional production and ultimate governance toward cleaner production and origin governance, from an only pursuit for economic objectives toward a double pursuit for economic and ecological objectives. Secondly, ways of resource utilization and economic growth in recycling enterprises are different from that in traditional enterprises. By means of internal exchange of logistics and energies, recycling enterprises set up ecological industrial chains, realizing the maximum of internal resource utilization and the minimum of environment pollution. Recycling enterprises achieve economic effects by intensive operations and internal growth.

#### *1.2 Regulation by law on recycling enterprises*

The recycle utilization of enterprise internal resources is the backbone of developed countries developing recycling economy. According to the requirements of cleaner production, enterprises adopt new designs and technologies to restrict the volume of wastes and pollution per unit to the allowable standard, realizing the recycle use of resources as



much as possible. The state should follow the requirements of recycling economy, and make up relevant laws and regulations, offering institutional guarantee for cleaner production.

(1) The legal regulations on recycling enterprises in foreign countries

In developed countries, the law of recycling economy emphasizes on the initial effects of enterprises on the consumption of resources and the generation of wastes, defining the responsibility of enterprises in resource utilization and wastes disposal, what serves as legal guidance for enterprise activities.

In Japan, the Basic Law to Promote Recycle Society establishes the responsibility of enterprises. It requires enterprises to take necessary actions to realize the recycle utilization as products turn into recycle resources after being used. Enterprises are responsible for the disposal and reuse of industrial wastes. The Environment Declaration issued in 2003 in Japan puts forward that enterprises should promote environment protection in operations, enlarging businesses by environment protection technologies. It encourages enterprises to realize the reuse of wastes. Meanwhile, it sets up legal punishments for activities offending the principle of cleaner production. The Law of Wastes Disposal in Japan establishes different standards for punishing more than twenty “illegal disposal” activities.

In United States, more than half of states set up regulations that require enterprises to follow the principle of “reducing wastes, realizing the reuse and recycle of resources”.

Under the effects of laws and regulations of recycling economy, enterprises in developed countries start various recycling economic practices according to self characteristics and situations and have already form a kind of atmosphere that benefits the development of recycling economy. For example, Du Pont Company builds up an internal recycling economic mode, innovatively developing the principle of “reducing wastes, realizing the reuse and recycle of resources” into a new production method that helps to achieve the environment protection goal of reducing wastes or zero disposal. It organizes the recycle of resources among different workshops, returning chemical matters from wastes, and developing new durable ethylene products. By giving up some chemical matters that pollute the environment in production, reducing the use of certain harmful chemical matters, and creating new crafts for returning products, the company decreases its wastes and exhausting gases to a great degree (Recycling economy project team of Employer Work Branch of China Enterprise Confederation, 2005, p17).

(2) Problems in developing recycling economy for Chinese enterprises and the legal countermeasures

At present, there is not a regulation and policy system that promotes the recycling economy in China. The Circular Economy Promotion Law of the People's Republic of China issued on 29<sup>th</sup>, Aug, 2008, will put in force on Jan. 1<sup>st</sup>, 2009. However, it is just a “framework law”. The Promotion Law of Cleaner Production in China does not clearly establish the responsibility and obligation of enterprises. And few laws and regulations focus on specific issues. The issue and application of the Interim Measures on Clean Production Checks are significant for promoting an overall cleaner production and regulating the checks on cleaner production. It establishes enterprises’ obligations of implementing cleaner production checks and regulates the due time for cleaner production checks. The results of checks should report in time. Enterprises that fail to fulfill the obligation of cleaner production checks should assume legal responsibilities. It defines the contents, procedures, and methods of cleaner production checks, what direct and helps enterprises to implement cleaner production checks according to relevant procedures and methods. However, other special laws concerning the development of recycling enterprises are still an absence.

Concerning the reuse of resources, it is necessary to promote the internalization of wastes disposal costs according to the law. Only when all costs of products (include social costs and ecological costs) realize the internalization in market, can resources achieve the effective utilization. Presently in China, not only enterprises do not pay for all ecological costs, but the government offers some allowances (for example, the government takes charges for wastes disposal that are lower than costs). As a result, enterprises may produce more wastes. In order to realize the long-term development of wastes return and disposal market, the industrial field must deal with the internalization of costs of wastes disposal. Meanwhile, promote the sorting of wastes in a greater scope by force. Because the disposal costs of returning recycle matters are higher than market prices, the market economy framework does not change a lot in encouraging the development of reversely returning channels. To solve this problem, two points should be done. Firstly, construct a compulsory wastes sorting and collecting system that will produce a large amount of recycling primary matters after consumption. Today’s mixed wastes disposal is complex on one hand. On the other hand, it has lower resource values. Sorting collection is a trend of wastes disposal. It is necessary to issue relevant law and build up a disposal system based on sorting. Secondly, strengthen the sorting collection of wastes and take measures to expand the demand for wastes. To increase the market demand for retrievable matters, we should pay attention to these important driving factors in developing the market: the incremental environment-protection costs of enterprise operations, the progresses in technologies and product designs, building up production workshops close to the sources of retrievable matters, etc. (Guotao Liu, 2005, p301-303).

As a developing country, the long-term extensive mode of economic growth determines that China should not blindly

copy the measures adopted by developed countries in developing recycling economy. In stead, China should control the overall process of social economic activities by analyzing the flow of materials. In China, we should encourage enterprises to adopt the life cycle evaluation method, considering the wastes management issue in a greater scope. According to the life cycle evaluation method, enterprises should perform a “from-cradle-to-tomb” overall evaluation as evaluating the effects of products on environment. The evaluation emphasizes on the effects on environment during different procedures, including the material refining process, the production process, the marketing process, and the final disposal of products. At the ultimate disposal stage, enterprises usually retrieve the wastes of products after the consumption. Therefore, many enterprises decrease costs by enhancing the recycle of wastes. For example, enterprises may think about how to realize easy recycle of wastes by products design. By this way, enterprises can obtain recycling materials at lower costs. These materials can be used for packing or other purposes. Meanwhile, it creates a final market for retrievable materials, supporting the development of recycling enterprises.

Besides, for some special industries that consume more resources, release more wastes, and can realize recycle of resources, China should make up special laws and strengthen the operability. As for the design of laws and regulations, we should emphasize on both rewards and punishments for enterprises’ ecological construction and environment protection. Adopt more effective economic incentives and other inspiring methods to drive enterprises to put recycling economy into practice. By means of prices, taxes, credits, and certificate fees, set up an economic compensation mechanism for ecological restoration and environment protection, guiding enterprises to develop the recycling economy voluntarily.

## **2. Regulation by law on recycling economy at the ecological industrial park level**

The ecological industrial park is a larger platform for recycling enterprises. It does not satisfied with the simple recycle of resources and energies but aims at realizing the added value of overall resources and energies in certain area. The horizontal coupling and vertical closeness of ecological industrial parks, together with the interactive effects between enterprises, make the regulation by law a necessity.

### *2.1 Ecological industrial parks and the characteristics*

There is not a universal recognition to ecological industrial parks (EIPs for short). It has different names, such as ecological industrial development (EID), ecological industrial networks (EIN), industrial ecological system, industrial community, by-product synergy, and integrative chain management. The most widely used one is the ecological industrial park (Gan Wang, Zhiqian Wan & Shuhua Zhong, 2003, p79). In general, ecological industrial parks are a kind of new industrial organizational form designed based on theory of recycling economy and idea of industrial ecology. It designs the industrial parks’ logistics and energy flows by imitating the natural ecological system. In ecological industrial parks, the by-products or wastes generated by an enterprise will be turned into another enterprise’s inputs or materials by wastes exchange or cleaner production, achieving the closed recycle of matters and the multi-level use of energies, forming an interdependent industrial ecological system similar to the food chain in natural ecological system, and realizing the maximum use of matters and energies and the minimum release of wastes.

The characteristics of ecological industrial park mode are: firstly, ecological industrial parks adopt different enterprise coexisting modes. According to the ownership relationships of coexisting units, the coexisting mechanism includes complex coexistence and independent coexistence. The complex coexistence means all participators belong to the same large group, or as child companies or workshops. The existence of a coexisting enterprise is completely determined by the group (the parent company). Recycling enterprises are in this kind of coexisting relationship in general. Independent coexistence means all participators are independent legal entities and there is not a subordinate relationship concerning ownership among them. In this coexisting system, the cooperation is entirely driven by economic interests, or for the sake of sharing infrastructures or reducing production costs. All participators are not constrained in administration by upper companies basically. This mode is proper for industrial parks. Secondly, the construction of ecological industrial parks is based on many enterprises. If the whole ecological industrial park realizes the ecological development of regional industrial system and the clean production really, every enterprise should firstly satisfy the requirements of cleaner production. In other words, all enterprises in an ecological industrial park must be recycling enterprises. However, for one enterprise, the cleaner production and internal recycle are limited because some wastes and by-products can not be consumed by the enterprise internally. Therefore, differing from recycling enterprises merely focusing on internal logistics and energy flows, the ecological industrial park emphasizes on the interaction of enterprises and the mutual influences between enterprises and natural environment. Thirdly, the ecological industrial park adopts modern management methods and policies, and new technologies concerning information share, water-saving, energy utilization, recycle and reuse, environment supervision, and sustainable transportation, ensuring the stability and sustainable development of the park (Zhijun Feng, 2004, p225-227).

### *2.2 Regulation by law on ecological industrial parks*

In an ecological industrial park, on one hand, in order to follow the “3R” principle, each enterprise maintains direct or

indirect relationships with others. The close relationships in enterprise production should be adjusted by laws. On the other hand, all investors aim at interests in production and operation. Then, the production and operation based on pursuits for interests may betray the macro economic development in the park, affecting the overall construction of the park. Therefore, it is necessary to make up laws and regulations to adjust enterprise activities considering the general aim of the park. Since the ecological industrial park represents the idea of recycling economy, its policies and regulations should aim at coordinating and balancing the interests between enterprises and the park. The theory of benefit-balance is supposed to be the theoretical base for ecological industrial parks' legislation. Perfect policies and regulations are important guarantees for the development of ecological industrial parks. For all countries and regions where there are ecological industrial parks, the first step is to make up laws and policies, establishing the parks' nature, status, development aims, preferential policies, and protection measures in law, and promoting and ensuring the development of ecological industrial parks.

