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The Problem with Defining Terrorism and the Impact on Civil Liberties – Britain is Beginning to Create a Monster with Large Claws, Sharp Teeth and a Fierce Temper?

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Abstract

After the September 11th attacks on the World Trade Centre in 2001, the United States reacted by enacting legislation, that was hoped would fight terrorism. The events of September 11 not only caused great distress and shock to many people but the reverberations across the world caused panic. The threat of terrorism has mainly come from small groups of people regarded as “extremists” or “fanatics” pursuing political, ideological and social goals. Few of us will forget the horrific pictures of the Twin Towers collapsing amidst the dust and carnage or the grotesque television images and telephone conversations on board the doomed aircraft. So began ‘The war on terror’ and the challenge for western democracy who now have the unenviable responsibility to safeguard national security and liberty. It does appear that counter terror policy has become instinctive and not well thought out. This article will examine the changes faced by the new Terrorism Act with the notion of civil liberties and innocence.

Keywords: Terrorism Act, Civil liberties, Glorification, Terrorism in the UK

1. Introduction

At a Labour Conference on September 27 2005 Tony Blair stated “We are trying to fight 21st century crime...with 19th century methods, as if we still lived in the time of Dickens. The whole of our system starts from the proposition that its duty is to protect the innocent from being wrongly convicted. Don’t misunderstand me. That must be the duty of any criminal justice system. But surely our primary duty should be to allow law-abiding people to live in safety. It means a complete change of thinking. It doesn’t mean abandoning human rights. It means deciding whose come first.” (Full speech can be accessed at the Labour Party website (www.labour.org.uk) 2007).

On Wednesday July 7th 2005 at approximately 08.50 a.m. a series of bombs exploded on London’s public transport system. Amidst the dust, and carnage echoes of cries could be heard all around Britain, of which the reverberations of what was happening would affect the whole world. Aldgate, Liverpool Street Stations, Russell Square, Kings Cross Street as well as Edgware Road and Tavistock Square were targeted. Helpless civilians butchered to death in the name of four suicide bombers pursuing political change. People willing to sacrifice their lives in order to complete their social, ideological and political goals had again succeeded in making the world dance to their tune. The terrorist attacks killed 52 people and over 700 people were injured.

2. The Problems with the definition of Terrorism

The modern definition of terrorism is controversial; the United Nations for example has not yet accepted a definition of terrorism. The European Convention on Human Rights and the European Court of Human Rights has not developed a definition of terrorism according to Colin Warbrick “A widely accepted definition of terrorism in international law has proved elusive”(see ‘The Principles of the European Convention on Human Rights and the Response to State Terrorism’ Colin Warbrick E.H.R.L.R Issue 3 [2002] Sweet & Maxwell Ltd 2002). Article 1 of the Framework Decision on Combating Terrorism (2002) definition of terrorism should include “serious damage to a country, with the aim of intimidation and destabilizing political, constitutional, and economic structures.” (United Nations Article 1 of the Framework Decision on Combating Terrorism (2002).

The UK definition of terrorism can be found under the Terrorism Act 2000 as the use of threat of action where the action falls within subsection 2

the use or threat is designed to influence the government or to intimidate the public or a section of the public

the use or threat is made for the purpose of advancing a political, religious or ideological cause

Action falls within this subsection if it

Involves serious violence against a person

Involves serious damage to property

Endangers a person's life other than that of the person committing the action

Is designed seriously to interfere with or seriously to disrupt an electronic system.

Section 34 of the Terrorism Act 2006 amended sections 1 (1) (b) and 113 (1) (c) of the Terrorism Act 2000. As Ben Brandon states, "The principal innovation is the new definition of terrorism...the new definition is international in inspiration and effect" (see 'Terrorism, Human Rights and the Rule of Law: 120 years of the UK's Legal Response to Terrorism' Ben Brandon Crim L.R. 2004 Sweet & Maxwell 981-997).

There is no universal definition of terrorism the previous definition was contained in section 20 of the Prevention of Terrorism Act 1974 as "the use of violence for political ends including any use of violence for the purposes of putting the public, or any section of the public in fear" these powers related mainly to terrorist affairs connected with Northern Ireland.

3. Brief details of key pieces of anti-terror legislation

3.1 The Terrorism Act 2000

On September 11th 2001 members from Al-Qaeda hijacked four commercial airliners. The hijackers intentionally crashed two of the airliners into the World Trade Centre in New York and one in the Pentagon. 2, 974 lost their lives another 24 people are missing and presumed dead.

Britain responded by enacting the Anti-terrorism, Crime and Security Act 2001 this was followed by the Terrorism Act 2000 which aimed to tackle international terrorism. The conjunction of the Terrorism Act 2000 was the most important political initiative in Northern Ireland since 1969.

Some of the key changes to the Terrorism Act 2000 are structural for the first time anti-terror laws are stated in one complete code which brings together legislation for Great Britain and Northern Ireland. The legislation no longer requires renewal or re-enactment save for one exclusively relating to Northern Ireland. Parts of the pre existing legislation have been dispensed with for example the power of exclusion and the power of internment in Northern Ireland. As Walker states "Section1 of the Terrorism Act offers some clarification"(see 'The Legal Definition of "Terrorism" in the United Kingdom Law and Beyond' Clive Walker P.L. Summer [2007] Sweet & Maxwell 331-353).

The 2000 Act did three major things first it added a number of offences to fill perceived gaps in the range of existing provisions punishing terrorist conduct. Secondly, it developed the practice of proscribing terrorist organizations introduced by the 1974 Act. And finally it provided new regimes for the detention without charge, and search and seizure. However the Terrorism Act 2000 has had its critiques for example it may be condemned as lax in comparison to its predecessor is not so much in the terms of its core elements of method, purpose and target in the circumstance of how these components are applied later in the legislation-the context.

3.2 The Prevention of Terrorism Act 2005

On 4 August 2005 the Prime Minister announced tighter regulations on anti-terror laws. The Terrorism Bill 2005 was introduced as a result to the terrorist bombings in London in July 2005. Breach of a control order without reasonable excuse is a criminal offence with a prison sentence of up to 5 years.

The main purpose of the 2005 Act was to provide the birth of control orders which imposed obligations on individuals suspected of being involved in terrorism. In *A v (FC) v Secretary of State for the Home Department* [2004] UKHL 56: [2005] 2 W.L.R. 87 it was held a control order may impose any obligations 'necessary' for preventing or restricting an individual from further involvement in terrorism. The House of Lords held that the power was a disproportionate and discriminatory response to the international terrorist threat presented to the United Kingdom. It was therefore incompatible with Arts 5 (1) and 14 of the ECHR 1950 by virtue of s 4 and s 6 of the Human Rights Act 1998. The belief was that each order would be made with conscientious thought in relation to the circumstances and the restrictions it would create would cause great distress to an individual for example restriction on movement, restrictions on communications and the requirements as a place of abode.

3.3 The Terrorism Act 2006

The Act was drafted in the aftermath of the July 7th attacks; the Act is highly controversial for a number of reasons. On August 5th Tony Blair stated, "There will be new anti-terror legislation in the autumn. This will include an offence of condoning or glorifying terrorism. This will also be applied to justifying or glorifying terrorism anywhere, not just in the United Kingdom." (Full text of the speech can be accessed at the Labour Party website www.labour.org.uk 2007).

Clause 2 now makes it illegal to publish a statement, which “glorifies, exalts or celebrates the commission...of acts of terrorism.” The wording has been criticized for being too vague however according to Charles Clarke “Our only answer to threat must be to contest and the defeat it.” (Full text of the speech can be accessed at the Labour Party website (www.labour.org.uk) 2007).

One of the purposes of the Terrorism Act 2006 was to create offences to penalize conduct which was thought would fall outside existing statutes and common law. The 2006 Act also amends the 2000 Act in important respects in particular by extending terrorist suspects for questioning by the police without charge and by enlarging police powers of search and seizure.

Under the Terrorism Act 2000 suspects can be detained for 14 days however the new piece of legislation has allowed a further 7 days detention if it is justifiable. The government argued that police should be able to arrest and investigate cases as early as possible. The government initially proposed 90-day detention first but were defeated in the House of Commons. The argument was that they needed the time for forensic testing and questioning (there is now a fierce debate with a proposal of 42 days detention).

4. Freedom of Speech and the glorification offence can they co exist together?

Following the terrorist attacks on July the 7th and the incidents on the 21st of July, the Prime Minister Tony Blair announced that a new offence glorifying terrorism would be introduced. At first the Bill contained an offence of ‘encouraging terrorism’ and another ‘glorifying’ it. However after continuous legal and political battles the proposal for a separate offence was omitted from the Bill.

The Home Secretary told us “the July events indicate that there are people in this country who are susceptible to the preaching of an argument or a message that terrorism is a worthy thing, a thing to be admired, a thing to be celebrated...What this Bill is about is trying to make that more difficult, that transition from people encouraging, glorifying, to then an act being undertaken”(Hansard Commons Draft Terrorism Bill, Written and Oral Evidence, HC 515-I, October 11 2005,Q3).

The Terrorism Act 2006 has made the “glorification” of terrorism a criminal offence, the difficulty with this provision is clear; when you outlaw freedom of speech you are violating civil liberties and this will surely result in Britain becoming less safe by silencing dissent. Edward J. Flynn states “there has also been a strong underlying message that respecting human rights while countering terrorism is not only a matter of legal obligation, but is also essential to an ultimately successful strategy”(see ‘Counter Terrorism and Human Rights: The view from the United Nations’ by Edward J. Flynn E.H.R.L.R. 2005). These new powers make us not only less free, we are also less safe when we drive dissent underground and alienate minorities. Swept up in this new anti-terror safety net could be those who protest against dictators like Zimbabwe’s Mugabe or North Korean dissidents.

The new offences of encouragement of terrorism and dissemination of terrorist publications are very broad. They do not require any intention to incite others to commit criminal acts. However ‘glorification’ became embodied in s 1(3) of the Terrorism Act 2006 as a means of defining indirect encouragement. This section applied to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts or Convention offences.

This provision covers offending speeches at meetings, sermons at places of worship, chants and placards at demonstrations, as well as printed literature, broadcasts, and material posted on the internet. The circumstances and manner which a jury must have regard in considering a statement depends on the medium of publications. By virtue of s1(4) of the Terrorism Act 2006 how a statement is understood depends on what members of the public could reasonably be expected to infer from it, this must be determined having regard both to the contents of the statement as a whole and the manner of its publication. As Lord Baroness Scotland explained “It is not an offence to incite people to engage in terrorist activities generally, or to incite them obliquely by creating in which they may come to believe that terrorist acts are acceptable...That is the gap we want to close”(Hansard, HL, Vol 676, col 455 (December 5 2005).

This has created difficulties in respect of freedom of expression. A statement published in a book, newspaper, pamphlet or magazine may be read, either in hard copy or on the Internet, by UK nationals, foreign visitors, and people abroad. By virtue of s 1 of the Obscene Publications Act 1959 it “shall be deemed obscene if its effect or the effect of anyone of the items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances.” (see ‘Blackstones Guide to The Terrorism Act 2006’ Jones, Bowers & Lodge Oxford University Press 2006).

In *R v Calder and Boyars Ltd* (1968) Cr App R 706 the Court of Appeal held that the jury should decide, whether the effect of the book was intended to deprave or corrupt a significant proportion of persons likely to read it. What constitutes a statement is not clear, the definition of a ‘whole statement’ in s 20 (6) of the Terrorism Act 2006 is limited to ‘a communication of any description, including a communication without words, consisting of sounds or images or both.’ Some contents within a book through various chapters could be regarded as encouraging acts of terrorism.

The distinction between 'direct' and 'indirect' encouragement reflects the provisions of Article 5 (2005 Council of Europe Convention on the Prevention of Terrorism). It is an offence by virtue s1(2) of the Terrorism Act 2006 subject to proof of the mental element in s1(2)(b) of the Terrorism Act 2006 to publish a statement containing such encouragement.

Under direct encouragement a person will commit the offence of publishing a statement in which it is alleged there is direct encouragement of terrorism if:

- a) he publishes, or causes another to publish the statement
- b) he intends at the time members of the public to be directly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism
- c) he is reckless as to whether members of the public will be so encouraged and
- d) the statement is likely to be understood by some or all of the members of the public to whom it is published as a direct encouragement or other inducement

For the offence to be established the 'statement must be likely to be understood by some or all of the members of the public to whom it is published' as a direct encouragement to them to commit acts of terrorism.

A person will commit the offence of publishing a statement in which it is alleged that there is indirect encouragement of terrorism under s1 if:

- a) he publishes, or causes another to publish a statement
- b) he intends at that time members of the public to be indirectly encouraged or otherwise induced by a statement to commit, prepare or instigate acts of terrorism
- c) he is reckless as to whether members of the public will be so encouraged and
- d) The statement is likely to be understood by some or all members of public to whom it is published as an indirect encouragement or inducement to them.

4.1 Criticisms

The glorification of terrorism offence was one of the most contentious clauses of the Terrorism Act 2006 in its passage through Parliament. The major cause for concern was how wide the offence could be used and the implications for freedom of expression as the Convention did not refer to the concept of 'glorification'. It does appear that the scope of these provisions is sweeping and disproportionate. It clearly fails to address the element of intent. This in turn does mean that these provisions violate the right to freedom of expression (Article 10). There is a legitimate worry that broadcasters, internet services providers, as well as organizations and individuals representing particular categories of legitimate political opinion, may engage in all manner self censorship.

Another criticism is that the right to freedom of expression will allow the prosecution and criminalization of persons for the lawful exercise of their right to hold and impart their ideologies. As a result, one author states "they would also have a wider chilling effect for society at large on its enjoyment of the right to freedom of expression, as enshrined in international human rights law" (see 'Clamping down on terrorism in the United Kingdom' by Clive Walker IJCL 5 (1137) 1 November 2006).

The Third Report of the Joint Committee on Human Rights (Third Report of the Joint Committee on Human Rights 2004) expressed concern over the glorification provision that and that it does infringe article 10. The Government declined to implement an amendment made by the House of Lords on 15 February 2006 that 'indirect encouragement' should comprise the making of a statement that the listener would infer that he or she should emulate it. The Secretary of State stated in Parliament on 15 February 2006 that s1(3) of the Terrorism Act 2006 is intended to give an 'exemplary description' of what would amount to glorification of terrorism hence those acts of glorifying terrorism but is not limited to them. The Joint Committee on Human Rights argued, "terms such as glorification, praise and celebration are too vague to form part of a criminal offence which can be committed by people speaking" (Session 2005-2006 (HL 75-I HC 561-I AT 27-28)).

A jury will have the responsibility not merely finding facts but of determining and applying the standards of the community in which it lives whether the conduct is dishonest or an article is obscene and is reasonable. Section 1(1) of the Terrorism Act 2006 requires that a jury must assess the impact of statements. The jury may find that the statement 'as a whole' and the manner in which it is published constitutes both 'direct' and 'indirect encouragement.' The glorification provision applies only to indirect statements. Section 1(3) of the Terrorism Act 2006 deems certain statements as a matter of fact to be statements of the kind described factually in s1 (1) of the Terrorism Act 2006 and introduces the word 'glorifies' which is partially defined in s20 as including 'any form of praise or celebration'.

Therefore a judge will direct the jury to consider indirect if;

- a) That they have to find whether as a matter of fact, a statement amounts to indirect encouragement to some members of the public.
- b) That statements include every statement that glorifies the commission of acts and is indirectly encouraging regardless of whether it glorifies.
- c) That glorification includes any for of praise or celebration.

In *R v Brown (K)* (1984) Cr App R 123 the problems of jury decision-making was shown. While a jury may well be considering general members of the public the 'members of the public to whom the statement is published' may be too difficult to describe. Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference. The exercise of these freedoms may be subject to formalities, conditions, and restrictions. As J.J Rowe states "Use of the Terrorism Act powers will probably give rise to claims of breaches of Articles of the European Convention on Human Rights...the Terrorism Acts powers are intrusive"(see 'The Terrorism Act 2000' by J.J.Rowe, QC Crim L.R. [2004]).

Under the Terrorism Act 2006 a person's passionate expression might be interpreted as recklessness. For example, the Mayor of London, Ken Livingstone, recently invited the cleric Yusuf al-Qaradawi to speak in the UK. Much of the criticism he faced as a consequence centred on comments made by Mr al-Qaradawi made which were deemed by some to incite terrorist activities. The Sun referred to him as "A ranting Islamic rabble-rouser who supports suicide bombings by children and brutal punishment of gays"(The Sun 2005). However his supporters continued to argue Mr al-Qaradawi was an individual who promoted peace and was entitled to express his views.

If someone is calling for the end of a particular rogue regime it is not particularly relevant whether they are negligent or reckless in the way they do so. Speech offences linked to terrorism must create a stronger definition of what constitutes terrorism than that contained in the Terrorism Act. Under this offence, "a Zimbabwean who has advocated the overthrow of the regime while resident there, and who then flees for his life might, when in the UK as a refugee, be liable for prosecution. Clive Walker states "There were furious debates about whether this offence might criminalize anyone who glorified the armed opposition to the Apartheid regime in South Africa (such as the revered Nelson Mandela) and there were calls for the future prosecution of Cherie Booth, the wife of the Prime Minister Tony Blair, for stating in a speech that in view of the illegal occupation of Palestine land I can well understand how decent Palestinians become terrorists."(Full speech can be accessed at www.labour.org).

Clause 21 allows for the extension of the grounds for proscription under the Terrorism Act 2000. This will now cover non-violent organisations who 'glorify' terrorism. There are currently 25 organisations subject to proscription, including al-Qaeda, Hamas and many other groups associated with international terrorism.

'Encouragement' is redundant for those who incite murder and dangerous for those who don't. We should enforce the law that already exists before spinning new law. The new offence of 'indirect' incitement, to capture the expression of sentiments which does not amount to direct incitement to perpetuate acts of violence, but which are uttered with the intent that they should encourage others to commit, or attempt to commit, terrorist acts. Another difficulty with this provision is the impact this would have on legitimate free expression particularly as it is concerned with the expression of sentiments which do not amount to direct incitement. This seems far too wide and will cover statements whose connection to acts of terrorism may be speculative.

Accordingly, the broad scope for prosecution under such an offence is likely to have a significant chilling effect on the expression of ideas by persons who have no intention of inciting terrorism. Another difficulty with prosecuting any incitement offence is the requirement on the prosecution to satisfy a jury to the criminal standard of proof that the words used by a speaker or author, given their natural and ordinary meaning, disclosed an intention to incite the acts in question. Although this requirement often presents an evidential challenge for the prosecution in practical terms, it does appear that people will be wrongfully convicted.

It appears that this offence of indirect incitement adds nothing to the existing law. Indeed, given that indirect incitement is concerned with statements, which do not directly reveal an intention to incite, it would be therefore more difficult for the prosecution to prove that such intent exists.

Although it is intended to implement article 5 (Council of Europe Convention on prevention of terrorism) the government's belief that these measures are necessary in order to implement the Convention does not relieve the UK of its obligation to ensure that any such implementation is compatible with fundamental rights. The Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles said:

"freedom of expression is one of the essential foundations of a democratic society and applies not only to ideas and information that are favourably received or regarded as inoffensive but also to those that "offend, shock or disturb. It would be particularly difficult to predict the circumstances in which a message would be considered as public provocation to commit an act of terrorism and those in which it would represent the legitimate exercise of the right to

express an idea or voice criticism freely. Giving [national courts] such wide discretion could hinder compliance with the principle of legality in criminal law” (para 25, Opinion of Senor Gil-Robles, 2 February 2005).

4.2 *Amnesty International*

According to Amnesty International:

“Human rights law makes ample provision for strong counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist’s objective by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with a successful counter-terrorism strategy. It is an essential element in it”(Kofi Annan UN General Secretary Amnesty International’s briefing on the draft Terrorism Bill 2005).

Amnesty International considers that some of the Terrorism Act 2006 is inconsistent with the UK’s obligations under domestic and international human rights law and may lead to serious human rights violations. The European Court of Human Rights has made clear, the right of freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment. To meet the necessity and proportionality test, including in relation to criminalization of the making or dissemination of statements which encourage terrorism, it must be shown that the person accused intended to incite an act of violence (terrorist offence) and that the statement caused a clear and present danger that such an offence would be committed.

Furthermore, a clarification of “statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism” fails to meet the requirements of precision and clarity of the criminal law. In particular, the explanation offered that the offence extends to statements that “glorify the commission or preparation (whether in the past or in the future generally)” of terrorist acts, from which the members of the public who receive them could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances is equally broad and inaccessible.

This provision fails to meet the required criterion of “necessity in a democratic society”, given its failure to address squarely the element of intent and to criminalise the publication of a statement “encouraging terrorism” only if there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. They also feel the provision does not address the element of intent. The provision does not squarely place on the state the burden of proving that the person who published (or caused another to publish) the statement intended to encourage or glorify terrorism.

This provision focuses on whether the accused knew, believed or had reason to believe that at least some of those who would receive the statement are likely to understand it as encouraging terrorism. In fact, the provision seems to reverse the burden of proof on the key element of intent: it states that it is a defence for the accused to show that he or she only published the statement in the course of provision or use of a service provided electronically or that the statement neither expressed his or her views nor had his or her endorsement, and that it was clear that it did not express his or her views.

Such a sweeping provision in criminal law, punishable by up to seven years in prison, would be clearly contrary to the very principle of freedom of expression and have a chilling effect on individuals seeking to lawfully exercise their right to freedom of expression.

4.3 *Freedom of Expression*

The right to freedom of expression is guaranteed under international law through article 19 Universal Declaration of Human Rights and article 10 European Convention on Human Rights. The synonymous term freedom of expression relates mainly to verbal speech which includes imparting, seeking, receiving ideas, and thoughts.

Freedom of expression occupies a high place in the hierarchy of rights in a democratic Society (Lord Steyn in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 125G HL).

In *R v BBC ex parte ProLife Alliance* [2003] 2 All ER 977 Lord Nicholls stated “Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts”(ex parte ProLife Alliance [2003] 2 All ER 977).

The problem it appears with the new offence of glorifying terrorism does relate to breach of deeper freedoms in a liberal state. People will now be concerned over the language they use because it may be construed as incitement to terrorism. Freedom of speech is crucial to democracy according to the British philosopher John Stuart Mill “the best test of truth is the power of the thought”(Oliver Wendal Holmes Jr 1919).

In addition to curtailing political speech, the British government has outlawed 15 militant groups, most of them Muslim.

It took a sterner attitude toward Islamists who had preached violence in the past, barring one well-known Syrian-born cleric, Omar Bakri Mohammed, from returning to the country. It secured the conviction of Abu Hamza al-Masri, the country's militant cleric, for soliciting murder and racial hatred. The problem appears is if a group of Britons were on a peaceful protest arguing loudly on a street corner about American foreign policy in Iraq, they could conceivably be prosecuted under the law. It's an extraordinarily vague statute, no two people can agree on what the law means.

According to Tony Blair "The purpose of terrorism is not only to kill and maim the innocent; it is to put despair and anger in people's hearts. It is by its savagery designed to cover all conventional politics in darkness, to overwhelm the dignity of democracy and proper process with the impact of bloodshed and of terror. The politics we represent will win and will triumph over terrorism." (Prime Minister Tony Blair 8 July 2005 Labour Party Conference www.labour.org).

The language of clause 1 was amended, at present there is nothing in the proposed definition of 'encouragement to terrorism' to require the prosecution to prove intention 'to incite further acts of terror'. The prosecution merely has to show that at the time the accused made the statement in question he or she knew or believed or had 'reasonable grounds for believing' that other members of the public were 'likely to understand it as a direct or indirect encouragement or other inducement' to commit acts of terrorism. It is also irrelevant whether any person was actually encouraged to attempt or commit an act of terrorism as a consequence of the statement being published.

The law here seeks to punish those making statements not for what effect they intended their words to have but according to what they might suspect others will make of them. Accordingly, any person who makes any statement with utterly innocent intent may nonetheless be found guilty and subject to up to 7 years imprisonment simply on the basis that he was aware or reasonably suspected others might regard his statement as encouraging directly or indirectly their own terrorist acts.

In particular, clause 1 does not specify which 'members of the public' would be 'likely to understand' the statement as incitement. If a statement were published to 1 million people, therefore, it would be an offence within the meaning of clause 1(1)(b) if the publisher were aware that one or two mentally unstable readers might regard it as 'direct or indirect encouragement' to terrorism.

If a statement were published on the Internet, it would conceivably be available to anyone in the world with a computer. In such circumstances, it would therefore become a criminal offence under clause 1 for a person to publish even the most innocuous statement so long as he or she reasonably believes or 'has reasonable ground to believe' that anyone in the world, no matter how unreasonable their interpretation, may regard it as incitement.

The incitement offences are directed at statements that seek to affect the unreasonable. Accordingly, the requirement to show intention is an essential safeguard against the manifest injustice of punishing a person for what others unreasonably understood him to mean. Without the requirement of intention, any person publishing a statement would be liable for the unreasonable interpretations of others.

Therefore, someone in the UK, for example, would be liable for prosecution to the extent that statements which they make on the internet (whether through their home pages or posting to message boards) might be thought to encourage any person in any other country with access to the internet to commit an act of terrorism. Someone making a comment on the internet in the UK would therefore be liable for the effect of their remarks on readers reasonable and unreasonable alike in such places as Afghanistan, Chechnya, Iraq or the West Bank. Clause 1 contains two safeguards. First, any prosecution under clause 1 would require the consent of the Director of Public Prosecutions or in the case of statements concerning 'affairs of a country other than the United Kingdom' the Attorney General. However, requiring the consent of a public official as a check against malicious or over-zealous prosecution seems a wholly unsatisfactory measure where the offence itself is odious to basic principles of justice.

In making people criminally responsible for the effects of their statements rather than their intention in making them, the draft offence is injurious to the key principles of criminal justice and free expression.

Therefore it does appear anyone committing any opinion to print, website or broadcast must consider the effects of their words and the effect it will have upon any who happen reads it or listens to it. It will not matter even if there is a misunderstanding, unreasonable the consequence or innocent the intent, a publisher will be liable for anything that may be read as encouragement by terrorists.

It does appear that the offence contained in clause 1 is a breach the right to free expression under article 10(2) of the European Convention on Human Rights. Specifically, although a court would agree the restrictions imposed by clause 1 on free expression pursue a legitimate aim of safeguarding national security, public safety and the prevention of crime, it is bound to find that the draft offence fails to strike a fair balance between national security considerations and the fundamental right of free expression. Specifically, the lack of any requirement on the prosecution to prove;

- (i) an intention by the maker/publisher to incite an act of terrorism;
- (ii) a likelihood that the statement will incite an act of terrorism; and

(iii) a sufficient causal nexus with an actual attempt or act of terrorism.

4.4 *The Home Office*

Together with the very broad scope of the offence ('direct or indirect encouragement') means that a court would most likely to find that the interference posed by clause 1 to legitimate free expression is disproportionate to the aims pursued and therefore not necessary in a democratic society.

The Home Office's press release states that the amendments make it clear that for an offence of glorifying terrorism to be committed, the offender must have also "intended to incite further acts of terror". However, the requirement in clause 1 remains that the accused knew or believed or had 'reasonable grounds for believing' that other members of the public were likely to understand it as a direct or indirect encouragement to commit terrorist acts, which itself is widely defined. This does not amount to intent. This clause should be amended to give clear effect to the Home Secretary's stated aim of requiring an element of intent.

The offence of encouragement in clause 1 also has failed to satisfy the requirement in Article 10 with freedom of expression be "prescribed by law" because of the vagueness of the glorification requirement, the breadth of the definition of "terrorism" and the lack of any requirement of intent to incite terrorism or likelihood of such offences being caused as ingredients of the offence.

It would be necessary to delete the references to glorification, insert a more tightly drawn definition of terrorism, and insert into the definition of the offence requirements of intent (which could include subjective recklessness instead of the objective recklessness test introduced at Commons report stage) and likelihood.

The offence would be committed by a person who publishes a statement, or causes another to publish a statement on his or her behalf, at the time knowing or believing, or having reasonable grounds for believing, that members of the public to whom the statement is or is to be published are likely to understand it as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism.

Statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism include statements which glorify the commission or preparation of such acts and "is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances".

4.5 *Case law*

The law already outlaws incitement to commit a particular terrorist act, such as the statement "Please will you go and blow up a tube train on 7 July in London?" but not a generalised incitement to terrorist acts such as "We encourage everybody to go and blow up tube trains." The Muslim cleric Abu Hamza Al-Masri was charged, on 19 October 2004, with solicitation to murder for soliciting or encouraging others at a public meeting to kill nonbelievers in the Muslim faith, and with incitement to racial hatred. The Law Commission is currently considering the law on encouragement and other offences of complicity.

The Home Office's written evidence acknowledges, that it could be argued that the description of the offence in Clause 1 of the Act is "insufficiently precise." "Glorification" is defined in the Act to include "any form of praise or celebration".

The legal certainty concern is that terms such as glorification, praise and celebration are too vague to form part of a criminal offence, which can be committed by speaking. The Home Secretary draws a distinction between encouraging and glorifying on the one hand and explaining or understanding the other. The law too, he says would not be caught by the new offence, because they do not amount to encouraging, glorifying, praising or celebrating.

The difficulty with the Home Secretary's response is that his distinction is not self-executing: the content of comments and remarks will have to be carefully analysed in each case, including the context in which they were spoken, and there will be enormous scope for disagreement between reasonable people as to whether a particular comment is merely an explanation or an expression of understanding or goes further and amounts to encouragement, praise or glorification.

The final source of uncertainty about the scope of the offence stems from the lack of any requirement in the definition of the offence that there be an intention to incite the commission of a terrorist offence, and that the statement must cause a danger of a terrorist offence being committed. As presently drafted, the state of mind which must be proved by the prosecution is knowledge or belief that members of the public are likely to understand the statement as a direct or indirect encouragement or other inducement to acts of terrorism, or having reasonable grounds for such belief.

This arguably falls short of a requirement of a specific intention to incite the commission of a terrorist offence. The only reason given by the Home Secretary for not including a requirement of intent in the definition of the offence is that this would make it more difficult to secure convictions for the offence.

5. Recommendations

The first concern is whether the phrase “fomenting, justifying or glorifying terrorist violence in furtherance of particular beliefs” is sufficiently precisely defined, bearing in mind the likely impact on legitimate public debate about the causes of terrorism, and therefore on freedom of expression.

