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# Africa Debt Crisis and the IMF

## with a Case of Nigeria:

### towards Theoretical Explanations

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#### Abstract

This paper, attempts to employ and apply the dependency and liberal economic theories in order to demonstrate how these two theories help in the accurate analysis and explanations of the debt crisis in the developing countries, particularly Africa and especially Nigeria. In doing this, the paper considers very briefly some of the actions and policies of IMF and other IFIs, the administrations of some Nigeria leaders and the undertakings/trend of events during the implementations of the Structural Adjustment Programme in Nigeria. It also reflects some of the activities in other countries in Africa relevant to the analysis. The paper concludes that the IMF, World Bank and the West should be blamed for collaborating with some Nigeria leaders in making the country indebted. And that the Nigerian masses needed reparation for the losses, pains and sufferings they have passed through because of IMF's SAP.

**Keywords:** IMF, SAP, Dependency, Liberalism, Debt, Corruption, Africa, Development

#### 1. Introduction

An accurate account and proper analysis of the debt crisis in developing countries of Africa, and Nigeria in particular cannot be possible without the examinations of some theories underpinning the problem. Scholars and writers have emerged with different theories and explanations concerning the debt crisis in developing poor countries. The protracted debt crisis in these countries has stimulated research projects that endeavour to unravel the causes, and explain the complexities surrounding the debt crisis. While some studies argue that dependency theory (Baran, 1957, Frank, 1971) is best for understanding the debt crisis, others maintain that development theory (Rostow, 1960) or economic explanations (Offiong, 1980) is more lucid. Yet, others contend that political explanations (Migdal, 1988) or the liberal theory (Burchill, 1996) is important. For the purpose of this paper, the dependency and liberal economic theories will be considered.

#### 2. Dependency Theory and Liberal Economic Theory

##### *2.1 Dependency theory and Africa's debt crisis*

Proponents of the dependency theory contend that the debt crisis in Africa could be perceived from the extreme dependence of Africa's economies on international competitive economic conditions over which they had little control. Dependency theory is predicated on the notion that there is a 'centre' of wealthy states and a 'periphery' of poor, underdeveloped states. Resources are extracted from the periphery (developing nations) and flow towards the states at the centre (developed nations) in order to sustain their economic growth and wealth. The major contention here is that the economic development of the developing countries (the Global South) was rendered impossible by the domination of the global economy by the already industrialized capitalist powers ('the Global North', Offiong, 1980). The implication is that poverty; including indebtedness of the countries is the result of the manner of their integration of the world system. The historical incorporation of dependent territories into global division of labour entailed a tendency toward economic stagnation in the colonies and neo colonies (Sandbrook, 1982).

Therefore, scholars for example, agree that American based multinationals own overseas investments too large to have been generated by the capital transferred by these companies out of U.S. Their net returns of foreign exchange to the U.S. are also reported to be very high and growing. The net effect is that holes are continuously knocked into the pockets of these poor countries and the degree of their impoverishment is growing more and more until they acquire the

psychological impression that the only way they can support investment is through foreign loans – loans which once acquired are swept away by worsening balance of trade (Baran, 1954; Frank, 1971; Rodney, 1974 and Sweezy, 1978). These developing countries go for more loans hoping that this will help improve the situation, but the conditions tied to these loans always spell trouble and doom for these less developed countries (LDCs); as in the words of George Washington, the former president of U.S. ‘it is madness for one nation to expect disinterested help from another – the U.S. does not have friends, but interest’ (in Abbah, 1996). Thus dependency tightens its grip; as the LDCs go for more loans from the financial institutions and donor countries. This is the phenomenon which Cheryl (1974) called ‘debt trap’. At this point, dependency becomes inescapable.

## 2.2 Liberal economic theory and Africa’s debt crisis

The liberal economic theory also offers plausible contention on the debt crisis in developing countries. The major argument here is that economic liberalization will help in the increase of flow of foreign investment into the developing countries, as a result of the easing of trade and exchange restrictions. The notion is that in the process of homogenizing the political economy of every member state of the international community that the objective of creating a market society on a global scale is within reach (Biersteker, 1993). Again, one of the major objectives of liberalization is to reduce the resource gap in the LDCs, by improving the trade balance and encouraging a net capital inflow. Thus, the growing importance of international organizations such as the G7, IMF and World Bank is indicative of the influence of liberal economic internationalism in the post-Cold War period (ibid).

However, events in the developing world provide us with some reasons why attempts made in redressing the situation through the encouragement of increased foreign borrowing have contributed to the current debt crisis by increasing the resource gap even further. These powerful transnational bodies which embody free trade liberalism as their governing ideology however impose free market strictures on developing societies. Since they are the primary organizations which formalise and institutionalise market relationships between states; they lock peripheral states into agreements which force them to lower their protective barriers (GATT and NAFTA for instance), thereby preventing developing nations from developing trade profiles which diverge from the model dictated by their supposed ‘comparative advantage’ (Burchill et al, 1996). The IMF and the World Bank for example, make the provision of finance (or more accurately ‘debt’) to developing societies conditional on their unilateral acceptance of free market rules for their economies, the conditionality of the so called - structural adjustment programme ‘SAP’ (ibid).

The IMF’s preconditions, which have their theoretical roots underpinning in monetarist doctrines, show no sensitivity or consideration to the peculiar underdeveloped nature of the economies, and as a result, the prescriptions have had the effect of threatening their very survival (Onimode, 1989). In fact one such conditional ties has been the insistence that the currencies of these countries be devalued. The application of this condition for example in Zambia 1985, Ghana and Nigeria in 1986, suggests that these economies are far from improving, rather it has worsened them, and thereby raises fundamental questions to their long term usefulness (ibid).

Besides, there is a large element of uncertainty in the minds of the donor bodies regarding the ability and stamina of the state in Africa, for example to stem the tide of opposition to overall adjustment policies, and thus meeting the expectations of loan repayments. The Zambian and Nigerian experience are cases in point (ibid). And by implication how long the programmes can be continued considering the serious hardship imposed on the people. Therefore, the lending organisations advance a lackluster approach to African countries. Above all, there is further submission that these financial institutions created an easy or sophisticated means through which corrupt leaders in developing countries can use to stash their nations’ wealth into tax havens; therefore, worsening the debt crisis, and deepening the level of absolute poverty to what Ikejiaku (2008, 2009 ‘in press’) coins the term *poverty qua poverty* to explain. The developed world contribute in Africa’s capital flight, ‘The poor countries are constantly de-capitalised and their economies remain largely upon decision made in New York, London, Paris and other metropolitan centres’ (Holsti, 1995). For example, Zairian Mobutu, Abacha and Babangida in Nigeria must have embezzled more than \$5billion each and Kenyan Arap Moi \$1billion (Azami, 2005).

All these were part of the factors that rendered the African economy weak, and therefore necessitated or led to their financial plight, dependency relation and subsequent interests and demand for foreign loans. Yet, the manipulations by the financial institutions and other lending agents, which were made feasible by the introduction of liberalism in Africa, helped in impacting negatively to the purse or coffers of African states, thus aggravated the debt crisis in the continent. For example SAP failed the majority of Nigeria; particularly it brought mass unemployment (AFRODAD, 2007). Kenya also continues to express its displeasure at the IMF and the World Bank for forcing these policy changes on it (Wayande, 1997). In the early 1980s, Uganda was rocked by weeks of demonstrations, as industrial workers and students took to the streets to denounce President Milton Obote’s IMF-imposed economic programme and in 1990, Matthew Kerokou of the Benin Republic in West Africa was removed from power following a wave of anti-SAP riots (Dare, 2001). It is therefore not surprising and understandable while notable scholars, such as Sachs (2005: 189) lambastes the IMF and World Bank for imposing draconian budgets to support SAP, which had: ‘little scientific merit

and produced even fewer results' It could rightly be argued that it is no coincidence that government that continued to operate quite well (e.g. Botswana) never had to subject themselves to the painful cure of SAP (Hyden, 2000).

In summation, therefore, this paper will apply the two theories (dependency and liberal internationalism) discussed above in the analysis of the Africa debt crisis and the IMF's structural adjustment programme, with particular emphases on Nigeria.