In specific, legal regulations on ecological industrial parks include these contents as follow:

(1) Perfect the legal mechanism concerning the internalization of environment costs

Because the environment is used as a public resource at a lower or without cost, some enterprises transfer the pollution costs to the society, which leads to a distortion between product costs and real costs. In China, because present laws about environment and resources do not include effective regulations concerning the internalization of "exterior diseconomy", enterprises in an ecological industrial park fail to make their price advantages prominent. Therefore, it is necessary to perfect relevant laws and regulations concerning environment and resources in order to achieve the internalization of exterior diseconomy, decreasing the prices relatively (Gang Wang, Zhiqian Wan & Shuhua Zhong, 2003, p81).

(2) Build up and perfect the legal system for green technologies

From the origin and the development of ecological industrial parks, where there is not the development of ecological technologies there is not the development of ecological industrial parks in a sense. For many industrial ecological chains and close recycling systems, the construction is supported by economical and reasonable technologies. However, the main strength that promotes the technological development is the system that benefits innovations, instead of the evolvement of technologies (Wangsheng Zhou, 2001, p12). So, technologies that support the development of ecological industrial parks, especially the ecological technologies, associate closely with the legal system. In other words, ecological technologies could not live alone without the powerful support of laws and regulations. Therefore, in order to apply and execute the Law of the PRC on Promoting the Transformation of Scientific and Technological Achievements, it is necessary to constitute relevant special laws, such as the law of scientific and technological input, the law of industrial promotion, and the law of achievements popularization, offering legal guaranties for the development of ecological industrial parks in technological supports.

(3) Build up and perfect the special policy and regulation system for the management of ecological industrial parks

The legislation of ecological industrial parks includes four aspects. The first is the policies and regulations concerning the construction of ecological infrastructure and the operation of ecological industrial parks. According to practices in developed countries, the "construction ----- operation ----- transfer" mode is to realize financing by using private capitals for the infrastructure construction and operation. This mode will benefit the construction of ecological infrastructure and the operation in China to a great degree. Related departments should make up relevant laws and supporting policies to encourage enterprises to operate public environment-protection equipments as soon as possible. The second is laws and policies concerning economic preference. In order to improve the competitiveness of products in prices, laws and policies should offer more economic preferences for enterprises in ecological industrial parks, chiefly including: preferential policies for the rate of loans for environment investment projects, conditions for repaying loans, and depreciation; using pollution charges, financial funds, or special funds to offer allowances for environment protection industries and technology updating projects that reduce pollution significantly; setting preferential taxes for enterprises in ecological industrial parks concerning business tax, value-added tax, and city construction maintenance tax; giving financial subsidies for products in ecological industrial parks, etc. The third is laws and policies about information system management in ecological industrial parks. The industrial information system includes related policies, project guideline for entering the parks, industrial network design, cleaner production technologies, logistics integration design, and environment management techniques (Quan Zhang & Yonghui Huang, 2004, p37). The fourth is policies and laws concerning technological guidelines. In order to match the construction of ecological industrial parks, it is necessary to compose relevant guidelines for the construction, especially for the design of ecological network, the integration of logistics and flows energies, water, wastes, and information, the enterprise education and training, the application researches, the implement of cleaner production technologies, and the formation of environment management system.

**References**

- Countermeasures. *Building Recycling-based Economic International Bigalopolis*. Shanghai: Shanghai Academy of Social Sciences Press. p37.
- Feng, Zhijun. (2004). *Introduction of Recycling Economy*. Beijing: People's Publishing House. p206.
- Liu, Guotao. (2005). *On the Green Industry and the Law of Green Industry in the Construction of Conservation-oriented Society*. Beijing: China Legal Publishing House. p301-303.
- Recycling economy project team of Employer Work Branch of China Enterprise Confederation. (2005). Practice and measures for Chinese enterprise developing recycling economy (I). *Shanghai Business*. No.4. p17.
- Zhang, Quan & Huang, Yonghui. (2004). The development of recycling economy and Shanghai's Wang, Gan., Wan, Zhiqian & Zhong, Shuhua. (2003). Legal system safeguards for the eco-industrial parks of China. *Science, Technology and Law*. No.2. p79.
- Zhou, Wangsheng. (2001). On the insitutional system of Zhongguan Cun field. *Research on Legislation of Zhongguan Cun*. Beijing: Law Press. p12.
- Zhu, Boyu. (2007). *Recycling Economy Regulation by Law*. Beijing: People's Publishing House. p211.



## On Hayek's Spontaneous Order in Perspective of "Financial Tsunami"

Ligang Zhang

School of Law

Shandong Police College

Jinan 250014, China

E-mail: zlg9705@163.com

### Abstract

This paper tends to prove that the emergence of "financial tsunami" illustrates Hayek's theory of spontaneous order in a sense. As the main theoretical tool for criticizing the socialism, Hayek defended for the capitalism by the theory of spontaneous order. He thought that it was a kind of moral order and also a kind of material order. It appeared spontaneously, as a result of human evolvement and evolution. The emergence of financial tsunami indicates that the capitalism does not overcome its internal instability or get rid of the periodical economic crisis proved by Marx either.

**Keywords:** Financial tsunami, Hayek, Spontaneous order

### 1. What is spontaneous order?

#### 1.1 "Spontaneous order"

Hayek's (Hayek was one of most important ideologist on liberalism in 20<sup>th</sup> century. He was a key role for the revival of liberalism after the World War II, and also one of main ideological torchbearer of "new right movement" happened in England and America in 70s and 80s in 20<sup>th</sup> century. It is the "spontaneous order" concept that has given Hayek the world-wide fame (Andrew Gamble, 2002)) "spontaneous order" concept has its origins. The western Enlightenment Liberalism includes Scotland Enlightenment Liberalism and England and French Liberalism (Razeen Sally, 2003, p181-202; Hayek thought there was true individualism and false individualism (Hayek, 2003)). Thereof, the Scotland tradition emphasizes on the spontaneous order. It develops around the concept of spontaneous order. Its core issue is always about how to form and maintain the social order in a stranger world. In Adam Ferguson's opinion, the spontaneous order is "the result of human activity instead of human design" (Hayek, 2003, p12). This theme has been explored and developed by three ideologists, Adam Smith in 18<sup>th</sup> century, Carl Menger in 19<sup>th</sup> century, and F. A. Hayek in 20<sup>th</sup> century, who had devoted themselves to the Scotland tradition.

Adam Smith's famous "invisible hand" gives the initial description of "spontaneous order". He said: "Why a man supports the domestic industry instead of foreign industries is for his own safety. He adopts certain method to realize the maximum value of industrial production in order to pursue self profits. In many circumstances, guided by an invisible hand, he achieves the goal though it is not his own will. He has never thought of the society. But for the society, it is not bad. Contributing to the society by pursuing for self interests is usually more efficient than contributing to the society in purpose. (Adam Smith, 2005)" In Adam Smith's opinion, the best way to encourage people to realize certain desirable effect is to benefit themselves. And the social relationships should not depend on personal identities completely. In a word, to benefit self is to benefit the society. This thought is popular among early Scotland ideologists (For example, Adam Ferguson, David Hume, and Mandeville have expressed similar ideas (Hayek, 2003, p12; Adam Smith, 2004, p374-380)).

Menger has further explained the "invisible hand" concept. His explanation is also taken as "Menger Problem" (Razeen Sally, 2003, p181-202): "How does the institution that serves the public welfare and is important for its development form, under the condition of without the public wills?" Menger's monetary origin theory is taken as the mirror of spontaneous order theory. In his opinion, money is resulted from human activities but not designs. Participators do not necessarily realize that they take parts in the creation of money. Monetary system is an unconscious result of human activity and exchange. Or, in other words, it is the human activity that starts a discovery process and finally creates certain system. Not any participator works hard toward this result purposely. And even nobody has ever imagined this result.

Hayek offers an epistemology for the spontaneous concept, or even wider, for the liberalism. Although Scotland

ideologists and Menger have indicated this point in their thoughts, they have never narrated it clearly.

In *Law, Legislation and Liberty*, Hayek defines the order as: “The so-called ‘order’ means such a state in which the mutual relationships among different factors are numerous and close. By understanding certain spatial part or temporal part of the whole, we can learn to get correct expectations for other parts. Or at least, we can learn to get expectations that are supposed to be correct. (Hayek, 2000, p54)”

Hayek classifies the order into two types: one is the order created by people. It is derived from human wills, namely “man-made order”; the other is the order developed by self. It is not created by anybody in purpose, namely “spontaneous order”. Spontaneous order includes conventions, rules, and systems. They are not created by people in purpose because people predict their benefits. They are unconscious results of numerous people who pursue own goals. In Hayek’s opinion, social development is not determined by certain individual but resulted from the interactive competitions among different wills, practices, mistakes, failures, and successes. Society needs orders that are not dictatorial orders or man-made orders but spontaneous orders. Spontaneous order is a kind of occasional result as different factors pursue self interests in a common frame that they make decisions on what are correct activities based on unilateral knowledge. Any factor will not know the specific effects of certain activity or the specific results of certain order. However, as long as everybody insists on the common law, he or she will be capable of evaluate others’ activities, which will ensure and promote the interests respectively.

### 1.2 Basis of “spontaneous order”

What is the basis of spontaneous order theory? According to Adam Smith, the reasonability of “invisible hand” lies in the division of labor. Menger turns to the wider division of knowledge, what enlightens Hayek. In Hayek’s opinion, the difficulty of creating social or economic orders is: “The knowledge about our conditions is not in an integrated state. Instead, they are controlled by different individuals. They are separate, incomplete, and usually inconsistent”. Hayek names this knowledge as tacit and unspeakable knowledge. In other words, we know the knowledge but we can not explain it clearly. As for this knowledge, Hayek thinks that it is necessary to constitute a set of institutions, by which knowledge owners can share their knowledge with the society. Others can make up their plans or pursue the goals according to this knowledge. Otherwise, the knowledge may be controlled and evaluated only by certain people or certain group. For example, in Hayek’s eyes, prices based on market competition can be taken as the tacit knowledge that is widely accepted by the society. As people make transaction decisions, they communicate or exchange their preferences for certain goods by activities instead of written letters, spoken words, or numbers. The price fluctuation toward certain direction offers an indirect way to acquire others’ knowledge, by which we can coordinate the activities with others. Therefore, the price system can involve us into certain institutional process, surpassing the inevitable shortages of personal knowledge, and forming the order spontaneously.