Compatibility with article 10, however, will depend on the precise wording of the restriction in question, and in particular whether it is sufficiently precisely defined to ensure that it does not disproportionately stifle legitimate debate. In February 2000 the Home Secretary published a discussion paper inviting debate on how the Government should strike the balance between security and liberty in the context of the present threat from international terrorism, and responding to the Report of a Committee of Privy Counsellors under the chairmanship of Lord Newton of Braintree on the operation of the Anti-terrorism, Crime and Security Act 2001.

The Joint Committee on Human Rights decided to hold its own inquiry into the human rights issues raised by the Home Office discussion paper. The Committee considers that long-term derogations from human rights obligations have a corrosive effect on the culture of respect for human rights.

On 25 February 2004 (Counter- Terrorism Powers: Reconciling Security and Liberty in an Open Society 2004) the Home Secretary published a discussion paper, the discussion paper invited a wide-ranging public debate on how the Government should seek to strike the balance between security on the one hand and liberty on the other in the present context of a heightened threat from international terrorism.

6. Conclusion

Terrorism is the defining issue of the present time. It raises political, legal, social and other issues of great difficulty. Terrorism of the modern kind has been manifesting itself since the 1960s and the 1970s. Accordingly the bombing of the World Trade Centre in New York in 2001 was not a one off event. There is not to doubt that the operation of human rights legislation can be both a source of unity and disunity. There is that tension between regarding a commitment to fundamental human rights as a unifying ideal and the core values around which a democratic and just society should be built, and the pragmatic implications of human rights legislation on state power and the state's relations to individuals in the pursuit of national protection and security.

The Human Rights Act that provides a systematic concern with fundamental values, and more informed public discussion about them; that ensures corresponding changes in methods and approaches to making, interpreting and applying the law as a whole.

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Selecting a Mode of Way to the Regional Rule of Law At Present China

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Abstract

Regional rule of law itself contains double values of strengthening the theoretical understanding and promoting to solve problems in reality. Its theoretical framework should be made from three perspectives of the regional definition, the functional objectives and cardinal content. In light of the reality in the current China, it is comparatively more reasonable to deeply promote the regional rule of law by continuing the mode of government-promotion road. Of course the conflicts between the unity of the rule of law and regional autonomy, regional rule of law and the unified market construction, official law and unofficial law will appear and needs coordinating.

Keywords: Region, Regional rule of law, Mode of government-promotion road

With the rise of regional science and the promotion of the rule by law in China, the regional rule of law has gradually become a brand new theoretical perspective of the topics of governing the country by law. And it is of the conspicuous importance in deeply promoting the legal construction. How to understand its basis of value? How to make the relative theoretical framework? Which mode of road is for the regional rule of law in China? What problems to solve in the course of promoting the mode? This text tries to comb these problems in a systematic way so as to give an initial understanding of the regional rule of law.

1. The value foundations of the regional rule of law

Generally speaking, the legal theory has two values, one is for theoretical understanding and the other is for the mechanism of solving the problems in reality. (Chen, Ziqing, 2002.). The research on the value of the regional rule of law should undoubtedly follow this line of thought to give a probe.

1.1 The value embodiment of the theoretical understanding.

First, the regional rule of law is one of the topics on legal construction. The rule of law, as an integrative framework of institution, has its own intact system. It has a series of internal structures such as the legislation, judicature, and law enforcement. And it should have level system of broader coverage. From the latter perspective, a law region, a law country and a law community have constituted the three levels of the rule of law. The so-called law region means that a given domain, under the control and governance of a sovereign country, can become a realm with good order by rule of law. (Li, Yubi. 2003.). It is a form demonstrated by rule of law at a certain level and a foundation to realize a law country and law society. It is improper to attach importance to the unity of legal construction while ignore its particularities and differences in various local and regional places or further deny the necessity, reality and pressures of regional construction with rule of law. Professor He Weifang said, “a good social system is actually made up of many small and even trivial mini-systems, just as the billowing Yangtze River of numerous small streams. Without specific rule of law, the grand and ambitious rule of law is only a slogan, a vibration of the air.”(He, Weifang. 2002, p.4)

Secondly, the regional rule of law is the result of the development of regional science. According to the theory of Regionalism, all the activities of human beings need a certain geographical space—region. The growth of economy, politics and culture in any local place or any country has been on with the interaction of other places or countries. And it has been realized or fulfilled in a certain region. At present, with the development of globalization and regionalization, the growth of globalism and regionalism, the regional science has constantly been developing deeply and extensively, resulting in the emergence and boom of regional economy and regional economics. And it gives further competitive

development to the regional politics, regional administrative science, even the complex administration, and regional public management and other regional theories and practice of multidiscipline, multi-direction, and multi-perspective. Region has become a new perspective of research on the social sciences and humanities, thus contributing to the growth and thriving of different regional sciences (such as, regional economics, regional politics, and regional administrative studies, etc.), all of which aims at exploring the regional harmonious development. In such circumstances, research on regional rule of law will be put on the important agenda of the social sciences. (Wen, Zhengbang. 2005.)

1.2 The mechanism of solving actual problems.

The mechanism mainly reflects that the regional rule of law is a rational choice of optimizing the collocation of regional legal resources and promoting the regional development. With the improvement of the standard of the rule of law, the allocation of legal resources has become an indispensable index with which people give to the evaluation of social nature, level of development, social interaction and decision-making. The size of legal standardization and the integrated legal system, the attitudes of the government and the community to law and their credit index have more significance in the economic and social interaction than that of the other resources. A region with complete allocation of legal resources is bound to have much more chances of accessing to effective investment and social interaction than that short of legal resources and with inadequate allocation. A good example of taking good use of legal resources is that the United States promoted the great development in its western region by reforming its law on the real estate. Theory of Adverse Possession was popular with the USA in the 19th century. According to the theory, if someone used the land of others in the identity of the owner and the real owner did not take any measure to give it a stop within the set time, the owner would lose his ownership of the land and the unlawful possessor would take the land ownership. With the further development of the western region, adverse possession became more attractive. In order to make clear the land ownership relations, the law again made a reform in more favor of the adverse possessors. For example, traditionally, the effective period of possession is usually 20 years. But Nevada in 1861 reduced it to five years. (He, Qinghua. 1999. pp.146-148). This law encouraged and induced the influx of new immigrants and the large number of foreign capital investment, and promoted the regional economic development. American experience in the content of concrete provisions and the universality deserves further consideration. But its strategy of developing by law and the idea of effectively establishing legal allocation of resources are of great significance for reference. Furthermore, the regional rule of law itself is a process of optimizing regional allocation of legal resources.

2. The relevant theoretical framework of regional rule of law

The theoretical framework of regional rule of law cannot be fulfilled in a day. It needs a continuous and perpetual research of numerous scholars and other people studying law. This text tries to propose some preliminary ideas or structures. The narration may not be scientific and reasonable enough. But I really hope to offer a few commonplace remarks by way of introduction so that others may come up with valuable opinions.

2.1 The definition of region.

To study the regional rule of law, the first thing is to give a clear definition of region, which is the background and starting-point of constructing regional rule of law. In regional economics, different people may have various understandings about region. Generally speaking, it can be divided into three levels, namely: the region of a country; the world region beyond national boundaries and made up of a few countries; region of parts of several countries. Research on regional rule of law is based on regions within China and followed by defining the scope of a region. According to regional economics, a number of districts and units will be integrated as a region by two criteria: one is the standard of homogeneity and the other functional standard. (Chen, Xiushan. & Zhang, Keyun. 2003. pp.5-6).

By the standard of homogeneity, we can classify those units or areas with the same or similar characteristics into an integrated region. In this process there are such indicators we can choose as unemployment rate, income, the proportion of heavy industry and so on. As for the standard of function, we can group the units or areas which have close contact one another according to certain indicators into a functional region. These regions are of special high interdependence. The indicators that can be chosen are districts of population flow, product supply area, business and shopping area, etc. The standard is not arbitrary. It is a task on the basis of research programs. And the classification is based on the organic combination of the two standards.

In terms of the standards of the homogeneity, the regional demarcation in the proposition of regional rule of law gives a comprehensive consideration to the similarity of economy, culture and the original legal system, legal systematic construction, and the legal awareness of the social main body among the regions and again combines with the functional objective of regional rule of law serving the legal system modernization. For the benefit of realizing the objective of the rule of law, those areas or units which have similar features or functional values are grouped into a legal region. Meanwhile, given a reasonable consideration of the unity for the rule of law and the regional characteristics, the size of the regions should be appropriate. If the a region is too big, the chance will be comparatively small of embodying and exerting its advantages. If too small, it will be affected greatly by the local features, which resulting in the disharmony

of the unity of the rule of law. In addition, based on the restrictions on the right as principal by Law of legislation, the regional settings can be as the followings (based on the administrative divisions), a region beyond the provincial boundaries and composed by a few provinces such as the western development region, the eastern developed region, etc., a region based on province, and a region composed by comparatively larger cities or autonomous boroughs within a province or inter-provinces.

2.2 The value orientation of regional rule of law.

How to define the value orientation of regional rule of law is a matter of question about both the direction of regional rule of law and the realization of the legal modernization in China. The value orientation of the regional rule of law can be understood from the following two aspects. (Wang, Jianhui. 2002.)

2.2.1 The unity of the rule of law

The principle of the rule of law is an rationalized guiding ideology. It is of comprehensive significance of guiding the whole rule of law. And it is an inherent spirit of law which has formed and developed in the process of rule of law. It exists in the conception of rule of law but beyond the law practice. Regional rule of law, as a layer of legal construction in our country, should take the realization of the unity of rule of law as its highest value orientation.

2.2.2 The innovation of regional legal system.

The evaluation on whether the existing system is effective on the region is not the pure one on the system itself but the one on the incentive measures, the degrees of protection and the regulations of the regional economy and social development. The effective system must facilitate the growth of the regional economy and social development. Due to the great differences in nature, culture, economy, society and other aspects among the regions, the existing legal system is difficult to meet the needs of the regional economic and social development. A whole set of legal systems must be provided according to the actual situations to suit and promote the rapid development of regional economy and society. These legal systems should be more innovative than the existing ones.

2.3 The core of the regional rule of law.

The regional rule of law should be a sound integrated system of internal and external mechanisms. The central task of the research is to explore and study how to establish and better the system of legal norms suitable for the features and actual situations of the regional development. Therefore, the content and structure of the regional legislative system become the core of the regional rule of law and the focus this text is on. Its relevant content can be developed into the following aspects:

2.3.1 On the legislative principle.

This is an issue concerning the value orientation of the regional rule of law. Except the general principles that regional legislation should abide by of democracy, science, and procedure, there are some other special principles which must be followed.

First, the principle of unity for the rule of law is demanded by the basic law of the legal construction. It has two layers of meanings. One is to maintain the unity of the entire socialist rule of law. Regional law should be based on the national law and adhere to the non-contravening principle. On one side, it should have no direct conflict against the content of the specific provisions in the higher-level laws. On the other side, it should have no indirect conflict against the basic principles and the spiritual essence of the higher-level laws and the specific legal system defined by the higher-level laws. The other is that the harmony and unity of rule of law among the regions should be kept to be suitable for the local conditions and promote the self-development of the region, and play an active role in facilitating the overall development of every region in China.

Second, the principle of highlighted regional characteristics demands that regional law should reflect the uniqueness of that region. Specifically, first, the regional law should fully reflect the degrees of demand for legal adjustment by economy, politics, culture, customs and the people in that region and the actual situation of adaptability. Second, regional law should have a stronger and concreter target and be able to solve those urgent problems in the region which the Central law does not have relative provisions or is not suitable to solve. It should give a combination to the enacting of regional law and the settlement of the practical problems.

2.3.2 On the legislative principal.

In a broad sense, legislation is a comprehensive or complicated task, and it is completed by systems of state organs with legislative right. Likewise, the legislative principal of regional law is the regional state authorities with legislative right and the regional state administrative organs. A legislation mode can be explored of combining the Central special legislation, interregional cooperative legislation and regional independent legislation. The Central special legislation means that the Central legislatures give a prescription as to the overall situation of strategic, structural, macroeconomic and principled issues. The regional cooperative legislation means that more than one regional legislature gives a

prescription as to interregional, cooperative and the collective issues within the regions. While the regional independent law is made by every regional legislature according to the problems it faces in the development. The Central legislation is basic while the regional legislation is deeper, which is of great significance to allocating the legal resources and bettering the regional legal systems.

2.3.3 On the legislative content.

Legislation Law provides that local legislation mainly lies in the following three aspects: first, the legislation for implementation, namely, the implementation of laws and administrative regulations, is stipulated specifically in accordance with the actual situation in the administrative region. The second is the self-determined legislation. That is, legislation is made for the management of regional affairs. The third is antecedent legislation. As to those out of the scope of the national exclusive rights of legislation, the region can make local regulations and laws required before the national legislation. Since the legislation of implementation is relatively fixed, there will be more discussion on the fields and scope of the self-determined legislation and antecedent legislation. Regional legislation has broad and complex range. Generally speaking, it mainly contains the events involved in local economic development, the protection of resources and environment, the labor protection and the protection of rights and interests of special personnel, the adjustment of social relations, the management of public causes, and the regional legislation, law enforcement and judicial affairs, etc.

The theoretical framework of regional rule of law has only laid a theoretical foundation for the rule of law. The following will mainly discuss how to solve the problem of selecting a mode, which is of more realistic value, I suppose.

3. Selecting a mode of road to the regional rule of law

There are two types of road modes of modernization of law system in the world. One is the social evolution in the Western developed countries, that is, natural evolution. The other is the government-promotion one in the developing countries. (Wang, Jianhui. 2002.). In light of the current reality in China, the government-promotion mode is a reasonable choice for the construction of our regional rule of law.

3.1 The macro environment in the process of China's law system determines that the government-promotion mode is more reasonable in a certain phase.

China is relatively short of traditional legal resources. She is also lack of the conditions of natural evolution of law system. The traditional legal cultural mechanisms bear a strong color of agricultural civilization. The thought of patriarchal clan system has dominated for a long time in history. The society is a typical community ruled by man. And a well-developed civil society is far to reach. Therefore, China does not possess the native resources and institutional mechanisms of the natural evolution in legal system. In this case, if a road is chosen of the natural evolution of the rule of law, it will be long and tortuous because the yielding, evolvement and evolution of the legal resources and the accumulation of public awareness about rule of law cannot be accomplished overnight. Meanwhile, if the state authorities are negative with inaction or just pay attention to the traditional experience, they will meet the hard problems of slow, disorderly, and atavistic spontaneous legal evolution. Opposite to the United Kingdom, France, the United States and other countries, what makes China embark the road of the rule of law, to a large extent, is not from the interior society but within the government. It is pushed or launched by the government.

In addition, the two major tasks that China is facing have demanded the construction of rule of law. First is the in-depth development of China's market economy. It is an economy ruled of law. The rule of law embodying the inherent requirements is the lifeblood of the market economy. China's economic modernization requires speeding up the modernization of the construction, especially, the construction of the non-economy. Laws and rules are needed to maintain the market economy and a new culture is to be reconstructed mainly by law. Second, along with the increasingly strong trend of globalization of the world economy and China's accession to WTO, the economic modernization in the developed Western countries has given tremendous pressure to China. There is no enough time for China to realize her economic modernization. The history of development in the Western developed countries shows that the economic modernization and social rule of law are interdependent. Forced by the demand for the process of building a market economy and the pressure of modernizing the national economy, in the relatively short period of time, the social rule of law must be fulfilled. The government-promotion road can make good use of its later advantage and shorten the time of the rule of law and exert the control power to the extreme degrees in the process to avoid the acute turbulence occurred in the social transitional period. The government-promotion road of rule of law is a proper choice by a country on the basis of national objective situations and the external pressures and challenges to the existence and development of that country. It is a positive response made by a country in front of challenges and pressure. (Jiang, Lishan. 1998.) At the same time, China has powerful political resources in reality. It can provide a chance for practicing the mode of the government-promotion road of rule of law.

In sum, we should say that the government-promotion road of rule of law has its own rational ground in the current phase or in the future. canonical

3.2 The government-promotion road of rule of law will be more effective from the perspective of promoting the rational allocation of resources and the coordinated development among the regions.

Chinese government owns large and comprehensive system of organizations and strong capacity of control and management. As to the static or dynamic resource of the region, there is every chance for it to give a full control. Through the government, the existing legal resources can be fully used to give a wide range of adjustments to the various economic relations and economic activities. By means of law, various incentive mechanisms of interests and right protection can be established to fully mobilize and bring into play the enthusiasm, initiative and creativity of the market principal, thus giving effective preparations of the various resources.

At the same time, there exist differences and imbalances in development of different regions, which is prevalent in each area and country. The countries with developed market economy have succeeded in applying proper regional policies to harmonize the development of different regions through the government. In terms of the reality in our country, the coordinated development of regional economy can be achieved through the adjustment of rule of law. China is a country with unified rule of law, which requires harmonized legal principles and legal institutions. However, the regional economic development may require more objective, more favorable environment or much more ascendant small platform to adjust and regulate the special cases or problems in that region, for example, how to reduce the impact of administrative divisions, how to achieve the reasonable adjustment of the regional industrial layout, and so on. All these should be made and arranged by local legislations or local laws before the whole country gives a unified regional economic cooperation law.

In all, it can be seen that at present and in the near future, to develop regional rule of law by adopting the mode of government-promotion road is more reasonable. But it will not be smooth and there will be a series of problems or even conflicts for us to give a solution.

4. The obstacles of the government-promotion mode of regional rule of law and its countermeasures.

Undoubtedly, a series of problems and potential dangers that may exist in the construction of rule of law promoted by the government will be found in the regional rule of law mainly driven by the government. I will not give further explanations about these problems for many scholars have made in-depth studies on them and given the corresponding countermeasures. I will concentrate on the problems and ways of solution because of the regional uniqueness that may appear in the government-promotion mode of regional rule of law.

4.1 The conflicts and adjustment of the unity of regional rule of law and the regional self-determination in construction of the regional rule of law.

It is inevitable that the conflicts exist between the unity of the rule of law and regional self-determination. They are between the Central and the local legislation, or within the local legislation in the same region.

4.1.1 The harmonization of relations in the Central legislation and the regional legislation.

Adjusting the relations of the Central and regional legislation should start from the Central and the local perspectives. It is the most important issue to make clear the divisiory scope of right between the Central and regional legislation in the Central angle. The central and regional relations include the mandate and restriction, only through which can the regional legislation be on the good way to scientific development. The mandate shows that regional authorities are recognized legally to have the rights to enact, amend and repeal regional law. One of the restrictions is that, in terms of position, the Central legislation has dominant position while the regional is secondary. The other restriction is that, as far as content is concerned, the Central legislation is of importance with universal principles, while the regional legislation is localized, targeted and complementary. (Tang, Wei. & Bi, Kezhi. 2002. p.140).

From the perspective of regional legislation, some points need making clear. First, the regional legislation can not overstep their popedom. The regional legislation cannot set foot in the exclusive legislative purview of the National People's Congress and its Standing Committee unless authorized by the state. Except that what is prescribed in the article 8 of Legislative Law, as to the other matters that the state have not developed into national laws or administrative regulations yet, the local authorities can formulate local laws and regulations according to the actual need. Once the national law or administrative rules become effective, the relevant local laws and regulations that are in conflict with them must be promptly amended or abolished. Secondly, as for the legislative programs that the state have recently introduced, the regional council should not be anxious to make laws. Thirdly, if the state authorizes the local council to develop the measures of enforcement, the local council should take the local practice into consideration to decide whether the measures of enforcement can be enacted.

4.1.2 The coordination of local legislation within the same region.

In a region of a province, when the province (or directly administered municipality) makes or adjusts the legislative plans, the provincial people's congress and its standing committee and the National People's Congress and its Standing Committee of the larger city in the province should pay attention to the joint and harmony of the legislative programs in

order to avoid the repetition and even conflicts and enable the two layers of legislative activities to operate orderly and harmoniously as an organic whole. Special region should fix the eyeballs on the appropriate coordination with the autonomous regulations and separate regulations in the autonomous eparchies or counties within the region. Attention should be also paid to the harmony of the regional laws and regulations with the governmental rules, and to planning as whole the relationship between legislation by the National People's Congress and the administrative rules and regulations by the government.

4.2 The conflicts and coordination of regional rule of law and the construction of the unified market.

In the process of promoting the regional rule of law, there will appear the conflicts of rule of law among the regions due to the inter-regional differences of economy, culture and customs. The conflicts need to be well coordinated because they deviate from the demand of the unified market system in China to some degrees. In the United States, the interstate agreement is the most important mechanism of regional rule of law to achieve interstate cooperation and settle the interstate disputes.

Accordingly, in Chinese mode of coordination in the regional rule of law, regional cooperation and administrative agreement should be the most important mechanism of coordination.

Regional collaboration has essentially a gradual process. And its rule is the legal system which has universal control and all members of the regional economic community should abide by. From the angle of the legal effects, the legal system of community of regional collaboration is between national legal system and local laws and regulations. Jilin, Liaoning and Heilongjiang arrived at a framework agreement of legislative cooperation on July 3, 2006 and jointly established the fields of collaboration, including the encouragement and protection of non-public economic development, the building of the community of integrity, dealing with unexpected public events, standardizing the supervision of law enforcement and developing the management of the national institutions and organizations and so on. It is a good innovation of regional collaboration. The administrative agreement, displaying the joint meeting system of the regional governments, similar to the interstate agreements in the United States and the administrative agreement in Spanish Public Administration and the Common Administrative Procedure Law, is a legal mechanism to achieve equality and cooperation among governments. For example, the Yangtze River Delta economic cooperation region has the Statute of City Economic Coordination Union in the Yangtze River Delta. In November 2004, the Cooperation Agreement of the Yangtze River Delta Cities was signed in Shanghai. The local governments in pan-Pearl River Delta region are the first to reach the Framework Agreement of Regional Cooperation in Pan-Pearl River Delta, a general principle. And then various concrete and specialized administrative agreements have been reached by the respective functional departments.

4.3 The coordination of the relations between the official and unofficial laws.

Masaji Chiba's first tier of dichotomy about law is official and unofficial. (Masaji, Chiba. 1997. p.190). He believes that the unofficial law is widespread in the civilian population, and is obeyed by the people in daily life. It has given great influences on the enforcement and functions of the national law. Thus, it is important to make clear their relations. In the researches about the plural theories of laws similar to the classification of the official and unofficial laws, more Chinese scholars incline to use the terms of national law and folk law. The reason why it is called folk law is that it is a spontaneous system of rule outside of the national law thought its formation and development cannot avoid the influence of the national formal legal system. It is the externalization of the people's will rather than the state will. I would like to borrow the conception of local knowledge by Goulds to interpret this. "Law is the common knowledge of a local place. Here the local place does not only refer to space, time, class and the various issues, but also to the accent. That is to say, the local awareness of what has happened should be linked to the local imagination of the would-be incidents". (Goulds, 1994. pp.73-171). The folk law is a kind of regulation that a certain community of people has accumulated and formed in a long living and working time. The national law is universal and uniform while the folk law is special and decentralized with a very strong local accent, which results in the conflicts, more acute and difficult to settle within the same region. And it has become a major problem that regional rule of law is facing.

To harmonize the contradictions, in the legislative process, first of all, the national law must actively communicate with the folk law, fully absorb the useful and constantly get self-improvement. It is the mission for national law. Otherwise, the national law will not be able to operate effectively and evading the law will become a universal phenomenon. (Su, Li. 1996. pp.59-73). The main means of positive interaction in Japan is that the national law can absorb the nonofficial law in a certain way by examination, selection and re-interpretation. The unofficial law has three ways to the official law. It can be regarded as "practices" or "common law" and recognized by enacted laws, or it becomes applicable of free judgment approved by the legal authorities, or it can be indirectly arrived at through the people's freedom of choice (the rights based on the Constitutional personal liberty). (Masaji, Chiba. 1997. p.120). It has great significance for reference in the process of regional rule of law. At the same time in the course of positive communication and interaction, several guiding principles should be followed. On one side, the authority of official law should be stressed to safeguard the unity of the state legal system. On the other side, the social relations with strong local accent and folk colors can be dealt with by the folk law while the official law should have necessary tolerance and patience. A good and

positive interaction between the official and folk laws through such effective communication is not only conducive to the realization of the regional rule of law but also to the cultivation of law resources in the civilian population and to lay a foundation for the rational transition of realizing the rule of law from the government-promotion mode to the natural evolution one.

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WTO Agreement on Agriculture: A Developing Country Perspective

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Abstract

This article critically assesses the extent to which the WTO takes into consideration the interests of developing nations, by reference to the Agreement on Agriculture.

Keywords: The Agreement on Agriculture, Special and differential treatment, Developing countries.

1. Introduction

Three-quarter poorest people of the world live in rural areas, the proportion in the developing countries being as high as 96%. It means that the agriculture is an urgent and vital problem for developing countries, and it is important to sustainable development, which includes poverty alleviation, economic growth and food security.

The Uruguay Round Agreement on Agriculture (AoA) came into force on 1 July 1995 and is to be implemented over a six-year period ending 31 December 2000 for developed countries and over a ten-year period ending 31 December 2004 for developing countries. The AoA called for the conversion of non-tariff barriers on agricultural products to tariffs as well as their reduction. It also called for cuts to both domestic support subsidies and export subsidies. Developing countries had a more relaxed schedule of reductions, and the Least Developed Countries were exempt from these cuts.

It considered the interests of developing countries to some extent and provides them with the special and differential treatment. However, world agriculture trade still remains heavily distorted. On the one hand, some rich countries keep on protecting their producers by domestic supports and export subsidies. On the other hand, they force developing countries open markets as agriculture trade liberalization. It can be seen that the AoA is not a really fair agreement to developing countries.

This article will discuss following questions: First, the special and differential treatment in the AoA for developing countries and the effect. Second, limits to special and differential treatment in the AoA. Third, some reforms which should be considered in Doha Round.

2. The special and differential treatment for developing countries and the effect

2.1 *Special and differential treatment for developing countries.*

Under the AoA, special and differential treatment is provided for developing countries. Developing countries may implement the agreement over a period of up to ten years and, in general, the reduction commitments in each area of the agreement for developing countries are two-thirds of those for developed countries. The special and differential treatment covers three main issues related to agriculture:

- Market access.

The AoA has a twofold aim: improve the transparency of existing protection measures and facilitate their reduction, and open domestic markets to more imports.

Developed countries are to cut bound tariffs by 36% over six years, and developing countries are to make 24% cuts over ten years. These are average cuts for all agricultural products; however, a minimum reduction of 15% for developed countries and 10% for developing countries is required for each product.

A minimum import threshold is stipulated for each sector of agricultural production where there are non-tariff barriers. This was set at 3% of domestic consumption in 1995 and is increased progressively to 5% by 2000 (4% by 2004 for developing countries).

- Domestic support.

The types of support included in amber box are calculated using the Aggregate Measurement of Support (AMS) and are subject to reduction. Developed countries must reduce this support by 20% over six years and developing countries by 13.3% over 10 years.

Under the de minimis rule, countries are exempted from reducing product-specific support that does not exceed 5% of the total value of production of that product (10% for developing countries) and non-product-specific support that does not exceed 5% (10% for developing countries) of the value of total agricultural output.

Developing countries are also exempted from reducing support for agricultural investment, input subsidies for low-income farmers and support to encourage diversification from growing illicit crops. These types of support are allowed under special and differential treatment.

- Export subsidies.

The AoA aims to cut export subsidies. The agreement requires developed countries to cut the value of export subsidies by 36% and to reduce the volume of subsidized exports by 21% over six years.

Developing countries must reduce the value of subsidies by 24% and volume of subsidized exports by 14% over ten years. Because of developing countries' higher marketing costs, subsidies to reduce the costs of marketing and transporting exports both domestically and internationally are excluded. (See Table 1)

2.2 The disappointing effect of the AoA.

Developing countries were supposed to see a rising share of global agricultural exports as a result of the market access provisions. But the Global South's share of agricultural trade has remained steady at around 36% since the agreement was implemented, and their share of agricultural exports to developed countries has remained at 22.4% between 1990-1991 and 2000-2001 (Aksoy M. Ataman, 2005, pp.220).

At the same time that their share in global agricultural trade did not increase as expected, the developing countries experienced import surges, flooding their domestic markets with cheap, subsidized imported products from developed countries (FAO, 2006). Although all members were required to liberalize agricultural trade, many developing countries, especially the poorest ones, had already substantially liberalized their agricultural sectors under programs of structural adjustment in the 1980s (Jennifer Clapp, 2006). Under the AoA the developing countries made cuts that were on average greater than the cuts made in developed countries (Anderson, Kym and Will Martin, 2005, pp.263). The result is that developing countries were left much more vulnerable. This has meant that even though the rich countries were required to make steeper tariff cuts than the developing countries, they started from a much higher level and it was not enough to eliminate the inequality. Rather than level the playing field, the AoA made it more steeply stacked against developing countries. The effects on small peasant farmers, whose very livelihoods have been threatened by competition from cheap subsidized imports, have been particularly serious.

It can be seen that such favourable provisions are not as effective as developing countries' anticipation. It is because the provisions of the AoA are unfair to developing countries in fact. In other words, it has never done enough in considering the interests of developing countries.

3. Limits to special and differential treatment in the AoA

The vast majority of special and differential treatment in the AoA fails to address their purported objectives efficiently. This disappointed result is caused by two reasons: first, some provisions in the AoA give developed countries the chance to keep promises unconsummated. Second, although there are favourable provisions for developing countries, there are still some troubles for them to fulfill their obligations.

3.1 The unconsummated promises of developed countries.

The developing countries have not achieved their anticipation in the AoA. The most important reason is developed countries did not carry out their promises in deed.

- Market access.

The main expectation of developing countries for Uruguay Round is that developed countries could open their markets, at least in agriculture field which has being highly protected. To be disappointed, this expectation did not come true. The actual situation is distorted as follows:

First, under the tariffication commitments of the AoA the WTO members have to convert most non-tariff barriers to tariff on agricultural imports and declare upper bounds for tariff rates. Most developed countries take advantage of such 'convert' to collect high tariff, which is even higher than non-tariff barriers in equivalent effectiveness. Although tariffication appears to be a significant step forward, in most developed countries average agricultural tariffs are higher than non-agricultural tariffs, with rates on some agricultural products exceeding 500% (OECD 2001).