### 3. Africa, Nigeria and Debt Crisis

#### 3.1 Background to Nigeria's Debt Crisis

The Nigeria state, just like many other states in Africa (example, Kenya, Democratic Republic of Congo, formerly Zaire and Ghana to mention but a few) in the 1960s and early 70s were not indebted. When Nigeria obtained independence in 1960, the world believed that, she will usher in economic prosperity for her citizens. It was because of this thinking the world saw Nigeria as the future economic giant of Africa (AFRODAD, 2007). The thinking was not a mere wishful idea because: Oil, the money-spinner, had been discovered at Oloibiri in present-day Bayelsa state in 1956. By 1958, Nigeria had begun to export the black gold to earn petrol-dollars. Also, agriculture was booming; cash and food crops were being produced massively and were fetching for the nation much foreign exchange. In fact, suffice it to say that Nigeria was blessed with an abundant and a viable human resource base, a favourable climate and a vast expanse land more than twice the size of Britain (ibid).

Actually, Nigeria, comparatively with other developing countries, was rich. She had no reason to go a borrowing. In fact, Nigeria later successfully financed her 30-month civil war from 1967 to January 1970 without taking a foreign loan. It was this that made General Yakubu Gowon (1966-1975), Nigeria's military head of state, at the time, once vaulted during the early 1970s that Nigeria problem was not cash, but rather what to use the available money to do.

However, trend of events during some of the successive governments and administration from the periods of General Obasanjo's regime (1976-1979) till Babangida and Abacha regimes (1985-1998), surprisingly, cause the nation's 'boast' to begin to fade. She then discovered that to keep moving, she had to take foreign loans. In no time, she was subsequently caught up in a crippling foreign debt crisis that besides compromising its economic progress, political stability, social dignity and cultural integrity, also dealt a debilitating blow to the Nigerian masses, because of the pains and sufferings they passed through during SAP.

#### 3.2 Application of Dependency and Liberal Theories

Dependency theory and the liberal economic theory provide us with the most informed explanations on why Nigeria degenerated to the statue of indebted nation. In the late 1970 and 1980s, disillusion with statist approaches and the ascendancy or dominance of neo-conservative governments in Britain, the United States, and to some extent in West Germany – provoked a shift toward a liberal market oriented paradigm. Specifically, failings in the form of mistaken policies (particularly in United States under President Regan and Britain under Thatcher), not essentially the workings of the global economy or globalisation were identified as the prime cause of economic stagnation in the Third World (Okafor, 2004). The current global development philosophical approach, particularly by the developed capitalist nations and international financial institutions is still critical on machinists of developing countries' economies, as the cause of their economic development backwardness:

Today's revised development ideology retains both the emphasis upon domestic sources of economic malaise, and the faith in liberal economic policies. What is new is the belated recognition of the centrality of the state, and in particular, accountable government, to sustained capitalist development (Sandbrook, 1993: 2).

The above fact could be better understood from the perspective of the World Bank's Seminal report of November 1999 titled: Sub-Saharan Africa: from crisis to sustainable Growth which was an exceptional clear and authoritative account of the call for liberal economic and free enterprise model for Africa's recovery. And as a way of providing the much needed solution to economic problem of Africa, particularly the debt crisis, the IMF and its cohort (the World Bank) which arrogated to themselves, the right and responsibility of putting Africa in the right part, agree inter-alia, that Africa needs not just government but better government that concentrates its efforts less on direct interventions and more on free trade liberalism. The Bank's report claimed that what characterized most African countries was a bloated capricious-management and faulty policy. Hence:

The Leviathan must be tamed, redirected, and made effective? The Bank proposed in effect, to convert the monopolistic African states into liberal democracies linked to enlarge and rejuvenated private sectors, and to build the reformed states' institutional capacity (Amin, 1994: 45).

However, a superficial reflection on the expatiated report of the IMF (and the World Bank) would show the plan as appealing option for the continent, but a critical study into the factors that led to the role of these two institutions were/are playing in the economic development of Africa would show that, after all, IMF and World Bank could be

nothing but instruments of neo-colonialism. The activities of these financial institutions were more or less to maintain the dependency nature of African countries (Okafor, 2004).

This submission becomes glaring and more convincing when it is appreciated that the IMF was initially a pure European establishment. During the first period of its existence, the IMF gave the impression of certain efficiency as it helped to re-establish the convertibility of European Currencies (1948-1957); then helped European economies adjust (1958-1966). From 1967 on however, the fund failed to maintain stability despite the creation of Special Drawing Rights (SDRS). (Parity adjustments were numerous after this date: devaluation of the Pound and the Franc, revaluation of the Mark and the Yen, floating of the price of gold etc).

The adoption of the General system of floating currencies in 1973 may be considered to mark the end of the Breton Wood's mandate. At a point, the continued existence of the IMF was called into question. The institution survived by taking new functions: Management of unilateral structural adjustment in developing countries, and, from the end of the 1980s, intervention in Eastern countries with the goal of ensuring the re-incorporation of these countries into the international monetary system (Amin, op cit: 36).

Imperatively, and drawing from the above revelations, one might be tempted to ask why an institution (IMF) which once failed to deliver in Europe was drafted to take the lead in the economic recovery of Africa and other developing world? Surprisingly, and as if oblivious of the question of incompetence on the part of the IMF, the Western governments moved to implement the recommendations of the institution by granting of loans/aids to any African state that follows the IMF's economic liberalization policies. In Africa, this was midwived through SAP.

Development Forum informs us that the annual expenditure on health in the poorest countries average less than \$5 per person. In wealthier countries such as USA, Canada etc. health expenditure average \$400 per person (Onimode, op cit). This is because the poor are either entirely unemployed or underemployed. The situation is contrary to the decades before SAP reforms were introduced, and as the 1997 IMF Report has confirmed. According to it, in the decade prior to 1985, many countries experienced annual growth rates of employment in excess of 5 percent (including Ghana, Mali Mauritania, Niger, Tanzania and Togo) with some as high as 10 percent per annum (ibid).

Again, the loans and aid administration from the developed to underdeveloped African states remain economically retrospective. On this pedestal, it can be pointedly contended that, one of the biggest stumbling blocks to Africa's social development in modern times was the external debt crisis. Not only did the West, through the instrumentality of IMF deplete financial resources and channel capital flows from poor countries to rich countries through interest payments, it retarded economic development and increased poverty (Filomena, 1997).

As it is with loans, so it is with aids to Africa. The liberal economic policies, coupled with the integration of the continent into the international economic system, have been argued to have both the implications of indebtedness and poverty perpetuating (Onimode, op cit). At times, the aids are either insufficient or go with unfriendly conditionality. At other time, it is diabolically handled to be ineffective. For example in 1994, the whole of Sub-Saharan Africa received fund for Development and Industry (FDI) flows worth \$1.8bn, the size of flows to New Zealand. The whole of North Africa received \$1.3bn, the size of foreign investment in only Portugal. The Total official Development Assistance (ODA) to Sub-Saharan Africa in 1970-1996 was only \$39.157bn (Sharitayanam et al, 2001), and in 1999-2000, ODA for basic social services averaged \$4.9bn (World Bank, 2000). The IMF and World Bank note with sadness, that in some cases, aid is tied to purchases of goods and services approved by the donor country. Such restrictions reduce the effectiveness of aid and undermine the principle of country ownership (ibid). That is not all, the most pathetic of it all is that most of the so-called aids given end up not leaving the donor country. To say the least, this is exploitation, this is also imperialism, this is a means to maintain the dependency relationship with African continent, and this is as well the ill fate accompanying liberalism in Africa. Just as Irungu (1994) captures:

For every dollar allocated for US aid, up to 70 percents will never leave the US. Each year, roughly \$70bn will be spent on purchasing goods and services in cities such as New York and Texas. Up to 80 percents of all British goods and contracting British services... For every dollar that entered the continent in loans, grants (and) investment three dollars left as profits, debt servicing and interest.

### *3.3 Nigeria Leaders, Debt Crisis and IMF*

It is rather unfortunate, that African leaders know this too well but still accept the loans and aids even in the face of their incapacity to pay back. This is why some less corrupt and more reliable regimes such as the government of Shagari and Buhari did not succeed in getting the IMF loan. This is because these leaders were very convinced that their administrations cannot comply with all the conditionality or prescriptions that follow SAP. Again, these leaders considered the plights and sufferings, which the Nigerian masses will pass through if they accept complying with IMF's prescriptions. For example, the government of Shagari is noted to have assessed the IMF financial facilities after approaching the institution on loan assessment sometimes in 1983. Nigeria, under Shagari's regime sought to borrow \$2 billion from the fund, largely to help refinance, and had initiated negotiation with IMF. However its trade debt then

estimated to be between \$3 billion and \$5 billion has not been serviced, and Nigeria was unwilling to comply with IMF guidelines; therefore, his administration did not succeed in getting the IMF loan (Biersteker, 1993). And by the period Shagari left office in 1983, Nigeria was indebted to \$14,130.7 million (CBN Annual Report, 1988).