The emergence of spontaneous order is due to everyone’s personal will. They does not necessarily form an integrate recognition toward the whole. For Hayek, the most common spontaneous order is market order. He defines the market order as “exchange process”, in which nobody is responsible for programming it generally because people’s recognitions are incomplete and separate. “It is an unavoidable fact that everyone does not know most of specific facts that determine the market order, while the aim of market order is to manage this condition properly. By these unknown processes, people create a wide and general order based on self activities. Although people can not understand this order, they rely on this order thoroughly. (Hayek, 2002, p50)”

Hayek’s main contribution to the liberalism tradition is that in perspective of the epistemology he emphasizes on the limits of people’s ability of designing and directing the system and its result. Therefore, Hayek is “a complete anti-planning scholar” (Peter Watson, 2006, p441). In Hayek’s eyes, planning is wrong in theory and infeasible in practice. In *The Road to Serfdom*, Hayek advances his viewpoint that associates the liberty with market completely. It is not similar to Locke’s thoughts in England Enlightenment Movement and Hobbes’ modern liberty conciliarism: the state intervention is evil in nature because it invades individuals’ natural rights immorally. In Hayek’s opinion, the problem is not right or wrong but the result. As the government tries to manipulate the market, it can not master the complex details, backgrounds, and tacit knowledge about the market to a great degree. Therefore, considering the result, to make the spontaneous order to exert effects is desirable. Compared with other methods, this process may lead to a more prosperous and happier result. Hayek’s thinks the government is a impartial “judge” who is responsible for maintaining the game rules but not allowed to participate the game directly, or change the game result.

## 2. “Financial tsunami”: a counterevidence of spontaneous order

### 2.1 The sub-prime mortgage crisis causes the financial tsunami

Financial tsunami is a vivid description of the financial crisis pervading in the world at present. It indicates the crisis’ wide and serious influences on global economy. The financial tsunami is caused by American sub-prime mortgage crisis. Then, what is sub-prime mortgage crisis?

American sub-prime mortgage crisis happens in the real estate market (Riguang Zhang, 2008). The so-called sub-prime

mortgage is normally made out to borrowers with lower credit ratings. As a result of the borrower's lowered credit rating, a conventional mortgage is not offered because the lender views the borrower as having a larger-than-average risk of defaulting on the loan. Lending institutions often charge interest on sub-prime mortgages at a rate that is higher than a conventional mortgage in order to compensate themselves for carrying more risk. It is natural essentially. However, because of the effects of loose credit management, active financial innovation, and rising prices in the real estate market and securities market during the six and seven years in the United States, it is not executed in practice. As a result, the potential sub-prime mortgage risk becomes a fact.

The precondition for the sub-prime mortgage crisis is the changing credit environment, especially the house prices stop rising. Because the sub-prime mortgage borrowers have lower credits, or have not convincing income certifications, or bear other debts, they may fail to repay the loans and fall into defaults. As the credit environment is loose or the house price is rising, loan lending institutions can realize re-financing or take the mortgaged houses and then sell them even they can not take back loans. By this way, they can still realize a balance. However, as the credit environment changes, especially as the house price is dropping, to realize re-financing or to sell the taken houses is not easy or even impossible. Once it happens in a large scale, a crisis appears (see Appendix).

The sub-prime mortgage crisis causes a new credit crisis in the United States and the world. It is regarded as the most serious financial impact on the United States during the past 76 years. At present, the five shock waves caused by the sub-prime mortgage crisis is pervading toward the world. Many countries declare to close the stock market. The United States Senate approves an 850 billion dollars bailout plan. G2 promises to save the market by any means. It seems to be an inevitable fact that all countries in the world will take actions.

### *2.2 The causes of the sub-prime mortgage crisis*

As the causes of the sub-prime mortgage crisis, although people hold different views, one point is widely accepted that the excessive financial innovations and the extravagant financial market magnify the leverage effect of financial derivatives. This result has something to do with the loose supervision of US government (Jianhuan Wu, 2008; Jing Wang, 2008; Yuwen Deng, 2008).

On one hand, the US government drives the financial institutions' high investments. Virtual economy is the primary characteristic of US economy. In other words, the United States highly depends on the recycle of virtual capitals to make profits. Its financial products system is similar to a conversed pyramid. The bottom is basic asset, such as mortgage loans, and credit loans, based on which the financial derivatives building appears. In order to stimulate the economic development, the US government reduces the rate of interests frequently. From 2001 to 2004, the rate of interests reaches the bottom in history. The US government hopes to pull the economic growth by developing the real estate market. It suggests loan lending institutions to offer more loans, which creates a favorable condition for the development of sub-prime mortgage operation and the high-leverage investments in sub-prime mortgage derivatives. As a result, American financial derivatives market based on mortgage loans and other basic assets develops fast. As the financial derivatives are designed more and more complex, the transparency concerning their real values and risks is decreasing. The high-leverage investment can bring about high return on capital. However, it puts forward higher requirements for risks evaluation. Once the financial institution undervalues the risk, it will be magnified and expand toward the whole group under the leverage effect. In addition, with the accelerated globalization, this risk will quickly infect the main financial markets in the world.

On the other hand, the US financial supervision system has serious defects. The issue of Financial Services Modernization Act of 1999 in the United States indicates that the financial industry enters a mixed operation time. However, till today the separated financial supervision is in effect in America. There are seven financial supervision institutions. Because many different types of financial institutions will participate in the securitization of sub-prime mortgage, it is necessary for supervision institutions coordinating this process. However, the complex supervision system will cause coordination problems and supervision defects. The US financial supervision system forms at the separated operation time. The key is still the institutional supervision. Since the application of mixed operation, the US financial market develops quickly. Financial innovations appear one after another. Financial derivatives turn to be more complex. Capitals flow fast. Therefore, the functional supervision will undoubtedly become the main body of financial supervision. Unfortunately, the US functional supervision is weak. From the supervision of whole financial system, except some investment banks, the activities of other financial institutions are not under any supervision.

### *2.3 The "financial tsunami" conversely proves the spontaneous order*

Many domestic scholars agree that the "financial tsunami" is the most serious challenge to the globally prevailing economic liberalism, namely the new liberalism theory, after the doom of cool war. It declares the collapse of new liberalism established by the "Washington Consensus" (Focusing on the debt crisis happened in Latin American countries, Williamson, an American scholar put forward the "Washington Consensus" in 1989. It includes ten broad sets of recommendations, namely: (1) Fiscal policy discipline: apply the tight fiscal policy, reduce the budget deficit, and

prevent the inflation; (2) Redirection of public spending from subsidies toward broad-based provision of key pro-growth, pro-poor services like primary education, primary health care and infrastructure investment; (3) Tax reform – broadening the tax base and adopting moderate marginal tax rates; (4) Interest rates that are market determined and positive (but moderate) in real terms; (5) Competitive exchange rates; (6) Trade liberalization; (7) Liberalization of inward foreign direct investment; (8) Privatization of state enterprises; (9) Deregulation – abolition of regulations that impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudent oversight of financial institutions; (10) Legal security for property rights. The core of “Washington Consensus” is the liberalization, marketization, privatization, and fiscal stabilization. By starting a market mechanism, the national economy will realize a stable rise) in later 80s at 20th century. For these years, the United States and other western countries advertise the “Washington Consensus” based on new liberalism in the world, especially in developing countries and transition countries. As a result, the financial crisis happens in many countries in Northeast Asia, Africa, and Latin America. Now it is the time for the United States. And even Paul R. Krugman, an American economist and the Nobel Economic Prize winner in 2008, changes his opinion. Paul R. Krugman belongs to the new generation of the so-called liberal economic school. He has ever successfully predicted the Asian Financial Crisis happened in 1997. In his opinion, the best way to depress the financial crisis is to impose strict regulations on investments. He hopes the Bush government takes over most of financial enterprises openly. A funny fact is that America offers the liberalization as a prescription for Asian countries during the “Asian financial crisis”.

As the crisis happens, many people think of a term, namely the “Minsky Moment” (Minsky has been unknown to public before his death. One year after his death, the Asian financial crisis happened and spread all over the world. As Russian financial crisis was in a serious condition, an economist Paul McCulley in American Pacific Investment Management Company coined the “Minsky Moment”). Hyman P. Minsky is an authority in the financial crisis research field. According to his “Financial Instability Hypothesis” (This hypothesis is originated from Minsky’s a well-known paper *Will it happen again?* (“It” refers to the great crisis”)), the nature of capitalism determines the instability of financial system. A financial crisis and its harms on economic operations are inevitable. Minsky’s viewpoint is simple and clear: in good days, investors venture on risks; the more the good days are, the more the investors venture on risks, which will finally lead to excessive risks. Step by step, investors will reach a critical point. Cashes produced by assets could not compensate for the debts originated from the obtainment of assets. Due to the losses of investment assets, loan lending institutions choose to take back the loans, which will cause a collapse of asset values. Finally, the financial tsunami happens and the Minsky Moment is coming.

The instability is not only a defect of the capitalism financial system, but also a feature of free market economy. A free market economy will inevitably produce a polarization, causing social conflicts, and messed social orders, and even collapse, what has already been proved by the capitalism’s hundreds of years’ history. It is an undeniable fact. Otherwise, socialist movement and practice will not happen. The “financial tsunami” proves that a free market economy can not produce Hayek’s so-called spontaneous order automatically. The state intervention is necessary. As a key role of re-born classical liberalism in modern society after the World War II, Hayek strongly advocates his “spontaneous order” theory. However, in front of serious financial crises, this theory is not convincing any more.

### 3. Is there spontaneous order?

#### 3.1 Liberty and resource

All traditional liberalism writers neglect an extremely important issue, namely the relationship of liberty and resource, as they advocate their liberalism theory. Or, in other words, in their opinions, it does not deserve to be discussed. However, in our eyes, it is a necessary framework for reference. Here, my opinion is that there is a positive correlation between liberty and resource and a negative correlation between state intervention and resource. Firstly we describe the first relationship and then the second.

As for the first relationship, it means the construction of liberalism writers’ liberty system needs for relatively sufficient resources. The more sufficient the resources are, the more possible the construction of a western liberty system is. Then, the spontaneous order exists in a sense. However, as the resources are scarce, the possibility of constructing a liberty system is small and it is impossible to produce the spontaneous order. The core idea is that the construction of western liberty system wastes resources.