Second, they use 'special safeguard measure' acclimatize themselves to such transition in order to protect their farmers. The special agricultural safeguard was designed to address disturbances in domestic markets arising from the removal of non-tariff measures, either in terms of a surge in imports or a decline in domestic prices. However, the modest use of special safeguards suggests that countries' concerns regarding import surges for tariffed commodities were not warranted. That means they will take some restrictive measures as long as the volume of imports exceeds a trigger level or the price of the imported product falls below a trigger price.

Third, although there were minimum cuts to the levels of tariffs which should be reduced, the reductions were averaged, and in practice they were very different for each product. This meant that tariffs on some key products were reduced by very little in practice, especially where there were high tariff peaks to begin with. In addition, food aid was exempted from the export subsidy reductions. It leads that the tariff cut of some farm products, which have potential benefit to developed countries, is remaining on a very low level. For example, on the first year of the AoA has being in operate, the tariffs of some developed countries reached very high rates, such as American (sugar 224%, peanut 174%), EU countries (beef 213%, wheat 168%), Japan (wheat 353%) and Canada (butter 360%, eggs 236%) (World Trade Report, 2003). In terms of provisions in the AoA, developed countries only need to reduce tariff by 36% at the end of 2000, accordingly, the tariffs of some products is stayed on a forbidden high level.

Fourth, the very high tariffs occur on products also has quota restrictions. Broadly, in-quota imports face a zero or low tariff but any potential imports above the quota can face a prohibitive tariff. Take US as an example: beef 26.4%; dairy products from 26% to 145.2% according to product; sugar up to 140%; peanuts 139.8%; tobacco 350%, and cotton up to 34.9%. The average out-of-quota tariff is 53% (WTO, 2005). The evidence indeed suggests that the current US barriers hit the developing countries, especially very poorest countries. A joint IMF/World Bank paper concludes, "The results suggest that EU protection is heavily skewed against imports from middle-income developing countries, and US protection against imports from LDCs." (IMF/WB paper, 2002)

- Domestic support.

In terms of provisions in the AoA, developed countries should cut their domestic support on agriculture. However, the sum of such support is increasing.

Developed countries must reduce domestic support by 20% during 1995 to 2000. But the supports which included in green and blue boxes are exempted from cuts and there was no limit placed on them. In addition, the US and EU insisted on a 'Peace Clause', which prohibited any challenges to subsidies levels until January 1, 2004, to give the members time to adjust their policies. In this way, developed countries cut the supports in amber box and added lots of the supports in green and blue boxes at the same time. For example, the farmers who live on poultry feed in US and EU have not received support from governments directly. However, the corn for feeding poultry is in the scope of domestic support. Such indirect support brings African farmers into trouble and leads increasing of the sum of domestic support. It is claimed that such supports which developed countries are using can not distort trade. But in fact, they may make farmers able to sell their products in a lower price than those who do not have such supports.

According to the statistic of OECD, the equivalence of domestic supports of all developed countries has being increased from 247 billion dollars in basic period to 174 billion dollars in 1998. In EU countries, the number has being increased from 99.6 billion dollars in basic period to 129.8 billion dollars. In US, it increased from 41.4 billion dollars to 46.9 billion dollars during the same period. And from basic period to 1999, the Total Support Estimate (TSE) of OECD countries was increasing from 276 billion dollars to 326 billion dollars.

The effect of such domestic support appears to have particularly adverse effects for developing countries. For example, the support of US to its domestic cotton industry would lead to a rise in world prices of at least 25%. On this basis, it is estimated that the US support cost the poor cotton-producing countries about 250-300 million dollars in lost export revenue and GDP (IMF/ World Bank, 2002).

- Export subsidies.

According to the provisions of export subsidies in the AoA, at the end of 2000, developed countries need to cut 36% of export subsidies of period time. That means they can still keep 64% of original export subsidies.

Developing countries have the desire to cancel export subsidies, however, it is hard to implement. For example, EU still holds 90% of the export subsidies of the world. Although the proportion of export subsidies reduced from 31% to 14% during 1990 to 1999, it is only one aspect of problem. During the same period, the common agriculture policy payout went up from 24.9 billion dollars to 39.5 billion dollars. Therefore, the export subsidies only declined one third but not 55%.

In addition, some measures, which are taken by developed countries, have similar effects as export subsidies, such as export credit, export credit guarantee and export insurance. For example, the US offers more support to exports through export credits than any other country. The OECD calculates that nearly 90% of the subsidy value of export credit

programmes is from the US programme (compared to 7% from the EU). Such measures boost import as well but do not need to be cut. Developed countries may cut export subsidies as commitment on the one hand and increase such measures on the other hand. However, developing countries do not have resources to execute these measures.

European Committee agreed that the high export subsidies had already led to the long-term overproduction. It disturbs export markets which do not obtain the subsidies in developing countries and causes the export dumping. For example, Indonesia has accused the US of dumping flour on its market, with detrimental effects on Indonesian rice production. A recent surge in US grain exports to Nigeria has hit local production of cereal substitutes, such as cassava and rice. It is alleged by Kenyan government that US dumping of wheat in Egypt lies behind a surge in Kenyan imports of very cheap Egyptian flour, which has had adverse consequences for Kenyan wheat farmers. These examples show that US subsidies for domestic cereal production can have detrimental effects not only on cereal producers in developing countries but also on producers of substitutes for cereals, such as rice.

3.2 *The troubles brought by the AoA to developing countries.*

Although developed countries have not complied with their promises, they keep on bringing pressures to developed countries to implement import and trade liberalization. However, in course of implementing the provisions in the AoA, more and more troubles present to developing countries. The high costs are hard to afford and the complexity of adapting domestic policies with provisions in AoA is a big problem. Further more, the special and differential treatment provided by the AoA for developing countries is not as effective as they anticipated.

- Market assess

First, the actual implementation of transition from non-tariff barriers to tariff is not very easy for developing countries.

(1) Many developing countries do not have non-tariff barriers, which can convert into equivalent tariff. Thereby, they cannot make use of the equivalent high tariff to protect their farmers like developed countries.

(2) In a considerable number of developing countries, government mandated import monopolies or state trading enterprises still control significant share of imports (mostly essential food items) (Prema-chndra ATHUKORALA, 2007, pp.877-897). It is difficult to establish the frame of domestic law to accord with provisions in the AoA during a short period.

(3) Most of developing countries are highly dependent on agriculture produce and imports. In most of African developing countries, the agriculture import proportion is 20% to 50% of total imports. In Latin America the proportion is 18% to 32% (Prema-chndra ATHUKORALA, 2007, pp. 897). As the necessity result of the abolishment of non-tariff barriers, the price of agriculture products, especially food, will rise. It will bring a serious negative impact to developing countries.

Second, the aim of tariffication is to achieve trade liberalization, in which is deemed to have an active effect on poverty alleviation and economic growth. In terms of such theory, developing countries have to cut their tariffs. In fact, Bengal have cut its tariff from 102% in 1988 to 27% in 1996, Ghana; Kenya and Tanzania cut more than a half tariff in 1990s, and the average tariff of Peru in 1991 was only one third of that in 1989. However, we have not seen any return for those countries until now. That because the advantage of liberalization bases on following conditions: the stabilization of macroeconomics (including exchange rate and income of exports), the high efficiency of market institution (such as competition, credit and basic establishment) and interior reallocate mechanism (such as safety net). But in the real world, developing countries cannot fulfill such conditions.

Third, open market causes increasing of import and shake of price in developing countries. However, the AoA does not provide developing countries with the facility which can protect them from those negative effects. Only a few developing countries can use special safeguard measure because it can only be used on products of tariffication and only nine members in WTO have the right to apply this provision.

The measures of anti-subsidy and anti-dumping are sometimes suggested to be the instead way of special safeguard measure. However, these measures cannot offer any resolvent. The first reason is the aims of these measures are different: special safeguard measure is for temporary wave of price; meanwhile the anti-subsidy and anti-dumping measures are for the distortion of trade. The second reason is that most developing countries are in defect of professional law knowledge and technical framework to startup anti-subsidy and anti-dumping measures which need a high cost. As a result it is unable to prove the damage made by subsidy or dumping. The last reason is that such measures are only applied to some limited dumping actions because of the exception made by developed countries during the negotiation.

- Domestic support and Export subsidies.

First, unlike developed countries, developing countries did not have domestic support or export subsidies as much as developed countries. In terms of provisions in the AoA, developing countries are forbidden to add or increase de minimis domestic support and use export subsidies. The scope of supports which are free of cut is very narrow and only

half of developing countries are using such supports. Obviously, it is unfair that the countries which own high supports can keep most of their supports and even increase them because of some defects of the AoA, meanwhile, the countries which have the low supports or no support are forbidden to afford subsidies more than de minimis level.

Second, the special and differential treatment is not as effective as it seems like.

(1) The lower reduction commitments in domestic support and export subsidy of developing countries are good for a few countries, which have budget to use such measures. However, most developing countries can not make use of them. The higher de minimis percentage does not have any actual interest for them: most countries do not have enough fund to afford even 5% support of the value of the total agricultural production.

(2) Though reduction commitments of developing countries are permitted to be implemented a few years later, such schedule is based on politic bargaining but not real requirement of developing countries. The method which could really help developing countries is establishing the measure related the factors and essential of reduction commitments, in other words, but not dogmatic deadline.

Third, like we mentioned above, the benefits which brought by special and differential treatment for developing countries are impaired by the treatment of green and blue boxes for developed countries.

4. Some reforms which should be considered

In light of the developing countries' disappointment with the AoA, the WTO membership endorsed the idea of a 'development round' at Doha. It was supposed to give special consideration to the needs and concerns of developing countries. The Doha Declaration stressed that special and differential treatment for developing countries would be integral to the agricultural negotiations. However, the drafts submitted by US, EU and OECD are still disappointing and highly controversial. It was widely seen that the draft did not represent all members' interests fairly, and in particular was inadequate with respect to developing country concerns.

- Developing countries in particular are dependent on agriculture as a major source of employment and foreign exchange, and the AoA rules should be changed to allow these countries to nurture their domestic agricultural production and markets. Exemptions from tariff and domestic support reductions should be revised to take into account relative economic dependence and poverty. Market access.

Developing countries, especially poor members, should be allowed to limit market access, by the application of tariffs, quotas or variable levies, to protect the existence of agricultural systems that they can show provide environmental or other public goods. This would allow poor Members to take action to protect their environments and peasant farmers, when they do not have the fiscal resources to do so.

Tariff, special safeguard and tariff quotas are three important aspects of market access which should be considered to amend to meet the needs of developing countries. There are some suggestions about these aspects.

First, in order to keep food security and protect peasant farmers, developing countries should control imports of food directly. At the same time, AoA should allow developing countries to execute quantitative restrictions. When a country takes such measures, it should note the Secretariat of WTO and prepare to negotiate with other countries if they require.

The tariff cut commitment of products which related to food security should be abolished. When developing countries found the current tariff of a certain product could not protect peasant farmers, they can negotiate with interest concerned countries and ask for rise limited tariff. In such situation developing countries should not be asked for compensation.

AoA should give a 'top' tariff which could apply to all the products. That means the tariff of any product cannot be higher than the 'top' tariff. As the special and differential treatment, developing countries could have a higher 'top' tariff than developed countries.

There should be a certain proportion of the total agriculture tariff cut (such as at least a certain percent) and of every agriculture tariff cut during five years. At the same time, give developing countries lower proportion and longer time.

Second, there should be a provision that developing countries could execute special safeguard measure. Because it is complex to start the measure, the AoA should afford a simple standard of startup for developing countries. One possible way is if the import level exceeds a certain proportion of the average level of last three years, developing countries could execute special safeguard measure. The same way can be used in trigger price: when the price falls to a certain proportion of the average price of last several years, they can use the measure.

Third, except the tariff quotas for some special countries, there should be more tariff quotas that could be executed by all the members with transparency. In particular, tariff quotas should be used by export countries which actually implement non-discrimination policy.

- Domestic support.

First, the supports including in blue and green boxes should be restricted and cut as same as those in amber box. There

must be a schedule of supports reducing: all the supports must be abolished before a certain time, and the proportion of supports reducing of every year should be set. Further more; domestic support should be restricted by Dispute Settlement Mechanism.

Second, in order to protect food security and peasant farmers, developing countries could afford domestic supports to products which for domestic consumption and peasant farmers. Such supports should not be restricted by Dispute Settlement Mechanism. To insure the supported products are only used for domestic consumption, only the non-exported products or the products which in the limitation of lowest export (a certain percent of products) could apply such supports. And the definition of peasant farmer should be determined by idiographic society and economic conditions of developing countries. The de minimis commitment of market access of developing countries should be abolished.

- Export subsidies.

First, all kinds of export subsidies, including export credit, export credit guarantee and export insurance, should be cancelled during a certain period or before a certain time. All countries should note WTO Secretariat about their plans and measures of export subsidies cutting so that Secretariat can supervise them effectively. The developing countries should be afforded a longer period.

Second, AoA should allow developing countries to execute export subsidies for high-tech agriculture products. There should be a top subsidy likes a certain percent of export price of product.

5. Conclusion

Among all the agreements of WTO, the most interested one to developing countries seems to be the AoA. To some extent, the reason that developing countries accept the agreement on TRIPS and GATS which does not have much benefit to them is because they expect to achieve the anticipated purpose in the field of agriculture. However, the actual situation is not so satisfying and it could even say they are cheated. The AoA ignores real differences among countries by suggesting that all nations can benefit from following varying degrees of the same liberalization policies. Worse, the agreement allows rich countries to buy themselves extraordinary exceptions to the rules, something developing countries cannot hope to do.

The basal problem of AoA is that it based on a hypothesis that the production and trade of agriculture can be operated under commercial condition. However, in most of developing countries the agriculture is not a commercial work. It is operated mainly by peasant farms and farmers, who living on farming not because of earning money but because the lands are owned by they for generations and they do not have other income. It is hard for them to face the international competition and may result to a large scale unemployment and breakdown of country economy. That leads the fact that the protection of agriculture in developing countries is even more important than that in developed countries. Therefore, when the AoA considering the restriction of applying protected provisions on agriculture in developing countries, it should be much caution and fair. The first thing should be considered is the particular situations of developing countries but not the political balance between them and developed countries.

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Table 1. Special and differential treatment in the AoA

Measures		Developed Countries	Developing Countries
period		6 years	10years
Market access	customs duties reduction	36%	24%
	minimum per tariff line	15%	10%
	opportunity	5%	4%
	deadline	2000	2005
Domestic support	reduction in AMS	20%	13.3%
	de minimis rule	5%	10%
	exceptions	Blue and green boxes	Blue boxes, green boxes and three types in amber boxes.
Export subsidies	reduction in value	36%	24%
	reduction in volume	21%	14%
	exceptions	-	Support for marketing and domestic and international transport



Legal Framework on Risk Management for Design Works in Malaysia

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Abstract

The construction industry is subject to more risks and uncertainties than many other industries. Construction projects are associated with various aspects of risks, be it risks associated at the feasibility stage, design stage, construction stage and post construction stage. In order to complete the project successfully, the parties involved must be able to manage the risks associated with the project. Although the need and importance of risk management cannot be denied, the practice among the players in the construction industry does not reflect such urgency. There have been a number of cases which resulted in damages and losses, where such damages could have been avoided if proper risk management had been properly administered. In the event where risks still occurred, failure to exercise risk management policies will result in no protection available for the parties. The standard of risk management among the parties involved in a construction project in Malaysia differs from one company to another. This is due to various factors such as a company's resources for risk management, types and size of the projects and so on. As such there is a need to standardize the practice of risk management among the parties involved to secure the safety and performance of the project. This can be achieved through legal measures, where certain requirements on risk management can be imposed to ensure that the least required practice of risk management is exercised. This is in line with the nature of the law itself, namely to address public safety, security, clarity, flexibility, transparency and adaptability. This paper is meant to look at the risks associated with the design works under the traditional procurement route in Malaysia and the need for the Malaysian law to come up with a framework in ensuring the practice of standard risk management among the architects as lead designers under the traditional procurement system. Certain aspects need to be addressed, as Malaysian law seems to be inadequate in establishing the framework for risk management in relation to design works.

Keyword: Legal, Risk management, Malaysia, Design Works

1. Introduction

Similar with any other industries, risks exist in the construction field. Accordingly, the acceptance of an obligation in a building contract is associated with the acceptance of commensurate risks, namely the risk of being unable to fulfill the obligation because of one's own inadequacy, incapacity, inadvertence or error, or because of interference from outside sources or supervening events (Nigel, 1996). The risks, if not properly managed, may cause substantial loss to the parties. Therefore, dealing with the risk that some events might occur, and with their consequences when they occur, is the art of risk management (Mehr and Hedges, 1989). It is important for the risks to be managed properly to avoid disruption to the project.

Good risk management practice is essential in achieving the above aim. However, in practical, the practice of good risk management varies from one individual or company to another. Various reasons can be associated with this fact, such as failure to understand the risks involved, poor comprehension of the practice of risk management and its benefit as well as limited resources available in practicing risk management. Nevertheless, whatever the reasons, it is submitted that proper risk management practice is essential in ensuring the success of the project. As such, by virtue of this article, the

manner of the Malaysian legal system in corresponding to the establishment of risk management framework will be looked into, in particular on risks associated with architect and design works. With sufficient and clear illustrations of the law on the architect's duties and obligations on design works, particularly in relation to risk management exercise, the risks of the project can be properly managed and in turn contribute towards proper execution of the project.

2. Problem statement

The Malaysian construction industry is widely dominated by the traditional structure of contracting, where three distinctive parties are involved, namely the employer, architect and contractor. The traditional structure of contracting formed the backbone of the existing Malaysian building contract, such as the Persatuan Akitek Malaysia (PAM) 1998 Form of building contract, the Construction Industry Development Board standard form of contract for building works (2000 edition) and the Public Works Department Forms. According to this form of contracting, the employer will engage the architect for design, while the construction works will be carried out by the contractor. Basically, the contractor will be selected either directly by the employer or through a tendering process. The architect will be responsible to administer the contract. The basic picture of the above procurement system can be associated with a number of advantages, as well as disadvantages. Similarly, various aspects or risks can be associated with the traditional procurement route. The law may facilitate the practice of risk management, either by imposing duty to exercise the basic element of good risk management practice in design works, by properly allocating the risks to the most appropriate party to manage or even establishing the benchmark and standard of acceptable risk management policy.

Nevertheless, the role of Malaysian law in establishing a standard risk management practice among the construction community is still lacking. One of the examples is on the legal provisions related to insurance. Insurance has been accepted as a tool of risk response, being part of the risk management exercise. However, under the Malaysian law, provision related to the necessity of insurance is inadequate. For instance, there is no legal guidance on latent defects insurance, as compared to the English law. This particular type of insurance is important to cover against defects in the design, materials or construction of the building which is not discovered until some time after its completion, which may take place long after the defect liability period has ceased. Without such insurance, the architects are left without any protection for losses due to defect in design.

3. Design and risk

In order to understand the perspective of risks related to design works, specifically in relation to architect and design works, we have to look at the definition of design. Generally, for the purpose of description, design can be termed as (Cornes, 1989): (a) all the decisions that need to be made as to the location in three dimensions of every component part of the project, the definition of the quality and quantity (including the specification of workmanship) of each component and how each fits in with another; and (b) all the same decisions in relation to any temporary works (not being part of the finished project) needed to achieve the construction of the project. On this point, all standard forms of building contract assume that the temporary works should be left to the contractor on the basis that he is best placed to deal with such matters.

With reference to the definition of risk, Cooper and Chapman (1987) defines it as: "Risk is the exposure to the possibility of economic or financial loss or gain, physical damage or injury, or delay, as a consequence of the uncertainty associated with pursuing a particular course of action." According to the British Standard on risk (BS 4778, 1991 Part 3 – in Royal Society, 1991) risk is "a combination of the probability, or frequency, of the occurrence of a defined hazard and the magnitude of the consequences of the loss." The Royal Society of United Kingdom, in one of the findings of its study (Royal Study, 1991) termed risk as "the probability that an adverse event occurs during a stated period of time." Risk management, therefore, can be well illustrated in the words of Raquib (2002) as a systematic process for identifying and evaluating pure loss exposures faced by an individual or an organization and for selecting and administering the most appropriate techniques for treating such loss exposures.

Based from the above definitions of risk, it can be noted that the term risk incorporates three essential elements, namely probability of occurrence, potential loss and time. Accordingly, the existence of such elements within the context of the definition of design can be regarded as design risk.

4. The Essentials of Risk Management

Risk management practice, according to Jaafari and Anderson (1995), can be classified into three different stages, namely risk identification, risk analysis and risk response. According to Williams (1995), the identification of each risk is an important step in risk management. However, this task is the most difficult during the whole process. Accordingly, the identification of the source of each risk and its element will enable it to be separated from other risk elements. Giving due consideration over each influencing factor will ease the process of analyzing and management of the risks (Bajaj, 1997). The most important thing to ask during the risk identification process is (Godfrey, 1996). "What are the discrete features of the project (risk sources) which might cause such failure?" Once the influencing factors have been identified, the risk can be analysed and proper response can be strategize.

Meanwhile, risk analysis is defined as the quantification of risk as the magnitude and frequency or time frame of each event. Each event may be a single incident or an aggregation of incidents (Jaafari and Anderson, 1995). In conducting risk analysis, various techniques can be applied, such as code optimization, sensitivity analysis, probabilistic analysis, Monte Carlo simulation and kinetic tree analysis. By conducting risk analysis, we will be able to quantify the effects of the major risks which have been identified earlier. Nevertheless, it was submitted that risk analysis has not been constantly conducted in construction projects (Hayes, *et al.*, 1986). Generally, commercial pressures were often invoked by the clients, contractors, and consultants in avoiding analytical approach over the risks, even though the benefits of risk management cannot be denied. On the other hand, once the risk has been identified and analyzed, the parties involved have to make a decision in responding to the risks which is called as risk response. Accordingly, the higher the degree of risk involved, equal response must follow. Various ways are relevant with regard to risk response, such as avoiding the risk, reducing, transferring or even absorbing it. These steps can be taken single handedly or in combination, depending on the circumstances. The most efficient response to risk is by allocating it to other parties who are in the best position to accept it (Mills, 2001). The practice of allocating the risks has always be in line with the spirit of building contract, where the purpose of the contract is to determine and distribute the rights and obligations of each parties involved. Under the traditional scheme of contracting, for instance, during the tendering process, the contractor will evaluate the cost of the project and place his bid with certain contingency funds included as a way of responding had something bad happened during the course of the project. Nevertheless, it is submitted that this practice was done blindfolded, since no scientific premium calculation was carried out, due to the absence of formal risk analysis. Risk contingencies have always be the practice based on past experience, concealed or hidden within the bid process (Mills, 2001).

With reference to the above, it is clear that risk management has other major benefits, in addition to the project being completed on time and within budget, such as (Mills, 2001) it enables decision making to be more systematic and less subjective. It also allows the robustness of projects to specific uncertainties to be compared while making the relative importance of each risk immediately apparent. In addition, it gives an improved understanding of the project through identifying the risks and thinking through response scenarios. Finally, it has a powerful impact on management by forcing a realization that there is a range of possible outcomes for a project.

5. Perspective of risks on design works under the standard form of contract

According to Taylor (2000) there are a number of risks embodied in the standard forms of building contract available in the industry. The risks illustrated are connected to standard forms regulating the traditional procurement route, where a lead consultant will be responsible for the rest of the professionals involved in the project. Accordingly, the Malaysian PAM 1998 Form is a contract form of similar nature, and the lead consultant referred to under PAM 1998 is the architect. Malcolm Taylor grouped the principal risks associated with standard forms into seven headings:

5.1 Changed responsibilities

Prior to the appointment of the contractor, the architect as the lead designer owed duties solely to the client. However, once the contract is concluded, the architect responsibilities have changed. To administer the contract fairly, he has to act even-handedly between the client and contractor. The architect has a quasi-judicial role, where he should not give advice to the client or take instructions which would compromise his position to act fairly in the interest of both the contractor and the client.

5.2 Provision of information

It is a normal occurrence in a construction project that the contractor will not receive full construction information on appointment. Various devices have been introduced in order to provide protections for the contractor in such circumstances, as well as allowing the consultants to issue the information later. However, it is submitted that this is substantial risk territory for consultants and the contractor claims and the client pays up and then looks to the consultants to recoup. Under this circumstance, it is advisable for the consultants to rely on clauses requiring sufficient notice to be prepared by the contractor for information required, rather than invoking clauses on master programmes of the project.

5.3 The consultant's power to instruct

The architect, being the lead consultant, as well as the sole agent appointed by the client to administer the contract on his behalf and acts on two functions, namely (a) To act on his own behalf as the designer of his part of the total design, and (b) To act on behalf of other consultant designers, as a channel for passing on their instructions and certificates to the contractor.

The contract makes no distinction between the above tasks of the architect, therefore creating the opportunity of risks to occur. Therefore, the lead architect needs to be able to identify the initiating professions for all communications with the contractor, be it him as the project architect as well as representing the other designers. Such boundaries of respective professions lie within the appointment of each professional. If the architect fails to draw the line of each initiating

profession, the architect as a designer may attract liability for the action of other designers. In addition to this, the architect must also be able to make the designing group understand when they should make their contributions in the contract administration to avoid further conflict. Another ground where the architect, as the lead consultant, needs to be clear is on the need to differentiate between the wide power given by the contract upon him, in contrast to the power given to the other designers under their respective appointment. While the client is powerless to question or prevent the issuing of an instruction by the contract administrator acting as his sole agent, the consultants must be aware that they do have the corresponding duties to consult the client pertaining to such matters. As such, it is submitted that there should be some kind of mechanism in allowing these information to flow. Any sort of conflict may jeopardize the project.

5.4 Inspecting quality of construction

The quality of construction is a major risk area involving the consultants. Differences of opinion between the consultants and contractors on the quality, time and cost of a project are almost certain to arise in a project. However complete the specification and drawings, the quality required can be elusive and often has to remain for the contract administrator or lead consultant's ultimate acceptance when he inspects construction completed or under construction. It has been a long tradition that the designer inspects to reassure the client that construction reaches the standards laid down by the contract. While designers may disagree on what such reassurance might mean to a court, they will be unanimous in rejecting it as any form of guarantee. Therein lay the risks of inspection. The duty to inspect can be divided into five stages, namely (a) Occasional or frequent inspection of work in progress and unfixed materials/equipment by the contract administrator, clerk of works or site engineers, with the contract administrator having the power to reject it and having it rebuilt, (b) Certification of completion, when the contract administrator is satisfied that the works is completed, (c) Commencements of the defects liability period, during or shortly after which the contract administrator draws up a list of defects which appeared during the period, (d) Certification that the contractor has made good these defects and (e) Issuance of the final certificate.

There are risks involved under each heading. However, the risks of each stage can generally be grouped into two categories, namely (a) The possibility of two different perceptions by the parties involved, namely the client and the consultants. The client might deduce some sort of guarantee that all works are inspected and complied with the contract requirements, especially when he is also paying for consultant site staff, clerk of works and site engineers. On the contrary, the contract administrator may counter to the perception of the client, by arguing that irrespective of inspection and various certificates, contractually the contractor still remains responsible for providing the quality specified. On this point, the client is still open to content that he is eligible to claim against the contract administrator as well as the contractor if he believes that he has not received the quality agreed on, based on the fact that he has paid for the reassurance inspection carried out by the professional consultants. This contention is supported by the fact that the words of the contract are not completely clear in limiting the consultant's potential liability, and (b) The second category is on the significance of the final certificate. Is the final certificate issued by the contract administrator intended to be regarded as a form of guarantee, thus will it bar the client from making further claims against the contractor? In the case of *Crown Estates Commissioners v John Mowlem & Co Ltd*, the court was of the opinion that the issue of the certificate prevented the client from pursuing the claim. Although the judge in this case did not openly mention that the client can claim against the consultants based on the ground that his issuance of the certificate has prevented the client in his legal action against the contractor, legal expert submitted that such inference can be made from the judgment. As such, it posed another spectrum of risk to the consultants, especially to the contract administrator.

5.5 Variations to the contract, extensions and damages

The present contract forms contain complex mechanisms to adapt to changes and its consequences to the parties involved. Sometimes, although the changes are so significant that the project has become completely different from the initial project tendered by the contractor, the mechanisms available in the contract provides substantial provisions for the recovery of the contractor expenses.

With reference to the changes and variations, the design team has to be vigilant in advising the client on potential consequences, in particular the aspects of incomplete design which might have to be reworked, causing the issue of variation instructions to arise. In addition to this, the contract administrator has to take into consideration the fact that normally variations and changes will lead to higher expenses. Under this circumstance, the contract administrator owes a duty to inform the client of potential expenses on the project.

5.6 Insurance

Another aspect of risks embodied in the wordings of standard forms of contract available in the industry is on the issue of insurance. The contract administrator, while is expected to understand the whole content of the contract produced by, or under the advice of, his professional institute, the clauses on indemnity and insurance are partly exceptions to this

rule. The clauses on insurance are largely drafted on the advice given to the insurance industry; their language is largely the language of the insurance industry. The drafting of the insurance clauses must be set up correctly otherwise; the purpose of the insurance clauses in managing the risk will not be fulfilled. In addition to this, the understanding of the meaning of the insurance clauses is also essential to serve the above objective.

5.7 Payments to the contractor

The traditional scheme of construction requires the client to pay a substantial portion of the total cost in stages before the building can be put into use. The client faces the risk that if the contractor had defaulted and disappeared before completion of the project, he would have to hire another contractor to finish the job, without assurance of cost recovery from the absconded contractor. With the above point in mind, the client will look at the consultants, in particular the architect who is the contract administrator, to ensure that he doesn't pay too much on account. The consultants have to consider this matter carefully, especially when certifying finished work by the contractor. If the contract administrator over-certifies the work, and the contractor fails before the work is completed, the client may be successful in his claim against the consultants.