Also, under Buhari government; in spite of the fact that the Buhari administration serviced her foreign debts more than other regimes, the IMF, acting through the US blocked the loan application of \$1.6 billion which the government of made to Saudi Arabia in February 1984. This yet compelled Buhari's government to start negotiations with IMF in late February 1984. But after series of discussions, the government publicly criticized the IMF around mid-1985 suggesting a deadlock over possibility of assessing IMF loan (Banguna, 1987). And by the period Buhari left office, Nigeria owed \$18,034.1million (CBN, op cit).

However, unlike the above two regimes, Babangida, quickly accepted complying with the IMF prescriptions without considering the interest of the Nigerian masses. The simple logic is that the IMF wants to assert its hegemony over Nigeria at all cost, while Nigeria under Babangida's regime in the same ball game, wants to assert its supremacy over the Nigerian citizens, without considering their conditions. This is what made the various groups in Nigeria to vehemently oppose the SAP and Babangida's regime diametrically, with the resultant riots, demonstrations and conflicts in the midst of suffering because of the excruciating effects of SAP. Having forced Nigerians to accept the IMF, in a bid to keep the tentacles of Nigeria's dependency on Westerners and their international financial institutions going; the debt crisis plummets, since Babangida's regime was unable to service her debts which as at 1989 have risen to \$29.28 million and by 1993 when he left office, the country was indebted to over \$32 million (CBN, *ibid*). In fact, it has been argued that the IFIs (particularly, the IMF and World Bank) and the West should be blamed for causing the Nigeria's debt crisis. This is because,

At the close of the day a situation was created in the process of the international trade between Nigeria and the West was exploited by the IFIs and the West to create foreign debts and a debt crisis later in Nigeria. Also, the process was used to create stolen wealth for Nigerians, the IFIs and the West at the detriment of Nigeria (AFRODAD, *op cit*: 9).

#### 4. Conclusion

In summary, therefore, Nigerian leaders, IFIs and the West have individually or jointly involved in the plot to the looting of a huge volume of Nigeria's external loans as well as domestic resources. This has made the nation's debt crisis critical, coupled with the failed policies of IMF through its SAP economic reforms. Really, when a cost comparative analysis is taken of the social/environmental damage, political unrest, conflicts, insecurity and sufferings inflicted on Nigerians by the policies of the IFIs, particularly IMF's SAP and sovereign governments of the West, the irresistible conclusion is that Nigeria has already repaid all her debts in calculable terms. In fact what Nigeria needs is not debt repayment but payment of reparations to her years of colonial and neo-colonial exploitation by the West and the industrialized creditor nations. This exploitation was made possible through the dependency relationship and the introduction of liberal economic ideology in Africa and Nigeria in particular.

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# The Relationship between Organization Capital and Trade Structure and Its Policy Enlightenment

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## Abstract

Traditional international trade theory is mainly based on comparative advantage. In fact, structure of international trade is more complicated than what is illustrated by theory, which affects illustrating ability of traditional international trade theory. By introducing organizational capital and combining it with specialization and scale economy, this paper interpreted intra-industry and inter-industry trade and put forward relevant suggestions for policy.

**Keywords:** Organizational capital, Comparative advantage, Trade structure, Policy enlightenment

## 1. Traditional international trade theory and its shortcomings

Traditional international trade theory is mainly based on comparative advantage. David Ricardo's Theory of Comparative Cost and Theory of Comparative Advantage are evolved from differences of labor productivity between two countries in trade. In a 2\*2\*1 model, two countries with different labor productivities trade for two kinds of goods. One country possesses comparative advantage over the other country in production of the two kinds of goods. Under this circumstance, the country with lower labor productivity will produce and export one kind of goods that has relatively less disadvantage in export (namely with comparative advantage). The country with higher labor productivity will perform quite the reverse. The H-O Theory emphasizes on difference of factor endowment instead of difference of labor productivity, thinking that structure of international trade takes difference of factor endowment as a precondition, and every country produces and exports the goods that chiefly consume domestic rich factors and imports the goods that intensively consume domestic scarce factors. H-O Theory still follows traditional comparative theory. Before the appearance of modern trade theory, trade theory is basically derived from H-O Theory, following the way of factor endowment. But Leontief paradox appears as people try to prove the H-O Theory. Later, lots of new theories come into being in order to explain the Leontief paradox. However, practical structure of international trade is more complicated than what is illustrated by theory. For example, before the World War II, the trade between developed countries and developing countries is dominant. But afterwards, it is the trade between developed countries that dominates the international trade, which surpasses the trade quota between developed countries and developing countries. Meanwhile, the trade between developing countries is growing. In the aspect of trade structure, trade between developed countries is mostly intra-industry trade. Changes of international trade structure contribute to the emergence of intra-industry trade theory that completely gives up the two fundamental assumptions of traditional trade theory, namely unchanging returns to scale and perfect competition market. The representative is Paul R. Krugman, an American economist. The intra-industry trade theory is based on increasing returns and imperfect competition, by which to explain the intra-industry trade. Some domestic scholars, such as Zengqiang Fan and Tao Shang (2006) bring organization capital into a comparative advantage framework to explain the developed countries' comparative advantages over developing countries in international trade and international value-chain division. In their opinion, human capital and organization capital are different factors that impact comparative advantage. From a macro viewpoint, they introduce organization capital into national trade analysis for an initial try, which explores the traditional comparative advantage theory. In fact, enterprises' comparative advantages serve as the micro base for the comparative advantages in international trade.

Enterprises' organizational capital is an important factor forming comparative advantages in international trade. By introducing the organizational capital, this paper studies the relationship between organizational capital and international trade structure from micro and macro angles, and advances relevant policy suggestions.

## **2. Organizational capital and international trade structure**

### *2.1 Fundamental concepts of organizational capital*

The organizational capital concept can be traced back to Marshall in economic field. In analyzing the basic factors of production, Marshall (1961) regards organization as the fourth resource besides land, capital, and labor. Becker and Gordon (1966) take normal organization as a property form. In their opinion, the owner of normal organization is entitled to shape, change, dismiss, or sell the normal organization in order to reach certain goal. Therefore, to own normal organization means normal organization can be treated as property. Prescott and Visscher (1980) define organizational capital from an information angle. They think that the information about employees and tasks is a kind of asset for companies. Tomer (1987) analyzes the relationship between individuals and organization, from a human capital angle, chiefly focusing on the integration of individual gifts and individuals with the organization. He firstly divides human capital into enterprises' common human capital and special one. By combining with enterprises' other production factors, the special human capital can form different kinds of organizational capital. Edvinsson and Malone (1997) add organizational capital (includes innovation capital and procedure capital) into structural capital. Atkeson and Kehoe (2005), from a capital model aspect, regard enterprises' accumulated special knowledge as organizational capital. By studying American manufacturing industry, they conclude that the value generated by organizational capital is about two third of value of material capital.

In China, Junyi Weng (1999) begins a study on organizational capital relatively early. Following Tomer's thought, Junyi Weng (1999) regards organizational capital as the value existed in form of organizational capital and based on capital expenditure caused by organizational incentive and coordination. Zheng Fan (2002) thinks that organizational capital deposit is total organizational capital investment at certain moment, which reflects an enterprise knows how to coordinate its business activities. Organizational capital is also a force of an enterprise, which helps the enterprise avoid transferring this ability to competitors. Zengqiang Fan and Tao Shang (2006) agree that organizational capital is a factor connected closely with knowledge and human capital, emphasizing the impacts of effective and coordinative economic activities on organizational efficiency. Enterprises' organizational ability reflects the organizational capital. All views agree that enterprises' institutional regulations, organizational structure, organizational culture, and management structure are components of organizational capital.

In our opinion, organizational capital is the factor that hides in corporate operations and can generate added-values for an enterprise. It associates with specific organization and does not disappear due to leave of certain people. The enterprise that quite relies on key management talents or technological experts does not have strong organizational capital. An enterprise with strong organizational capital has intensive cohesion. Its organizational objectives are in accordance with individual goals to a great degree. Employees have high identification toward the organization. If employees leave the enterprise, what they take away is their individual capitals but not organizational capital. Organizational capital is an important factor that causes intra-industry specialization.