In order to recognize this issue, we must trace back to the history. Firstly, during the free capitalist period, capitalist countries can spoliage all resources in four continents except for Europe, what helps them accomplish the necessary primary accumulation for state development. All western developed countries appeared before the World War II depended on invasions and wars in development. Just as what was said by Marx, every pore of the capitalist is full of blood and dirty things since it was born. It is a vivid description of this process in history. Secondly, as a crisis happens, capitalist countries have sufficient spaces for warring, by which they can export social contradictions. Were not the World War I and the World War II the best proofs? If we use the spontaneous order theory to explain this process, since the construction of social orders relies on human activities instead of human designs, sufficient resources are necessary



for human “activities”. In fact, the spontaneous order theory pre-designs human orders as a pyramid structure. In Ancient Greece, the democratic system was based on its slavery system, what has rightly illustrated this structure. The spontaneous order theory essentially enlarges the bottom of the structure. In perspective the world, several western developed countries locate at the top of the pyramid and amounts of undeveloped countries and regions form the bottom. In nature, before the World War II the human order is a modern copy of the evil slavery system in Ancient Greece. The only difference is that the slaves turn into countries instead of natural persons.

Now the problem is: whether is it possible for new arisen countries after the World War II to build up the so-called spontaneous order by imitating the free system strongly advocated by western countries in order to achieve the social development? On one hand, many countries copy the mode of western developed countries, such as countries in Latin America and Africa. But what were the results? Latin American countries play a “successful tragedy” (James H Donnelly, 2001, p193-217). Many African countries are in poverty and wars. On the other hand, some Asian countries explore a new social development mode differing from western countries. Especially, China’s successful reform and opening practice in thirty years has already served as a shining example of realizing national and social development based on relatively scarce resources for other countries. The development practice of new arisen countries after the World War II has proved that in an environment where resources are relatively scarce, countries are more equal, and people’s consciousness of equality is stronger, the so-called free system that is based on sufficient resources becomes irrational more and more and loses its values as a mode gradually. Surely the free market is a better mechanism for resource allocation, comparing with full planning economy. Due to the initial instability, the free market economy wastes human resources very much. People can endure the existence of one America but not more. The existence of one America has already consumed most of human resources.

### 3.2 Order and state

According to Hayek’s theory, he does not completely deny the function of state. After all, the state is responsible for national defense, executing juridical system, and offering public goods. It should supplies a framework for the generation of orders. The state is to maintain the game rules but not participate in games directly. Considering the result, the state intervention is undesirable. Therefore, the state is not allowed to invade private properties or hurt people’s freedom in production and consumption. In Hayek’s opinion, market orders are derived from the interactions of thousands of people. They are not based on any central plan or any pre-coordination. In my opinion, if there are spontaneous orders, their construction is not independent from state intervention. During the capitalist development process, state intervention is always necessary though the degree is different. Different degrees are caused by various richness of resource during different history periods. Next we discuss the second relationship that there is a negative correlation between state intervention and resources. In early capitalist society, the state intervention covers a small scope and is not so frequent (that is way people agree the opinion that state intervention is evil in nature). Although the free market has necessary resources for its development, the state intervention is not unnecessary. As for this point, I will prove it by some history facts during the free capitalist period in England. As resources becomes scarce gradually, the possibility of accomplishing state and social development by free market system is small, and the necessity of state intervention turns to be large. Without state interventions, orders will fail to be built up. Here, I will use the development practice in China to prove this point.

As for the development of early capitalist in England, the right description is that intervention is for no intervention. Here I want to cite John Gray’s conclusion that is convincible. In his opinion, even in England in 19<sup>th</sup> century, the state large-scale intervention serves as an irreplaceable precondition for liberalism. One of predetermined condition for the free market in England in 19<sup>th</sup> century is that the state turns public lands into private lands by power. And the importance of Poor Law issued in 1834 should not be ignored. This law forces people to accept jobs, no matter how the market regulates wages. These are all key procedures for the construction of free market in England in mid 19<sup>th</sup> century. In Gray’s eyes, why a free market can be constructed in special Anglo-Saxon culture during a short period is for special legal, social, and economic condition, plus the cool and strong state power. Even in such a favorable environment, it still proves that a free market wastes human resources and ruins social life. It is stable by no means. This social system appears firstly in England in 19<sup>th</sup> century, then in English again, America, Australia, New Zealand, and gradually the world in 80s in 20<sup>th</sup> century as new liberalism policy. According to Gray’s idea, the disappearance of free market, but not its appearance, in 19<sup>th</sup> century is resulted from the slow evolution of history. Therefore, Gray’s conclusion is sharp different from Hayek’s opinion:

“The free market developed in England in mid 19<sup>th</sup> century is not accidental. Opposite to the false history advocated by the new right school, it is not originated from a long-term and unplanned evolution process. It is a man-made product based on powers and politics. .... The state intervention is always a key factor for economic development.” (John Gray, 2002, p1-25)

After the World War II, the primary structure of human orders has gradually become a ladder structure from the pyramid structure. Especially after the cool war, the ladder structure is clearer. The trend of multi-polarization in world political

orders well illustrates this point. It means the most severe issue in front of new arisen countries in state and social development field is the scarcity of resources after the World War II, because, on one hand, western developed countries still hold most necessary resources for economic and social development; on the other hand, all new arisen countries pursue development, which makes resources more separate and shorter. As a result, new arisen countries must explore a new development mode to replace the free market system. In these explorations, China's development is a successful example. No matter when it is the planned economic period or the reform and opening period, China adopts the so-called government-dominating economic and social development mode and achieves a great success, creating and continuing the greatest economic miracle in human history. In today's China, the new liberalism also has its believers. They criticize the government's too-much interventions. Suppose we follow western countries' new liberalism, would China realize present achievements? The answer is definitely no. A development comparison between China and India after the World War II rightly illustrated this point. At the very beginning, conditions in the two countries are similar (as a matter of fact, the condition in India is better than that in China. India achieves independence earlier than China. It does not suffer from an overall war. And it has a nice international environment). India is a free democratic country, and China a socialist country. After half of one century, the two countries' social and economic development rightly proves this point.

Now let's have a close look at the United States in the financial tsunami. To deal with the problems of sub-prime mortgage, sub-prime mortgage crisis, and financial tsunami, the United States government starts a large-scale bailout plan. The generation of sub-prime mortgage is rightly resulted from the state intervention. In order to stimulate the prosperity of real estate market and pull the economic development, the Federal Reserve activates the real estate economy by continuously reducing the interest rate in recent years, which helps to accumulate amounts of risk bubbles. Why the Federal Reserve takes these actions is because the President Alan Greenspan strongly supports the *laissez-faire*. Just as what we said before, the generation of sub-prime crisis is associated with the loose financial supervision of the United States government. In fact, the loose supervision is a kind of intervention, namely the negative intervention, which is different from the positive intervention after the crisis happen. But negative intervention is also intervention after all.

Therefore, in the process of constructing orders, the state should not only make up rules but also participate into the "game" directly, and even change the game result. The construction of orders must depend on state intervention. Social orders are not independent from human designs. They are not resulted from pure human evolution.

### *3.3 Orders and knowledge*

Hayek's spontaneous order theory is based on his knowledge theory. In Hayek's opinion, the knowledge in use about our conditions is not presented collectively or completely. On the contrary, the knowledge is always held by different individuals. They are separate, and incomplete. Therefore, they are tacit and unspeakable knowledge. Nobody but the person himself knows what is best for him. As long as there is a set of system, individuals with tacit knowledge will act for the sake of common interests, which will lead to the generation of spontaneous order.

To benefit oneself and the common interests at the same time is the basic idea of Scotland traditional liberalism. Based on people's self-regards, this idea inspires people to reach certain desirable result unconsciously. Everyone has the self-regard. That is true for most of people. However, logically speaking, we can not conclude that self-regard benefits common interests based on this fact. To benefit oneself and the common interests is only a value judgment but not an objective fact. Therefore, we are not sure whether people with tacit knowledge will act for the sake of common interests. So, the base for the generation of spontaneous order is unbelievable. Here we use an example to prove it. Thinks about the stock market disaster happened in 1987 in the United States. What is the direct reason for the disaster at that time? All American investment banks adopt the latest transaction way, namely the computer program transaction. Everyone masters the high technology. All transactions can be managed by computers instead of people. Computers will generate and supervise different parameters automatically. As one parameter reaches certain degree, it will be sold out or bought in. When all financial institutions adopt this method, once the parameter reaches certain degree, these financial institutions will choose to sell out or buy in. As a result, the market order is in a mess. Minsky's "Financial Instability Hypothesis" also indicates that at certain critical point, the instability happens and orders collapse, what serve as a right reason for state intervention.

In Hayek's eyes, because the state could not master all complex details, backgrounds, and tacit knowledge about the market to a great degree, state intervention is undesirable in perspective of the result. Firstly, we should acknowledge that people's most of knowledge concern state policies, designs, and programs. State intervention is a source of tacit knowledge. Secondly, as financial tsunami happens, without the state intervention the result will be more undesirable. If the state can not master all tacit knowledge completely, it will be more impossible for individuals to master all tacit knowledge.

#### 4. Conclusion: the elegy of spontaneous order

Hayek is taken as a main critic for sorts of socialism and collectivism. At 70s and 80s in 20<sup>th</sup> century, the upsurge of new right school and the growth of new liberalism have ever signalized the victory of Hayek's theory. And the disorganization of Former Soviet made Hayek well-known in the world. In my opinion, if Hayek's spontaneous order theory, compared with Former Soviet's socialist, is reasonable for its existence, and it is a powerful tool for criticizing the social development mode in which the state replaces the market completely, nothing more at all. The disorganization of Former Soviet does not mean the truth of Hayek's spontaneous theory. They are companies. After Former Soviet was finished, the spontaneous order theory lost its values in existence. If, just as what was said by Hayek, the socialism and collectivism is a "way toward slavery system", then, the spontaneous order is a path to collapse.

One of important aspect in Hayek's theory is that he defends for the capitalism. In his opinion, the capitalism is a kind of moral order and material order. He tries to prove that the capitalist system, similar to the spontaneous order in the nature, generates spontaneously and is resulted from human evolution. As for his theoretical methods, Hayek did not go beyond the old methods of western social sciences since the Enlightenment Movement. He just applied the effective analysis and synthesis method used by natural sciences to social scientific studies and tried to make it popular (Cassirer E., 2007, p34-86, 216-256; Alasdair MacIntyre, 1995, p111-137). But it is not a universally effective method, because the human society is not like the nature. The human society does not follow some universal, objective, and clear laws. Certain social theory is only a value explanation. It could not surpass its reference framework. The financial tsunami again illustrates Marx's classic thought, namely his criticism on capitalism. The capitalism does not escape from its periodical samsara. The internal instability is an incurable disease for the capitalism. Its generation and burst are the main roots for human pains for hundreds of years.