From the above perception of risks illustrated by Malcolm Taylor, we can simplify that risks related to design under the traditional procurement route can be two folds, (a) the first perspective of risk in relation to the above is related to the designer's specific duty under the building contract. Within the context of this article, the designer's duty is limited to the duty of an architect, who also acted as the contract administrator. Accordingly, behind every designated duty, lies the potential of failure and risks to the project. Failure to execute the duty accordingly will expose the project and the designer to various risks elements, liability and legal actions, which will then have an impact over the designer, the design and the project. Under the contract, the architect is under the obligation to perform certain duties. The nature of the designer's duties, as stipulated by the contract leads to a possibility of risk occurrence. For instance, one of the major duties of an architect is to prepare a design for the project. Under this circumstance, there is a possibility for design error which will jeopardize the whole project, due to various factors. There are many factors which may lead to design error. For instance, the designer responsible over the design is incompetent to do so, or there are certain constraints on the designer to come up with a viable design, such as monetary and time constraints. Design error might also take place when the project in question requires noble and risky designs to be prepared, and (b) the second perspective of risk in relation to architect and design works is related to the whole structure of the procurement route. While the previous form of risk is associated with the specific duties of the designer, this type of risk is associated with the practice of the industry within the nature of the traditional scheme of contracting. Various aspects of risks can be related to the structure of the procurement, such as the risks due to involvement of various parties in the project, the elements of insurance available in the industry as well as the nature of the work carried out under the traditional procurement route. For example, in order to illustrate the risks involved in the nature of contracting, the whole process can be illustrated in accordance with the RIBA Outline Plan of Works. The outline, dividing the procurement route into twelve stages, outlines the whole process involved, including the preparation of the project design. One of the stages involved during the RIBA Outline Plan of Works is the 'Briefing' stage. Accordingly, the design will be prepared by the architect based on a briefing of the whole project by the client. Insufficient details given during the briefing process may lead to designing problems, not only during the preparation of the design itself, but also during construction. Contractors will have to ascertain more details in relation to the incomplete design and this will cause delay to the project. An incomplete design will also lead to price discrepancies during tendering process. It might happen that the whole project cost will eventually increase, due to the above reason. Accordingly, it is clear that risk management is essential in ensuring that the project can be completed successfully. Due to its importance, risk management has to be thought off seriously. One of the means in establishing good risk management practice is through legal measures.

6. The Law

It must be noted the role of law is significant during the whole risk management process. Risk management is an area, which may be effectively thought of in the formulation of law and establishment of legal framework. It is essential to analyze how those potential risk factors related to human actions could cause human sufferings. Those actions could be protected by legal terms so that risk of damage cannot occur at all. Any law should address public safety, security and should be clear, flexible, transparent and easily adapted. Use of risk and risk management knowledge can effectively serve these purposes in meaningful ways (Raquib, 2002). This purpose is in line with the objectives of the law itself, either by refraining people to commit certain acts, or by binding people to do certain acts. The basic example of the role of law within this context is the regulation of speed limit on highways. The purpose of imposing a speed limit is to protect human lives and properties. It may be perceived that if lawyers and legal administrators learn risks and related management procedures, existing legal framework may be stronger, as risk management encompasses a 'shield guard' to protect human lives and properties (Raquib, 2002).

The present awareness of the Malaysian construction community over the importance of risk management has increased and steps have been taken to improve the present scenario. This is made evident based on the opening remark by the

Honourable Dato' Fong Chan Onn, the Minister at the Malaysian Ministry of Human Resource who delivered during a dialogue session between the Minister of Human Resource and the CEO of construction company in Malaysia on 7th March 2006: "... Department of Safety and Health is in the final stage of introducing a new set of regulations, which will require employers to manage safety and health at work sites systematically. One of the main elements in the regulations is the requirement for employers to conduct hazards identification, risk assessment and risk control at the construction sites."

Nevertheless, it is submitted that the Malaysian law provisions on establishing a solid ground for risk management practice is insufficient and still lack positive development, in particular risks related to design works. For instance, in the United Kingdom, the Construction Design and Management (CDM) Regulations 1994 was placed to ensure that the risk related to design is addressed by placing certain specific legal duties on the designers. The CDM Regulations are meant to improve the overall management and co-ordination of health, safety and welfare throughout all stages of a construction project, with the purpose of reducing the number of serious and fatal injuries. Unfortunately, a similar legislation is not available in Malaysia. Another example can be related to the requirement of insurance cover in a construction project. While there is a legal obligation imposed on professional designers to maintain certain amount of professional indemnity insurance, there is no such requirement for non-professional designers. In a construction project, not all designs will be prepared by the architect. Under certain circumstances, the consultant, contractor or sub-contractor is responsible for certain parts of the design works.

For instance, the sub-contractor, to a certain extent, does play some role in designing part of the project as illustrated in the case of *Holland Hannen And Cubbits (Northern) Limited v Welsh Health Technical Services Organisation*, where the sub-contractor was responsible for the preparation of design for windows in the construction of Rhyll Hospital. However, the sub-contractor failed to insert the details of sealant to be used in his design. On this matter, the court held that the details of the sealants are necessary for the works to be properly completed. "I think that the reality is that, as was recognized by the direct contract and as [the sub-contract] themselves admitted, [the sub-contractor] were the designers of the windows assemblies. They should have submitted full particulars of their designs, including details of sealants, to [the architect] for approval. Inevitably, that approval would have been of a somewhat formal character, since [the sub-contractor] and not [the architect] were the experts with regards to sealants as they were with regards to windows generally, but the effect would have been to make quite certain that the sealants become part of the contract works."

Under the above circumstances, if lack of details in the design prepared by the sub-contractor caused damages on the employer's part, there is no professional indemnity insurance coverage to protect the employer against such loss. In addition to the above, while there are provisions on professional indemnity insurance related to the architect in particular, the policy coverage is still lacking. There are a number of deficiencies within the Malaysian context. Apart from the issue on professional indemnity insurance, another area where Malaysian law is at *lacuna* is on the matter of latent defects policy. In the United Kingdom, the latent defects insurance or the inherent defects insurance has been common (Levine and Wood, 1991), but such insurance policy is not practiced in Malaysia. The policy provides that, subject to any exclusion, cover against defects in the design, materials or construction of the building which are not discovered until some time after its completion. This policy is a first party policy which allows the insured to make a claim for the cost of rectification of defects and frequency; it takes the form of a ten-year non-cancelable policy.

By virtue of the above examples, it is submitted that the legal provisions available in Malaysia related to design risk management are insufficient, and the door is still widely open to be explored. Any law should address the public safety, security and should allow for clarity, flexibility, transparency and adaptability. Use of risk and risk management knowledge can effectively serve this purpose in meaningful ways.

7. Conclusion

To ensure the safety and proper performance of a construction project, the parties involved must be proactive in managing the risks associated with the project. With reference to this paper, the architect as lead designer under the traditional procurement route has to ensure that all risks related to design works are properly managed and controlled. However, due to certain reasons, such measures of properly managing the design related risks vary from one architectural practice to another, despite the ever importance of risk management. This fact cannot be tolerated since risk management is a proven tool in ensuring the safety and proper performance of a project. Therefore, some mechanisms are needed in ensuring that the standard practice of risk management is met. The law may provide the framework for proper performance of risk management practice, particularly in relation to design works. However, the state of the law in Malaysia is inadequate to fulfill the above objective. There are a few lacunas that need to be addressed, before proper legal framework on design risks management can be established.

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The Analysis on New China's Diplomatic Standpoint of the Basic Practical Principles

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Abstract

New China's diplomatic basic standpoint, namely, the new Chinese diplomacy has always been based on the Third World, this paper has analyzed the theoretical policy-basis why new China's diplomacy based on the Third World and the basic principles that should be adhered to in diplomatic practice, and regarded that the new China's diplomacy can be established in the Third World better, new China's diplomacy will have more achievements in the Third World.

Keywords: New China's diplomacy, Diplomatic standpoint, The third world

Throughout more than 50 years, with an overview on the development and evolvement of the basic standpoint thinking of New China's diplomacy, the diplomacy practice and achievements under its guidance, we can easily find out the basic idea that three generations of leaders on this strategic issue comes down in one continuous line. New China's diplomatic basic standpoint has a unique development and evolvement track and has its own theoretical policy basis and practice principles.

1. The Principles of Diplomatic Standpoint

In the diplomatic practice of more than 50 years since the establishment of New China, maintaining and strengthening the unity and cooperation with the Third World has always been the basic standpoint of China's diplomacy. The author believes that adhering and developing the basic diplomatic standpoint ideological have the following main policy and theoretical basis.

1.1 Foreign policy has provided the basis for the basic standpoint of new China's diplomacy

China unswervingly pursues an independent and peaceful diplomatic policy, the basic objective of this policy is to safeguard the China's independence, sovereignty and territorial integrity, and create a favorable international environment for China's reformation and opening up and modernization construction as well as safeguard world peace and promote common development, and these include:

1) China opposes hegemonism and safeguards world peace. China believes that countries, big or small, strong or weak, rich or poor, are equal in the world community. Disputes and conflicts of different countries should be resolved through peaceful consultations, should not resort to sword or the threat of sword and not use any pretext to interfere internal affairs of other countries.

2) China has been actively promoting the establishment of a fair and rational international political and economic new order. China believes that the new order should reflect the request of historical development, advance of times, the common aspiration and common interests of the world people. Five Principles of Peaceful Coexistence and other universally recognized norms governing international relations should be the basis of the establishment of new international political and economic order.

3) China is willing to establish and develop friend and cooperative relations with all countries on the basis of the Five Principles of respecting each other's sovereignty and territorial integrity, mutual nonaggression, noninterference in each other's internal affairs, equality and mutual benefit and Peaceful Coexistence. The basic standpoint of China's diplomatic policy is to strengthen the solidarity and cooperation with the broad developing countries. Opposing hegemonism and establishing a new international order is the common aspiration of the broad masses of the third world countries and people, this meets the essential interests of the world people's, including the Third World. As a result, to achieve these goals, China's diplomacy must depend on the Third World fundamentally. In other words, China's essential diplomacy standpoint should be based on the Third World.

1.2 The national interests decide China's basic diplomacy standpoint established on the Third World (the developing countries)

For the relationship between the national interests and diplomacy, the expression of British knight, Palmerston, is rather profound and clear, "We have no permanent friends, and we have no permanent enemies. Only our interests are immutable, what we should follow and pursue is just these interests." Therefore, no permanent friends, only permanent interests, this word has become the golden rule of the country's diplomacy. This "interest", referring to the national interests, it is the fundamental starting point and ultimate destination of diplomacy. National interests are a historical category, just the entity of stability and dynamic. The so-called Stability refers to that nation's core interests in a certain period are to be fixed. Although diplomacy history of 59 years forms all the diplomacy history of new China, but for the history of China, it is just a little spoon-drift in the long river of history. Thus in this period, even though there are ever-expanding dynamic side of China's national interests, but overall the core interests does not change, the changeless core interests decide the diplomatic strategy will not change. Here, the core interest is security interests and economic interests (security interests and economic interests are the fundamental guarantees for the survival of a sovereign country), the diplomatic strategy include the strategy of standpoint. Therefore, the core national interests decide the diplomatic strategy, and then the relative stability of the core national interests decides the stability of the basic diplomacy standpoint. Therefore, the essential theory that considers the national interests as the deciding factor of diplomacy provides strong theoretical support for new China's basic diplomacy standpoint basing on the Third World all the time.

1.3 The common historical experiences and the same identity destine the China's diplomacy must be based on the Third World

Like other Third World countries, China also is the enslaving, oppressing and exploiting objects of imperialism and colonialism, just like other Third World people, Chinese people also fight for national liberation, national independence and safeguarding the country's sovereignty against the imperialism, colonialism and hegemonism, it is precisely because of these common historical experiences, and China was deeply branded with the Third World mark. As early as in 1955, when participated in the first Asian-African Conference, Zhou Enlai advanced: "since the modern era, the overwhelming majority of Asian and African countries and people have experienced and now is still suffering from the disaster and lifting caused by colonialism...Finding a common basis from wiping off colonial suffering and disaster, we can easily understand and respect mutually and support and sympathize with each other rather than mutual doubt and fear and exclude and oppose mutually." The thought that reckon China and the other Third World countries must depend on, support and development mutually all the time is deep-rooted in China. This in China has never been changed, in spite of the change of leaders or domestic policy changes, or foreign policy adjustments. These natural common grounds existing in China and the other Third World countries is not only the fundamental causes of the new China to support the independence movement in the Third World national liberation movements, but also the action basis of China's fighting against the West for the human rights that wins the support of the broad masses of the Third World countries, and solid foundation of China's further developing friendship and cooperation and coordinating action. Based on this consideration and common identity recognition, China has always stressed that he is a member of the Third World, and adheres to the Third World as the standpoint of China's diplomacy.

1.4 The fundamental attribute of socialism determines that China's basic diplomatic standpoint must be placed on the Third World (the developing countries)

China is a socialist country, China's national interests and the fundamental interests of the world peoples are the same. In socialist China, the diplomatic tenet is to oppose hegemonism, safeguard world peace and promote common development. The tenet requests China to strengthen solidarity and cooperation with the Third World for foreign operations adhere to the "combination of patriotism and internationalism." In the contemporary context of globalization and multi-polarization, the Third World is the important political force to oppose hegemonism and safeguard world peace and the natural allies that China can rely upon to achieve diplomatic tenet. In addition, the number of the Third World countries is 3/4 of the world, and the population 4/5, for what China regards the Third World as the basic diplomatic standpoint accords with China's socialism mission and struggling goal of communism. In order to achieve the highest goal we must adhere to the fundamental guidance of Marxism and combining patriotism and internationalism together. As a result, China has always maintained that "China has the responsibility and obligation to support the oppressed nations and Third World countries' just action to strive for and safeguard national independence and develop the national economy." Just as Mao Zedong in 1959 when he met African friends said: "We can expect, in the future, the anti-imperialist movement of African will develop faster than the past...all peoples, especially the socialist countries, the independent country must help and support you. You need support, we also need your support, and also all social countries need to support each other. Who is going to support us? It's just Asia, Africa and Latin America's national liberation movements...so it is mutual support. Your anti-imperialist movement is our support either. Soviet Union and China do a good job, this is your support. China's "combination of patriotic and internationalist" concretely shows in new China's diplomatic practice, such as Aid North Korea, the Vietnam War against the United States, these actions not only support the independence and liberation of neighbors, but also exclude the threat that imperialist hostile forces exerts on China, so as to maintain China's sovereignty and security interests, that's the vivid

reflection of combining patriotism and internationalism together.

2. The First Principle: Handling the Relationship Appropriately with the Third World Countries

Since October 1949, every leaders of China have attached great importance to the relationship with the broad masses of the Third World, and always consider strengthening the unity and cooperation with the third world countries as a basic standpoint in the foreign policy all the time. Most third world countries support China in a number of important international issues. For example, just because of the strong support of the broad masses of the Third World China resumed legitimate seat in the United Nations in 1971. After the 1989 political turmoil, similarly, the leaders of the Asian-African third world countries visit China firstly against the impact of the West sanctions, and also welcome Chinese leaders' visit with great hospitality. After the Cold War, also with the strong support of the African countries, China foiled 11 times anti-China overtures of Western countries in the conference on human rights, thwarted 13 times Taiwan's "participation and back" to the United Nations proposal, thwarted 9 times Taiwan's "participation" in World Health Organization intentions. Recalling Chinese relationship with the third world countries, there are many successful models, but something worth considering either.

2.1 The Third World is not a monolithic whole, to some extent, is a combination of term and thus China's Third World diplomacy is necessary to emphasize tactics also behave actively

On the one hand, with the common historical experiences of being colonized, exploited and oppressed, the Third World also have ever faced the common task to strive for national independence, safeguarding the country's sovereignty and developing national economy, now still have the desire to develop further economy and society, and build the new international order, which in theory is an abstract entity, so China's diplomacy in theory usually treat the Third World as an independent whole. This strategy not only won for China of that time wide sympathy and support, a good international reputation and diplomatic environment, meanwhile, won tremendous political force for the rising China today and created a new full-scale diplomatic situation. However, on the other hand, the Third World includes more than 160 countries that are different in history, culture and political system and spans across Asia, Africa and Latin America, thus, they are various, but also full of contradictions, differences and conflicts (there are differences between them because of national interests even serious differences. Moreover, in order to battle for spheres, the powerful and hegemonical countries also often provoked many contradictions between them in the Cold War). China's diplomacy in the practice of these colorful personalities, these contradictions, differences and conflicts has realistic achievement. For example, in the face of Western pressure of peaceful evolution, Chinese leaders often stressed, "The world is colorful, the historical stages of every countries, cultural backgrounds, social systems and concepts of values are different, and our way of life are quite different, this diversity of the world is just the source of vitality and innovation. Therefore, respect for and develop the diversity...so that we can conform to the trend of human society development." For the internal contradictions, differences and conflicts of the Third World, Chinese government scrupulously abides by the principles of neutrality and non-interference in internal affairs, the most cases is also quite successful. For example, on the Kashmir dispute between India and Pakistan, the Iran-Iraq war, the Cyprus issue and the Sahara issues and so on, China pursues an impartial and neutral stance, advocating the contradictions and disputes between them should be resolved based on the spirit of mutual understanding and friendly consultations and through peaceful negotiations. Theory and practice are not always consistent, and because of the strategic need, China's diplomacy in theory should continue to treat the Third World as a whole, for practical considerations, for the contradictions, differences and conflicts of the third world countries, the practice of Chinese diplomacy should be active, but at the same time we should avoid directly involve in and cross swords with the other major powers.

2.2 Properly dealing with the contradictions and differences existing objectively between China and other Third World countries, because all diplomatic actions taking national interests for the highest criteria

Recalling the history of relations between China and the third world countries, it is easy to find, since China and the broad developing countries have many things in common, China often regards the interests of developing countries and China as the same, moreover, regards China's diplomatic objectives as the third world country's diplomatic objectives. In a certain period of history, the common ground between China and other Third World can unite them and form a powerful political force, but at the same time we should also recognize that many objective differences between the two sides also exist. Firstly, the vast majority of developing countries are nationalistic countries, the guiding ideology is nationalism, and most of its development road is bourgeois parliamentary system. Therefore, in the Cold War period with the ideological confrontation as one major indicator, the differences between the two were particularly obvious. Secondly, the international situation determines a country's diplomatic policy. During the Cold War, the Third World scattered dispersedly, their forces are weak and effect is little, and being in a crevice between two conflicting camps, some of them adhered to the major western powers hostile to China. After the Cold War, the United States has become the world's sole superpower, the majority of Third World countries "West-dumping" trend is serious, and many countries fall to "one-sided". Although third world countries and China have many common interests, but some of these countries still hesitate in many specific issues and bow to Western pressure. For example, for the US-British air strikes

against Iraq and the US-led NATO bombing of Yugoslavia, in Africa, only South Africa and Egypt publicly denounced NATO's atrocities, most other countries are forced to swallow their rage. These contradictory mind and diplomatic behavior have a clear difference with China. Moreover, China and other third world countries have the same economic structure, similar technological level, the same export products and target group, as a result, there is competition. This is bound to result in contradictions between the two sides in attracting investments, scrambling technological and market. Thus, handling well the differences and contradictions between the two sides will become an important issue of China's diplomacy. From the fundamental starting point of national interests and according to the specific conditions of different countries, China establishes mutual reciprocal, mutual beneficial win-win bilateral relations.

2.3 Changing the bypass way of free aid and establishing the new aid mechanisms of mutually beneficial and cooperative

It is not wise to use free aid as a mean of developing relations with other countries, and it's a kind of lopsided relationship between countries based on assisting and being assisted. During the Cold War, China has provide vast numbers free aid for the vast majority of these Third World countries, the vast majority of these are of no conditions attached, China's foreign aid experts also asked to enjoy the same living and wages as the experts of the countries being aided. As a part work of diplomacy, these aids are carried out as the "political task" to some extent, but not consider the economic effect at all. In fact, this assistance does not conducive to the self-reliance development of the being aided, on the contrary, it leads to the dependence psychology of the being aided. After such dependence psychological formed, once their requirements are not meet, it will result in deterioration of relations. For example, Albania and Vietnam, which accepted China's largest aid, is a typical example. Facts show that the relations established on the basis of assistance is not a normal diplomatic relation. Of course, the author does not entirely negate and oppose foreign aid, but the crux of the problem does not lie in whether the assistance should be provided or not, and lie in how assist and whom should be assisted and how many should be assisted and so on. China should inherit the tradition, and at the same time advance with the times, appropriately adjust outdated policies, create new policies and establish new principle and mechanism. With national interest as the criteria basis, China decides its foreign aid policies openly, rationally, transparently.

2.4 China's great power diplomacy must first strengthen diplomatic foundation

In the course of construction and development of big-power diplomacy, China should not forget that the diplomacy with the third world countries is the basis of Chinese diplomatic work, the foundation can only be strengthened rather than weakened. China now belongs to the Third World, in a very long period she will still belong to the Third World, even if future development, we must always stand on the side of the broad third world countries. China and the broad third world countries have a profound and historical origins and a wide range of common interests. In sharp and complicated international struggle, the broad third world countries have been China's reliable allies all the time. China gradually joined in the ranks of the major powers today, the third world countries not only remains the political foundation of China's all-round diplomacy, as well as an important sales market for products and supply market of many important raw materials. Followed the building of the big power diplomacy, China should also consolidate and strengthen the diplomatic strategy with the Third World. We should strengthen the political relations with these countries designedly, including high-level exchanges and personnel exchanges, meanwhile, enhance economic and trade relations and give appropriate care in the normal exchanges. So far, China has set up China-Africa and China-Arab Cooperation Forum and established a free trade zone with the ASEAN countries. All these are effective forms to promote multilateral cooperation in the way of bilateral cooperation and it should be gradually deepened based on pragmatic. For Latin American, Caribbean and South Pacific countries, China should also actively explore, paving the way to with economic and trade cooperation, strengthening various areas and forms cooperation, squeezing "Taiwan independence" forces and further expanding China's influence in the world.

3. The Second Principles: Handling the Relation well with the Western Countries

Objectively speaking, the strong country is the dominant force in world development, is the founder of the world pattern. The changes of power contrast between strong countries affect the changes of the entire international situation, thereby affect every country's foreign policy adjustments. So the major powers relation should become the focus of every country in the international community normally.

3.1 Carry out big power diplomacy actively

For Realism School, the essence of international politics is power politics. Although this view is of great power and hegemony meaning, but it is a true portrayal of the international community. In the international society, the relations among major powers is in a position of major contradiction, is the major power for the change of the international order, plays an important and even decisive role for the world peace and development. Although China is still a great growing country, but it has already set up the image of a responsible big country and has an important influence on international affairs, thus it inevitably has to deal with the powers, which calls for China's diplomacy handling the relation well with the major Western countries and the developed countries necessarily. In addition, the awareness and strategy of major

power is one important compositive part of one country's comprehensive national strength, China will never become a real sense of the big powers if there is no awareness and strategy of major power. For China's essential task of domestic modernization, it also needs to set the relations with the major Western countries at the primary position in the foreign relationship. Regarding the relations with the developed countries as the focus or key, not only conforms to China's national interests, is also seeking truth from facts, advance with the times approach.

3.2 Develop pragmatic relations with the great powers

China's great power diplomacy should adhere to the principle of independence, according to the breadth and depth of different interests' intersection with the major powers, behave pragmatically, deal with neatly and develop different relations with them in different areas and levels. Relations between the great powers have always been both cooperative and competitive, both harmonious and frictional, and mutually precaution and rely on each other. China develops the relations with the great powers, insisting nonalignment, non-confrontation and not targeting at any third party, and always setting safeguarding the country's sovereignty and security in the first place. To that end, we should make every effort to seek advantages and avoid disadvantages, and develop positive factors and resolve negative factors. China and the United States both rival to each other, and there are a lot of common interests. Therefore, for the relation with the United States, we must both cooperate at the same time don't avoid struggle, the cooperation should be maintained in a certain distance, the struggle must be reasonable, beneficial and restricted so that it will not break. For Japan, China should deal with it from the angle of against the United States, the biggest strategic threat of China, and try to make the gradual improvement of bilateral relations between the current stalemates. Involved in the historical, territorial and other sensitive issues, China must uphold the principles and show the necessary flexibility, pay attention to the hardware as well as not stalemates and capture the best time to improve the relations between the two countries in a certain degree. Major EU countries had no direct interests' conflict with China. They are important relying force for China in expanding strategic space. China and Russia should continue to strengthen high-level exchanges and personnel exchanges and enhance mutual political trust, expand economic and trade contacts, consolidate the material foundation of bilateral relations, so that further deepen the strategic partnership between the two countries.

3.3 China's peaceful development clears up Western's "China threat theory"

After implementation reform and opening up policy, the comprehensive national strength and international influence of China is increasing gradually, this result in a number of Western countries extreme panic. Various forms of "China threat theory" are rampant right now. Regarding China's development and strengthening, some countries from the reality of international relations theory, think that the rise of China must be accompanied by external expansion and is bound to pose a challenge to the existing big country in the world or even conflict with them, thereby undermining world peace and stability. April 24, 2004, in the opening ceremony of the Boao Forum for Asia, in a speech, President Hu Jintao declared and commitment to the world: "China will adhere to the road of peaceful development, held highly the peace, development and cooperation flag, together with Asian countries create the new situation of Asia revitalization, and strive to make greater contributions to the grand cause of peace and development of mankind's. It comforts the world people undoubtedly. As an emerging power, China's peaceful rise has diametrically different way with the traditional great powers.

In particular, we should point out: Diplomatic focus does not mean a basic diplomatic standpoint for diplomatic focus must rely on basic diplomatic standpoint so that it can be maintained, diplomatic focus and basic diplomatic standpoint is the two important and indispensable elements of the all-round diplomacy, in China's diplomatic strategy, they supplement and promote each other. We can't emphasize one side and ignore or neglect the other side. Whichever country wants to better develop, firstly, they must their position accurately, find their coordinate location in the world order and determine their own diplomatic position (basic diplomatic standpoint). Before reform and opening up, for a variety of reasons, the new China has been in a state of poor and weak and survives only in the crack of big country in the world. Even though relations with great powers are extremely important, it can't be mentioned on China's diplomatic agenda. However, after the reform and opening up, especially in recent years, China's national strength has been enhanced constantly and established position as a great country gradually, China has capital of being a big country, so giving prominence and developing actively the diplomacy with the great powers is the inevitable result of China's national strengthening. The report of the 16th CPC National Congress set the diplomacy with great powers primarily, this just put up the objective existing thing in a pragmatic manner, narrowed the gap existing between the policy statements and diplomatic practice for many years and reflected China's diplomacy develops in a more pragmatic and rational direction, but it does not reflect the inclination to the developed countries of China's diplomacy or the declination of the importance of developing countries. We should realize clearly that: China is a big country, but it was an even more developing countries and is one member of the broad Third World (Note). Therefore, for China, the status of the Third World has not declined, nor decreased, the Third World is still the foundation of China's diplomacy. China's diplomacy still need to be established in the Third World, this is wise and in line with China's national conditions and the fundamental interests of Chinese people.

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Notes

Note 1. Despite the achievements of china have attracted worldwide attention, but China is still the world's largest developing countries and is facing with very arduous task of the development. According to the latest statistics of World Bank and the fresh data that China published recently, the total volume of China's economy in 2004 is only 16.6 percent of the United States, the per capita GDP only amount to 3.6 percent of the United States, 4.0 percent of Japan, in the 208 world countries and regions is No. 129. By the end of 2004 in China's rural areas, there are still 26.1 million people living below the poverty line. Every year we need to address near 24 million people' employment of urban and rural, and there are over 100 million rural labor need to transfer employment. Sources of information: "The White Paper on 'China's road of peaceful development'", seeing <http://politics.people.com.cn/GB/8198/3965187.html>. Additionally, the data indicate that China is still a "society-owes-developed" country. In 2003, China's first social modernization index was 73 point, in 109 countries is No. 57, second social modernization index for the 28 points, No. 59, comprehensive social modernization index for the 25 points, ranking No. 60. The social level of China departs far from the world's advanced level obviously.



After Election: Villagers' Participation and Collective Decision-Making -Collective Decision-making of China Rural Community in the New Context of Villagers' Election and Self-governance

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Abstract

This paper focuses on the collective decision-making process in the context of villagers' election and self-governance in China rural community. Taking X village for example, after describing the process of decision-making, the interactions was discussed among some important factors, including the efficiency and effectiveness of decision-making, villagers' participations, the structure and function of village political institutions, decision-making mechanisms and counseling rules. According to the survey, collective decision-making can be divided into two types: administrative decision-making and participant decision-making. Participant decision-making process involves differentiated and conflicting interests, consciousness of interests, and extensive villagers' participation. In the new context, the most important factor for collective decision-making is the building of a new balance mechanism-"negotiation and balance" counseling rule, in order to absorb and organize differentiated and conflicting interests.

Keywords: Administrative decision-making, Participant decision-making, "Mobilization and voting" counseling rule, "Negotiation and balance" counseling rule

1. Background and Questions

In the year of 2005, X villagers elected their own villager committee. The present village head promised to build tarred road for the village in the election. The committee began the program in 2007. The program was made in April and was approved by the local government soon. Although the plan, procedure and funds were approved by the villagers in the villagers' meeting, the program could not be performed smoothly because of the differentiation and conflict of the villagers' interest. In response to the challenge, the committee had revised the plan for several times. Finally, as the weather got cold, the program had to be shelved.

The rural area has achieved dramatic economic development and performed the institutions of villagers' election and self-governance in recent years. However, the public construction program must be suspended by the conflicts of villagers' interests. Why? Are the villagers impeding the public affairs for their own interest after the consciousness of interest? Is it because the new autonomic organization can not deal with the public affairs effectively? Or the institution cannot adapt to the new situation? By describing the collective decision-making process of X village, this paper tries to analyze the interactions among several factors that may influence the collective decision-making process, including the efficiency and effectiveness of decision-making, villagers' participations, the structure and function of village political institutions, decision-making mechanisms and counseling rules.

2. Literature review

How is the collective decision produced? Who can influence the making of collective decision? How do they interact with each other and develop consent? In this part, the author tries to build a framework for analyzing collective decision-making process.

2.1 Decision-making formation theories

The decision-making formation theories focus on such issues as environment, assessment, choosing, performance, feedback and revision of policies.