### *2.2 Organizational capital and specialization*

Just as what discusses above, real international trade structure is more complicated than theory, especially the intra-industry trade between developed countries after the World War II. Comparative advantage theory can not explain new conditions effectively, but intra-industry trade theory can in a sense. We think that this trade structure is caused by organizational capital to a great degree. Take the automobile trade between America and Japan for example. America and Japan are both capital and technology-intensive countries. They have similar resource endowments in automobile production. Neither has prominent comparative advantage. According to the comparative advantage theory, America and Japan will not have intra-industry trade in automobile industry. But that conflicts with the facts of international trade. At 70s and 80s in last century, Japanese automobile has occupied more market shares in American automobile market, which has aroused the America-Japan trade friction. In 2004, the market occupation rate of Japanese automobile in American automobile market reaches 30% ([www. baidu.com](http://www.baidu.com), and [www. pcauto.com.cn](http://www. pcauto.com.cn)). American General Motors and Ford enter Japanese market either. Although Germany is an automobile giant, its domestic automobile market is also taken by foreign automobile. The market occupation rate of foreign automobile reaches a new top, 36.1%, in 2006. In some new federal states, Toyota and Peugeot even occupy 50.5% of market shares. In 2006, Toyota and Peugeot export 1,240,000 automobiles to Germany, rising 5.2% than last year (Ministry of Commerce of PRC, from [www. baidu.com](http://www. baidu.com)). Indeed, the diversity of demand drives trade. But that is not the only reason. From an organizational capital angle, we think, in the automobile industry, enterprises have different organizational capital deposits, which will be internalized into products in an intangible way. As a result, products tend to have different qualities, styles, and costs, reflecting the diversity of products. Then, how does an organization achieve the diversity of products? In our opinion, organizations always have certain specialization and coordination. In a sense, any kind of economic organization is a

synthesis of various specialization and coordination. Therefore, organizational capital associates with certain specialization. So, organizational capital deposits indicate the degree of specialization. An organization with effective specialization and coordination has strong organizational capital. That is the degree of internal specialization and coordination in an economic organization. Besides, there is another kind of specialization that surpasses one organization and spans different organizations, such as General Motors and Toyota's specialization in automobile production. Specialization leads to diversity of products, which can satisfy customers' needs better. Organizational capital results in inter-organizational specialization, which impacts organizational capital conversely. For example, America and Japan's specialization in automobile production drives more investments in relevant organizational capitals, which enhances and solidifies the comparative advantages of two countries in automobile industry.

Furthermore, for joint ventures, the organizational capital is different from each party but still connects with specialization. Take Shanghai Volkswagen, a Sino-Germany Joint Venture, for example. The investment ratios are: Saic Motor 50%, Germany Volkswagen Group 40%, and Volkswagen (China) Investment Co. Ltd. 10%. The cooperation will last for 45 years, till the year 2030. Shanghai Volkswagen introduces technologies from Germany Volkswagen Group, adopts a production flow from Germany, and follows Germany Volkswagen Group's production management and quality management system, which makes Shanghai Volkswagen can achieve not only a spillover effect of technology but also a spillover effect of institutional capital from Germany Volkswagen Group, such as the precise quality, JIT delivery, and brand construction. On the other hand, Shanghai Volkswagen can also get a spillover effect of institutional capital from Saic Motor. But state-owned enterprise does not possess sufficient organizational capital deposit, which makes Shanghai Volkswagen fail to benefit more from Saic Motor. Institutional capital is an irreplaceable component of organizational capital. Therefore, as a joint venture, Shanghai Volkswagen inevitably possesses two parties' certain organizational capitals, but not a simple sum of two different organizational capitals. An organic combination of two organic capitals forms Shanghai Volkswagen's organizational capital, such as precise quality, JIT delivery, brand construction, and strong human capital deposit. Shanghai Volkswagen and its mother company, namely Saic Motor, and Germany Volkswagen Group realize the specialization and coordination in production scope, products brands, and products quality. Germany Volkswagen and Shanghai Volkswagen develop new-generation medium and high-class automobiles by cooperation, gradually bringing Shanghai Volkswagen's R&D into Germany Volkswagen Group's global development system. Guangzhou Honda develops joint venture's self-owned brand, going far away than Shanghai Volkswagen.

### *2.3 Organizational capital and international trade structure*

Apparently, organizational capital theory can well explain intra-industry trade phenomenon between developed countries. It complements the traditional comparative advantage theory. Next, considering the nature of industry, we analyze the relationship between organizational capital and international trade structure.

(1) Organizational capital and inter-industry trade. For inter-industry trade, organizational trade forms enterprises' comparative advantage to a greater degree. It can be explained by traditional comparative advantage theory. In other words, all parties that participate in international trade, based on exerting their comparative advantages, will export products that intensively consume domestic rich factors, and import products that intensively consume domestic scarce factors. Traditional trade is complementary and pursues to reach a complementary equilibrium, which has a self-reinforcement mechanism for a long period under the effect of path dependence mechanism. Therefore, the equilibrium is relatively stable. But if being affected by interfering factors (such as strategic trade policy), the original equilibrium will be broken and form new equilibrium. China's foreign trade (such as China-America trade, China-Europe trade) shows a kind of relative stable equilibrium. China's trade structure: China exports primary products, such as textiles, steels, and coats. These products are labor-intensive and resource-intensive. What China imports from Europe and America are mainly capital-intensive and technology-intensive products, such as Boeing airplanes, production machines and equipments. The complementary trade can form a relative stable equilibrium, which can explain why a trade war does not happen though trade frictions appear frequently in China-America trade and China-Europe trade. Because the complementary trade has a self-reinforcement mechanism, it further enhances different parties' comparative advantages respectively. Somebody has already warned China and India of same curse. That is, under the effect of path dependence mechanism, their low-cost advantages will restrain their further development. To break this equilibrium needs interfering factors. Along with the implementation of China's strategic trade policies and the upgrade of China's industrial structure, the complementary equilibrium will be broken inevitably.

(2) Organizational capital and intra-industry trade. For intra-industry trade, such as the intra-industry trade between developed countries, the introduction of organizational capital usually leads to imperfect competitive market structure. As far as the intra-industry international trade is concerned, take the automobile trade between America and Japan for example, because different enterprises (such as General Motors and Toyota) have different organizational capitals, different organizational capital deposit is one of important reasons for economy of scale. The two enterprises have different organizational institutions and cultures. From a viewpoint of organizational idea, General Motors stands for the

free and open American style that can be identified in the design and production of automobile products. General Motors' designers continuously inject inspirations and passions into their designs that may turn into well-known automobiles later. General Motors' designers never stop their pursuits for perfect automobile design. No matter what it is the shape or the function, General Motors persist in continuous innovation and pursue for perfect all the time. Toyota is one of top ten automobile manufacturers in the world. Its products have won a wide popularity. Toyota adopts Deming production, decreasing production costs, realizing JIT delivery and zero inventories, and applying total quality management. The demand-driven production integrates the Fordism with individualized production together. It is the operational system that establishes the status of Toyota. However, Toyota's corporate culture that emphasizes on dedication and slow promotion generates unfavorable effects on the enterprise. For example, because of the left of senior managers who work in North America regions, Toyota's business grows slowly. See table 1.

From Table 1, we notice that General Motors mainly emphasizes on technological innovation and team cooperation. Toyota lays stresses on products orientation, namely the energy-saving and environment- friendly cars, and services. Germany Volkswagen Group gives priority to technology. Therefore, though all belong to the automobile industry, these enterprises can focus on their special field, realizing market segmentation. Toyota mainly develops energy-saving and environment-friendly cars and emphasizes on services. General Motors mainly produces large luxury automobiles and energy-saving cars. Volkswagen pays attention to design new cars, being a leader of automobile fashion. These automobile manufacturers exert their scale economic advantages in segment market. In a sense, just because enterprises make best use of self organizational capitals and realize specialization and coordination, economy of scale appears. For example, General Motors chiefly explore the market in North America and Europe, Toyota in Asia, and Volkswagen in new market. To be specific, Faw Toyota realizes the sales of RMB 400,000 in China in 2008. Meanwhile, General Motors and Volkswagen increase their investments in Chinese market. Due to China's market scale, they realize economy of scale either. In addition, the three automobile manufacturers export automobiles mutually, which drives the intra-industry trade of automobile industry between three countries. For example, in 70s and 80s last century, Japan exports a great number of cars to America, which causes a serious trade friction between the two countries. In order to make Japan restrain its exports, America even employs the federal government. Meanwhile, America improves its automobile exports to Japan. The inter-industry trade grows energetically.