The elegy of spontaneous order is playing and new human order is growing.

#### Appendix

Know How Serious the US Financial Crisis is in Five Minutes.

(from [http://military.club.china.com/data/thread/1011/2419/19/72/5\\_1.html](http://military.club.china.com/data/thread/1011/2419/19/72/5_1.html))

The most popular official explanation for the in financial crisis is the sub-prime mortgage issue. However, the total sub-prime mortgages are no more than hundreds of billions US dollars totally, and the state bailout capitals are more than thousands of billion US dollars, why does the crisis finish? Some essays point out that the crisis is rooted from the "leverage" transaction in financial institutions. Other experts think that the root of financial crisis is the 62,000 billion US dollars CDS (Credit Default Swap, CDS). Then, what on earth are the relationships of sub-prime mortgage, leverage, and CDS? Among lots of theses concerning financial crisis, we could not find a simple and clear explanation for these problems. Here, the author tries to offer an answer for these problems based on self understanding. For the sake of easy understandings, the author adopts several assumptions. Welcome any discussion and comment.

##### 1. Leverage

Presently, in order to obtain sudden huge profits, many investment banks adopt twenty or thirty times of leverage operation. Suppose a bank A has the assets valued 3 billion, then the thirty times leverage means 90 billion. In other words, bank A offers its 3 billion assets as a mortgage to get 90 billion capitals for further investment. If the investment makes profits at a rate of 5%, bank A can obtain 4.5 billion profits. Compared with its assets, it means a 150% sudden huge profit. Conversely, if the investment loses at a rate of 5%, bank A loses its all assets and gets a 1.5 billion debt.

##### 2. CDS contract

Because the leverage operation faces high risks, banks are not allowed to take it according to normal regulations. Therefore, somebody chooses to invest the leverage investment in "insurance", namely CDS. For example, in order to escape from leverage risks, bank A finds the institution B that is either another bank, or an insurance company, or so. A tells B: How about you offering insurances for my loan default? I will pay you 500 million in ten years totally, namely 50 million annually, as premium. If my investment is not defaulted, you get the premium. If my investment is defaulted, you pay off the debts for me. In perspective A, if no default, A can gain 4.5 billion. Even take 500 million as premium, A still gets 4 billion. If there is default, insurances will pay for debts. Therefore, as for A, it is a beneficial business. B is wise. He does not agree A's invitation at once. Then, he comes back to make a statistical analysis and finds that the default ratio is less than 1%. If there are 100 similar business partners, it can get 50 billion premiums totally. If one is defaulted, the insurance is no more than 5 billion. Even two are defaulted it still can gain 40 billion. Both A and B think the deal is good for them. Therefore, they choose to cooperate.

##### 3. CDS market

After B gets the deal, C may envy him. C comes to B and tells him: How about selling 100 CDS to me? I will pay you 20 billion totally, namely 200 million for each contract. I have to wait for ten years in order to get 40 billion dollars. Now I can get 20 billion dollars right now and without risks, why not? Then, B and C reach the deal immediately.

As a result, similar to stocks, CDS can be traded in financial market. In fact, after C gets CDS, he will sell them at a price of 22 billion, instead of waiting for ten years for 20 billion. When D finds it, he thinks: deduct 22 billion from 40 billion and gain 18 billion. It is cheap as an "original stock". Then, D will buy it. Here, C gains 2 billion. Afterwards, CDS will be sold again and again. Its market value even reaches 62,000 billion.

#### 4. Sub-prime mortgage

According to above analyses, A, B, C, D, E, F, ..... all make profits. Then, where is the money from? In essence, the money is from the profits of A and similar investors. And their profits are mostly from the US sub-prime mortgage. Some people may say the sub-prime crisis is caused by lending money to the poor. The author does not agree. In author's opinion, sub-prime mortgages are mainly for common US real estate investors. According to their economic strength, they can afford one house. But considering the rising prices of houses, they may take real estate speculations. Then, they mortgage their houses, and buy other houses with the loans. As for this kind of loans, the interest rate is about 8% or 9% above. They can not deal with the loans by their wages. So, they continue to mortgage their houses, paying former interests by new loans. At this moment, A is happy because his investment makes profits for him. B is happy because the market default rate is low and his insurance business will continue. Then, C, D, E, F, and others also make profits.

#### 5. Sub-prime mortgage crisis

As the house price reaches certain level, it stops rising. At this moment, the real estate investors feel worry. They fail to sell houses on one hand. On the other hand, they have to pay interests continuously. Finally they give up houses and banks take them. Now defaults happen. However, although A feels a little sorry because he can not make huge profits, he does not lose much since he has bought insurances from B. And B does not worry at all because he has already sold the insurance to C. Then, where is the insurance for CDS? The answer is in G's hand. G buys 100 CDS with 30 billion from F just now and does not sell them. Suddenly, G gets news that there are 20 defaults among these CDS, which greatly exceeds the former 1% or 2% by estimation. For each default, G has to pay 5 billion premiums. Then he will pay 100 billion premiums totally. Plus the 30 billion expenses, the loss of G reaches 130 billion. Although G lists in the top ten financial institutions in the United States, he could not survive from such a huge loss. As a result, G goes bankruptcy.

#### 6. Financial crisis

If G finally goes bankruptcy, A will lose his 500 million that is used by A to buy insurances. What's worse is that because A applies the leverage theory to investments, according to former analyses, he can not pay back all debts by his assets. Then, A is at the edge of bankruptcy. Besides, A1, A2, A3, ....., A20 will all go bankruptcy. Finally, G, A, A2, ....., A20 come together and ask helps from the Secretary of the Treasury together: G can not go bankruptcy by all means. Otherwise, everyone will fall to a doom. Then, the Secretary of the Treasury is moved and makes G state-owned. Afterwards, the premiums of A, ....., A20 valued 100 billion will be paid by all US taxpayers.

#### 7. US dollar crisis

Just as we have mentioned, the market value of 100 CDS is 30 billion, while the total market value of CDS is 62,000 billion. Suppose the default rate is 10%, the default CDS will be 6,000 billion. This number is 200 times of 30 billion. If the US government has to pay 100 billion for purchasing the 30 billion CDS, the US government will pay 20,000 billion for other default CDS. If not, A20, A21, A22, and others will go bankruptcy one after another. No matter what measures the government takes, the depreciation of US dollars is inevitable.

All assumptions and numbers used in calculation are not completely in accordance with the real condition. However, the seriousness of US financial crisis should not be underestimated.

#### References

- Adam Smith. Translated by Guo, Dali & Wang, Yanan. (2005). *An Inquiry into the Nature and Causes of the Wealth on Nations*. Beijing: The Commercial Press. p27.
- Adam Smith. Translated by Xie, Zujun. (2004). *The Theory of Moral Sentiments*. Xi'an: Shaanxi People's Publishing House. p374-380.
- Alasdair MacIntyre. Translated by Gong, Qun & Dai, Yangyi. (1995). *After Virtue*. Beijing: China Social Sciences Press. p111-137.
- Andrew Gamble. (2002). Translated by Wang, Xiaodong & Zhu, Zhijiang. *Hayek: The Iron Cage of Liberty*. Nianjing: Jiangsu People's Publishing House.
- Cassirer E. Translated by Gu, Weiming. (2007). *The Philosophy of the Enlightenment*. Jinan: Shandong People's Publishing House. p34-86, 216-256.

- Deng, Yuwen. New liberalism makes mistakes in the world and China. <http://theory.people.com.cn/GB/49154/49155/8182042.html>.
- Friedrich Hayek. Translated by Deng, Zhenglai. (2000). *Law, Legislation and Liberty*. Beijing: Encyclopedia of China Publishing House. p54.
- Friedrich Hayek. Translated by Deng, Zhenglai. (2003). *Individualism and Economic Order*. Beijing: Shenghuo-Dushu-Xinzhi Joint Publishing Company. p12.
- James H Donnelly. Translated by Wang, Puqu. (2001). *Universal Human Right in Theory and Practice*. Beijing: China Social Sciences Press. p193-217.
- John Gray. Translated by Zhang, Dunmin. (2002). *False Dawn: The Delusions of Global Capitalism*. Beijing: China Social Sciences Press. p1-25.
- Peter Watson. Translated by Zhu, Jindong. Lu, Yuehong & Hu, Fagui. (2006). *The Modern Mind: An Intellectual History of the 20th Century*. Shanghai: Shanghai Translation Publishing House. p441.
- Razeen Sally. Translated by Qiu, Feng. (2003). *Hayek and Classical Liberalism*. Guiyang: Guizhou People's Publishing House. p181-202.
- Wang, Jing. The US financial crisis' causes and lessons. <http://theory.people.com.cn/GB/49154/49155/8104026.html>.
- Wu, Jianhuan. What is on earth the real cause of sub-prime mortgage crisis? <http://theory.people.com.cn/GB/49154/49155/8227246.html>.
- Zhang, Riguang. What's the US sub-prime mortgage crisis? <http://theory.people.com.cn/GB/49154/49155/6813352.html>.



## Judicial Review—A Regulator of American Society

Zipeng He

China Huayi Broadcast Corporation

No. 3, Meifeng Road, Fuzhou, Fujian 35003, China

E-mail: [birdhzp@sina.com](mailto:birdhzp@sina.com)

### Abstract

Judicial review of the American Supreme Court plays an unexampled role in the political life of the United States. For the system of separation of powers, it is an important method for the Supreme Court to check the Congress and the President. For the American public, it helps build public values and plays an important role in protecting human rights and dealing with big disputes. It is exaggerated to say that the history of the United States can be written by the judgments of the federal courts. However, it is reasonable to say that without the history recorded by the judgments of the Supreme Court, the history of the United States will not be complete. Therefore, judicial review is an important adjuster for the American society.

**Keywords:** Judicial review, Regulator, the Supreme Court, Checks and balances, American public

### 1. Introduction

In America, the Supreme Court's main power is the so-called "judicial review"—the right to declare laws unconstitutional. Although it is not explicitly given by the U.S. Constitution, the Supreme Court has developed the authority to review any executive and legislative action or law passed by any level government (if challenged in a court case) and can declare it unconstitutional if it is found incompatible with the U.S. Constitution. Such authority has enabled the Court to exert a great influence on many aspects of the American society. So the judicial review is by any means a regulator of the American society.

This article mainly discusses two basic aspects of America's judicial review, namely origin of judicial review, which consists of two parts—political background and theoretical basis, and role of judicial review, which consists of role in the system of Checks and Balances and role in the public. These basic aspects illustrate judicial review explicitly and wholly.