The first theory is the "rational model" or "scientific model". Borrowing form the economic assumption of "economic man" or "rational man", some politicians argued that the politics can be developed to a precise science like economics. As for the decision-making, all-round rationality can help mankind identify the problems, define policy alternatives and make the most effective choice. (Yan, Jirong, 2004, p 247)

The second theory is the “bounded-rationality model”. As for Herbert Simon, the world is large and complex, and we do not have the capacity to understand everything. We also have a limited time in which to make decisions. We are also limited by the schemas we have and other decisional limitations. As a result, our decisions are not fully thought through and we can only be rational within limits such as time and cognitive capability. (Simon, 1982)

The third theory is the “muddling-through decision-making model”. According to Lindblom (1968), policy making is typically a never-ending process of successive steps in which continual nibbling is a substitute for a good byte. To Lindblom, there are some inherent deficiencies in the rational decision-making model. The first one is that policy-makers must identify the problems continually rather than predetermine them. The second is that rational decision is impossible because of the limitation of time and information and the consumption of analysis. The third one is that policy-maker must confront the dilemma of objectives and values. Therefore, the collective decision-making process is a never-ending process.

To conclude, the collective decision-making process is such a never-ending process that we should study it in a dynamic perspective rather than a static one.

2.2 Theories on participants

Although the decision-making process theories regard decision-making as a continuous process, they do not point out the participants and their interaction. The following theories can help us identify the several kinds of participants in decision-making process.

2.2.1 The “government-society” perspective

From the “government-society” perspective, the participants can be divided into two types according to their nature: public power and social force. For public power, public decision-making is a problem-solving process, which is a response to public interest and desire. (Zhao, 2000: p195) On the other hand, for social forces public decision-making process is a process, in which various social forces require public power to authoritatively distribute common resources on the basis of their interest and needs. (Easton, 1965) So, the decision-making process is an interaction between government and society.

2.2.2 Interest group, economic organization and party

In my opinion, the participations of social forces can be divided into two types: individual participation and collective participation. The collective participation contains the participations of interest group, economic organization and party.

The interest group theory can date back to the period of the foundation of U.S.A., when politicians, including Madison and Washington, argued that party is a common phenomenon for a free society. (Hamilton, 1980) In the influences of scientism and behaviorism, the concept of interest group developed to a new interest theory at the beginning of the twentieth century. For Bentley, all are the group interests, while both individual interest and state interest are frictional. Society is the balance of the interests of groups and the function of government is to coordinate and balance the interests of groups. (Bentley, 1967: p258-259) In the 1950s, Truman (1951) conducted empirical study on interest group and perfected interest group theory. After that, interest group developed into pluralistic elitism and corporatism by absorbing pluralism and elitism. (Zhang, 2005)

Michael G. Roskin pointed out the difference between interest group and economic organization and that between interest group and party. Economic organizations work for their own economic profit, while interest groups involve public interest. Parties strive to possess public power, while interest groups attempt to exert influence on public power. (Roskin, 2004)

To sum up, decision-making process involves five types of participants: individual, interest group, parties, economic organization, and public power.

2.3 Social theories on collective decision-making

Up to now, we have identified the process and participants of collective decision-making. But how do they interact with each other and produce consent?

2.3.1 Rational choice theory

According to rational choice theory, there are two basic factors for interaction: actors and things. The actors possess the things, from which they can get interests. These things can be called resources or cases. The relationship between actors and resources is control and interest relations. (Colman, 1990: p34) More importantly, interest is shaped by needs and desire. Social action is a decision-making process, in which actors possess, control and exchange resources to meet their needs, guided by the principle of maximizing interest by minimizing cost.

Furthermore, social actors can be both individuals and groups. When social actor is individual, the process is called individual decision-making, while that is called social decision-making when social actor is group.

2.3.2 The social background of collective decision-making

However, the decision-making process is not independent and exclusive as the chemical experiment in the laboratory; rather it is embedded in the social and cultural background. (Granovetter, 1985) To conclude the political systematic theory, James E. Anderson (1994) pointed out that the requirement of policy-making comes from environment, which is inputted to the political system. Generally, environment requires and limits policy-making and the environment includes geographic characteristics, demographic factors, politics, culture, social structure and economic institutions.

2.3.3 The mechanism of the collective decision-making

The key question of collective action is: how different rational actor produce cooperative decision and consent? Or what mechanisms coordinate the interests of different actors? There are four main ways to coordinate and balance the different interest: (a) ideal rational choice; (b) institutionalization; (c) compulsory power; and (d) authorization.

Furthermore, these mechanisms are not independent, but interrelated and intertwined. They work together to balance the interests of different participants and produce collective decision and action. However, their functions differ among different social and cultural environments. As Samuel P. Huntington (1992) said in his *Political Order in Changing Societies*, in traditional society, political order is determined by the interaction of rational choice and authorization; in pride society, political order involves the relationship of rational choice and compulsory power; and in civil society, political include more interrelation between rational choice and institutionalization. As a matter of fact, there exist all the mechanisms in one society, even with playing different roles.

2.4 Framework for analyzing collective decision-making

Now, we can find that there are several factors can influence the decision-making process. In order to combine all the factors, we can build a framework that can tell us the process more directly and comprehensively. The framework can be illustrated by the figure 1.

First of all, collective decision-formation is a never-ended process, including identifying problems, revising plan and interacting continually. Secondly, the main participants can be divided into two types: government and social forces. Social forces involve individuals, interest groups, economic organizations and parties. As government is a factor of political environment, I list only four participants in the figure. Thirdly, the interaction and action of each participant must abide by the mechanisms, which developed through history. These mechanisms include rational choice, institutionalization, authorization and compulsory power. Finally, all these factors, influencing collective decision-making process, are shaped and influenced by and interacting with distant social environment and social process.

3. The phase of decision-making guided by the village committee

Just after the Spring Festival of 2007, the village committee took positive action and made a plan on building tarred road. From the survey, I found that there were five main steps to make the plan, including the villagers meeting.

Firstly, the village committee went to the local government and asked for advice and permission. The secretary of the village CPC (Communist Party of China) insolently told me, "Accompanied by YR (the village head), I went to the town government and met with the vice administrative chief who is responsible for the facility construction. He showed us the layout of building tarred road. He said the road of our village should be built three years ago. Unfortunately, the program was not performed for some reasons. So it is appropriate to build tarred road now."

Then, the committee made the plan of building tarred road. After communicating with the government, the committee held meetings for several times. Finally, they made a plan and divided work among the members. The village head described the primary plan, "In the end of February, we held a significant meeting. We made the primary plan and reported it to the town government. More importantly, we divided the work. According to the decision of this meeting, I assumed the work of communicating with the town government. ZY (the secretary of the village CPC) was responsible to propagandize the plan to the villagers. And YJ (the vice village head) was assigned to make budgeting. "

Thirdly, the committee held meeting which aimed to report the plan to the villager representatives. One of the villager representatives told me, "It is beneficial for us to build tarred road. There are so many motor vehicles in our village that the soil road cannot meet the needs of the villagers. At the meeting I strongly agreed to this program. Nearly all the representatives approved the program too."

The last procedure of the decision-making process is the holding of the meeting of all villagers. The attendants of the meeting included two supervisor of the town government, three members of village CPC, five members of village committee, four leaders of villager production team, and all villagers over sixteen years old. Following is the meeting agenda:

a) One of the supervisors of the local government addressed the attendants. He introduced the background of this program. Then he said that the government would support the program and wished the project would be finished soon.

- b) The village head introduced the plan on how to build the tarred road. He said building road as a long-term program dated back to the beginning of 1990s. The committee had made a new plan of residence in 1991 and constructed the main road of the “#” shaped plan. He said that because of the limit of budget, they cannot build all the roads this time but only the front main road which stretched to the public road five mile away.
- c) The vice village head who was responsible for budgeting introduced the budget. He said all the residents must invest to guarantee the performance of the program to supplement the government funds. He said every villager had to hand in 150 yuan.
- d) The secretary of the village CPC encourage the villagers to work together to finish this beneficial program.
- e) All villagers voted and approved the program.

To sum up, there are several characteristics of decision-making of this phase: a) the decision-making is relatively efficient, because the process lasted only three months; b) the decision-making was dominated by the village committee and we can outlined the process as “village leaders----villager committee----village elites----all villagers”; c) the main mechanism is order and support, that is, the committee made decision and then asked for consent of the villagers, even ordered and directed the villagers.

4. The phase of villagers’ participation and decision revision

However, the performance of the plan was not “favoring” for the committee. Although the plan was passed at the villagers meeting, lots of villagers rejected to carry out the plan. Why?

4.1 An example of the participation of individual

There is a field in the western end of the village, which was contracted by CHZ for ten years. The performance of the plan would require him to cut down about fifty trees in the field. All the trees were just five years old and were useless. However, according to the contract, the field was owned by the committee, so the committee tried to force him to cut the trees.

CHZ rejected the policy strongly. He said, “*At least, the committee should pay for my lost.*” Then the committee promised to pay him for these trees by 100 yuan per tree.

However, CHZ applied for more compensation. He said there was more expected profit, so the committee must pay these trees by 1 000 yuan per tree. His requirement was impossible for the committee. Finally, after negotiating for several times, the committee promised to pay 20 000 yuan for these trees.

This case indicates, after the implementation of the Family Unity Contracted Responsible System, farmers became independent market participants, owning the rights of management of and benefiting from land. This institution proceeds to incite farmers’ consciousness of interest. More importantly, farmers have resources to negotiate with the public authority, which was impossible thirty years ago. (Li, 1998)

4.2 An example of participation of organized interest group

There are several pools in the village, which are used to save water for irrigation. However, the pool dried up in recent years. So the committee changed these fields to residence.

However, building houses on these fields is expensive. For example the resident must raise the ground sill in order to build house, because the land was much lower than those around. Furthermore, there were not public facilities, such as public road, drainage system and so on. So, all the villagers were reluctant to build houses there.

In order to perform the unified plan of residence-construction, the committee promised to construct public facilities in these areas five years ago. YC (a villager) told me, “The committee has promised to construct the road, drainage and electric facilities five years ago. So we built houses here. But five years past, it is still very inconvenient to live here. I think the committee is not believable. So I will not invest to build the tarred road unless the committee performs the promise made five years ago.”

There are four pools in the village, which were changed to residence area. So this case involved about forty families, or 200 persons. They all wanted the committee to build public facilities now, or they would not invest to build tarred road. So they applied together. They all agreed that they would not support the program if the committee did not build public facilities for them.

YC said, “YD (another villager) and I went to the home of the village head one night. I also carried some presents to him. I told him that it is a good thing to build tarred road and we support the program actively. What I want to say is that the committee has promised to build public facilities in the new residence areas five years ago. Why not build them at the same time? However, the villager head rejected our application at once. He said there was not too much money to do all these work. More importantly, he said the money appropriated by the government can be used only to build tarred road, which is prescribed clearly by the government. Finally, I told him that this is not only our desire, but also the

desire of 200 persons. If the committee can not solve the problems, all involved would not support the new program.”

The committee knew that it was unreasonable not to build public facilities in these areas. In order to guarantee the performance of the plan of building tarred road, the committee organized a meeting to interpret the case to those villagers, who built houses in the new residence areas. Finally, the committee promised that if there was enough money, they would build the public facilities, or they would build in three years.

This case indicates that it is a matter of fact that those persons who have common interest can express their desire. Compared to individual, the organization has more strength to negotiate with the public power. However, there is no normal procedure for villagers to express their desire, so they must organize themselves and express their needs by visiting the village head. When failed, they even expressed their ideas by threatening.

4.3 An example of participation of dispersive interest group

As said above, there are four main roads in the “#” shaped distribution in the village. However, because of the limit of budgeting, the new tarred road can only cover one principal road. First of all, in order to ensure the quality of the road, the committee determined to build an 8-meter-wide road, which would be unnecessary to rebuild in twenty years, or it would be a waste. Secondly, as the limit of budgeting, building all the four main roads can not ensure the quality of the roads, which may be rebuilt in several years.

Some villagers who live in the back of the village rejected the plan, the moment the plan was performed as the committee got the appropriated money by government. QZ said, “It is unfair to build the front road for the villagers who live in the back of the village. All villagers hand in equal money, but only those living in the front of the village can use the road directly. The chance is that all the roads in the village are not solid. If the other roads are not built, the tarred road will be damaged too. So I argue that all the roads should be built, even if the roads are not as wide as expected.”

The message was dispersed so quickly that it was supported by nearly all the villagers who lived in the back of the village. More importantly, from the survey, there was no evidence that someone had organized the villagers to reject the program and express their argument. The message was dispersed mainly by chatting.

One villager said, “I have bought a new truck to do transportation business. If the road in front of my gate can be built, I can donate 5 000 yuan. To tell the truth, if the road can not be built, I am reluctant to hand in any money.”

Another said, “It is really unfair. I did not hand in any money. Not because I reject the program of building tarred road, but because I must protect my right of using public facilities. Another reason is that all the villagers in the back of the village have not hand in money. If I provide money, others will criticize me.”

There were a large number of different reasons given by villagers, although the only way to reject the plan was to reject to take out money. Finally, the committee was forced to change the primary plan by narrowing the road and building all the main roads.

Although the participants’ reasons may be different, however they have common interest. Even they are not organized to express their desire and needs, they also develop a same tone on the basis of informal communication. This indicates that interest group not only can be formally organized ones but also those informally exist. However, the prerequisite is there are opportunities, whether form or informal, that can help members express and communicate their viewpoint.

4.4 An example of participation of economic organization

In the large project, there were a lot of small projects, which can carry profit for economic organizations. In the villagers’ meeting, the committee made a plan on how to lease these projects. It is said that the procedure will be fair, open and just.

Some villagers have organized a construction team, which mainly worked outside the village. They wanted to assume some projects in this program. So FB, the leader of the team, went to the home of vice village head, who responsible for budgeting in this project. The vice head promised to lease some appropriate projects, if they were able to finish the work.

However, after the meeting of invitation public bidding, the committee was inclined to employ another construction team, which was introduced by the town government. The team got high praise from other villages too. When the members of the inside construction team heard this message, they went to the office of the committee and asked for opportunity to assume some projects. FB said to me, “Why provide opportunity to outsiders to earn our own money? So we went to the office to persuade the committee to lease the projects to us. They were holding meeting when we reached the office. I said our team could finish the work. All the members live in the village, so it would be very convenient to organize. And we could do extra works if required, because we are the members of the village...Some members were somewhat angry, when they heard that outsiders would assume the project. They required the committee to protect the insiders’ interest and all of us would support the committee in the future. Even some villagers said that we will reject the committee’s decision, if the committee cannot meet their needs. So your admission would be appreciated

by all of us.”

As a matter of fact, the team communicated with the committee for several times. Finally the committee leased half of the projects to that inside team. The village head told me, “I was embarrassed then. To tell the truth, the village construction team cannot work as well as outside ones. So we should lease the project to outsiders to protect the quality of the program. But some members of the construction team rejected to hand in money, if they cannot get the opportunity. So we were forced to meet their needs.”

For another time, the villagers rejected to hand in money as an instrument to express their desire. However, they were neither individuals nor interest groups, but an economic organizations. Although the construction team was a small-sized organizations, it was an inside organization which was embedded in the village. The social network provided them an instrument and opportunity to contract the projects. As for the committee, the decision may not meet the principle of maximizing profit and minimizing cost.

To conclude, the phase of villagers’ participation and decision revision, there are some characteristics: a) the decision-making is not dominated by public power or individuals or interest group or other organizations, but was the product of the interactions among several participants, including the public power; b) actually, the revision disturbed the performance of the primary plan made by public power, which used to be the dominant force to make collective decision. (Yang, 1993)

5. Analysis of the decision-making process

In order to describe and interpret the process of decision-making referred to above, I will find the characteristics of the two phases, evaluate the efficiency and effectiveness, and identify the trend of the development of political institutions in china rural community.

5.1 Administrative and participant decision-making

In the first phase of collective decision-making, the village committee tried to make and publicize a complete plan and then persuade the villagers to support and implement the plan; we can call this phase “administrative decision-making”. By contrast, in the second phase, the villagers participated in the process and forced the committee to revise the primary plan to meet their needs; we can call this phase “participant decision-making”.

The administrative decision-making was dominant about twenty years ago, when the state-power intervened in the community affairs completely and deeply. The community members were motivated and persuaded to perform the policy made by the public power. So the collective decision was made from high to low and from inside to outside.

However, after the reform and opening up, the family unit contracted responsible system made the farmers independent participants of economy, which proceeded to incite the farmers’ consciousness of interest. Furthermore, as the diversifying of china society, farmers’ interest differentiated too. They became the participants of both market economy, democratic politics, which was promoted by the performance of villager’s election and autonomy.

There are several forms of villagers’ participations. They can be support, protest and profit participation; they may be individual or group participation. More importantly these participating actions were embedded in the social background. However, the ways to participate indicate the informal nature, such as threatening by not supporting and sending presents.

5.2 The effectiveness and efficiency of collective decision-making

To evaluate the process is a complicated matter. In my opinion, we can use two terms to assess the making and performance of collective decision.

The first is efficiency, which is used to evaluate the input and output of decision-making. For the goal, public decision-making is a process, in which individuals, groups or government solve problems and achieve goals in certain environment. (Friedrich, 1963: p79; Andson, 1990: p4-8) So, we can assess the process by how they achieve the goal using the term of efficiency.

The second one is effectiveness, which is used to describe the performance and support of the decision. Collective decision-making involve several kinds of participants, who may have different goals and interests. How to balance the differentiated interest and perform the decision by various participants can be assessed by the term of effectiveness.

Let’s return to the case. In the phase of administrative decision-making, the decision-making is characterized by high efficient, but in the second phase, the disturbing of the performance of decision indicates the decreased efficiency and low effectiveness.

5.3 Interpretation: Structural intensification and functional weakening

From the description and analysis, we can find that the key factor of the problem is that how to absorb and balance the participants’ interest on certain issue. Furthermore, the decrease of efficiency and low effectiveness in the second phase

was caused by the failure to absorb the villagers' interests in the first phase. Why the committee did not balance the differentiated interests? The answer is the dilemma of structural intensification and functional weakening of political institutions in present China rural area.

At present, the china rural community has all the modern political institutions, including the villager CPC, villagers meeting, villager representatives, village committee, and production teams. All these institutions played important role in the phase of administrative decision-making through supporting and publicizing the decision made by the committee.

However, we also can find that all the institutions did not investigate the common villagers' interests, desire and needs. All the members of these institutions are servant of villagers as the modern political values say. However, the institutions have not changed their values of totalitarian system and developed new values of modern politics. All lead to the functional weakening and confusion of these institutions, which lead to the failure to absorb and balance the differentiated and conflicting interests.

5.4 Policy: Building new consulting rules

The economic and political development of china rural area requires the reform of political institutions, which should include structural and functional change, to balance and absorb the various participants' interests. As the community has owned all the institutions, the key factor becomes how to build new counseling rules to ensure the function of these institutions. The counseling rules indicated in the phase of administrative decision-making can be called "Mobilization and voting" counseling rule. Although the origin of power determines the orientation and style of public authority, the previous situation can influence the present situations. As a matter of fact, the community leaders use the administrative style to deal with lots of community affairs such as taxation. However, as to the collective decision-making, the style cannot adapt to the new situations. The old "mobilization and voting" counseling rule lead to the functional weakening and confusion of political institutions, and thus the failure to absorb the differentiated and conflicting interests.

From the survey, we can find that there are no formal ways for villagers to express their interests. So the solving of the problem requires providing opportunities and means of participation. Then, to change the "mobilization and voting" counseling rule to a new "negotiation and balance" counseling rule is necessary.

The new "negotiation and balance" counseling rule can provide a forum for villagers to express and interpret their interests and viewpoint. Then, the committee or public power can absorb the villagers' advice and make more effective decision.

I think the following points should be taken account into the building of new rules: a) the rules should be universal; b) the rules should be discussed and agreed by all the community members; c) the rules aim at providing ways for villagers to express their interests; d) The rules should absorb, balance and organize the villagers' interests; and e) collective decision should be made on the basis of negotiation among various participants.

6. Conclusion

The aim of this paper is to describe and interpret the problems of collective decision-making in china rural area, in the context of villagers' election and autonomy. Because of the dilemma of structural intensification and functional weakening of political institutions, the decision-making is not so efficient and effective as past. So to solve the problem must change the consulting rules to adapt to the new situation.

Firstly, I build a framework for analyzing collective decision-making, which include the process, participants, institutions, mechanisms, social environment and social change. This frame work is used to check the case. The social changes led by economic and political reform have changed china rural society, which requires the change of decision-making rules to ensure its effectiveness and efficiency.

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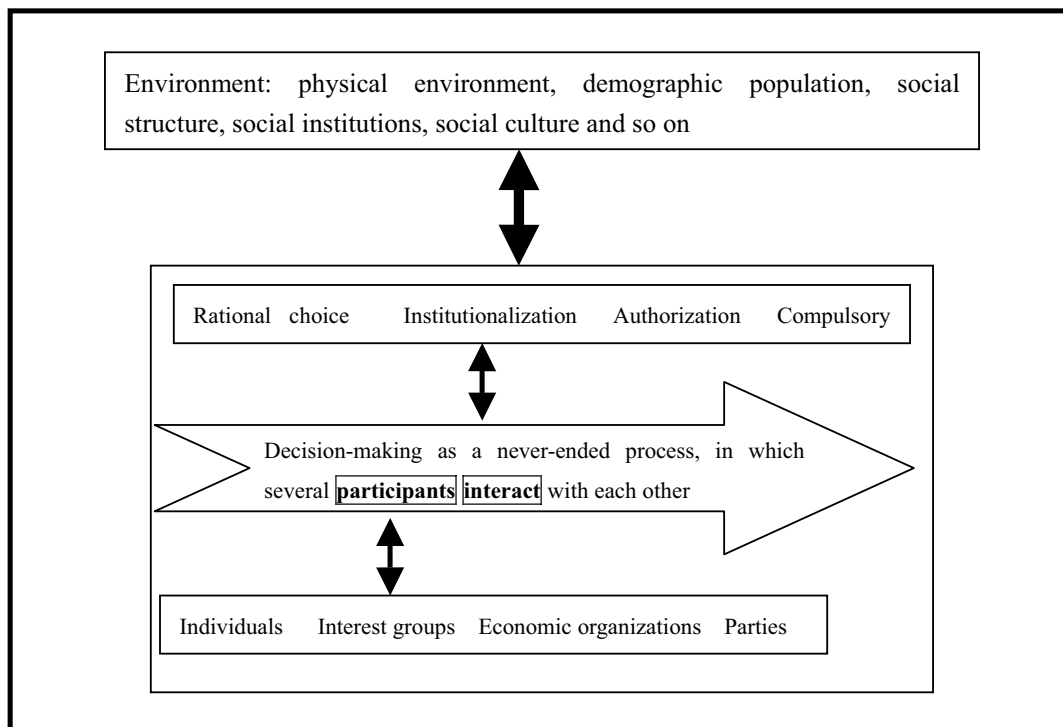


Figure 1. A Framework for Analyzing Collective Decision-making



Neo-Liberal Constitutionalism: Ideology, Government and the Rule of Law

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Abstract

This article explores the centrality of constitutionalism and the rule of law in neo-liberal ideology. It argues that neo-liberalism is not simply a one-dimensional set of economic ideas directed at promoting the free market, but is an ideology with broader political dimensions. At the core of neo-liberalism is a serious doctrine about politics and the proper role of government. Neo-liberals like F.A. Hayek, Milton Friedman and James Buchanan recognised that in order to have a functioning market order, a corresponding political order is a vital corollary. However, the article points out that a number of contradictions and tensions sit at the heart of the neo-liberal conception of politics: those that exist between freedom and the state, liberty and democracy, and law and legislation. The article suggests that one of the most daunting tasks facing neo-liberal politicians and theorists in the twenty-first century will be to overcome the constitutional 'ignorance' of Western democracies and institute a framework of rules, conventions or procedures through which the powers of government can be adequately constrained.

Keywords: Neo-liberalism, Constitution, Rechtsstaat, Law, Legislation

1. Introduction

Neo-liberalism acknowledges the need for government, but is, at the same time, acutely aware of the dangers that government embodies. The constitution is a fundamental concept for neo-liberalism as it represents the only acceptable means through which the powers of government and other state officials may be curtailed. In neo-liberalism, constitutional government is equated with limited government and so it is believed that only through the application of constitutional constraints and the supremacy of law can individual liberty be safeguarded. There is thus a significant ambivalence in neo-liberal ideology towards the state and politics. Neo-liberals such as F.A. Hayek recognise that they must, somewhat paradoxically, emphatically engage in politics in order to free society from politics. Neo-liberalism's interpretation of what it considers to be the political, however, takes a definite form. A liberal constitution, it maintains, depends on a strict separation of powers, a government bound by law and the establishment of the rule of law. This article will outline the principles and operating procedures of a specific neo-liberal model of constitutional order that represents the only acceptable means of both limiting the coercive powers of government and upholding the rule of law.

At the heart of neo-liberalism's conception of constitutionalism is its interpretation of the rule of law. In neo-liberalism, the powers of government are constrained by the rule of law underpinning the constitution. The rule of law represents the fundamental fixed rules that stand over and above the political community. According to Dicey's classic exposition, the rule of law 'means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the government' (1905, 198). For neo-liberalism, the rule of law is crucial to the proper functioning of a market order as it prevents government from stultifying individual incentives to pursue individual ends or desires. It starkly contrasts its liberal ideal of the rule of law with collectivist economic planning which, as Hayek states, 'cannot tie itself down in advance to the general and formal rules which prevent arbitrariness' (1944, 79). In this view, the rule of law, unlike the legislation of central government, not only guarantees equality before the law, but also individual liberty by restricting the arbitrary exercise of government powers to those determined by a permanent framework of formal laws.

This article sets out in detail neo-liberalism's ideal constitutional state. It argues that neo-liberalism's uncompromising adherence to government bounded by the law, embedded in the rule of law, creates contradictions that strike at the heart of the ideology. Principally, its attempt to construct a constitutional discourse that encourages the 'dethronement of

politics' where discretionary authority is replaced by general rules attaches a high level of importance to politics. The constitutional limitations on the capacities of legislatures that neo-liberals such as Hayek, James Buchanan and Milton Friedman advocate are themselves inherently political in the sense that to a greater or lesser degree they embody different views about desirable forms of social organisation. Not only does this incorporate politics into the core of neo-liberalism, but it also raises a number of important tensions that exist in the ideology between the freedom and the state, law and legislation, and liberty and democracy.

The first section of the article examines the constitutional traditions that neo-liberalism has drawn inspiration from. It argues that neo-liberalism does not endorse all constitutional frameworks, rather it has carefully selected principles from constitutional traditions from different countries and different periods of history and incorporated them into its own constitutional system. The main constitutional traditions that the article claims neo-liberalism has drawn upon are the ancient Roman Law tradition of individualist private law the early American Constitution and the German liberal *Rechtsstaat*. The second section of the article explores the complex relationship that exists within neo-liberalism between law and legislation. It looks at the tensions that exist between private law and public law and 'liberalism' and democracy, and the centrality of the principle of the rule of law in the resolution of these conflicts. The third part of the article sets out neo-liberalism's ideal constitution. It examines the 'New Madisonian' vision of public choice theorists such as James Buchanan, Gordon Tullock and Robert Wagner, and the Hayekian constitutional model set out in his *Law, Legislation and Liberty*. This section of the article closes by highlighting some of the problems that arise when a neo-liberal constitutional order is practised at the global level. The article concludes by contending that neo-liberalism's so-called detachment from politics can be called into question when instituting the constitutional framework of rules, conventions and procedures that it aspires to.

2. Constitutional Traditions

The constitution has a dual responsibility to both institute and curtail the powers of government. Whilst in principle neo-liberals support most models of liberal constitutionalism which lay down rules to limit the activities of the state, this article argues that they subscribe to particular constitution traditions which embody their ideal of a rule of law state.

2.1 Ancient Roman Law

Neo-liberalism draws inspiration from the ancient Athenian constitution and the individualist private law of ancient Rome. Indeed, in Hayek's work there is a strong sense of looking back to the law of early civilizations. In *Law, Liberty and Legislation*, he cites the early law of the Medes and Persians 'that changeth not'; law that was conceived as 'unalterably given'. Early 'law-givers', he points out, 'from Ur-Nammu and Hammurabi to Solon, Lykurgus and authors of the Roman Twelve Tables, did not intend to create new law but merely to state what law was and had always been' (1973, 81). Hayek maintains that the law of these early civilisations did not remain static; law continued to develop, and the changes that were permitted could not be a result of the intention or design of the law-maker. It was through the development of customs rather than the direction of rulers in these ancient societies, Hayek observes that the general rules of just conduct came to be accepted (*ibid*, 83). (Note 1) The classical period of Roman law, Hayek shows in his *Constitution of Liberty*, was fundamental for the development of modern liberalism. Roman civil law, like the later English common law, he states was almost entirely regarded as a product of 'law-finding' by the jurists; that is, 'law grew up through the gradual articulation of prevailing conceptions of justice rather than by legislation'. In particular, he points to the writings of Cicero which offer 'many of the most effective formulations of freedom under the law'. 'To him', Hayek writes, 'is due the conception of general rules or *leges legum*, which govern legislation, the conception that we obey the law in order to be free, and the conception that the judge ought to be merely the mouth through whom the law speaks' (1960, 166). He goes on that 'no other author shows more clearly that during the classical period of Roman law it was fully understood that there was no conflict between law and freedom and that freedom is dependent on certain attributes of law, generality and certainty, and the restrictions it places on the discretion of authority' (*ibid*, 167). This respect for law in classical Rome Hayek points out led to a period of complete economic freedom, and had a profound influence over the development of Western law.

2.2 The American Constitution

The American Constitution of 1787 is held up by many neo-liberals as a 'liberal' constitution which in theory safeguards the freedom of the individual. Milton Friedman proclaims that it embodies two broad principles which are fundamental for liberalism: first, 'the scope of government must be limited - its major functions must be to protect our freedom both from the enemies outside our gates and from our fellow citizens'; second, 'government power must be dispersed - if government is to exercise power, better in the county than the state, better in the state than in Washington' (1962, 2-3). The Constitution was drafted by Thomas Jefferson's contemporaries to embody 'a national government strong enough to defend the country and promote general welfare, but at the same time sufficiently limited in power to protect the individual citizen, and the separate state governments, from domination by national government' (Friedman and Friedman, 1979, 130). Ultimately the framers of the constitution sought to reconcile republican government and social stability by diffusing power, enforcing property rights, and balancing the interests of conflicting social groups.