### 3. Enlightenments for China's foreign trade

Organizational capital and international trade structure theory offer important enlightenments for China's foreign trade.

(1) Adjust trade structure and develop intra-industry trade. Today's international trade is: there is trade based on comparative advantages between developed countries and developing countries and also the intra-industry trade between developed countries, and the later is dominant. The former is mainly determined by comparative advantages, and the later organizational capitals. At present, China's foreign trade is based on comparative advantages, mainly exporting low value-added labor-intensive products, and importing high value-added technology-intensive products. This trade structure has ever greatly driven China's foreign trade, but also brought about more trade frictions. Terms of trade are worse for China. Because comparative advantages are dynamic, along with the improvement of Chinese enterprises' competence and the rise of China's position in international specialization, we should energetically develop intra-industry trade.

#### (2) Increase investments in organizational capital

In our opinion, organizational capital is the factor that hides in corporate operations and can generate added-values for an enterprise. It associates with specific organization and does not disappear due to leave of certain people. For a country, its enterprises' organizational capital deposits determine its trade structure and status to a great degree. Presently, China's textile enterprises possess high organizational capital deposits. And China's foreign trade surplus is mainly from this industry. Just as American and Japanese automobile enterprises, and American software enterprises possess high organizational capital deposits, which give them advantages in world automobile trade, China must increase investments in domestic enterprises' organizational capital deposits, which will exert profound effects on the improvement of China's terms of trade and the change of China's economic growth way.

(3) Continue to develop comparative advantages. Comparative advantages are still the base for China's foreign trade at present. A viewpoint is China's labor advantages can last 15 years. But others think that the pure labor-dependent growth does not last. No matter how much China's labor advantages last, most people agree that low labor costs are still China's comparative advantages for a long time. Therefore, China's present trade structure based on comparative advantage theory is reasonable, which has been illustrated by the long-term foreign trade surplus. In China, the light industry and textile industry possess evident comparative advantages. However, comparative advantages are changeable. Along with the rising prices of certain factors, especially the price of labor, the prices of other factors, such as capitals, tend to dropping. Because of the long-last foreign trade bilateral surplus and the more than one thousand billion exchange reserve, capital is not scarce in China any more. It becomes a relative rich production factor. Therefore, comparative advantages are dynamic. We should develop China's comparative advantages from a dynamic angle. The

trade between America and British in history well illustrates the dynamics of comparative advantages. Before the industrialization, America imported a great number of textiles, steels, steamers, and engines from British. And America provided with resources for British. But after the Industrial Revolution, especially after the Second Industrial Revolution, America turned into a country that exports these goods.

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Table 1. Several automobile enterprises' organizational capitals.

Name	Organizational idea capital		Organizational structure capital	
	Corporate strategy	Corporate culture	Ownership structure	Organizational framework
Toyota	Focus on energy-saving and environment-friendly cars	Care about "human resources" Emphasize on services and products	Omit	Lean-Production organizational structure
General Motors	Technology innovation, develop electronic commerce, enhance development of environment-friendly products and technologies	Center on customers, sincerity and integrity, safety, continuous improvement and innovation, completely empowered team cooperation	Omit	Close organizational framework
Volkswagen	Technology innovation	Technology-based innovation, emphasize on leading technologies	Omit	Start to implement localization



## Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience

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### Abstract

In order to promote efficiency and realize democracy ideal, Italy transplanted adversary system in 1988. Because of rampancy of organized crimes and compulsory prosecution system and material truth ideal, reformer's effort was nibbled away by constitutional court of Italy. In 1999, the legislature of Italy amended Article 111 in Constitution which formed the constitutional basis of adversary system. Until now the reformers win. The Italian experience tells us: transplant of adversarial system is not only trial structure reform but reform of whole criminal procedure; in the course of internalizing the new system, a difficult repeated testing is the only way.

**Keywords:** Adversary System, Italy, Lessons

The new Italian Criminal Procedure Code of 1988 represented a revolutionary transition of continental inquisitorial procedure, because it was inspired by the Anglo-American adversarial system. The new Code had been experienced a series of changes since it came into force. The difficult history of criminal procedure reform in Italy can give a few lessons for continental law tradition countries which are going to transplant adversarial procedure system. The ambitious attempt to shift from a centuries-old non-adversarial procedure to an adversarial mode modeled upon practices in the United States has made the Italian experiment of great interest from the perspective of law reform: perhaps for the first time in the modern period, the Italian legal system is the subject of an international academic debate. (Elisabetta Grande, 2000) Italy, by adopting a largely adversarial criminal process within an inquisitorial tradition, stands poised to lead the development of a third way of delivering criminal justice. (David M. Siegel, 2006)

### 1. Transplant of Adversarial System in 1988

The Code of 1930, drafted in the fascist era, criminal proceedings were divided into two phases, the investigative stage ("istruzione") and the trial stage ("dibattimento"), with the investigative stage holding more influence over the proceedings. The Code provided for an investigating judge ("giudice istruttore") with extensive powers. On recommendation of the public prosecutor, the investigating judge would direct the investigation in order to "ascertain the truth." He would hear witnesses and experts, perform searches, seizures and experiments. The investigating judge could also summon and question the accused. All the evidence obtained in the course of the investigation would be recorded in the investigative dossier, upon which the trial judge based his decision. Originally the defense was forbidden to participate in the investigative phase. Later reforms and a series of decisions of the Constitutional Court in the 1970s allowed the defense opportunities to challenge or contradict information that was gathered. However, confrontational and adversarial initiatives were permitted in the trial phase, which took place only if the investigation had collected sufficient evidence. In most cases the trial phase did not add to what had been done in the investigative phase or disavow the conclusion reached during the investigation. The trial simply functioned as a control on what had been previously decided. (Illuminati Giulio, 2005)

Italy has what is probably the biggest backlog and slowest pace of litigation, both criminal and civil, among all Western countries. As estimated, there are about 1.5 million civil suits and more than 2.5 million criminal actions before the

Italian courts, and proceedings often last 15 years or more. (Macro Fabri, 1994) “The excessive duration of trials--for which Italy has been repeatedly condemned by the European Courts of Human Rights--has itself contributed to a multiplicity of disastrous consequences which violate citizens’ legitimate expectations from their system of justice.” (Di Federico, 1989)

Given the prestige enjoyed by the American legal system in general and by American criminal procedural in particular, it is not surprising that the Italian legislator, seeking a way to “open up” its criminal justice system to reflect its status as a modern democratic society, looked at the United States for its inspiration. “The new Italian Code appears as the most outstanding event in the 20th Century.” (Ennio Amodio and Eugenio Selvaggi, 1989)

### *1.1 Abolishing the Investigating Judge and Establishing the Principle of Adversariality*

The 1930 Code was based on the premise that all evidence should be available to a judge, regardless of how it was collected; no limit should be placed on the search for the truth. The drafters of the 1988 Code, however, were driven by an opposite belief. They believed that no investigation could be completely impartial; all investigators are affected by their personal points of view and backgrounds. (Glaucio Giostra, 2001) Furthermore, they believed that the act of investigating a crime itself creates bias on the part of the investigator. Because of this potential for partiality, the drafters of the new Code created a clear separation between criminal investigations and trials. (Michele Panzavolta, 2005) Under the Code, the individual parties conduct investigations, effectively abolishing the investigating judge and establishing *giudice per le indagini preliminari* (GIP). The GIP does not conduct any investigation before trial any more, whose function is to guarantee the legality of investigatory phase and protect the legitimate rights of suspects from government invasion. Any restraints of personal freedom requested by the prosecutor and any activities such as wire taps or other interceptions that impinge upon an individual's right of privacy, require GIP's authorization following a hearing.

Under the new Code, investigations are conducted by the prosecutor. The new code configures the prosecutor as a party to the proceeding and deprives him of the judicial powers he previously enjoyed at the preliminary inquiry. The prosecutor is no longer required to pursue the search of the truth in his investigation. Moreover, in presenting the evidence in court he is expected to be partisan (article 190 c.p.p.). According to the most authoritative Italian scholarship, that means that the Italian prosecutor is now no longer in charge of collecting evidence on behalf of the person under investigation.