### 2. Origin of judicial review

#### 2.1 Political background

Just as George Washington helped to shape the actual form of the executive branch in the US, the third Chief Justice, John Marshall, helped to shape the role that the courts would play. That is, he established judicial review in 1803, when he dealt with the case of *Marbury vs. Madison*.

The story began in 1800, when Republican Jefferson won the presidential election and defeated the incumbent Federalist president John Adams. This election made Jefferson the first Republican president. But although the Republicans controlled the presidency and the Congress, the Jeffersonians found that the Federalists still dominated the judiciary. So, one of the first acts of the new administration was to abolish the Judiciary Act of 1789, which had just created a number of new Federalist judgeships. Although President Adams had tried to fill the courts with members of his party before he left the office, a number of commissions had not been delivered, and one of the appointees, William Marbury, sued Secretary of State James Madison to force him to deliver his commission as a justice of the peace.

The new Chief Justice, John Marshall, understood that if the Court awarded Marbury a writ of mandamus (an order to force Madison to deliver the commission to Marbury) the Jefferson administration would ignore it, and thus would significantly destroy the authority of the Court. However, if the Court denied Marbury's appeal, it might well appear that the justices had acted out of fear. Either case would be harmful to the basic principle of the supremacy of the law.

Marshall's decision in this case has been seen as a judicial tour de force. Firstly, he declared that Madison should have delivered the commission to Marbury, but then he declared that the power of the Supreme Court, which was given by section 13 of the Judiciary Act of 1789, to issue writs of mandamus, exceeded the authority allotted to the Supreme Court by Article III of the Constitution, and therefore section 13 of the Judiciary Act was null and void. Thus he was able to chastise the Jeffersonians and yet not create a situation in which a court order would be flouted.

The critical importance of Marbury's case is that the Supreme Court gained several powers, one of which was the

authority to declare acts of the Congress and implication acts of the president unconstitutional if they exceeded the power granted by the Constitution. Therefore, the Supreme Court became an actually equal partner of the government and the Congress, and it has played that role ever since.

## 2.2 Theoretical basis

In the theoretical view, Marshall deduced the necessity of such a power from the purpose and procedure of the Constitution. He reasoned that judicial review is necessary to carry on the Constitution's substantive and procedural limits on the government. If the Court could not strike down a law that conflicted with the Constitution, Marshall said, the legislature would have a "real and practical omnipotence." (Wu Yun, 2002, p.208) In his opinion, "certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." (Wu Yun, 2002, p.300) Marshall declared that it was definitely the right and duty of the Court to say what the law means. Furthermore, if both law and the Constitution apply to the same case and they conflict, the Court must determine which of the conflicting rules governs the case. Because the Constitution is superior to any ordinary act of the legislature, the Constitution must govern the case. In other words, the Court is obligated to reject any law that violates the Constitution.

## 3. Role of judicial review

### 3.1 Role in the system of Checks and Balances

The judicial review serves as a regulator in the American society. In the system of Checks and Balances, judicial review is a magic weapon against the Congress and the government, which makes the three branches—legislative, executive and judicial—more regulative and stable. In the United States, if the Supreme Court is deprived of the authority of judicial review, the power of judicature will be significantly weakened. That is because, on the one hand, according to the Constitution, all the chief justice in the U.S. should be appointed by the president, and then be approved by the Congress, that is to say, the Supreme Court is under the check of the president and the Congress. On the other hand, the executive, together with the legislative, governs the American military and financial affairs, and also has a great influence on public interests and the wealth of society, they can make active actions to deal with these issues. On the contrary, the judicature hardly has anything to do with these matters; it is only on the duty of making judgments. This unbalance between legislation, executive and judicature would definitely do great harm to the principle of rule by law. But with the judicial review, things become quite different, for the Court has the right to interpret the Constitution. It can shape laws of the Congress and government actions by deciding whether they conform to the Constitution or not. Therefore, judicial review helps to build a sound system of Checks and Balances in the United States.

#### 3.1.1 A weapon against the Congress

Judicial review is a weapon against the Congress, since the Supreme Court has the right to review the bill passed by the Congress and decides whether the bill is unconstitutional or not. This situation has a famous precedent to go by. In the case of *Marbury vs. Madison* (1803), the Supreme Court has for the first time invalidated an act of the Congress—Article 13 of the Judiciary Act of 1789. According to Article 13 of the Judiciary Act of 1789, the Supreme Court was authorized to issue writ of mandamus to American officials. But John Marshall insisted that the Supreme Court had no power to issue such a writ of mandamus, for Article 13 of the Judiciary Act of 1789 was contrary to Article III, Section 2 of the Constitution, which gave the Supreme Court original jurisdiction only in cases concerning ambassadors or foreign ministers or in cases in which a state was a party. Thus Article 13 of the Judiciary Act of 1789 was unconstitutional and invalid. John Marshall remarked that a legislative act contrary to the Constitution is not law.

This decision has chastised the Republican-governed Congress. It told the Republicans that although they controlled the government and the Congress, they must abide by the Constitution and the principles of rule by law and separation of powers. So it is the judicial review that prevents a ruling party from autocracy.

In the first 75 years since the United States has been founded, only 2 federal acts passed by the Congress have been invalidated by the Supreme Court; while in the next 75 years, 71 federal unconstitutional acts have been struck down, only in the 1880s, there were 5 federal acts and 48 state acts that were declared unconstitutional. From January, 1935 to April, 1936, among 10 appeals concerning the New Deal which was sued in the Supreme Court, 8 federal acts were struck down. From 1937 to 1979, the Supreme Court declared 49 federal acts unconstitutional. These decisions have greatly battered the Congress' deviant actions and defended the system of Checks and Balances and the principle of separation of powers.

#### 3.1.2 A weapon against the president

Judicial review is a check on the government, especially on the president, although the federal judges are appointed by the president. According to the US Constitution, all the chief judges should be appointed by the president, while it doesn't suggest that the incumbent chief judges will conform to the president who has appointed him or her. For

example, President Nixon has in his term appointed Warren E. Burger, Harry A. Blackmun and Lewis F. Powell as chief judges, while in the case of *the United States vs. Nixon*, all the three chief judges were unanimous in denial of Nixon's demanding that he should hold executive privilege in withholding tapes of White House conversations dealing with Watergate.

Thanks to the judicial review, the Supreme Court has the sole right to interpret the Constitution. Thus it can enlarge or limit the president's constitutional power by giving new interpretations and meanings of the Constitution. When the system of Checks and Balances is challenged by the growth of executive power, the Supreme Court would be in its attempt to restrain the president. The typical example came in the 1930s. When Franklin D. Roosevelt (FDR) came into office in the depth of the Depression, he started the New Deal by pushing through an urgent package of reforms to get the nation back on its feet. In the process, he centralized so much power in his hands that critics accused him of seeking to become a dictator. The Supreme Court, under the principle of judicial review, had to restrain the president. So it invalidated a host of laws in 13 decisions between 1934 and 1936. On May 27, 1935, the famous "Black Monday" of the New Deal, the Court declared the entire National Industrial Recovery Act as unconstitutional. It was an attack on the very heart of FDR's program. A great uproar broke out, and President Franklin D. Roosevelt even proposed legislation to force older justices to resign and to expend the number of the Court so that he could appoint more liberal members. The Court survived this presidential onslaught and so did the judicial system.

Other examples occurred:

After the Second World War, in the notable steel seizure case of 1952 (*Youngston Sheet and Tube Company vs. Sawyer*), the Supreme Court denied President Truman the power to take control of a steel plant during the Korean War. In *New York Times vs. U.S.* (1971), the Court ruled against Richard Nixon's efforts to block publication of the Pentagon Papers, declaring that such a prior restraint was a particularly disgusting restriction on freedom of speech. And in the case of *the United States vs. Nixon*, the Supreme Court, by an 8:0 ruling, denied Mr. Nixon's claim of executive privilege in withholding tapes of White House conversations dealing with Watergate and thus paved the way for Nixon's downfall. (Yan Weiming, Han Zhenrong, Le Ruifu & Wang Honglin, 2000, p.68)

So the judicial review is a check on the president.

### 3.2 Role in the public

#### 3.2.1 Influence on the general value of the people

Judicial review is also a regulator of the public, for it helps to cultivate and shape the general value of the people, although it could not govern the public opinion.

Every notable decision of the Supreme Court would automatically exert a great influence on the public opinion, and then affect the public value. In the landmark case of *Plessy vs. Ferguson* (1896), the Supreme Court supported the legality of racial segregation. Before the ruling, segregation between blacks and whites had already existed in some schools, restaurants, and other public facilities in the southern America. But in people's opinion, it was not the mainstream of the American society, for the public hadn't yet known whether it was constitutional or not. It was waiting for the Supreme Court's interpretation. In the *Plessy* decision, the Supreme Court ruled that such segregation did not violate the 14<sup>th</sup> Amendment of the Constitution. Because the Court held that racial segregation was legal as long as the segregation facilities for blacks and whites were "equal." This "separate but equal" doctrine was only partially implemented after the decision. But since the Supreme Court determined it as constitutional, the public could hold this opinion at large. They made separations throughout the country in most public facilities—schools, street cars, railroads, hotels, restaurants, sports arenas, telephone booths, and elevators—just within a few years. The doctrine of "separate but equal" has been cultivated in the minds of most people. The public value has been significantly influenced by the decision.

Nearly 60 years passed, the Supreme Court ruled in *Brown vs. Board of Education of Topeka* (1954) that the "separate but equal" doctrine was unconstitutional. Two years later, in *Gayle vs. Browder* (1956), the Supreme Court struck down segregation in public transportation—the same kind of segregation upheld in *Plessy*. By then the South had not only built a sound racial segregation system in the society, but also built it deeply in people's minds. To invalidate a system is easy, but to change people's value that the system has cultivated in people's minds is by no means an easy thing. It took numerous lawsuits, much federal legislation, and persistent efforts of civil rights protesters in the 1950s and 1960s to finally get rid of the system of segregation. Finally, the system of segregation was cleared off from the American society in that it had no place in the Constitution, and most importantly, it had no place in people's minds.

Another famous case, *Roe vs. Wade* (1973), in which the Supreme Court ruled that a woman has a constitutional right to do an abortion during the first six months of pregnancy, has also changed people's minds. Before the Court's ruling, a majority of states prohibited abortion, for most people thought abortion was inhumane and unconstitutional. However, the Court declared these state prohibitions unconstitutional and overturned them in *Roe vs. Wade*, ruling that states could restrict abortion only during the final three months of pregnancy, which aroused a heated dispute in the public.