Liberalism was, therefore, at the heart of the Constitution. The culminating purpose stated in the preamble of the Constitution was that it was to 'secure the blessings of liberty to ourselves and our posterity' (Ketcham, 1993, 38).

The intention of the framers of the American Constitution to create a liberal constitution by decentralising political power is reflected in the American Bill of Rights. The American Bill of Rights set out a number of 'fundamental' and 'inalienable' rights that were not to be infringed by legislative majorities (Foner, 1999, 25). For Hayek, the founding of the American Constitution and the Bill of Rights represented a unique endeavour to bring into being a liberal government and write the rules under which it should operate. This process, he claims, 'was guided by a spirit of rationalism, a desire for deliberate construction and pragmatic procedure', which rejected tradition. Hayek argues that while constructive rationalism may have been 'more justified here than in many similar instances', it was 'still essentially mistaken' (1960, 180-1). Nevertheless, Hayek comments that the intentions of the Federal Convention in 1787 to 'limit the powers of government' and 'curb the arrogation of powers by the state legislatures' were consistent with liberal principles. The American Constitution, he argues, not only divided power between different authorities thus reducing the power that any one body may exercise but also at the same time provided adequate safeguards for private rights. Hayek goes on to cite Lord Acton's praise for the American Constitution: 'Of all checks on democracy, federalism has been the most efficacious and the most congenial...The Federal system limits and restrains sovereign power by dividing it, and by assigning government only certain defined rights. It is the only method of curbing not only the majority but the power of the whole people, and it affords the strongest basis for a second chamber, which has been found essential security for freedom in every genuine democracy' (*ibid*, 184).

The transition, however, in American ideology in the late-nineteenth and early-twentieth centuries towards social responsibility and greater reliance on the state had important ramifications for the American Constitution. Friedman and Friedman observe that 'the Constitution, shaped by a very different climate of opinion, proved at most a source of delay to the growth of government power, not an obstacle' (1979, 287). The conception of the Constitution as the people's political law was promoted which advocated a transfer of responsibility for the Constitution from the Supreme Court to the legislature, and thus to the people where it democratically belonged. American liberals campaigned vigorously against the notion that the Supreme Court served as an impartial instrument for law and the preservation of the Constitution. During this period, Hayek observes that 'the prohibition that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' was, reduced to a 'practical nullity' (1960, 188). The Supreme Court, he argues, overstepped its proper judicial functions when it was presented with more and more legislation 'which seemed contrary to the spirit of the Constitution'. Hayek claims that 'the Court built a body of law concerning not only individual liberties but government control of economic life, including the use of police power and of taxation' (*ibid*, 189). The Supreme Court exhibited a new deference to economic regulation by both the states and the economy, affirming federal power to regulate various aspects of economic life such as wages, labour and production.

2.3 The German *Rechtsstaat*

The German theory of the *Rechtsstaat* places limits on all forms of government – republican, monarchical or democratic – within an all-embracing legal system. It is this emphasis on legal constraints that makes the German *Rechtsstaat* the model constitutional state for many neo-liberals. Hayek, in particular, is enthusiastic about the *Rechtsstaat's* potential for securing freedom within a natural legal order. Indeed, the *Rechtsstaat*, he states in his *Constitution of Liberty* represents the 'ideal of the liberal movement'. In Germany in the nineteenth-century he states that the main constitutional objective for the liberal movement was not to solve problems of the political state through the advent of democracy and republican government as in America, but through 'the limitation of government by a constitution, and particularly the limitation of all administrative activity by law enforceable by the courts' (Hayek, 1960, 198-9). Hayek points to the rise of new separate administrative courts in Germany in the 1860s and 1870s which were completely independent and concerned exclusively with the application of pre-existing rules or administrative law. The creation of these new courts he comments represented an attempt to finally 'translate into practice the long-cherished ideal of the *Rechtsstaat*' (*ibid*, 201). Indeed, the new administrative courts were fundamental to the realisation of the rule of law as unlike normal judicial courts which were always concerned with the aims of the government of the day and could therefore never be fully independent, their main function was to provide a body of detailed legal rules for guiding and limiting the actions of the administration, thereby protecting the freedom of the individual. Hayek readily acknowledges that while the liberal ideal of the *Rechtsstaat* 'may never be perfectly achieved, since legislators as well as those to whom the administration of law is entrusted are fallible men, the essential point is that the discretion left to the executive organs wielding coercive power should be reduced as much as possible' (1944, 76).

Hayek, however, points out that the German conception of the *Rechtsstaat* 'proved to be more considerable in theory than in practice'. He observes that in Germany in the 1870s and 1880s, 'when the system of administrative courts received its final shape in the German states, a new movement towards state socialism and the welfare state began to gather force'. He comments that 'there was, in consequence, little willingness to implement the conception of limited

government which the new institutions had been designed to serve by gradually legislating away the discretionary powers still possessed by the administration'. The tendency Hayek argues was to exempt from judicial review those 'discretionary powers' that were required for the new tasks of government (1960, 202).

3. Law and Legislation

Neo-liberalism's strong constitutional attachment to the German *Rechtsstaat* is reflected in the important distinction that it makes between law and legislation. Hayek in his three-volume, *Law, Legislation and Liberty* famously associates the former with a spontaneous liberal order, the latter with a constructed social order. Pivotal to this distinction is Hayek's conception of the rule of law and its relationship to individual liberty and democracy. Neo-liberals' commitment to the rule of law determines the form of democracy that they are willing to accept as being compatible with liberalism. They reject the conception of popular sovereignty and instead advocate a form of restrained democratic rule that is subjected to general rules and genuine laws. Only this form of democracy they contend can uphold the market order and guarantee individual freedom.

3.1 Public Law and Private Law

In his *Law, Legislation and Liberty*, Hayek maintains that the legal order of modern states comprises two very different and conflicting sets of rules, *nomos* and *thesis*. Hayek argues that *nomos* represents a spontaneous order underpinned by universal laws and 'rules of just conduct' that have emerged from an evolutionary and adaptive process. He contrasts this form of order with *thesis* which stands for rational design implemented through the statute rules made by government – legislation (1973, 95-123). Hayek sets out three important distinctions between law and legislation or 'private law' and 'public law' that are fundamental for understanding his conception of liberal constitutionalism and the rule of law. Firstly, Hayek states that whereas law in the proper sense of the word is 'discovered' independently of human will, legislation is 'willed' or 'invented' – it is an artificial construction. Legislation consists of commands directed to the achievement of specific ends. Law, in contrast, allows individuals to pursue their own ends. Secondly, Hayek contends that while a political authority lays down legislation, law emerges from a 'judicial process'. Unlike legislation or 'public law' which is concerned with 'administrative measures', private law, he states, can only be 'taught' and 'enforced' by impartial judges. Thirdly, Hayek argues that whilst the constructed order of law-making is compatible with economic planning, positive liberty, and social justice, law is consistent with only economic freedom, negative rights and 'abstract justice' (1973, 124-44).

Hayek points to the changing concept of law in contemporary society, in particular the confusion of law with legislation. He argues that the spontaneous order of the Great Society has since the late-nineteenth-century gradually become part of the constructivist rationalism of an organised social order. Legislative bodies, he maintains, that had always existed in some shape or form for the creation of public law, 'gradually accrued the power of changing also the rules of just conduct as the necessity of such changes became recognised. Since those rules of conduct had to be enforced by the organisation of government, it seemed natural that those who determined that organisation should also determine the rules it was to enforce' (Ibid, 90). This development Hayek contends is detrimental for individual liberty as it 'gives into the hands of men an instrument of great power' capable of producing an even 'greater evil'. He argues that such a development 'necessarily leads to a gradual transformation of the spontaneous order of free society into a totalitarian system conducted in the service of some coalition of interests' (Ibid, 72).

3.2 Liberty and the Rule of Law

The ideal constitutional order for neo-liberals, which distinguishes law from legislation, is the rule of law. The rule of law constitutes the political essence of neo-liberal ideology. It restricts the coercive powers of government, encourages economically productive behaviour, both safeguards and embodies the liberty of the individual, and ensures equality and justice by making every individual accountable to law and by preserving the legal system.

As argued above, neo-liberalism's conception of the rule of law draws inspiration from the German *Rechtsstaat* and English common law tradition. Neo-liberals like Hayek conceive the rule of law as a legal system based upon economic freedom. As in the German *Rechtsstaat*, in neo-liberalism the rule of law is considered to be a comprehensive and systematic legal framework of rules that exist prior to the state. The rule of law subjects government to comply with universal 'rules of just conduct' or *nomos* that oversee the ordinary relations between individuals, which are independent of a particular political stance or policy. In Hayek's account, the rule of law requires a separation of powers, which denies the legislature the right to alter law as it sees fit. He explains that like English common law, the rule of law is not commanded by any one individual, but has evolved from custom and adapted to its changing circumstances; it is an embodiment of tradition. Indeed, in a 1967 article, 'The Results of Human Action but not of Human Design', Hayek describes the spontaneous legal order created through law. 'Law', he argues, 'is not only much older than legislation or even the organised state: the whole authority of the legislator and of the state derives from pre-existing conceptions of justice, and no system of articulated law can be applied except within a framework of generally recognised but often unarticulated rules of justice' (1967, 102). (Note 2)

The rule of law is fundamental for Hayek and other neo-liberals as it represents 'the law of liberty'. In his *Constitution of Liberty* Hayek argues that law and liberty could not exist apart from one another, and thus maintains that 'law is the basis of freedom' (1960, 148). Liberty for Hayek is the purpose of law, and law is a means for the achievement of freedom as an end. Law, then, in Hayek's constitutional scheme exists for the protection of liberty. Indeed, he writes in his *Road to Serfdom* he contrasts the liberal *Rechtsstaat* with communist, fascist, socialist and national socialist states. He writes that 'nothing distinguishes more clearly the conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the rule of law' (1944, 82). Gottfried Dietze, therefore, points out that Hayek disputes Carl Schmitt's 'Pure Theory of Law' assertion that 'every state, no matter how despotic, is in tune with the rule of law; that even the Third Reich was a *Rechtsstaat*' (1977, 132). Hayek makes it explicit that planning in any shape or form leads down the 'road to serfdom' where rule of law and its liberal values is replaced by 'democratic' legislation and administrative regulations.

3.3 Neo-Liberalism and Democratic Government

A major challenge facing the rule of law in modern societies, Hayek argues, is the rise of majoritarian democracy. Hayek's distrust of majoritarian democracy or popular sovereignty is based on its identification of law with the will of the sovereign majority. In such a democratic system there is no room for law other than that that is made by the demos. Hayek warns of the inherent dangers in this form of democratic rule. The danger of popular sovereignty, he writes, 'lies not in the belief that whatever power there is should be in the hands of the people, and that their wishes will have to be expressed in majority decisions, but in the belief that this ultimate source of power must be unlimited, that is the idea of sovereignty itself'. Popular sovereignty he argues is a product of a false constructivist interpretation of common rules – he maintains that there can be no justification for the unlimited exercise of power that has derived from some purposive will (Hayek, 1979, 33). What Hayek refers to as 'dogmatic' or 'doctrinaire' democrats advocate unrestrained and 'unlimitable' democracy. These democrats argue that since power is in the hands of the people, no safeguards are needed for limiting that power. Thus Hayek states that 'ideal of democracy, originally intended to prevent all arbitrary power, becomes the justification for a new arbitrary power' (1960: 107). Democracy simply becomes a channel for the abuse of government power. The root of the problem, Hayek states, is that 'in an unlimited democracy the holders of discretionary powers are forced to use them, whether they wish it or not, to favour particular groups, on whose swing-vote their powers depends'. He says that this applies as equally to organisations like trade unions as it does central government. The end result Hayek argues is a 'democratic' system which rather than serving the interests of the majority, is forced to serve those select interests with the greatest access to political power (1979, 139).

Hayek presents an alternative 'liberal' interpretation of democracy in his work that is compatible with the rule of law – what David Held refers to as 'legal democracy' (Held, 1996, 243). Like law, Hayek maintains that democracy has become an 'undiscriminating' term used by modern states to the point where it ceases to have any proper meaning. Hayek seeks to bring democracy back to its authentic roots by limiting its coercive powers and subjecting it to the rule of law. He states that while both the dogmatic democrat and liberal may agree that wherever coercive rules have to be laid down they should be decided by the majority, where they differ is 'in the scope of state action that is to guided by democratic decision' (1960, 107). In Hayek's liberal conception of democracy, the majority does not construct law, but they 'discover' it in the internalised general rules of conduct that underpin the spontaneous order of liberal society. In Hayek's scheme the majority are not morally entitled to do as they please. Their 'power is limited by commonly held principles and there is no legitimate power beyond them'. There are therefore definite limits to questions that should be decided by the majority. He acknowledges that while it may be necessary for a majority to come to some form of common agreement on how to perform certain tasks, this does not imply that it also has the legitimate power to make decisions which threaten to undermine the spontaneous order of society. 'Democracy's limits' Hayek writes, 'must be determined in the light of the purpose we want to serve'. He states that 'the limits imposed on democracy by the liberal are those within which it can work effectively and within which the majority can truly direct and control the actions of government. So long as democracy constrains the individual only by general rules of its own making, it controls the power of coercion'. He warns that 'to disregard these limits will, in the long run, destroy not only prosperity but democracy itself' (*Ibid*, 115-6).

Democracy therefore needs to be constrained by a constitution that can limit the powers of government. The liberal tradition of shared values, Hayek argues, must underlie constitutional limitations. This liberal constitution he explains must recognise society as a 'living organism': 'it will have to deal with a self-maintaining whole which is kept going by forces which we cannot replace and which we must therefore use in all we try to achieve'. Changes in liberal society must be made by 'working with these forces rather than against them; they must occur within the confines of established rules of just conduct rather than being democratically determined. Changes where they occur should therefore be piecemeal rather wholesale (*Ibid*, 70).

4. The Constitution of a 'Liberal' State

Neo-liberalism's constitutional ideal of government under the law is set out by liberal economists from the Virginia

School such as James M. Buchanan and Gordon Tullock and economists from Austrian School, in particular Hayek. While differing in many important respects, Buchanan and Hayek both put forward radical peripheral concepts or policy proposals for limiting the scope of government interference that is permitted under the constitution. The 'ultra-liberal' constitutional state that they advocate as an ideal would curtail oppressive bureaucratic government, preserve the rule of law, provide limited public goods and maintain collective security against external threats. This constitutional ideal is fundamental for neo-liberalism as it outlines the necessary legal and political structures for a functioning market order.

4.1 The 'New Madisonians'

James M. Buchanan and other prominent members of the Virginia School of Economics have drawn a great deal of inspiration from the American Constitution. Buchanan traces the roots of his public choice perspective on constitutional reform back to the ideas displayed in James Madison's *Federalist Papers* and in this respect Nick Bosanquet argues can be regarded as a 'New Madisonian' (1983, 71). He retains an admiration for a constitution in which voting systems and constitutional rules curb the power of the executive. Buchanan's central claim, however, is that the American Constitution, traditionally seen in terms of the checks and balances between executive, legislature, and judiciary, has in the twentieth-century deviated from its founding rules and principles that once constituted part of the American political order (1986, 26).

Constitutional reform proposals advocated by public choice theorists like Buchanan, Gordon Tullock and Robert Wagner have focused on measures which will re-set limits to government interference. In their *Calculus of Consent* Buchanan and Tullock apply the individualistic calculus of micro-economics to public action, demonstrating that utility-maximising politicians do not necessarily maximise the public interest (Buchanan and Tullock, 1962). Their subsequent efforts to find the appropriate rules to constrain public figures brought the problem of constitutionalism onto the political agenda in America. They favour, in particular, a 'fiscal constitution' which comprises the set of constitutional rules which regulate government decisions on expenditure and finance. Buchanan states that he wishes to see a 'constitutional requirement that the federal government balance outlays with revenues except in extraordinary times' (Buchanan and Wagner, 1977, 178). To overcome the inherent bias of majority voting in favour of high demand groups Tullock suggests a greater use of the two-thirds voting rule for all appropriations (1965, 47-56).

In *The Consequences of Mr Keynes*, Buchanan, John Burton and Wagner consider similar ideas in the British context. In Britain they point out there is no written fiscal constitution outlining the rules that provide constitutional checks upon excessive expenditure or excessive resort to deficit finance by the government. The political actors that implemented Keynesian economic policies were simply unable to 'fine tune' the economy under the conditions of a competitive party democracy. Vote-maximising politicians were responsive to the demands of electoral politics rather than the policy prescriptions of Keynesian economic rationality. These politicians taking into account the electoral timetable pursued 'lax' monetary and fiscal policies in order to secure favourable but temporary economic conditions, especially increases in employment. They simply failed to act as the 'public-interest maximising politicians and officials, the far-sighted statesmen and trustees of the future' envisioned by Keynesian presuppositions. Faced with the reality of the politico-bureaucratic process, politicians pushed forward with plans to increase public expenditure programmes and avoid cuts without regard for theories of economic policy or for total budget size (Buchanan *et al*, 1978, 58-61).

Perceiving a bias in the British fiscal constitution towards excessive government expenditure and deficit finance, Buchanan, Burton and Wagner argue for a balanced-budget rule. Britain's fiscal constitution, they contend, has historically kept in check the manipulations of those in power, but 'contains a potentially fatal deficiency once the balanced budget rule is usurped and replaced by the Keynesian legitimisation of deficit finance'. 'It retains no rule to prevent vote-buying government manipulation of government expenditure and finance by an Executive that has, through the party system, a (working) majority of votes in the House of Commons' (*Ibid*, 73-5). They maintain that the Keynesian revolution has undermined those shackles on government action – the Gold Standard, and balanced budgets – that were understood by the classical economists as a necessary to contain the tendency of representative government towards deficit finance and uncontrolled growth of government expenditure. Thus they assert that 'the danger of government manipulation is far stronger now that it was in the nineteenth-century' (*Ibid*, 82). They argue for the amendment of the British (and American) fiscal constitution to include the balanced-budget principle where no government would be permitted to function by means of a budget deficit. Adopting this principle is the only means through which to eradicate government's ability to manipulate the fiscal system and economy for short-term political gain. (Note 3)

4.2 Hayek's Model Constitution

Hayek sets out a comprehensive neo-liberal vision of the ideal constitution in his *Law, Legislation and Liberty*. Like the Virginia School's conception of a liberal constitution, Hayek's constitutional order is concerned with establishing a constitutional framework that is capable of holding the power of the state in check, whilst respecting the general rules that underpin the market order. Hayek argues that traditional constitutional mechanisms for limiting government through the separation of powers have been rendered redundant by the doctrine of parliamentary sovereignty, uniting

executive, legislative and to some extent judicial power in the hands of the governing administration (1978, 98-104). Hayek outlines his own tri-cameral system comprising a 'Legislative Assembly', a 'Governmental Assembly' and a 'Constitutional Court'. He makes it explicit that it is not his intention 'to present a constitutional scheme for present application', but rather to 'discover' how 'the power of legislation, in the sense in which it was understood by those who believed in the separation of powers, can be effectively separated from the powers of government' (1979, 107). Hayek's central aim is to present a constitutional model that will secure 'the containment of power and the dethronement of politics' more effectively than traditional liberal constitutions have done (*Ibid*, 109).

The first representative body in Hayek's model constitution is what he confusingly terms a 'Legislative Assembly'. This assembly would be charged with the task of upholding and gradually improving the rules of just conduct or 'law'. Its function would be the articulation of moral norms – 'the views about what kind of action is right or wrong' – that underpin the market order. It would enforce the rules of just conduct, revise private (including commercial and criminal) law, define the principles of taxation and state regulations on matters such as health and safety and production or construction. These tasks would be substantial and difficult as they would involve 'the preservation of an abstract order whose concrete principles were unforeseeable' and the exclusion of 'all provisions intended or known to affect principally particular identifiable individuals or groups' (*Ibid*, 109). Hayek, however, makes it explicit that the function of Legislative Assembly would not be to define the functions of government, but 'merely to define the limits of its coercive powers'. He states that 'though it would restrict the means that government could employ in rendering services to the citizens, it would place no direct limit on the content of the services government might render' (*Ibid*, 109-110).

Because of the significance of its task, Hayek suggests that membership of the Legislative Assembly should be severely restricted to particular individuals capable of carrying out its responsibilities. Hayek (1944, 76) states in his *Road to Serfdom* that the liberal notion of an assembly of independent and infallible men entrusted with the task of maintaining the rule of law is an 'ideal that can never be perfectly achieved'. He, however, goes on to claim in his *Law, Legislation and Liberty* that it would be possible to select specific members of the community for the Legislative Assembly that could be paid and pensioned sufficiently to be independent of any interest group pressure. Hayek suggests that membership should be limited to those 'mature' members of the community aged between forty-five and sixty, who would be elected by their peers for a 'fairly long period' such as fifteen years, 'so that they would not be concerned with being re-elected, after which period, to make them wholly independent of party discipline, they should not be re-eligible nor forced to return to earn a living in the market but be assured of continued public employment in such honorific but neutral positions as lay judges'. This Hayek states would ensure that members tenure as legislatures 'would be neither dependent on party support nor concerned about their personal future'. As an additional safeguard, he maintains that the '*nomothetae*' elected to the Legislative Assembly will not have served in the Governmental Assembly or party organizations (*Ibid*, 113-4).

The second representative body in Hayek's constitutional scheme, the 'Governmental Assembly', is entrusted with administration and what he refers to as 'legislation'. The Governmental Assembly Hayek states is representative of existing parliamentary bodies. Its central tasks would be very considerable; it would organise the apparatus of government, decide the use of personal resources entrusted to the government and mobilise popular support around policy measures. Hayek, however, makes it clear that the Governmental Assembly would be 'bound by the rules of just conduct laid down by the Legislative Assembly, and that, in particular, it could not issue any orders to private citizens which did not follow directly and necessarily from the rules laid down by the latter' (*Ibid*, 119). Unlike the Legislative Assembly which is guided by opinion, Hayek believes that the Governmental Assembly should be based on a competitive party system and should be guided by the will of the majority. Indeed, he maintains that 'for the purpose of government proper it seems desirable that the concrete wishes of the citizens for particular results should find expression or that their particular interests should be represented' (*Ibid*, 112).

Hayek acknowledges that the idea of entrusting the task of stating the general rules of just conduct to a representative body distinct from the body that is entrusted with the task of government is not entirely new. The ancient Athenians who kept the '*nomothetae*' distinct from the governing body, he points out, attempted a system based on these lines. In his article 'The Constitution of a Liberal State', he comments, however, that in the modern world 'the separation of powers has never been achieved because from the beginning of the modern development of constitutional government the power of making law and the power of directing government were combined in the same representative assemblies' (1978, 101). The basic purpose of Hayek's scheme is to achieve a distinct separation of powers within a democratic system by setting up two distinct representative assemblies charged with altogether different tasks and acting independently of each other. John Gray has argued that Hayek's liberal constitutional state has the form of a 'common law *Rechtsstaat*' (1986, 69). Like common law judges, the representatives of the Legislative Assembly would have the ability to 'discover' what justice demands in the spontaneous order of market society, and the capacity to correct disorders in to order maintain the stability of the system of law as a whole. Through a process of judicial review, it would also have the ability to contain the power of the Governmental Assembly within the confines of the rule of law (Hayek, 1979, 128-9).

The third body in Hayek's model constitution is the Constitutional Court. Its membership would include professional judges, former members of the Legislative Assembly and perhaps, Hayek suggests former members of the Governmental Assembly as well. The Constitutional Court Hayek argues would be concerned with the mediation of conflicts between the two main assemblies. It would address 'problems that would arise chiefly in the form of a conflict of competence between the two assemblies, generally through the questioning by one of the validity of the resolution passed by the other'. The main point to stress Hayek states is that 'its decisions often would have to be, not that either of the two assemblies were competent rather than the other to take certain kinds of action, but that nobody at all is entitled to take certain kinds of coercive measures' not provided for by the general rules of just conduct (1979, 121). In periods of emergency Hayek states that it may be necessary to grant limited coercive powers, but makes it clear that these powers should never be possessed by the same agency that has the power to declare a state of emergency. In Hayek's scheme, the Legislative Assembly would be allotted the right to declare a state of emergency and would thus have to confer upon the Governmental Assembly powers that in normal circumstances it would not normally possess. The Legislative Assembly would, however, be free at all times to restrict the powers granted to the Governmental Assembly, and at the end of the emergency revoke its powers (*Ibid*, 125).

4.3 Neo-Liberal Constitutionalism and the Global Order

In his *Law, Legislation and Liberty* Hayek sets out detailed proposals for a model neo-liberal constitution for nation states. However, he also sees his model as being appropriate for a federated global system in which the Legislative Assembly and Constitutional Court would be international bodies and Governmental Assemblies highly localised 'quasi-commercial corporations competing for citizens' (*Ibid*, 132). David Held states that what Hayek advocates is an 'international market order' accompanied by a 'federation of ultra-liberal states where all interaction is conducted between individuals unimpeded by state boundaries'. Such a federation would be bound by a 'higher authority' – a Legislative Assembly - which 'would specify and help guarantee the rules of international trade and commerce'. In line with Hayek's constitutional model, this authority would be above particular group interests and 'its brief restricted to the possibility of ensuring the rule of law in international terms'. Hayek does not believe that an international Legislative Assembly can be formed on a transnational basis in the short term, but that like-minded nations can begin to form such an assembly, such as a regional authority (Held, 1996, 244).

Hayek's work, therefore, envisions a global neo-liberal constitutional order. Certainly neo-liberals have reservations about the construction of supranational institutions, in particular a supranational government beyond some pure service agency, embodied, for example, in an organisation like the European Union. What neo-liberals strive for is an international body like Hayek's Legislative Assembly that is limited to the negative task of restraining the actions of national governments that are harmful to the market order, and upholding the international rule of law. (Note 4)

5. Conclusion

This article has argued that the constitution and its accompanying concepts such as private law, legal responsibility, abstract order, 'rules of just conduct', and evolution are fundamental concepts of neo-liberalism that strike at the heart of liberal debates on the separation of powers, the protection of individual liberty, and the primacy of law. The main dilemma for neo-liberals is establishing legal structures that do not interfere with the market order. They reject nearly all constitutional models in Western democracies in particular the so-called 'liberal' constitution of America on the grounds that it has no more prevented legislators from making greater inroads into liberty in America than many other Western countries. In no democratic country, neo-liberals contend, has the ultimate power of government ever been under the law; it has always been in the hands of a body free to make whatever laws it wanted to achieve its particular.

Neo-liberalism's central claim is that too much importance is attached to the apparatus of politics both at the national and global level. Neo-liberals have thus attempted to construct a constitutional discourse that places strict limitations on politics. Hayek aspires to a constitutional model that entails the 'dethronement of politics', where discretionary authority is replaced by general rules. Buchanan and other public choice theorists have proposed more constructivist legislative measures which would require government to balance its budget in order to reduce public expenditure and deficit finance. However, as this article has shown, neo-liberalism's conception of a 'liberal' constitution is an intrinsically political one. The constitutional limitations on the capacities of legislatures that they advocate are inherently political in the sense that to a greater or lesser degree they embody different views about desirable forms of social organisation.

Neo-liberalism's core political objective is to overcome the constitutional ignorance of Western democracies by instituting a constitutional framework of rules, conventions or procedures through which the policies of government can be constrained. This framework, neo-liberals argue, is not only desirable, but is also an indispensable condition of a liberal society. The efficiency of a liberal constitution, they contend, depends on the strict separation of powers, a government under the law and an effective rule of law. They draw their inspiration from the ancient Athenian constitution, the individualist private law of ancient Rome, and the German liberal movement of the nineteenth-century that found expression in the *Rechtsstaat*. Neo-liberals are, however, acutely aware of the problems of implementing

such a constitutional system. They would need to overcome the limitations of the political system and established democratic institutions and persuade parties to adopt what Buchanan calls a 'constitutional mentality' in respect of economic policy (1979, 19). Thus the constitution is a concept that sits at the heart of an enormously ambitious neo-liberal political project that strives to resurrect the rule of law and rebuild the foundations of liberal society.

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Notes

Note 1. These general 'rules of just conduct' and their centrality to a neo-liberal constitution are discussed at more length later in the article.

Note 2. It is this interpretation of law that makes Hayek critical of utilitarian attempts in nineteenth-century Britain to remake law on rational principles. He makes it explicit that law in the proper sense of the term can never be radically remade in the name of excessive rationalism.

Note 3. Buchanan, Burton and Wagner (1978, 82), however, argue that a 'return to a previously unwritten constitutional convention of the balanced budget may not be sufficient. Mere conventions, once broken, are too easily broken again. A written constitutional rule, rather than a convention, is therefore now called for'.

Note 4. A neo-liberal global order would thus make all socialist plans for redistribution impossible. Hayek (1979, 150), however, states that 'this is no less justified than any other constitutional limitation of power intended to make impossible the destruction of democracy and the rise of totalitarian powers'.



Commentating the Contradictions in the Implementation of Canada's Immigration Policy

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Abstract

Immigrating is the primary means of population growth in Canada and the main source of enlarging the labor force, and the important safeguard for maintaining the national strategy and the people's livelihood. Every Canadian government in history has taken making and implementing appropriate immigration policies as one of the basic tasks. The policies have been adjusted with the historical conditions and international circumstances. However, it is necessary to give a timely analysis of the implementation of the policies and make an adjustment. This text, from the academic perspective, tries to analyze the contradictions in grading standard and the employment criteria of immigrants, in manpower input and waste, in social equity and recessive discrimination, and in short-term benefit and long-term danger during the implementation of its immigration policy. And I recommend it be adjusted and improved.

Keywords: Canada, Immigrant, Policy, Analyze the social contradictions

Canada, in a modern sense, a country composed of immigrants from every part of the world. Canada has a history of pioneering the settlement, founding the state, and making the development. Meanwhile it has a history of migration. Immigrating is the primary means of population growth in Canada, the main source of enlarging the labor force, and the important guarantee for maintaining the national strategy and people's livelihood. Immigrating gives a vital influence on Canadian economy, culture and politics. It is known that in Group of Eight (G8) Canada has the highest population growth rate. Immigration is the major factor. (Note 1). It is no more than that immigration is said to be the foundation of the Canadian state. As a scholar said, Canada is unique in its economic success. The boundless land, large forests, numerous rivers and vast seas have provided requirements to maintain its sustained economic development. Adopting immigration policies to attract the global talents, especially those skilled workers and businessmen and investors, Canada has injected considerable vitality to the domestic economy. (Jiang, 2001, p.3). Every Canadian government in history has taken making and implementing appropriate immigration policies as one of the basic tasks. The policies have been adjusted with the historical conditions and international environment.