Article 358 of the code of criminal procedure states that “the prosecutor completes every activity necessary under article 326 c.p.p. and also assesses the facts and circumstances favoring the person under investigation.” as read together with article 326 c.p.p., article 358 c.p.p. has been interpreted as asking the prosecutor to collect the evidence in favor of the suspect only for the very limited purpose of deciding whether to prosecute or not. In other words, in deciding if the evidence collected is sufficient to obtain a conviction at trial, the prosecutor shall not disregard the evidence favoring the person under investigation, because, as Cordero says, “if the prosecutor disregards (evidence favorable to the suspect), looking just in one direction, he risks a failure at trial or even before at the preliminary hearing; that the prosecutor must also consider the suspect's side is a matter of elementary caution, it is not a matter of inquisitorial opportunity.” (F. Cordero, 1998).

In order to balance the unequal position between the public prosecutor and the defense the new Code establishes the principle of adversariality in which the assistance of a lawyer is required when the public prosecutor or the police carry out investigation. There is a distinction between investigation that require the presence of the defense counsel, who must be notified in advance (such as the police or the public prosecutor interrogation of the suspect), and those that the defense counsel have the right to attend if they can be found and are immediately available, but which do not need to be announced in advance (such as searches and seizures). (Mireille Delmas-Marty & J. R. Spencer, 2002)

### *1.2 Cutting off the stream-line relations through the “Double-Dossier” System*

Inspired by American adversary system and strictly separate the trial phase from the investigative one, the new Code invented a new system—“Double-Dossier” System. The system was so named in opposition to the single investigative dossier that characterized the old system. In the 1930 Code, any record of evidence collected by the investigating judge was placed into the dossier. This dossier was then brought to trial and had other records of the evidence formed at trial added to it. The drafters of the new Code wanted to prohibit any use of the prior record at trial. They also wanted to shield the trial judge from the investigative file so that he would not be biased by the records contained therein. The idea was to not prejudice the judge's mind at the commencement of trial, thereby guaranteeing only the evidence produced during the trial would influence the judge. (Michele Panzavolta, 2005)

The result is a dual principle in use of the contents of the files. Only information in the trial dossier, which contains the formal steps for starting the prosecution and constituting a *parte civile*, the written accounts of investigative steps which cannot be repeated as well as any evidence taken ahead of trial at *incidente probatorio* and defendant's criminal record and other information that could be useful in assessing the character of the accused, may be used directly as evidence; but information contained in the public prosecutor's dossier may only be used negatively, in rebuttal. (Mireille

Delmas-Marty & J. R. Spencer, 2002)

### *1.3 Laying Down Strict Exclusionary Rules to Guarantee Trial-Centeredness System*

The aforementioned description of the severance of the dossiers should guarantee that investigative evidence does not affect the judge's decision at trial. Nevertheless, the Code, when drafted, contained two additional rules to further ensure that the judge will be shielded from the investigative record. First, the parties, particularly the prosecutor, could not take the initiative to read any prior statements or other investigative records at trial, except for those few exceptions specifically provided by law. The second rule prohibited police officers from testifying at trial as to witnesses' statements collected during the investigation. These two rules guarantee what has been called the "accusatorial golden rule": out-of-court statements may be used only to verify a witness' veracity; they cannot be used for the truth of the matter asserted. Thirdly, the severed co-defendant's prior statement to the prosecutor could be used for substantive purposes only if he failed to show up at the trial, but not if he attended and exercised his privilege against self-incrimination.

Despite these measures, the drafters of the Code feared that a system that excludes all investigative evidence could be too rigid and cause inefficiencies. For this reason, they provided some exceptions to the rule. One exception allows the parties to read a relevant portion of the investigative record when it has become absolutely impossible to otherwise present the evidence due to serious and unforeseen reasons (e.g., the witness' sudden death). The second exception allows the parties can make substantive use of prior statements of the accused that were rendered to the prosecutor, not the police, once the statements are used at trial to discredit the accused. The third exception is about hearsay rule: if the statements were collected at the crime scene immediately after the action occurred, they can be used at trial for substantive purposes only after they have been used to discredit a witness.

### *1.4 Shifting Responsibility for the Production of Evidence to the Parties at Trial*

In order to transfer the powers of court investigation to parties the new Code changes the traditional powers separation in court. Unlike the former criminal procedure model, in which the entire proof-taking process was officially conducted and the fact-finding process was officially controlled (since the evidence was assembled by judges and other impartial officials and produced in court by the trial judge), the new code, in principle, took the opposite approach, envisaging a system of adjudication in which the evidence is essentially presented by the parties.

Accordingly, in sharp contrast with a system where the presiding judge used to first interrogate the defendant and the other private parties, and then, ex officio, examine witnesses by exclusively questioning them, introduce documents, examine expert witnesses and finally admit and examine the evidence presented by the parties, the Italian criminal procedure code now provides that "evidence is received upon party's request" (article 190 c.p.p.). Thus, each party presents his own case, calls his witnesses and examines them.

The trial begins with the discussion of any preliminary matters, such as venue or claims of procedural error. Then the prosecutor, like his American counterpart, makes his opening statement. This is followed by the opening statements of the "private parties," i.e., plaintiffs asking for damages and parties "civilly accountable for the fines." The injured party of a crime can indeed intervene in the criminal action and become a co-plaintiff together with the public prosecutor.<sup>n42</sup> Subsequently, it is the accused's turn to make his opening statement. Each side indicates the facts to be proven and the evidence they intend to introduce. The prosecutor presents evidence first, then it is other parties' turn to produce evidence. As there is no a prima facie case to be proven by the prosecution (due to the absence of a bifurcated trial where the jury is the ultimate trier of facts), this order of evidence production may be subject to derogation upon agreement by the parties.

Unlike under the previous code, the defendant can decide not to take the stand. Unlike the common law system, moreover, the defendant is given the opportunity to issue spontaneous statements whenever he deems it necessary to do so. Questions are posed to witnesses, technical consultants and private parties by the parties through direct, cross and re-direct examination. Answers to leading questions are not admissible during direct examination, but they are admissible during cross-examination. (Elisabetta Grande, 2000)

### *1.5 Speed up the Trial Hearing through Various Special Procedures*

In order to speed up the trial hearing, procedural alternatives have to the usual forms of ordinary proceedings have been planned, which include abbreviated judgment (*Giudizio Abbreviato*) and application of penalty by request of the parties (*Procedimento per Decreto Penale*) and criminal order (*Procedimento per Decreto Penale*) and direct judgment (*Giudizio Direttissimo*) and immediate judgment (*Giudizio Immediato*). The last two procedures are trials without preliminary hearings and the judge could make his decision based on the investigatory dossier. The other three procedures are simplified procedures without trial. Abbreviated judgment and application of penalty by request of the parties, which has embodies the party-dominated "negotiated justice", have some similarities with American plea bargain system. The Italian drafters wanted to use these two procedures to reduce trials by 70-80%. (Stefano Maffei, 2004)



In the original version of the abbreviated trial, the defendant and the prosecutor agreed to a judgment on the investigative file. In other words, both defense and prosecution waived their rights to trial but not to a judgment. The abbreviated trial serves the interests of both parties. The prosecution obtains a quicker resolution of the case, while the defendant, on the other hand, receives a reduction in penalty. If the defendant is found guilty, he is sentenced to a penalty reduced by one-third of the regular sentence. (Freccero, 1994) Application of penalty by request of the parties has some resemblance to the plea-bargaining conducted in the United States. In this deal, the defendant's attorney and the prosecutor agree on a penalty for the defendant. The defendant is then accorded a reduction of up to one third of this penalty. Under the original Code provision, the reduced penalty bargained for could not be longer than two years imprisonment. By reaching an agreement on the penalty, the accused waives his right to trial and to a full judgment. (Michele Panzavolta, 2005)

## 2. The Limitation of the Reform

### 2.1 Contamination of Judges by the Trial Dossier

In Anglo-American criminal trial, the jury as truth-finder has no legal path to seize any information about the case before trial. In order to guarantee the disinterestedness of the jury, when indicting the public prosecutor should not transfer any evidence to the trial chamber. The new Code of Italy also adopted some measures to protect the judges being effected by the one-side information of public prosecutor, which requires only trial dossier can be transferred to judges before trial. A few exceptions had been laid down, some exceptions may have practical reasonableness, because such measures that cannot be repeated in trial must be conducted before trial are not practicable, but evidence such as previous conviction and other character evidence, which are usually excluded in America, can openly and legally come into trial judges sight, so the new Code cannot protect the trial judges contamination from the dossier.