But unfamiliar with the situation before the Supreme Court's decision, more than 80 percent of adults believed abortion should be legal under some circumstances after the decision.

In a 1997 Gallup Poll, about 15 percent of Americans said they opposed abortion under all circumstances, including cases where the pregnancy resulted from rape or incest or where the pregnancy might lead to the death of the pregnant woman. On the other hand, 22 percent said abortion should be legal under any circumstances. Most Americans—60 percent—believed in a compromised position, declaring that abortion should be legal under some circumstances but not others. (Wu Yun, 2002, p.354)

It was just the Supreme Court's opinion in the *Roe* decision.

### 3.2.2 Safeguard of human rights

Judicial review helps to protect and regulate human rights. It serves as a shelter of the people. Although the initial American Constitution gave no article concerning human rights, the first ten amendments to the Constitution, the Bill of Rights, granted a wide range of human rights protections. It defines the scope of individual freedom and establishes basic American civil liberties that the government cannot violate. Originally the Bill of Rights only applied to the federal government, but in a series of 20<sup>th</sup> century cases, the Supreme Court found many state-level bills have clearly violated the Bill of Rights and infringed on citizens. So it must protect human rights with its judicial review.

In the case of *Gitlow vs. New York* (1925), the Supreme Court firstly applied the Bill of Rights to the state level. In this decision, the Court said that freedom of speech and of the press was fundamental personal liberties "protected by the Due Process Clause of the 14<sup>th</sup> Amendment from impairment by the states." (Wu Yun, 2002, p.89) This application of the Bill of Rights through the 14<sup>th</sup> Amendment is sometimes called the doctrine of "incorporation". By the end of the 1960s, the Court had decided to apply nearly all of the Bill of Rights to the state level.

*Gideon vs. Wainwright* was an important court case of 1963 in which the Supreme Court ruled unanimously that defendants in all felony cases have the right to have legal counsels. Justice Hugo Black wrote the majority opinion (to write explanation of the decision) of the Court, that if a defendant charged with a serious crime cannot afford an attorney, the government is required to provide one. It is the government's constitutional obligation to do so. As a result of the *Gideon* decision, most large cities and some states now keep a staff of attorneys known as public defenders who provide counsel for poor defendants in criminal cases. In other areas, trial court judges appoint private attorneys to represent poor defendants and the government pays the fees. Some areas combine these two systems. This decision provided important protection to the rights of criminal defendants.

Just as the decision of *Gideon vs. Wainwright* gave the criminal defendant the right of attorney help, the decision of *Miranda vs. Arizona* (1966) granted the criminal suspect the right of "keeping silence". That is, the Supreme Court ruled in this case that police officers must advise suspects of certain legal rights before arrest and questing. In *Miranda* the Court described a four-part warning police officers must give to a suspect who is arrested or otherwise detained. The warning is designed to inform suspects of their rights not to incriminate themselves and to have the assistance of the counsel. Under the *Miranda* decision, if the police failed to provide the necessary warning, the prosecution could not use any statements of the suspect as evidence in a criminal proceeding. Any evidence of such statements should be void.

## 4. Conclusion

As judicial review regulates the American society, the Supreme Court must invalidate all kinds of unconstitutional acts or actions, no matter how today's people see these decisions. It sometimes made "incorrect and irrational decisions"—in today's people's view. In the case of *Dred Scott vs. Sandford* (1857), the Supreme Court, in order to defend the supremacy of the Constitution, has struck down the Compromise of 1820, which banned slavery in US territories north and west of the state of Missouri. In this case, slave Dred Scott had been taken to the free state Illinois and the northern part of the Louisiana Purchase by his master Dr. Emerson, then he was made free by the Missouri Compromise of 1820. But when he was taken back to hometown by his master, he became a slave again. A few years later, Scott claimed for his freedom in the Supreme Court on the ground that he had once lived in the free territory. The Supreme Court ruled that Scott was a Negro and not a citizen of the United States; hence he could not sue in a federal court. And most importantly, the Court declared that the Missouri Compromise of 1820 was unconstitutional in that it deprived southerners of their property without due process of law. This decision has aroused a heated argument for a long time, and what is most important, it has aggravated the breakout of the Civil War. But as to the Supreme Court, it certainly defended the Constitution with its power of judicial review.

Judicial review is a powerful and controversial regulator of the American society because it allows the Supreme Court to have the ultimate word on what the Constitution means. This permits justices, who are appointed rather than elected, to overrule decisions already made by the Congress and the president throughout the country. It underscored the importance of the power of the Supreme Court.

Since 1803 the Supreme Court has cited *Marbury* more than 250 times. It has been used to support the outcomes in

many major constitutional cases involving the power of the president [*Clinton vs. Jones* (1997) and *United States vs. Nixon* (1974)]; the death penalty [*Furman vs. Georgia*]; reproductive rights [*Griswold vs. Connecticut* (1965) and *Webster vs. Reproductive Health Services* (1989)]; relations between state and federal government [*Baker vs. Carr* (1962) and *Garcia vs. San Antonio Metropolitan Transit Authority* (1985)]; and civil rights [*Cooper vs. Aaron* (1958)]. (Wu Yun, 2002, pp.301-302)

To sum up, the American regulator—judicial review—plays a very important role in American society.

### References

Li, Daokui. (1999). *American Government and American Politics*.

Lu, Runkang. (2003). *Theory of the Constitution of the United States*.

Roaming, Around. (2005). *Marbury v. Madison*, [Online] Available: <http://blog.sina.com.cn/u/55332228010000i6>(July 15, 2008)

Wang, Enming. (2003). *American Culture and Society*.

Wu, Yun. (2002). *The Rule of Law in the United States*.

Yan, Weiming, Han, Zhenrong, Le, Ruifu & Wang, Honglin, (2000), *Understanding Modern America*.



## Research on Indictability of Criminal Investigation Behavior —in the Background of Criminal Judicature Reform

Lin Jin

School of Public Security

Zhongnan University of Economics and Law

Wuhan 430064, China

E-mail: jingzhujin0612@gmail.com

### Abstract

Criminal justice reform is a new requirement formulated to carry out basic strategy and target of ruling the country by law after we joined in WTO, and punishing crime and guaranteeing human rights are the two value goals pursued by modern criminal justice practice. Investigation is a part which belongs to criminal procedure system. However, whether the act of criminal investigation could be institute legal proceedings is still in dispute. On the one hand, there are abuse of right and dissimulation of power in the course of criminal investigation: on the other hand, we also should consider concrete present situation of judicial practice in our nation, and the particularity of act of criminal investigation itself. Our purpose is to give the solution to this question by the application of citing instances method, contrastive demonstrating and contradict the opinion of others. The thesis holds the opinion that it is suitable for the cognition of such problem to combine it with improper criminal investigation behavior, and give specific measures based on analysis of the nature of criminal investigation behavior and power disposition in criminal judicature now.

**Keywords:** Criminal judicature, Dissimulation of investigation power, Nature of investigation behavior

### 1. Introduction

Overall conception on criminal judicature system innovation and concrete problems for operation are focal points studied and concerned by scholars of criminal judicature academic circles. For criminal investigation is a component of criminal procedure, so we also should not only establish viewpoint of inspection from legitimate procedure correlated with the background of criminal judicature system, but also need to pay attention to the substantive value of criminal investigation.

Whether litigation can be initiated against the act of investigation is controversial, and we need to take peculiarity of criminal investigation into consideration. Usually, criminal investigation behavior is divided into secret and public patterns. In the first circumstance, the means of using special criminal informer and ransack will probably suffer from the dilemma that special criminal informer may constitute entrapment or complicity with real suspect (Wang Wen Zhang, 2002, p.3), so it is necessary to give legal restrictions to regulate such method of criminal investigation. But meanwhile permitting litigation may let the arrangement about predetermined criminal investigation strategies exposed. As far as I am concerned, we can regulate and legitimate secret investigation by reconstructing the relationship between Public Security Organization and People's Prosecutors' Office then emphasizing prosecutorial supervision against secret investigation, so permitting initiate lawsuits is not appropriate. However, unsuitable exercise of criminal mandatory measures such as arrestment, to ransack and custody is a present problem remaining in act of public investigation, thus act of public investigation has the necessity to be brought an action against.

### 2. Investigation power dissimulation

#### 2.1 Significance

Then, we should further clarify different situations of investigation power dissimulation. For research on controversial problems in science of investigation requires us not only to establish thinking mode from the angle of the macroscopic that we should put this dispute at due process of criminal procedure, but also need to pay attention to the microcosmic substantial problems like concrete situations of investigation power dissimulation. Next the thesis summarizes four concrete dissimulation situations of investigation power, because on one hand we give the significance of indictability of criminal investigation behavior on the premise that the existence of investigation power dissimulation; on the other hand through analyzing concrete situations we can further definite the property of litigation against act of investigation: it belongs to administrative procedure or criminal procedure? Administrative procedure means that People's Court solves

administrative disputes in specified range by surveying legitimacy of administrative action, according to requests of nature person, corporation and other tissues; while criminal procedure is given the conception that People's Court, People's Prosecutors' Office and Public Security Organization solve criminal liability problems of the accused with the participation of the parties and other criminal litigant participants.

## 2.2 Concrete manifestations

### 2.2.1 Mixing of administrative and criminal function

Administrative compulsory measures are applied in the law case which should be dealt with criminal procedure (Liu Mei Xiang, 2004, p.168), or there is the situation that criminal liability and administrative penalty are the same nature of punishment: restricts personal liberty or dispossession. In the latter, for the counterparty who has accepted administrative attachment before suffering from criminal detention or arrestment, time limitation of personal freedom based on administrative attachment should be offset criminal coercive measure which is toward the same behavior of counterparty. However, Public Security Organization sometimes will not exercise the offsetting when executes criminal punishment.

### 2.2.2 Illegal enforcement of criminal coercive measure

Illegal enforcement is the serious problem remaining in the course of carrying out concrete criminal coercive measure by Public Security Organization, such as extorting a confession by torture, abusing power of ransack and distraint, illegally using monitoring system and arresting without formal authorization from People's Prosecutors' Office. But we should get to know that the relationship of Public Security Organization and People's Prosecutors' Office in China is "division of individual responsibility" and "mutual restriction", People's Prosecutors' Office is endowed with the responsibility of supervision of case filing, examining arrest, review and prosecution, and it has the duty to prevent illegal enforcement of concrete criminal coercive measure from emerging. So we can deduce that if we take legal proceedings against act of investigation, subject of action are the two: People's Prosecutors' Office and Public Security Organization.