However, it is necessary to give a timely analysis of the implementation of the policies and make an adjustment. It is said that Canadian scholars are encouraged to participate in the policy research. "A Canadian scholar Trent published his paper, entitled Social Science Research Contributes a Lot to Canadian Society—Viewpoints of a Spectator. It gives a comprehensive and systematic exposition of the usage and type of contribution and content of social sciences. According to Trent, social science can give recommendations and help the governments to make decisions, draw more proper policies, avoid harmful decisions, and enhance the level of discussing and debating the issues." (Chen, 2003, pp.6-8). In view of this, the text, from an academic point of view, tries to analyze the contradictions of Canada implementing its immigration policy and to recommend it be adjusted and improved.

1. Contradictions in immigrants grading standard and the enterprise employment criteria.

According to the independent skilled immigrants grading standard established by the Canadian Government, a set of strict censoring procedures are adopted to an applicant's educational qualifications and work experience then corresponding marks are given. Those independent skilled immigrants, who are allowed to enter Canada, to a large extent, largely by virtue of the educational certificates and work experience of their own, have gained the approval from the immigration authorities after reaching or even transcending a certain score. That is to say, their educational certificates and working experience are acknowledged by the immigration authority in the course of application. Otherwise, the immigration authority would not approve their applications. However, when in Canada an independent skilled immigrant is looking for a job, he encounters a quite different situation. His certificate and work experience are not recognized by Canadian companies. This phenomenon is not a secret, and it is often reported by the media. For example, a Web site carrying a text says language, education and familiarity with the local community are still the main factors affecting the employment of new immigrants. Their education, not recognized by Canada enterprises forms the

biggest obstacle in employment. (Note 2). Again another Web site has such a text as that when many new Chinese immigrants arrived in Canada, they found it difficult to look for a job. The reasons they are told are that they are lack of work experience in Canada. But if Canada does not provide opportunities for new immigrants the first work, how can they gain the local work experience? This phenomenon often forms a vicious cycle. Many new immigrants are deeply troubled. (Note 3). Why? Because the authenticity of the educational certificates is doubted and the local work experience is stressed. The question of the authenticity of certificate should be settled in the process of a candidate's application. The original work experience of his or her original country and the new work experience in Canada need a step-by-step process. Therefore, there is no convincing reason for Canadian companies to deny an independent skilled immigrant's educational qualifications and work experience. No wonder some one put a question which remains perplexed despite much thought. People allowed to enter Canada according to Canadian immigration standards cannot find a job there. Who is on earth wrong? (Note 4).

The contradictions of immigrant grading standard and corporate employment criteria have reflected the imperfect system of Canada's immigration policy. According to Canadian government's independent skilled immigrant grading standard, the officials concerned censor and recognize the applicant's education and work experience, and declare that he or she has the corresponding ability. While according to Canadian employment standard, the employers involved do not recognize the new immigrant's education and work experience and also do not believe in his or her ability. Who tell the truth? They should discuss the problem and reach an agreement within them. If the former lived up to their words, then the latter should acknowledge the immigrants' educational qualifications and work experiences; if the latter mean what they say, then the former should not recognize the academic qualifications and work experience, throwing the immigrants in the helpless plight in an alien world.

2. The contradictions of the input and waste of human resources

A fierce competition of talents has been on across the world. At present, the developed countries are, with their strong economic strength and technological superiority and excellent working and living conditions, transforming the front of competing for talents to every corner of the world. (Xu, 2001, p.204). Both the basic conditions of sparsely-populated land and the globalization of international competition have wanted Canada to import human resources on end. To develop national economy and safeguard the national interests, or to abide by the prevailing norms of international relations, it is necessary and unalterable for Canada to do that. Obviously, human resources input is determined by the educational state of labor force and the research fields. It is mainly senior human resources that can easily cross the threshold to migrate. In fact, because every government in history gives timely readjustment of the immigration policy, Canada has imported a large number of senior human resources from other countries. It must be noted that, the human resources immigrating into Canada are also a valuable national wealth to the original countries. In the world competition for talents, Canada is fascinating and attractive by its favorable conditions.

Snatching human resources is one thing. But how to utilize them is quite another. Due to various reasons, the new immigrants in Canada encountered many obstacles or difficulties to find employment. They cannot give full play to their talents. Canada's new immigrants, the high unemployment and low employment rate and low income are an indisputable fact recognized officially.

Canadian Statistics Bureau has recently published a new immigrant employment report and revealed the employment of new immigrants to Canada. Statistics shows that, compared with the native-born people or those with local college education, these new immigrants are difficult to melt into the Canadian society and find jobs. For example, in 2006, the Canadian national average unemployment rate was 4.9 percent. But the average unemployment rate of these new immigrants was as high as 11.5 percent, more than twice the locals. The educated new immigrants had lower employment rate than their local counterparts. The unemployment rate of the new immigrants with degrees of Bachelor was 11.4 percent, while the unemployment rate of the native people with the same degrees was only 2.9%. (Note 5). The report of Canadian Social Development Board shows that immigrant families in Canada earn less than the native families, colored people less than the white. (Note 6). The Center of Social Studies and Industrial Relations of the Toronto University surveys that from the early 1970s to the mid-1990s, the income gap between immigrants and the local people had obviously enlarged. Since 1996, new immigrants have found it harder to find jobs and their average wage is equivalent to 60 per cent of the local people's. (Note 7). Therefore, there appears a kind of phenomenon of wasting human resources in Canada, quite different from the pressing human resources input narrated above. Talents become useless because they cannot find a job. The skillful talents have to divert to the low-skilled jobs. From the global perspective to observe the human development, the human resources wasted in Canada had consumed the cost of education and other resources and should have created economic benefits in the exporting countries. Furthermore, most modern emigration countries belong to the developing countries. They need more senior human resources comparing to the developed Canada. Witnessing the senior human resources who are in great need have been wasted, the developing countries almost get into a helpless situation. The international conflicts fighting for the human resources have been on. It is learnt that the officials of South Africa and other countries even complained to Canadian officials repeatedly that

some of their people with higher education had flown into Canada. (Note 8).

Canada emphasizes examination and approval while carrying out its immigration policy. But there exists a relatively weak part in the immigrant employment. Therefore, the migration process is in a serious imbalance. On the one hand it is active to introduce human resources and talents to meet the demand of its domestic labor market; on the other hand, it forms an obstacle of immigration employment and human resources are wasted greatly. No matter what human beings develop to be, the idea of making the best and proper use of talents will never outdated. It is an immoral behavior and phenomena to make a great waste in any country at any time. Wasting human resources, owing to Canada's immigration policy, is irresponsible for the new immigrants and the human resource exporters.

3. The contradictions of social justice and recessive discrimination.

It is widely publicized by international opinion, media and immigrant intermediary that Canada has developed economy and advanced technology. It has vast land which is of beautiful scenery. It also has rich natural resources. It is a country of social equity, cultural pluralism, and political stability. Therefore, Canada has attracted annually tens of thousands of migrants. Social equity is a vital reason. Many people in their original countries have higher education, a longer period of work experience, a considerable high pay and quite an outstanding work performance. They abandoned the jobs they had had in their original countries and migrated to Canada. To much degree, they believed in Canada's social justice, hoping to further improve their living environment. Indeed, social equity is one of the cornerstones of Canadian legal system. Constitution of Canada has such provisions that every citizen is equal before the law. Every citizen should not be discriminated and enjoys the equal protection and benefit by the law. Canadian Human Rights Act provides that everyone should have the same equal opportunities that other people have to create a life that he or she can do and hope to have. Meanwhile, he or she should undertake the responsibilities and obligations as a member of the society. To ensure the opportunities, the Canadian Human Rights Commission was established to correct any unlawful discriminations, including racial, national and ethnic original discriminations. Canadian Plural Cultural Law says that it should promote all the ethnic communities formed in the development of various fields and encourage individuals to take a full and equal participation, help them eliminate any obstacles in the participation, and secure everyone to be equally treated and protected by the laws. (Gao, 1999, pp.331-333).

Such cases as the law articles may betray the fact can appear in any country in the world. Canada is no exceptional. Open discrimination in Canada have already been cast aside, but hidden discrimination, particularly the recessive discrimination endured by new immigrants in the employment, still remains widespread. It is a typical example that employers do not recognize the educational qualifications and working experience of new immigrants, which is contrary to the spirit of social justice. Canada Social Development Board reports that the reason why the income of an immigrant family is much less than that of a non-immigrant family lies in the racial discrimination by employers and Canada's refusal of the educational qualifications out of the scope of North America. (Note 6). Population census data announced by Canada government and academic studies indicate that the income and the employment prospect of the immigrants are going from worse to worst. There exists in Canada a recessive discrimination against foreign immigrants. Scholars and immigration interest advocates point out that discrimination is one of the factors that reduce the income of the immigrants. (Note 8).

Canada's immigration policy plays a relatively weak role in the immigrant employment, resulting in the recessive discrimination against new immigrant employment. In the present world, it is not surprising to find that social justice and hidden discrimination are coexisting. However, those new immigrants suffering from the discriminatory employment barriers in Canada will be disappointed at social justice. It is undoubtedly a worse injury. In such a modern civilized country as Canada, should those people who have enacted laws and those who have social conscience want to see such things happen? The new immigrants are new blood though they belong to vulnerable group. In order to reduce and eliminate all kinds of recessive discriminations finally, it is necessary for the government to interfere and enact a special law for them.

4. The conflicts of short-term interests and long-term damage.

There is no doubt that Canada's current immigration policy can still go on. All over the world, Canada still remains attractive to candidate immigrants. In recent years, the number of migrants to Canada is generally consistent with Canada's plan. Such case will be on in the coming several years. Immigrants have and will have served as the main source of Canada's population and workforce. Though the Canadian government plays a small part in providing assistance to the immigrants except of introduction and examination, the new immigrants rely on their own efforts to overcome various difficulties, to find their settlement, to receive education and training, to find employment. They have made positive contributions to the social development and social progress of Canada.

If Canada won't give a major structural adjustment to its immigration policy, some of the potential hazards will gradually be felt with the time going by. The new immigrants, especially those from developing countries, because of the obstacles of employment, the recessive discrimination, the helplessness of unemployment due to the refusal of

acknowledging their educational qualifications and work experience are very likely to doubt the social fairness and the credibility of the Canadian government. For example, if a Chinese-Canadian has university education, knows English, and has rich work experience, after 20 years of hard work, his total income is only half of that of a Canadian ordinary worker. Many people immigrate to Canada in order to earn more money and seek for a better life. But after their arrival, they feel disappointed and frustrated at their unsatisfactory employment and life. Some immigrants blame Canada for its deception. (Note 2). This kind of emotion is very expansive and inflammatory. With a broken dream, some new immigrants may leave Canada for other countries or just come back to his original country because they have no way out of their plight. It is reported that, according to some Experts, more and more foreign immigrants are forced to rely on unemployment insurance and welfare payments for a living. Some even return to their homeland or emigrate to the United States. (Note 8). Learning of this, many candidate migrants who had wanted to go to Canada will probably stop their plans and choose to go to other places. The accumulation of the negative impact of the new immigrants' living conditions may destabilize the status of Canada as an ideal for immigrants.

In order to nip in the bud and for the national interests of the long-term development, Canada's immigration policy needs a major structural adjustment. All migrants generally experience two diametrically different situations. One is that application and examination must be approved by the Canadian governments. The other is that Canadian governments are absent while you are looking for a job after your landing. The starting point is to find a balance for its immigration policy adjustment. To meet the demand of its domestic labor market, Canada continues to recruit the qualified immigrants. But what is stressed is that it should promote its domestic labor market to accept, absorb or assimilate these immigrants. Here the shift in emphasis reflects the structure of the immigration policy. In the past the recruitment and approval are stressed but the reasonable measure, I think, is to promote the employment of immigrants.

5. Conclusions

Based on the above analysis of the contradictions, the main problems in Canada's immigration policies get displayed from different perspectives. From angles of humanistic concern or Canada's reputation and interests, Canadian government should pay much attention to these contradictions and exert their efforts to solve them. Good advice is harsh to the ear. Canada, a democratic country, might be able to adopt different ideas and public opinions and make corresponding improvements. In the context of globalization, to pay attention to and improve the people's lives should be beyond the boundary, and any government officials, scholars or even ordinary people have the right to say.

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Notes

- Note 1. Canada has introduced 1.2 million migrants in the last five years. [EB/OL]. 2007-08-03. [Http://www.Okwang.cn](http://www.Okwang.cn).
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Problems Existing in China's Hotel Service and Study on the Strategy from the Aspect of Customer Value

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Abstract

This paper is aimed to probe into strategy of how to improve China's hotel service quality based upon the theory of customer's value. Firstly, the author makes the statement on basic connotations of theory of hotel customer's value. Secondly, the author points out problems existing in China's hotel service from the aspect of customer value. Finally, the author proposes of hotel service strategy based upon customer value.

Keywords: Customer value, Service quality, Service strategy

1. Interpretation of hotel customer value

1.1 Connotation of customer value

Study on customer value started from the 1990s and there is no uniform recognition for the definition of customer value in academic circle. Nevertheless, the definition of customer value, namely, customer value refers to the balance between customer's sense of profit and customer's sense of loss, enjoys popular acceptance and recognition. Customer's sense of profit refers to total profits that customer feels during the entire process of purchasing and using products or service, which includes appreciative quality factors such as physical factor, service factor, price factor, image factor and speed factor, etc and comprehensive satisfaction level he acquires in the process of consumption. Customer's sense of loss refers to total expenses that customer feels during the entire process of purchasing and using products or service, which includes not only currency cost (mainly refers to purchasing price), but also non-currency costs such as time, energy, mentality and chance, etc. The larger the difference between the above-mentioned two is, the bigger the customer value is. We can use formula to express customer value as (service utility created for customer + quality of service process) / (service charge + costs for acquiring service).

1.2 Interpretation of hotel customer value

The author believes that hotel customer value refers to the balance between customer's sense of profit and customer's sense of loss acquired from products and services provided by the hotel for satisfying his demands during the process customer stays in the hotel.

2. Problems existing in China's hotel service from the aspect of customer value

China's hotel industry has been largely improved in the last two decades, which is, in fact, the process that keeps improving and perfecting hotel service quality. The above-mentioned process includes not only management and recognition of quality among management personnel, but also quality of hotel products provided by the employees. Generally speaking, hotel industry has done a great job in China's service industry in the two aspects. Nevertheless, it still stays in the stage of exploration in the aspect of service strategy and various problems exist as the following:

2.1 Weak consciousness of customer service

Excellent service of hotel is embodied in the service process of service personnel for their customers. Therefore, the quality of service personnel will have direct influence on the service quality of a hotel. Emphasize on operations and ignore service, which is the internal reason that results in lower service quality. Hotel leaders' ignorance on service management will also directly influence each employee, which will cause service personnel's weak consciousness of customer service and lower the entire service level of the hotel. Hotel's service personnel change frequently. The hotel will, in order to reduce expenses, increase efficiency by downsizing staff and increase quantity of trainees and temporary personnel instead of improving the corresponding training. Qualities of new employees differ a lot, which influences service quality embodied in the following behaviors, namely, bad attitude, shift blames one another, untimely treatment with problems, low service efficiency, slow in action, no one answers phones for a long time, and chat during

work time, etc, all of which are obviously seen in hotels with low star levels and they severely influence images of hotels.

2.2 Irregular customer service behaviors

Service personnel move customer's belongs without permission, enter customer's room without knocking the door, cancel room temporarily that the customer reserves ahead of time, incomplete requirements in guest room, delay in customer service, failure to supply hot water and non switching on air conditioner, etc, which are almost commonly seen in hotel industry in China and severely influence service quality of hotel.

2.3 Shortage of humanization service design

System refers to the process, steps or policy that transmits products and service to customer. System is the way of transmitting values to customer. System is the key for the success in operations. Most problems existing in hotel service are related to system. Too many systems are designed only for the convenience of employees or management personnel. Unsuitable system setting of hotel will lead to delayed service, which will severely influence normal operations of hotel. Employees in the hotel complain all the day, criticism on one department by the other exists, customer's satisfaction with hotel descends and complains increase. Both internal and external troubles are originated from the shortage of scientificity and maneuverability of its system.

2.4 Ignorance in the creation of customer value and cultivation of loyalty to customer

Enterprises will, in drastic market competition for the accomplishment of operating targets, often adopt a series of competition strategy to improve market share of their product and service and keep attracting new customers. Nevertheless, most hotels do little in maintaining and strengthening the relationship with old customers, cultivating and creating loyal customers in comparison with their behaviors in attracting new customers, which is the important method for enterprises to keep long-term competition capability.

Enterprise need provide values for customers if he is intended to cultivate customer's sense of loyalty. Enterprises are lack of recognition of consumer's dominating positions in the market in the 1980s and they scarcely paid attention to demands and anticipations of consumers, that is, external customers of enterprises. Hotels relied merely on internal management to improve their competition capability. Scopes of competition are confined to price, product, function and quality, which are far from enough for acquiring continuous profits. Consumers are becoming dominating forces in the market with the establishment of purchaser's buyer's market and only the competition strategy with customer as leading direction can win in the market. Emphasis of customer has been converted to value since 1990s, which has become the key competition factor in service market. Continuous innovation made by hotel for customer value is the only way to maintain competitive advantage in the market.

3. Hotel service strategy based upon customer value

3.1 Understanding customer value requirement

It is necessary to integrate customer information, establish customer following-up files and execute individual pursuit service in order to master customer value requirement as the following for details:

- (1) Establish electronic data base for customer information. Utilize modern computer and software to carry out scientific categorized management on customer information, use information system to follow customer's purchasing state and value orientation, master real-time customer information and prevent from customer loss.
- (2) Establish perfect customer history file, which should include customer's basic information (such as age, sex, income, occupation, educational background, hobby and family situation, etc), consuming behaviors during his stay in the hotel, credit status and special requirement during his stay in the hotel. Furthermore it should also include interactive information between customer and hotel such as mails, calls and return visit, etc. It is necessary for hotel to collect customer information from multiple channels, namely, guest room department collects customer's information on his living habit, food and beverage department should understand customer's eating habit and personnel in the hall should pay attention to customer's information such as customer's complains, etc. It is available for hotel to acquire customer's feedback information of its service through ways such as survey on satisfaction, following-up mails and reception of customer's complains, etc;
- (3) Establish platform for sharing hotel's internal information based upon the collection of customer's information, which will enable service personnel in each department of the hotel master clearly customer's requirements and provide best and individualized service.

3.2 Provide value-added service for customer

Customer has his own expectation when he purchases hotel's product, which is based upon relevant individual or team background and is also originated from his trading experiences with hotels in the past. Customer pursues the maximized value and his requirements for hotel service is not confined to satisfaction in lower level and he will be satisfied in

higher level only when hotel offers value-added service beyond his expectation, which will accomplish the conversion from satisfaction to loyalty.

Hotel should not only emphasize on standard service based upon regulations and systems, but also pay attention to its individualized and supreme value-added service. It indicates that hotel should provide extra service after its service satisfies customer's normal requirements, which will exceed customer's anticipation. Intercontinental Hotel provides Value-added Service Plan for its customers, that is, customers living in it with full charge without limitation on time will enjoy a series of favorable service, namely, they will enjoy limitless broad band service free of charge, airport meeting and seeing off service free of charge, free breakfast, laundry service (dry wash and wet wash), free local calls and prolonged check-out time to 6 PM. Consistent Value-added Service of Intercontinental Hotel enjoys great popularity among customers and the chance of acquiring more returned customers is obviously enlarged when customer's anticipated value is exceeded.

The operating thinking of maximize customer's value will extend the idea of providing value-added service for customers to each level and make it permeate into service consciousness of hotel employees so as to make them pay attention to customer's feelings, satisfy customer's requirements, provide satisfactory service and create feelings of surprise. Hotel should place customers on the center of organizational structure and establish medium and long-term partnership with customers by providing value-added service beyond their anticipations, which will satisfy customers, make them stay and win their loyalties.

3.3 Establish service brand

Establish brand credit is the foundation to improve customer's recognition value. Competitors can imitate one product instead of imitating brand. Products become out of dated soon but successful brand lasts forever. A good brand is guarantee for service quality, which will strengthen customer's trust on hotel's products or services, relieve customers from unpredictable recognition risks in financial, social and security aspects before the consumption and a good brand predicts also the great popularity among customers.

Just like brands of physical products, it is necessary for service brands to pay attention to brand name and marks. The establishment of service brand should pay more attention to customer's value sense when he enjoys the service, namely, emphasize on establishing individualized brand based upon hotel brand, utilized effective communication channels to transmit individualized service to customers and establish good relations with customers. Real power of brand is originated from customer's investment on his feelings. It is necessary to establish a connection between excellent service brand with customer's feelings and internalize brand, namely, interpret brand, sell market and transmit brand idea to service personnel. Whether or not employees will take brand commitment as their behavioral standard and provide excellent customer value during their service will play a decisive role in forming excellent customer experience for the service process is accomplished by the contacts between them and customers. Internalization of definition and value of brand will assist employees in providing stable and effective services for customers. It is necessary to make employees understand what kinds of values they should make for customers and the detailed executions in practical work before they provide services for customers.

3.4 Adjust hotel's management and organization structure

3.4.1 Establish customer-oriented management organization structure

Currently, most hotels establish organization structures traditionally, that is, pyramid type of line-staff system. This kind of traditional power-concentration type of organization structure is advantageous in its classification of rights and limits, subtle work division and clear liabilities, which works effectively in stable environment. Nevertheless it is worse in its flexibility, which makes it unable to adapt to environment with rapid changes. Customer's requirements are unpredictable when hotel provides services. Therefore customers expect hotels more powerful in their adaptation capability in their services to satisfy their requirements rapid. Besides, the execution of hotel services need effective supports and cooperation from various departments such as guest room service department, food and beverage department, health and entertainment department, public relationship department, security department and engineering department, etc. Traditional organization structure contains too many levels and information of customer's individualized requirements beyond regulations and standard will be transmitted to superintendents in higher levels for coordination after multiple levels and some of them will be solved only by multi departments. At that time the traditional organization structure fails to adapt to the changing environments and will inevitably prolong customer's waiting time, which will further influence hotel's service quality. Therefore, hotels must reform management organization structure oriented by customers and promote customers at the bottom of pyramid to the top. Secondly, management personnel in different levels must support and help employees' services because they directly contact customers and serve them for their satisfactions. Customer-oriented management organization structure of hotel fully represents customer-centered thought, which will be helpful in improving efficiency of hotel services.

3.4.2 Establish flexible service organization

Flexibility of hotel organization structure refers to the establishment of, in addition to stable management organization structure, management team type of organization such as project team for the accomplishment of some temporary and mission-oriented services. The application of this leading thought when hotel holds some large-scaled activities and conference service will be highly plausible because the reception of projects in these categories belongs to temporary and short-term projects and customer's value anticipation keeps changing. The use of flexible management will improve hotel's adaptation capability.

Hotels should, in order to meet requirements for this kind of large-scaled activities and conferences, peel off part of management functions and service functions such as dinner reception, guest room service, marketing and commercial operation, etc, and re-organize a flexible organization with power adaptation capability, which should be totally led by project director in chief. It belongs to temporary and dynamic team with golden key as its axis, customer requirements as leading and accomplishment of reception mission as its purpose by the integration of products of various departments. The golden key is the axis of this flexible organization and links with products and services of various departments to form integrated service system, which will provide services in total process in all aspects. Strict service quality management rules and regulations will be taken as kernel principles for hotel personnel management, operation management and service quality management. Meanwhile hotels should execute three-level inspection system with characteristics, namely, primary inspection of service personnel to carry out requirements for various services; secondary inspection of managers of departments to inspect conference site layout, equipment status and service program; last inspection of total golden key inspection to coordinate with service links, follow customer's service requirements and carry out service details.

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What is the Future for IR Theory? Does it need a Radical Review?

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Abstract

Contemporary international relations theory is the result of recent works of synthesis with classical political thought, international law, history, and even psychology and biology. While some of these developments, like evolutionary psychology, can prove detrimental to its development, I find that international relations theory has surpassed most of its moments of crisis, and is characterized more than ever by pluralist thought. Paradigms continue to hold power on researchers, but most of them produce non-paradigmatic theories. It can be concluded that IR theory is still at the beginning (because of the inability of its researchers to draw an accurate view of the discipline itself), we actually observe a positive evolution in the fact that IR is evolving towards a more inclusive and complete science, a science that can offer more answers at practical level, and that the variety of these responses offers a guarantee against their misuse.

Keywords: International relations theory, Paradigms, Development, Post-positivism

It is often said that who wants to know the future, must look in the past for answers. This might be the case for the discipline of IR, too. The somewhat troubled history of the last decades, with its fair share of paradigmatic wars, and, more recently, methodological debates, at a first glance, apparently does not allow for too much optimism. In the same time, the 'recent' shift of the discipline in the direction of reconciliation with the political thought and its normative element, and developments of influential IR theories originated in other disciplines, like physics and biology, are complicating our image of the discipline.

What does then the future have in hold for IR? Does the previous bleak image lead us to believe pessimistically in an equally (or even worse) bleak future, or the image we have constructed is inaccurate and we are actually witnessing a coming out of crisis, and an ongoing process of improvement of theory?

There are few resources for determination of prospects in IR theory for the discipline itself, and even fewer studies directed toward a 'prediction' of the future (Davis B. Bobrow, 1999, 2). This is both expected and understandable, since the proper scientific research does not allow for conclusions to be reached without testing the hypothesis, and, as Davis Bobrow puts it, because "it fits well with the view of our future as open to choice and purposeful action, with both substantially dependent on recognition of alternatives and conditionalities (Davis B. Bobrow, 1999, 2)". This reluctance justified or not, has prevented theorists to think also about how IR theory should look towards its future. This means not only there are too few attempts to reform the discipline; it has also prevented a coherent evaluation of what we have in the present. Constructing hypothesis about the future of IR theory seems therefore taboo. I agree with Davis Bobrow that working with conjunctures may prove useful to our understanding of the discipline and the directions it should take, even if the conjunctures will never be proven (Davis B. Bobrow, 1999, 2), but I believe we can build a more accurate image of IR just by extracting from present research enough useful information about the direction in which research is headed.

With the exception of the English School and of a few European scholars like Habermas and Raymond Aron, who are more in touch with classical political thought, and are not afraid to employ the normative theory, international relations scholars have mainly axed their research on the above mentioned paradigmatic wars, arriving to a point in time where it became orthodoxy. The most obvious effect was that young researchers were strongly discouraged at a certain point in time during the late 80s to pursue new areas of debate (Maliniak, Daniel, Oakes, Amy, Peterson, Susan and Tierney, Michael J., 2007, 4).

For the purpose of this essay, and also for the space limitation, it is rather unnecessary to review the entire history of the paradigmatic wars. Just in a few words, the paradigmatic wars in the last two decades of the twentieth century were seen to bring to light inter-paradigm intolerance, a failure in admitting the validity of arguments brought by other approaches, the tendency to start and follow fashions, a retreat from science and a disregard of cumulating knowledge (Michael Brecher, 1999, 216-217).

According to Michael Brecher, these were causes for a deeper crisis in IR, one that witnessed the "creation, persistence,

and accentuation of a set of flawed dichotomies” (Brecher, 1999, 217). What Brecher had in mind for flawed dichotomies were the reliance of researchers exclusively on theoretic work, and the exclusion of history from their research, the overwhelming use of deductive paths to theory and the predominance of quantitative methods in research (Brecher, 1999, 218). But Brecher also witnessed the beginning of change, in the reconciliation between theory and history, in the success of inductive research such as the Singer’s COW Project, and in the combination of research techniques (Brecher, 1999, 219-221). Michael Brecher provides an alternative to the deductive path, in what he calls a bottom-up strategy, where variables are first analyzed and classified, then grouped, creating a model that contributes to the creation of theory (Brecher, 1999, 223). Brecher is actually giving account of his own work in the ICB Project, and concludes that pluralism and synthesis are the proper paths to future research (Brecher, 1999, 228). He also bemoans the overwhelming use of rational choice theory, arguing that it has a reductionist, unilateral character, and that it disregards the fact that human decision-makers are incapable of “pure rationality” (Brecher, 1999, 231).

Another useful critique of rational choice theory was given by Raymond Aron, who (as Bryan Frost observes), denied the existence of an universal purpose for all states (Bryan-Paul Frost, 2006, 510), such as power or national interest, and, as a consequence of this, the inability of international relations theorists to predict the behaviour of the states in cases of crisis. Aron’s dismissal of such a concept, which Frost compares to the “utility” (Frost, 2006, 511), in economics, is not only a critique against realism, but also a critique of the entire discipline that rejects the notion of justice (Frost, 2006, 513). What Aron means is actually the states’ own conception of justice, which differs from unit to unit, and that conditions the strategy employed as such (Frost, 2006, 515). The result of Aron’s research is that states which share the same conception of justice create stable systems (Frost, 2006, 515), a conclusion which will be also reached by scholars combining International Law and International Relations theory, as it will be detailed below. But, as Frost shows, Aron’s work is not limited to critique, but also provides directions for the reconciliation of IR theory with the Political Thought, as well as with history (Frost, 2006, 516-517).