### 2.2 Not Passive Enough Judges

The Italian trial is not entirely party-controlled. There are four departures from a purely adversarial approach to fact-finding. First, if parties consent to the admission of hearsay, the trial judge may require original proof (i.e., non-hearsay evidence), according to article 195 c.p.p., n.3. Second, the presiding judge, is allowed not only to question witnesses at the conclusion of the examination (as in the U.S. system), but also to indicate to the parties new issues that need to be addressed during the examination. Third, expert witnesses, always officially appointed, unlike in the U.S. system, may be examined ex officio in court (article 224 c.p.p., n.1, but also arts. 468 c.p.p., n.5 and 501 c.p.p., n.2). Moreover - and this has proven to be a very influential provision in a legal system rooted in the continental tradition - article 507 c.p.p. provides that, after all the evidence has been produced in court, whenever absolutely necessary, the trial judge is subsidiarily authorized to examine proof sua sponte. The presiding judge will then examine the witnesses he himself has produced and decide afterwards who among the parties will pose questions first (usually it is the party that appears to be favored by the witness's statements). (Elisabetta Grande, 2000)

### 2.3 Limited Application of Special Procedure

Although the procedure known as *giudizio abbreviato* is available for all crimes, the request of the defendant is not the only condition for applying such procedure. Only the request are permitted by public prosecutor first and the judges then can the abbreviated judgment apply.

With regard to Italian plea bargain, there are at least three differences between Italian plea bargain and American one: first, in Italy defendants can plea bargain during the preliminary hearing and even during the trial, when all the investigations and the paperwork have been concluded; second, plea negotiations are limited to offenses involving only pecuniary fines or where the sentence, as a consequence of mitigating circumstances, negotiations, and the statutory sentence reduction of up to one third, does not exceed 2 years imprisonment; third, in the Italian system the prosecutor and the defendant do not bargain over the nature of the crime for which the defendant pleads guilty. (Nicola Boari, 1997)

### 2.4 Limited Defense Power to Investigate the Case

The new Code has authorized the defense lawyer such broad rights as to be there while interrogation of the suspect and free communication with the his client and dossier reading, and also established the principle of adversariality according to which the defense lawyer can monitor almost all activities of the investigative organ, which may be envisaged by his American counterpart. The Code also conferred powers of investigation on defense counsel; however, "Those rights were rather limited and theoretical, in particular because there was no possibility of authenticating statements received by the defense counsel." Because the public prosecutor had been one partisan and not judicial officer any more, the defense counsel possibility of getting some helpful evidence from the public prosecutor was thin, such inequality between the public prosecutor and the defense can eventually affect the integrity of the trial. (Mireille Delmas-Marty and J. R. Spencer, 2002)

## 3. Return to Inquisitorial System

### 3.1 Conservative Behavior of Italian Constitutional Court

The 1988 new Code transformed the structure of Italian criminal procedure from judicial officer dominated inquisitorial

system to party dominated adversary system. But “the law in book” doesn’t mean “law in action”, the most important condition for implementation does not rely on the Code’s perfect words, but on the law-executors. The written laws require a certain amount of acceptance from the governed; otherwise, they will encounter resistance in their application and other forms of rejections. Such a system which ideal is so contradicted with continental traditional ideal was doomed to meet its difficulties in implementation. The bellwether that defeated the new Code was the Italian constitutional court. In Italy, any provision of law can be submitted to the Constitutional Court for review to determine whether this law is consistent with or in violation of the Constitution. These submissions can be made in the course of a judicial hearing only when there is doubt about a provision's validity. The constitutionality issue can be raised by either the presiding judge or by parties provided that the complaint is not considered groundless by the judge. (Michele Panzavolta, 2005) Prosecutors and judges submitted a large number of provisions of the new Code to the Constitutional Court. In particular, the allegations were directed against those rules that supported the sharp distinction between investigations and trials.

### 3.1.1 Invalidating the Prohibition against Police Officers Testifying about Statements Collected in the Investigations

The Constitutional Court agreed with these complaints and delivered a first blow to the Code in Decision n. 24/1992. Here the Court invalidated the prohibition against police officers testifying about statements collected in the investigations. In the view of the Court, the provision violated the principle of equality because it prohibited police officers' hearsay testimony while a similar ban did not apply to ordinary witnesses. Unfortunately, the Court failed to see the essential role this provision played in separating the phases of the criminal process.

### 3.1.2 Treating the Out Court Witness Statements as Evidence of the Facts at Issue

Pursuant to Art.500 of the Criminal Procedure Code impeachment of witnesses for statements made at trial, inconsistent with out-of-court statements, had been reduced to a mere credibility test. The Constitutional Court endorsed the Italian judiciary's criticisms by its Decision No 255/1992, in which it declared paragraph 2 of Art.500 of the Criminal Procedure Code unlawful, since the principle styled as “non-dissipation of evidence”, was to be deemed also applicable to the system of criminal procedure newly introduced. Following this decision, any statements made by witnesses to the prosecutor came, through impeachments of witnesses due to inconsistency or silence at trial, to be treated as evidence of the facts at issue. (Ennio Amodio, 2004)

### 3.1.3 The Severed Co-defendant Who Attended Trial but Exercised His Privilege against Self-incrimination could Have His Prior Statements Read

Decision n. 254 in 1992 declared Article 513/2 unconstitutional, thus permitting the admission of out-of-court statements of a severed co-defendant called to testify in the other defendant's trial, regardless of whether the severed defendant chose to exercise his right to remain silent. The Court justified its decision on the ground that it was unreasonable to treat a severed co-defendant and a joint co-defendant differently. If a joint co-defendant who attended trial but exercised his privilege against self-incrimination could have his prior statements read, a severed co-defendant should be treated in the same way.

### 3.1.4 The Judge’s Veto Power to Plea-Negotiation on the Basis of the Rehabilitation of the Convicted Person

In the Italian Constitutional Court's 313/1990 decision, issued the year after the new Italian Code introduced the *patteggiamento*. In this decision, after repeatedly stating that the judge's power of control over the agreement was not just a formality, the Constitutional Court held that art. 444.2 of the Italian Criminal Procedure Code, which regulated the *patteggiamento*, was unconstitutional because it did not expressly give the judge the power to control the congruence between the sentence agreed upon by the parties and the seriousness of the offense, and thus deprived the judge of the power to enforce art. 27.3 of the Italian Constitution, which establishes that the goal of punishment is the rehabilitation of the convicted person. Therefore, this decision attempted to reaffirm and increase the powers of the judge against the parties regarding the *patteggiamento*. (Maximo Langer, 2004)

### 3.1.5 Wide Interpretation of the Court’s Authority to Order Extra Evidence

Among the Constitutional Court's many decisions that have altered the original accusatorial approach, a new interpretation has been provided as to the rule by which the trial judge's power to call witnesses in the interest of justice had been restricted to exceptional cases. By Decision No 111/1993 n16, it was held that, if the prosecutor fails to offer any evidence at trial, out of negligence or lack of initiative, then the judge may deal with any such failure by ordering that useful items of evidence be gathered to establish the truth. The Constitutional Court, referring to the pursuit of truth, has stated that the parties do not have a completely free hand with the evidence. (Mireille Delmas-Marty and J. R. Spencer, 2002)

## 3.2 Factors Contributing to the Adversarial System's Failure

### 3.2.1 Reality: Rampant Organized Crime

Mafia-type organizations are so deeply interwoven into the fabric of Italian society that they have become part of the

darker side of Italian culture. (Ottavio Campanella, 1995) At the end of 1987 the biggest trial--that of Palermo involving 454 defendants--lasted 20 months and ended with more 300 convictions. Organized crime became one of the most important factors that caused the trial delay, Italy used the method to severed trial of organized crime defendants to solve such problem. But such method brought another problem: how to judge the admissibility of the confession of the severed defendants. As the Part One said, Italy adopted a very strict exclusionary rule to protect the defendant's right of confrontation. (Louis F. Del Duca, 1991)

In 1992, two valorous prosecutors were brutally assassinated by the mafia. All the institutions of the Italian State had to display their firm determination in fighting the mafia. This justified the need for emergency legislation aimed at strengthening the evidentiary powers available to law enforcement officials. Parliament passed a bill in August of 1992 that implemented the Court decisions and increased the exceptions to the rule that the only evidence admissible was that collected at trial. For example, the parties were allowed to introduce records of other proceedings and decisions taken in collateral cases. Also, out-of-court statements of witnesses not present at trial could be used more extensively. This legislation was enacted by the State in response to attacks by organized crime. (Illuminati Giulio, 2005)

### 3.2.2 System: Lacking Separation between Adjudicating and Prosecuting Members of the Judiciary and Compulsory Prosecution Principle

The Italian prosecutor is a career bureaucrat who has a lifetime position with almost complete autonomy. A mechanism for automatic wage increases keeps the salaries of the judges and prosecutors at the top of the pay scale for public employees. (William T. Pizzi & Luca Marafioti, 1992) The lack of separation between adjudicating and prosecuting members of the judiciary - consistent with the previous officially-controlled system in which all officials were in charge of discovering the truth and, consequently, of collecting and introducing evidence both for and against the accused - denies defendants a fair trial under the new system for collecting and presenting evidence.