### 2.2.3 Admissibility of administrative presumption evidence

In the course of determining crime of causing traffic casualties, paper of determining the responsibility in a load traffic accident is the conclusion given based on administrative action, but Public Security Organization usually regards such paper as the evidence which can enter into the scope of evidences collected for criminal investigation. To a great extent is the reason that cognizance on responsibility degree of causing traffic trouble depends on paper of determining the responsibility in a load traffic accident, therefore, if Public Security Organization consider somebody constitutes crime of causing traffic casualties, and the paper is a powerful explanation. In my opinion, whether admissibility of administrative presumption evidence in criminal investigation activities should be admitted still controversial, because we must notice such question: if some mistake contained in the paper leads to improper collection of evidences in the stage of investigation, how to identify the property of litigation against act of investigation, criminal procedure or administrative procedure (Li Yong Hong, 2006, p.218).

### 2.2.4 Appearance of malfeasance in expert testimony

Expert testimony is one of the concrete investigation measures, and according to Decision of Management Problems in Expert Testimony, the meaning of malfeasance in expert testimony is that surveyor or identification organization brings heavy loss to the parties for breach of duty, providing illusive proving documents or adopting other fraud method in order to defraud registration. However, Decision of Management Problems in Expert Testimony is management detailed rules of administrative organ, and expert testimony is managed by administrative department for justice, contradictorily malfeasance in expert testimony also the component of investigation measure. So whether indictability of criminal investigation behavior should include malfeasance in expert testimony is the problem we need to consider.

## 3. Nature determination of investigation activity

### 3.1 From an angle of nature of investigation power

Analyze particular conditions mentioned above, maybe we can see that nature determination of investigation activity is the key point to further discuss the indictability of investigation behavior. If inappropriate actions happening in investigation activity are belong to category of criminal field, we can not initiate administrative procedure. First of all, we make nature determination of investigation activities from a viewpoint of nature of investigation power. Some scholars point out that investigation power is pure judicial power (Huang Qiang, & Ge Mu, 2004, p. 4). In my point of view, such statement has certain reason but still owns the defectiveness. Investigation is used in the stage of criminal investigation for the purpose of finding out the details of the case and collecting the evidences. Thus, purpose of criminal investigation is consistent with that of criminal procedure. Besides, investigation power manifested as characters of substantive truth, procedural justice and modesty for operation and to a certain extent reflects neutral feature of justice. In a word, investigation power really possesses some attribute of judicial power, and based on

traditional idea, judicial behavior can not be initiated lawsuits, so we should not give indictability to act of investigation, which means investigation behavior does not have the litigable nature.

I incompletely agree with this proposition, and concrete situations of investigation power dissimulation let us know the necessity and emergency to give the parties some powerful way to protect their rights and interests, then restrict the abuse of power, so litigation is an effective way to realize such goal. State Compensation Law of the People's Republic of China ignores how to launch the way of judicial remedy under various conditions of investigation power dissimulation, and it can not create some channels with practical significance to prevent interest of the suspects from being infringed. Therefore, we can not deny possibility of accusation against act of investigation; also investigation power has other characters which make it distinguish from pure judicial power.

### *3.2 From an angle of operation mechanism*

The operation mechanism of criminal investigation activities is characterized with administrative act. First of all, investigation system runs the pattern of "strips and blocks combing together, with the blocks dominated", and implement leadership of business from strips organization. This is quite different from longitudinal guidance models of judicial organ. Secondly, the starting of criminal investigation activities has the initiative, after placing a case on file for investigation and prosecution, Public Security Organization usually fulfill research work and put criminal coercive measures in an active way, while judicial activity has obvious passivity. The beginning of judicial activity is limited by prosecution, appeal and petition, and the trial scope is decided by the range of prosecution. The third, substantive or programmed form of sanction given by judicial organ can not be changed only for the reason that facts of original judgment are not clear, insufficiency of evidence or the composition of trial organization lack legitimacy. But compared to judicial activity, the result of criminal investigation activity can be changed by preliminary hearing, and People's Prosecutors' Office also has the authority in case there is need for supplemental investigation, and sends the case back to Public Security Organization for supplemental investigation, or conduct further investigation by itself.

### *3.3 Nature of investigation activity*

Combined with the analysis of those two angles mentioned above, as far as I am concerned, investigation activity is quasi-judicial activity carrying with administrative color, and it is not pure judicial power. In addition, in the second part of the thesis, by summarizing concrete situations of investigation power dissimulation and we know the important practical significance for giving act of investigation indictability nature.

So in my opinion, we can take legal proceedings against act of investigation within the scope of criminal procedure, but for the complexity of investigation behavior, we need to give specific solution countermeasures according to four different situations.

## **4. Whole conception of indictability**

### *4.1 Situations for permission to take proceedings*

In this part, I will give whole conception of indictability in my understanding and cognition. In the first circumstance which is the mixing of administrative function and criminal function, proceeding against act of investigation is reasonable for the case itself should be coped with criminal procedure, and the purpose of correcting improper administrative compulsory measure is to form proper decision about how to take criminal coercive measures. Besides, the occurrence of such circumstance due to unclear boundary of authority seriously infringes rights and interests of the suspects. So I agree with the proposition that entrusting to us the right of taking legal proceedings against act of investigation in such situation. However, single prosecutorial function of judgment system of criminal justice excludes judicial supervision toward pretrial activities, therefore, besides endowing the suspect right of presenting a plea, we need to strengthen judicial supervision toward pretrial activities. There is a viewpoint about the suggestion that People's Court should intervene the stage of criminal investigation as neutral party (Zhou Chang Jun, 2005, p.195). I affirm the positive aspect of this suggestion, but we need to notice the difference between western legal systems and judicial practice in our nation. In present stage, carrying out the model of complete intervention of People's Court is not suitable; the authority of People's Court can not substitute that of preliminary hearing department. Maybe the feasible way is to select persons who are proficient in criminal law from People's Court, and then constitute the expert group, such group does not intervene the procedure of examining or approving an arrest, and its main duty is judge whether determination of criminal facts given by investigation personnel is right or if the suspect should bear criminal liability, the justifiable bases of implementing criminal coercive measure.

Then turn to the second circumstance "illegal enforcement of criminal coercive measure", People's Prosecutors' Office own the obligation of requiring Public Security Organization to execute supplemental investigation toward law case transmitted for review and prosecution, and supervising legitimacy of act of investigation or whether some criminal coercive measure taken based on the merits of law. Therefore, we deduce subject of action are the two: People's Prosecutors' Office and Public Security Organization. We need to establish special judicial review mechanism toward supervise behavior of People's Prosecutors' Office, and litigation is the way initiated by the suspects to start review to

People's Prosecutors' Office. In the actual scope of review, we must pay more attention to legal authorization of prerogative order provided by People's Prosecutors' Office. In addition, it is necessary to permit the suspect to initiate corresponding mental injury compensation.

#### 4.2 Reasons for no-indictment

In the content mentioned above, we discuss the significance and situations of indictability, and we still need to clarify some situations which are not suitable for being take legal proceedings. In the third circumstance "admissibility of administrative presumption evidence", improper collection of evidences in the stage of investigation for mistakes existing in paper of determining the responsibility in a load traffic accident is just such situation. Problems exists in the paper are appropriate for solved by administrative reconsideration, because whether such paper can enter into criminal procedure as administrative presumption evidence and be treated as a controversial part are focuses remaining on the stratum of legislation technology. These problems need to be stipulated in declaratory statute for Criminal Procedure Law of the People's Republic of China. Last but not least whether we can initiate legal proceedings the target of which is expert testimony? The proposition that I want to advocate is expert testimony possesses high technology and nature of neutrality, although it is a part of investigation measures, its operating subject and system of management reflect the property of administrative system, thus, permitting possibility of accusation is not a proper idea.

### 5. Conclusion

As far as I am concerned, whether permit suspects to initiate lawsuits or not needs to consider factors hereinafter:

1. If concrete act of investigation infringes rights and interests of the suspects by carrying out illegal criminal coercive measures and other criminal methods, like situations of "mixing of administrative function and criminal function" and "illegal enforcement of criminal coercive measure", we can regulate such act of investigation by litigation, and then strengthen judicial supervision toward pretrial activities or establish special judicial review mechanism toward supervision behavior of People's Prosecutors' Office, finally permit the suspect to initiate corresponding mental injury compensation.
2. If the problems are mainly recognized as defects exist in current laws, like "admissibility of administrative presumption evidence", or in the situation of "Appearance of malfeasance in expert testimony", and the property of which has administrative attributes, those circumstances are not suitable to be raised lawsuits.

### References

- Changjun Zhou. (2005). *System and Logic: Transitional Analysis on Criminal Litigating Mechanism*. Peking: Chinese Founder Software Publishing House.
- Huihua Ren. (2002). *Principle of Criminal Investigation Learning*. Peking: Law Press.
- Meixiang Liu. (2004). *Theory on Criminal Investigation Procedure and Study on the Reform*. Peking: China Legal Publishing House.
- Qiang Huang, and Mu Ge. (2004). "Discrimination on Judicial Property of Investigation", *Power. Public Security Journal*. 84 (4), p82-84.
- Weizhi Huang. (2007). *Exterior Rule and Latent Law Rule in Criminal Judicature*. Peking: Chinese Prosecutorial Publish House.
- Wenzhang Wang. (2002). "Two Boundary Issues of Special Criminal Informer Work", *Chinese Criminal Police*, 25 (3), p1-2.
- Yonghong Li. (2006). *Theory of Criminal Judicature*. Peking: Chinese Prosecutorial Publish House.
- Zhijun Chen. (2006). "Dialysis of Criminal Judicature Reform Outlook", *Theoretical Research on Jurisprudence*. 21 (1), p100-105.

A journal archived in Library and Archives Canada  
A journal indexed in Canadiana (The National Bibliography)  
A journal indexed in AMICUS  
A journal listed in Ulrich's  
A journal listed in Journalseek  
A journal included in Google Scholar  
A journal included in LOCKSS  
A journal included in PKP Open Archives Harvester  
A peer-reviewed journal in politics and law

## Journal of Politics and Law

Quarterly

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](mailto:jpl@ccsenet.org)  
Website [www.ccsenet.org](http://www.ccsenet.org)  
Printer William Printing Inc.  
Price CAD.\$ 20.00

ISSN 1913-9047