Coming back to our issue, the future of IR theory, we need to focus on the determination of fractures in the present. Is Brecher’s image (chronologically the most recent among those analyzed above) still valid, or have things evolved, and we do not need to worry? First of all, paradigmatic wars have become a thing of the past. Scientific evidence shows that non-paradigmatic studies account for more than 50% of all the articles appeared in the most influential academic journals. As a recent TRIP research project has determined “the steady increase in non-paradigmatic articles from 30 percent in 1980 to 50 percent in 2006” (Maliniak, Oakes, Peterson, and Tierney, 2007, 8). Other evolutions included the disappearance of non-theoretic work: “the dramatic decline of atheoretic work from 47 percent in 1980 to 7 percent in 2006, the emergence of constructivism in the early 1990s, the prominence of liberalism relative to the other three major paradigms throughout the time series, the complete collapse of Marxist work starting in 1982 (8 percent) until 1991 (under 1 percent). The collapse of the Marxist paradigm in IR precedes the collapse of the Soviet Union and the end of the Cold War” (Maliniak, Oakes, Peterson, and Tierney, 2007, 8). But the most striking find is that realism has occupied only a minor, and in continuing decline, place in the field, throughout the entire period researched by the TRIP Project (Maliniak, Oakes, Peterson, and Tierney, 2007, 8). Also, International Relations theory has made important steps toward reconciliation with other disciplines, like political thought, history, and international law. Research on the methodological tools used recently by IR theorists, shows that, although the most used method is the quantitative one, it is almost in all cases combined with other methods of research.

Therefore it seems Brecher’s concerns should not be reiterated for the future of the discipline. Why then some authors bemoan them still? Are they the only ones out of date, or is it a larger phenomenon which contributes to the maintenance of old debates? According to TRIP Project research, even though articles appeared in the leading journals have dealt less and less with paradigmatic subjects, statistics show that, at least in the United States, researchers not only choose to view themselves as belonging to various paradigms, but they also contribute to the myth of the paradigmatic wars, by attributing them a larger proportion than TRIP research shows: “The survey evidence reveals that IR scholars believe the literature is dominated by work that fits within one of the major paradigms, and this is not surprising since we have been telling each other and our students for years that realism and liberalism (and to a lesser extent constructivism and Marxism) are the organizing paradigms of the discipline. The conventional wisdom claims that realism was dominant in the 1980s and that the end of the Cold War led to the collapse of Marxism, the decline of realism, and the rise of liberalism and constructivism. Indeed, this is largely what the survey data show. Today, despite a clear decline in IR scholars’ perception of the importance of realism, they believe that nearly 30 percent of the literature is still realist in orientation. IR scholars’ perception of the percentage of literature devoted to liberalism has also declined, but faculty believe that nearly 27 percent of today’s IR literature can be categorized as liberal. The proportion of literature perceived to build upon constructivism has risen over time, according to faculty respondents, from 10 percent in the 1980s to a high of 25 percent in the 1990s before levelling off at 17 percent today” (Maliniak, Oakes, Peterson, and Tierney, 2007, 8).

And this is manifested predominantly in the large proportion dedicated by introductory courses in international relations to paradigms, especially to realism, which statistics shows actually to have lost the hegemony of international relations

theory since before 1980, the earliest year taken into consideration by the TRIP Project. From the data presented by TRIP authors, it results that researchers in America still see the discipline in a very traditional way, a view that does not correspond to reality anymore. In my opinion, time will contribute gradually to the disappearance of this false image, so it does not represent a concern for the future of international relations theory.

In 1989, Jim George analyzed the discipline and found it dominated by dissent among the older schools and new developments, such as the “critical theory”, ‘post-positivism’, ‘discourse analyses’, or ‘post-structuralism’” (George, Jim, 1989, 270). According to Jim George, there are four challenges to the orthodoxy of IR theory: “the first emphasizes the inadequacy of the positivist/empiricist approach to the study of human society and politics. The second, concerning the process by which knowledge is constituted, stresses social, historical, and cultural themes rather than those reliant on “cogito” rationalism, notions of autonomous individualism, or variants on the “sense data” or “correspondence rule” formats. The third rejects as futile the foundationalist search for an objective knowledge external to history and social practice. The fourth emphasizes the linguistic construction of reality” (George, Jim, 1989, 272). But, at that time, as Jim George puts it, optimism was premature, because any attempts to reform the discipline were met with widespread resistance (George, Jim, 1989, 275). The merit of the third debate was that to introduce alternatives to orthodox IR, and its legacy is represented by the wave of recent developments that sought to improve IR and that build bridges between IR and other disciplines.

It has become obvious that IR theory cannot continue on its own to describe accurately and in a scientific manner a world in change, where the boundaries between domestic and international are beginning to erode. This is far from being a novelty within the political thought, as Howard Williams concludes when analyzing Lenin’s essay on “Imperialism” (Williams, Howard, 1994, 136). The analysis entitles Williams to conclude that the relation between IR theory and Political Thought is necessarily a symbiotic one (Williams, 1994, 137), since the individual has outgrown its position of subject to one country to citizen of the world, empowered, as Rosenau would say, by the recent technological advances (Williams, 1994, 139).

There have also been attempts to synthesize the findings of international law with International Relations theories. While most of the merit for this approach resides with the exponents of international law, the combined effort of the two disciplines is focused on explaining that anarchy at supranational level is not a synonym with “disorder and conflict: it merely means that there is no effective supranational authority” (Sriram, Chandra Lekha, 2006, 470). Sriram shows the beneficial outcomes of research between these two disciplines in practice, especially in the cases where there are post-atrocity justice problems (Sriram, 2006, 473).

If the discipline has made a lot of progress in the last years, thanks to reformers like the exponents of the English School, it is still obstructed by the resilience of researchers towards the normative theory, and the reconciliation of international relations theory with the political thought. In the efforts to construct the discipline, researchers often resorted to a scientific language that was intended to provide the research with increased explanatory value, and in the same time to avoid any moral implication (Rengger, Nicholas, 2000, 756). I think the cause for this intolerance towards morality resides in the attempts to establish the discipline as an objective science, and to distance it from political science, but objectivity was taken too far. As Rengger shows, Morgenthau was the first to launch an attack towards this tendency, but in time the result was that realism was credited with the strongest intolerance towards morality in international relations theory (Rengger, Nicholas, 2000, 757). The efforts of Wight and Butterfield to reform the discipline, as Rengger says, were largely unsuccessful. Recent attempts to re-introduce morality within international relations theory were done by Walzer and Beitz, and the establishment of the critical international theory, the findings of the Frankfurt School, and the contribution to liberal/democratic peace thesis (Rengger, Nicholas, 2000, 761) are part of the solution and are evidence for a definite shift within the discipline.

The same blurriness of borders between IR theory and Political Thought is discussed by Brian C. Schmidt. He identifies not one, but three areas where reunification is visible: “normative theory, democratic theory and work that can be placed in the rubric of identity/difference” (Schmidt, Brian C. 2002, 116). He also finds that not only IR theory is incomplete without the Political Thought, but also the reverse is true, agreeing with David Held, and before Martin Wight, that Political Thought theory is incomplete without taking into account the global system (Schmidt, 2002, 119). Schmidt also analyzes the work of David Held on democratic theory within the context of the reunification of IR theory with Political Thought, who asserts that many of the characteristic features of democracy “majority rule, accountability, autonomy, legitimacy, consent, self-determination – are rendered increasingly inoperable by forces operating under, above and through the sovereign state” (Schmidt, 2002, 127). Held’s conclusion is that democracy itself is under question (Schmidt, 2002, 127). Both Held’s and Schmidt’s work are useful reference points if we are to prove the value of the reunification/reconciliation between IR and PT, and the progress both disciplines are making from this association.

Progress within the discipline is therefore the result of recent works of synthesis with Political Thought, with International Law, with History. Another attempt to increase the scientific prestige of the discipline was the use of

biology in the creation of bodies of theory like the evolutionary concepts and the complexity theory (Bell, Duncan, 2006, 497). These contributions are welcomed, as long as they do not attempt to give universal answers derived from biology to IR issues, like for example evolutionary psychology. Duncan Bell shows that development of this fatalistic body of theory is dangerous because it of its attempts to explain important IR dilemmas through genetic determination theories (Bell, 2006, 498-499), while disregarding the role of “culture, social structures and political institutions” (Bell, 2006, 499). By declaring many of the problems (such as racism, nationalism, violence, etc.) faced by the international society as genetic derived, the exponents of EP create the idea it is impossible to change the state of facts (Bell, 2006, 505). Furthermore these arguments can be employed in various purposes (Bell, 2006, 507). If such theories get to conquer ground within international relations theory, they will prove detrimental to the discipline in the same measure extremist theories.

From what we have seen so far, the discipline of IR has surpassed most of its moments of crisis, and is characterized more than ever by pluralist thought. Researchers are engaged in producing mostly non-paradigmatic theories, even though they continue to believe in the force of paradigms.

While from some aspects, we denote that IR theory is still at the beginning (because of the inability of its researchers to draw an accurate view of the discipline itself), we actually observe a positive evolution in the fact that IR is evolving towards a more inclusive and complete science, a science that can offer more answers at practical level, and that the variety of these responses offers a guarantee against their misuse.

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On Positioning the Identity of Literature Editor

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Abstract

In this paper, the author, based upon the theories of sociology and editing, analyzes editing from four aspects, namely, writer of editor, scholar of editor, social activist of editor and editor of editor, which apparently exists among editors working for literature periodicals. Therefore, the debate in this paper contains universal meanings. The author draws a conclusion at the end of this paper that the editor should be editor only.

Keywords: Editor, Writer of editor, Editor of editor

1. Introduction

Recently, pure literature periodicals stay in difficult situation, which has become one of the focuses, to which people from all circles of the society pay great attentions. Besides, people involved in operating pure literature periodicals and editors have been trying their best to seek for a way out. Positioning the identity of editors working for pure literature periodicals thereby will obviously influence factors such as quality and style, etc of literature periodicals, which will further bring impacts on the prospective of development of literature periodicals.

What on earth should we position the identity of editors of literature periodicals? How should literature editors establish their own identities? Should they make themselves writers, scholars or social activists? In this paper, the author discusses the above-mentioned questions from different aspects and analyzes the advantages and disadvantages with the expectation for playing a role of instruction to some extent for the construction of literature editors.

2. Writer of editor

Apparently, writer of editor indicates that people who deal with editing work are also writers, namely, they are writers who also deal with editing work. As a matter of fact, it is a commonly-seen phenomenon. Most editors were literature lovers at the very beginning, who entered the circle of literature when they enjoyed fames after accomplished some works. Then they enter editing department of literature periodicals and start the work of editing.

2.1 As we all know that the writer of editor has many disadvantages.

Firstly, it is inclined to narrow the circle of literature periodicals. All writers have their own characteristics and features of creation and all of them are advocates and practitioners of certain literature slogan and literature school. Therefore writer of editor will subject to his own creation habit as standard in the selection of articles, based upon which he will determines whether or not to select them, which blocks the way of authors who release articles not in accordance with editor's taste. Furthermore, it is inclined to make some literature periodicals to have similar styles and same works will be published by editors of different periodicals. As to this point, Li Shaojun, Editor in Chief from Frontiers, has his unique understanding. He points out that the biggest disadvantage of writer of editor is to form a narrow circle and editors will release their own favorite works only. Besides, I publish your works and you publish mine. Editor working for literature periodicals belongs to a favorable profession before 1980s. Currently, most people are unwilling to deal with this work and those who like this job write things because they have time for creation and it is the advantage for them to publish their works as a literature editor. Furthermore, some people believe that literature periodicals have lost a large amount of their readers result from their becoming periodicals for limited circle.

Secondly, editors who write at the same time will disperse their energy and concentration. As an editor, the author believes that editing belongs to a very complicated job, which requires your full dedication. The phenomenon of writer of editor will undoubtedly bring large influences on editing work because creation needs too much energy. Both creation and editing have many common factors in their ways of thinking. Writer of editor will put too much consideration on their creation, which will inevitably influence modification and re-creation of articles. Such kind of influence exists not only in the aspect of thinking fatigue, but also in thinking exclusion.

Since writer of editor contains so many disadvantages, which also exists objectively, it is necessary for directors and editors in chief working for literature periodicals to guide and control writers of editors in their work: standard for the

selection of articles should accord with styles and features of periodicals and make great efforts to avoid personal factors.

2.2 Writer of editor also contains advantages from the other aspects as following

Firstly, they can deeply experience trial and tribulations of creation. Labor of writer belongs to the invisible labor. Writer creates works silently sitting in front of the computer. They look like having no sense to common people though writers have consumed large amount of their energies. The value of their labor will be recognized by people only after their works are released and become cultural products. It is hard for people without fellow feelings to understand the difficulty of creation. Writer of editor will be keenly aware of the difficulty of creation, which makes writer of editor to give considerations to authors when they deal with editing work.

Secondly, writer of editor has a higher level of taste in literature appreciation, which requires not only higher level of cultural quality, but also professional understanding of literature. It is very important for editors to pay attention to the psychological state of writer's creation when they deal with articles. The above-mentioned psychological state is hidden between the lines in literature works and it is impossible for editors who do not understand personality, experience and philosophy of writer and who do not have deep understanding of creation process to fully and deeply understand it. The final value of literature works lies in the things deeply hidden in the works. Writer of editor, owing to their own experiences of creation, enjoys unique advantages in the aspect of appreciating literature works. Xi Zeren, Editor in Chief of Sichuan Literature believes that the advantage of writer of editor in the aspect of appreciating literature works is very important. He indicates that the disadvantage of school exclusion is not universal though it does exist because editors who do not create also have their own tastes.

Thirdly, writer of editor is favorable for flourishing literature styles and schools. Every coin has its two sides. Writer of editor is inclined to narrow the literature circle, which also plays the role of helping form literature styles and schools. He Shaojun, Editor in Chief of Novel Selection believes that the writer of editor is favorable for the flourishing and development of literature styles and schools. He believes that it is not universal phenomenon that writer of editor causes barriers for the appearance of literature rookies though the phenomenon does exist. In the history of modern literature, most editors in chief in many periodicals are renowned writers, which accelerate the further development of their own schools and styles. For example, Literature Monthly Magazine with Mao Dun as its editor in chief propels the development of realistic literature; Creation with Yu Dafu as one of the creators accelerates the formation of romanticism in modern literature history in China; New Moon created by Xu Zhimo makes Art for Art School find a foothold in literature circle; Shi Zhecun, Liu Na'ou, backbones of New Feeling School, they create New Literature & Art, which expands New Feeling School; Lin Yutang creates Renjianshi, and Yuzhoufeng, which advocate humorous essays, etc. The above-mentioned facts indicate that creation of periodicals by writers is favorable for the flourishing and development of literature styles and schools.

3. Scholar of editor

Editor is undoubtedly more like scholar or literature critic from the aspect of job category. So what are advantages and disadvantages of scholar of editor?

We believe that the scholar of editor has higher level of cultural cultivation and systematic knowledge and they have excellent foundations and structures for knowledge in both fundamental domains and generative domains. Knowledge in fundamental domains plays fundamental roles in editing, level of which is the necessary prerequisite to determine whether or not the editor will do well in editing job. Scholar of editor indicates that his body knowledge structure takes knowledge in fundamental domains as kernel and takes knowledge in generative domains as assistance, both of which form an organic integrity. The external representation of body knowledge structure of editor lies in quality and result of editing. Therefore it plays a very important role in whether or not it will satisfy the thirst for knowledge among target audience and whether or not it will constitute knowledge structure and cultural system according to value tendency of target audience. Editor will, with excellent knowledge structure, have a higher level of vision and wider orientation to make macroscopic analysis of various writers and works and the works they edit will be more comprehensive.

Literature thinking basically belongs to imaginal thinking but scholastic thinking is basically rational because study pursuing requires rigorous scholarship. Scholar of writer will combine well these two kinds of thinking so as to have deeper understanding of writers and works. Thinking capability is related to study on editing body, level of creation and final effect of editing. Creative thinking of editing body in professional behaviors of contacting and processing information should work in ways of combination of divergent thinking with complex thinking, and combination of intuition thinking with analytic thinking and it should not only emphasize on theoretical thinks, but also give full play to creative imagination. Therefore scholar of editor will be favorable for promoting cultural taste of literature periodicals.

Scholar of editor is also represented in his criticism on literature works. As a kind of psychic phenomenon, literature works are functional in recognizing and cultivating in addition to its function in aesthetic feeling. Editor should take certain standard to carry out evaluation on subjects by objects in criticism. Different criticism purposes determine

different representative styles. Traditional criticism emphasizes on the cultivation, which causes moral criticism; modern criticism emphasizes on human instinct, which causes criticism of psychoanalysis. The final purpose of editor criticism is to use the articles. Therefore purpose of criticism is accomplished as long as works that editor surveys is in accordance with article adoption standard no matter it belongs to moral criticism, psychic criticism or other criticism.

Periodical creation by scholar should prevent from being bookish. Scholar of writer is inclined to master periodicals in the thinking way of pursuing studies and it makes them emphasize more on knowledge, which will make periodicals inflexible with little spiritualism.

4. Social activist of editor

The definition of social activist of editor contains rich connotations. Firstly, literature is gradually marked with print of marketization with the rapid development of market economy. Marketization means operation and operation means social activities. Therefore social activist of editor thereby appears; secondly, as one important step in editing, soliciting contributions is kind of social activities; thirdly, from the macroscopic view of triune relationship among writer, editor and reader, editing belongs to a kind of social activity, namely, editor must be powerful in social communication. Publishing itself belongs to social activity and editor should be involved in each step from market research, topic selection, planning, article organization, printing and release and editor will be unable to do anything if he has no capability in social activities.

Social activist of editor will be showed in the nature of entire editing activity instead of being showed only in editor's treatment with articles. Simply speaking, editor should possess nature that a social activist does. Editor should have a reverse view on his work from the aspect of society and think about its social meanings. Editors must, in order to make their periodicals survive and develop in the competition, and recognized by the society, make great efforts to improve internal quality of their periodicals. One of the important contents to improve quality is to publish as many as possible works with higher level of taste and those that will cause predicted social influences, and do not release or release as less as possible mediocre works. The accomplishment of the above-mentioned targets will not only expand the influence of the periodicals, but also make self values of editors as editing body widely recognized by the society owing to the fine works they edit and release.

Social activist of editor is necessary but the disadvantage will be expressed soon if we pursue it intentionally, that is, it will make literature periodicals lose literature nature, pursue the so-called fashion elements and become shallow.

5. Editor of editor

Li Jingze, deputy managing editor of People's Literature, believes that a truly qualified editor should have wider views and master life and literature under wider views. It should be Editor if editor has to be someone. Editor of editor should have extensive learning instead of deep learning. Therefore, the ideal editor should never be a writer or a scholar.

Li Jingze believes that all important writers in modern literature history are editors and editors of most important literature periodicals are writers. Historically speaking, writer of editor is favorable for the development of literature. Whether or not are there conflicts between two identities today? Not absolutely! Because most editors are not writers; there is no apparent conflict even the editor is writer. Literature periodicals are in depression nowadays, which results from very complicated social and historic reasons. The reasons also lie in whether or not the periodicals are well run. That the periodicals are not well run has no apparently important relationship with whether or not the editors are writers. The reason that periodicals fails to enjoy fames in society lies in the shortage of articles with true characteristics.

Zong Renfa, Editor in Chief of Writer believes that writer of editor influences the appearance of youth in literature and the phenomenon does exist. But we cannot take it as the principal problem. We should find out that writer of editor is becoming weak and many renowned writers left editing department. Influential writers will not choose to stay in one editing department and they believe that it is unnecessary for them to not only deal with the work of editing but also create works. Therefore they will abandon editing if there is any chance. Writer of editor or scholar of editor is not as good as editor of editor. Writer, scholar and editor are not in opposite positions. It works no matter editor is writer or editor is scholar under the condition that editor does his work well. Editor must sacrifice his creation and learning if he does not leave the post as an editor. He can abandon the profession as an editor if he is unwilling to make sacrifices.

The author believes that editing plays the leading role in social propaganda field and editors are professionals in integrated editing of social information. Editor of editor basically refers to highly professional editing body. In order to be editor of editor, editors must keep absorbing new knowledge, new information, new thinking to make intelligent structural system of editing body remain in optimized state.

Educational background is one of the important factors for the above-mentioned optimization process, which is also the most fundamental level in intelligent structural system of editor. In modern society, education is the main channel for the acquisition of knowledge. Professional natures and social roles determine that editors must accept excellent higher education and successive related trainings. The entire process of being educated including continuation education

determines knowledge constitution, professional level and achievements. Accumulation of fundamental knowledge, professional knowledge and comprehensive knowledge of multiple subjects of editing body is mainly accomplished during the process of being educated. Therefore, lifetime education is very important for editing body.

Thinking capability is related to study on editing body, level of creation and final effect of editing. Creative thinking of editing body in professional behaviors of contacting and processing information should work in ways of combination of divergent thinking with complex thinking, and combination of intuition thinking with analytic thinking and it should not only emphasize on theoretical thinks, but also give full play to creative imagination.

Research capability gradually enlarges knowledge capacity and deepens knowledge depth of editing body, which makes it easy to convert knowledge to application results. Research capability is one of the basic qualities of being an editing body.

Creation capability enables products of editing body, through edited information of medium, to reflect most advanced, effective and applicable information related to development and advancement of human society and also makes them represent more valuable meanings and connotations of general cultures. Therefore, editing activity of editing body will truly promote social cultivation, cultural proliferation, social balance and perfect social organs. Therefore, the author believes that editor should be editor of editor.

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Tentative Discussion of Global Financial Imbalance

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Abstract

At present, the disorder change of the exchange rate, the interest rate rising have already posed the serious threat to the global economy continually growth. The global unbalance causes include the low American deposit level, the Chinese exchange rate lacking the elasticity, as well as Japanese, German and oil-producing country favorable balance. In order to solve this problem, the developed countries and the developing nations must joint effort to reduce the serious unbalance of the whole world day by day, and at the same time, change International Monetary Fund's role as the center of strengthening cooperation as well as resolving trade imbalance. And the international economy finance organization must increase the voting rights of the developing nations. Finally it pointed out that RMB revolution wasn't the effective method to solve the Chinese and American trade gap.

Keywords: International payment balance, Private capital, RMB exchange rate

1. Introduction

The recently published report of World Bank in the "Global Development Finance 2005" reveals that: net private capitals that flow into the developing countries in 2004 increased by 5.1 billion U.S. dollars to reach 301.3 billion U.S. dollars. Foreign Direct Investment (FDI) in net totaled 165.5 billion U.S. dollars in 2004 with an increase of 13.7 billion U.S. dollars. Developing countries continue to increase their own capital outflows, meantime, coordinate with strengthening the balance of their current account, so the total surplus of them in 2004 reached 124 billion U.S. dollars. Global economic growth reached 3.8% in 2004, the fastest in the latest four years, and the developing countries achieved the fastest rate in the latest 30 years. And the growth rate of the region where the developing countries centralized is higher than the average level over the past 10 years. But at the same time, global imbalances are continuously expand, particularly the United States current account deficit reached 805 billion U.S. dollars in 2005. Therefore, Gains of the developing countries are vulnerable to the risks associated with the restructuring. Just as senior vice president of the World Bank, economists Ms. François Bourguignon said, "However, we should also keep in mind that the existent Global financial imbalances today have created risks -- disorderly fluctuate of the exchange rate, rise of the interest rates -- these may pose a threat to our gains. Developing countries need to prepare themselves to do a good job of adjusting, and some adjustments could be paroxysmal".

2. The performance of global financial imbalances

Firstly, although the international trade in goods and services grew steadily, is also faced with the threat of global imbalances and uncertainty of the economic growth. World Trade Organization said in its annual report of the 2005 estimates that after adjustment for inflation, global trade in goods increased by 6%, which is lower than expected of 9% in 2004, but higher than the average level over the past 10 years. European Union (EU) and Japan's exports dropped sharply, U.S. export growth has been slow as well, but China's actual exports which soared 25% will continue to grow, pushing up global export volume. Services trade of emerging economies, particular the "Golden Brick Four" (Brazil, Russia, India, China), has also grown substantially. However, the share of these countries in the global market is still relatively small.

Secondly, the current account deficit of the United States for 27 years has become the obstacle that affects the stability of the world economy. Every three containers that reach Long Beach, which is America's second largest port, will leave with two empty. Nothing could be better than this image shows a deficit of the United States as a threat to world economic stability. Beginning in 2006, the United States prepared to publish the current account deficit in 2005 (which includes trade in services, interest payments and transfer payments). This amount is about 805 billion U.S. dollars, which is equivalent to 6.5% of the gross domestic product (GDP), setting a record. Since 2002, the U.S. dollar has fallen more than 15% to the currencies of major trading partners of the United States. Some smaller Asian central banks hinted that they want to shift reserving a variety of foreign exchanges from simple dollars. However, few people expect

the final result: because the relentless rise in oil prices push up import costs, the U.S. trade deficit get more serious; oil producers, has become the new creditors of global economy; Strong growth in the United States and the global economy has eliminated two tense situation, it's the ever-increasing debt which the United States owe the other countries of the world, and high energy prices as well; The falling trend of the dollar has therefore been reversed due to large capital inflows. From 1913-2001, the United States accumulated a total national debt of 6 trillion Yuan, and from 2001-2006, the United States national debt also increased by 3 trillion US dollars to 8.6 trillion US dollars in the short period of five years.

Thirdly, the United States current account deficit accounted for a record-high proportion of the national income, and the imbalances in global economic asymmetry is more obvious. The United States current account deficit accounts for high proportion of the total national income. The U.S. current account deficit seriously deteriorated in the fourth quarter of 2005, the deficit represented the percentage of its national income to a record high of 7%. In the fourth quarter of in 2005, the current account deficit of the United States is 225 billion U.S. dollars which is far higher than 185.4 billion U.S. dollars of the third quarter. The current account deficit of the third quarter accounts for a ratio of 5.9% of the gross domestic product (GDP). And the current account deficit for the year 2005 is 805 billion U.S. dollars, accounting for 6.4% of national income. At present, the global financial imbalances continue to aggravate with an alarming rate. Meanwhile, a dangerous asymmetry emerges among the various imbalances. In the year of 2005, the current account deficit of the United States reached a record level, and accounted for about 70% of the total global economic deficit. According to IMF statistics, the United States current account deficit accounted for about 1.6% of global GDP last year. Meanwhile, the surplus areas of the world include: the emerging Asian countries, its surplus accounted for 0.5% of global GDP; oil-exporting countries, 0.5% of global GDP; Japan, 0.4% of global GDP; and the euro zone, Denmark, Switzerland and Norway, also have a surplus of 0.4% of global GDP. On the other hand, the surplus areas should be spread in much more scope: 70% of the total global current account surplus in 2005 came from about 10 economies. Indeed, the world was maintaining the balance on the needle of the U.S. external imbalances. If the United States who has the world's largest deficit sinks deeper in the deficit problem, while major global surplus States absorb its own savings at the same time, then the United States will feel increasing pressure on external financing. This will undoubtedly increase the possibility that these pressures will have to release in the international financial markets by the classic way of adjusting the current account, which means that dollar is to weaken and interest rates is to rise in the United States. As long as other countries in the world are in a state of excess savings, it is possible to avoid a substantial re-pricing of dollar-denominated assets. But now, with the surplus economies embarking on the long road of self-absorption of excess savings, it will be more difficult for the United States to prevent such a dangerous outcome.

3. Conclusions: Solutions of the global financial imbalances

3.1 Developed and developing countries should work together to reduce the growing problem of global imbalances

The International Monetary Fund pointed out in its important magazine "World Economic Outlook" that rich countries and developing countries have failed to take the necessary steps to reduce growing global imbalances. The IMF has called on the United States to make efforts to increase national savings to reduce the deficit for long time. And at the same time, Europe and Japan should implement structural reforms to remove obstacles to the economic growth, and Asian countries should increase exchange rate flexibility to upgrade its domestic demand. Although every country has agreed to take necessary steps to reduce global imbalances, they are all relatively slow in the implementation. Raghuram Rajan, the IMF chief economist, said that the related countries should play their own role by taking action to establish a "mutually agreed, credible multilateral framework for policy action, to help maintain market remain stability." According to the IMF reports, the global economic growth rate of 2005 will reach 4.3%, continuing to maintain a robust posture, but still "excessively depend on" the United States and China. The phenomena above makes people worry that there will be a marked slowdown in the global economy if the United States and China synchronously experienced weak economy. As said by Raghuram Rajan, "a large number of emerging markets, especially emerging Asian countries, have accumulated a huge amount of foreign exchange reserves to prevent the disaster from happening. However, the excessive accumulation of foreign exchange reserves will undermine the currency control, as well as the health of the financial system."

3.2 Change the role of IMF as the center of strengthening cooperation as well as resolving trade imbalance

As to global economic governance, leading countries generally believe that the role of the International Monetary Fund should be changed to place itself in the center of strengthening cooperation as well as resolving the trade imbalance. International Monetary Fund has been authorized to immediately launch the negotiations among the countries which have the largest trade imbalance amount. And the goal of the negotiations was to reach an agreement on reforming the economy and exchange rate policies, so as to narrow the trade balance and to prevent the occurrence of the global financial crisis. If the negotiations succeed, it will likely lead to major changes in economic policy, including the appreciation of the RMB. In the first IMF "multilateral consultation", the various causes of global imbalances which include the low level of savings in the United States, the inflexibility of exchange rate in China, as well as the surplus of

Japan, Germany and oil-producing countries will become the focus of public attention. And IMF will serve as a forum for participating countries to seek solutions to these economic problems. According to IMF Managing Director Rodrigo Rato, because the IMF can not force countries to change its policy, it will announce results of the analysis to exert additional pressure to induce them to reach agreement. Including China, all IMF members support the new procedures. Meanwhile, IMF members reach a consensus that some emerging market countries should be given greater IMF quotas and voting rights.

3.3 Program of G11 (including Group of Seven, China, India, Russia and Brazil), and consider increasing the voting rights of developing countries

Some of the world's largest banks and financial institutions urged in September 14, 2005 that global economic leaders should joint action to reduce the increasingly alarming global financial imbalances. And Institute of International Finance appealed that G7 which was constituted by leading industrial nations should incept China, India, Russia and Brazil as their members. The G11 which includes industrialized countries and emerging market countries may offer impetus to the economic reform which is necessary. And some of the economic reform has been mentioned but has not been fully implemented due to the absence of such an understanding that the parties need to take difficult compromise. In addition, Many Asian countries deem that they have still been marginalized in the multilateral organizations after years of rapid growth for a long period of time which was not fair. And it is generally felt that the organization preferred the relatively smaller European countries. However, other countries, particularly Turkey and Mexico, do not have enough say in the IMF. For example, Belgium has 2.16% of the voting rights in the IMF, compared with only 2.98% of China. Despite the scale of China's economy is six times larger than that of Belgium measuring with the nominal gross domestic product (GDP); but by purchasing power parity (PPP) measurement, the Chinese economy is more than 20 times larger than that of Belgium.

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