The notion of compulsory prosecution has found its way into the 1948 Italian Constitution. Its rationale has been the same fostering of prosecutorial impartiality that has justified its introduction in the German system. According to this theory, the lack of discretion on the side of the prosecutor would avoid future unfair treatment of crimes perpetrated by the political regime. (Elisabetta Grande, 2000) The compulsory principle can explain on the one side that why the public prosecutor only have limited power to plea bargain with the defendant, on the other side, the Constitution Court had used the principle to uphold the judge's power to find material truth. By Decision No 111/1993 n16, it was held that, if the prosecutor fails to offer any evidence at trial, then the judge may deal with any such failure by ordering that useful items of evidence be gathered to establish the truth. The Constitutional Court believed that, in the Italian judicial system - one governed by the "compulsory prosecution" principle - it cannot possibly be conceived that the prosecutor's lack of initiative may prevent the trial judge from establishing that an offense was or was not committed. (Ennio Amodio, 2004)

### 3.2.3 Culture: Search for "Material Truth"

Under the Continental tradition the evidentiary field rests within the scope of the decision maker's domain, whose inquiry is understood as a tool to be handled with a view to protecting the public interest. As a consequence, the comparatively passive role vested in the trial judge in proof taking by the 1989 Code, patterned after the adversarial model, has been perceived by the Italian judiciary as a barrier to elicit the truth.

As one of the continental countries, Italian traditional criminal procedure model was premised on the assumption that an impartial, capable researcher could best ascertain the facts of a case. By contrast, the new Code is rooted in the premise that there is not an objective way to ascertain facts or conclusions, but that truth is best found through confrontation of differing points of view. The traditional view of the fact-finding process is still prevalent today in Italy, both among the judiciary, and among the public. In order to restore the power the trial judge's power to elicit material truth, the Constitutional Court had declared many Articles of the new Code unconstitutional, just as what Milan University professor Amodio said in evaluating the "non-dissipation of evidence" principle: such principle was "a novel disguised version of the material truth principle at the root of Continental criminal justice." (Ennio Amodio, 2004)

## 4. The Re-Establishment of the Adversary Principles

In 1997, Parliament decided to re-establish the original accusatorial choice. Law 267/1997 abolished some of the many exceptions to the principles of orality and immediacy in order to place the trial stage at the center of criminal proceedings again. In particular, the reform stated previous statements of an accomplice, are separately inadmissible for determining the defendant's guilt as long as the accomplice remained silent at trial. The reform moved toward a restoration of the accusatorial process, preserving the defendant's right of confrontation. However, the Constitutional Court reviewed the revised provisions and concluded that they were an unconstitutional violation of the equality clause. The provision forbid the use of an accomplice's previous statements where the accomplice was silent at his trial, but did not forbid the previous statement of a witness. The reasons stated for the decision display the ideology of the Constitutional Court. The Court again recalled the principle that no judicial activities should be wasted and no evidence should be lost. Parliament and the judiciary were now in open conflict and the judiciary was prevailing. (Illuminati

Giulio,2005) The Constitutional Court's systematic misinterpretation of the Constitution made it clear that Parliament would have to amend the Constitution to explicitly state the intended procedural system. Constitutional law 2/1999 reformed Article 111 of the Constitution by introducing five new sections.

The sections added to Article 111 make it a very long article compared to other articles of the Italian Constitution. The amendment added five sections that read as follows:

- (1) Every judicial matter should be carried out under the principle of due process of law.
- (2) Every trial should guarantee each party equal standing to offer evidence or contrary evidence in front of an impartial judge. The law also guarantees that trials should be of a reasonable length.
- (3) In the criminal trial the law guarantees that a person accused of a crime should be privately informed as soon as possible of the nature and the reasons for the charges against him; that the accused should be assured enough time and suitable conditions to prepare his defense; that the accused should be allowed the opportunity, before the judge, to examine or to have examined any witnesses against him; that the accused have the right to subpoena favorable witnesses at trial on an equal basis with the prosecution, as well the right to produce other evidence in his favor; and that the accused be assisted by a translator at trial if he does not understand or speak the language used in the trial.
- (4) The criminal trial is based on the principle that evidence should be heard in front of the parties and each party should be able to offer contrary evidence and to challenge opposing evidence. The accused cannot be proven guilty upon declarations of anyone who willingly avoided being examined by the accused or by his lawyer.
- (5) The law regulates cases in which evidence is not presented in a manner such that the accused may challenge the evidence at trial by consent of the accused, due to verified objective impossibility or as a result of proven illicit conduct.

As the Constitution Amendment passed, the Italian legislature also enacted new provisions to guarantee the Amendment's implementation. Act No. 63/2001 primarily drew inspiration from the principle of "completion of the proceedings", pursuant to which a co-defendant whose position has irrevocably been defined by conviction or acquittal is treated as a witness and remains under an obligation to testify, but is entitled to be assisted by counsel. As a departure from this principle, a co-defendant not prosecuted on the same offense may only be heard as a witness if he was warned, when interrogated in the pretrial stage, that, should he give evidence against accomplices, he would be treated as a witness at the trial. Except for this, any co-defendant shall have the right of silence and may, accordingly, escape cross-examination, thus making any statements previously made by him to the prosecutor inadmissible.

Except to re-establish the strict evidence rule, the Italian legislature also adopted some other measures to strength the adversarial system.

Firstly, after abolishing the investigative judges, the task for pretrial judicial control and preliminary hearing was carried on by the GIP, who did not investigate the case any more. But because the GIP took these two tasks together, his decision made during the preliminary hearing may be affected by the information which he had got before hearing. In 1998, the legislature of Italy decided to set up a special organ - *the giudice dell'udienza preliminare* (GUP)-to conduct the preliminary hearing, thus the GIP's function remained to pretrial judicial control.

Secondly, defense lawyer's powers of investigation were bettered. The law of 7 December 2000, no.397, entitled "rules about defense investigations", extended the powers of defense to allow them to conduct their own investigations: he can interview people who may be able to provide information, he can be authorized by a judge to enter private places or places where the public is not allowed and he can examine seized evidence. Furthermore, he can engage substitutes, private authorized agents and technical consultants to carry out all these activities. All evidence found by the defense counsel is then collected in a specific dossier, called the "defense counsel's dossier". (Mireille Delmas-Marty & J. R. Spencer, 2002)

Thirdly, the enormous caseload of the Italian system itself adds to this cycle of inefficiency. Various reforms have recently been adopted to cope with this backlog. One reform issued in 1998 provided that minor crimes be judged by a single judge rather than by the traditional panel of three magistrates. In 2001, the legislature also introduced justices of the peace to deal with petty offenses, thereby relieving the tribunals from deciding some cases.

Despite these reforms, there is still tremendous pressure on the system to be more efficient. Law no.479 of 1999 removes the need for the prosecutor's agreement while the defendant initiates a request for abbreviated judgment. Another important change introduced in 1999 is that the defendant may now ask the judge to carry out further investigation-thereby removing the power of the judge to reject the request to proceed by abbreviated judgment because he did not have enough evidence before him to reach a decision in the case. The reform of Italian plea bargain goes the same route with abbreviated judgment: extending its application. The limitation of up to five years of imprisonment was introduced by statute in June by Law 134/2003.

## 5. Conclusion

The historic mixture of adversarial and non-adversarial characteristics implemented by the 1989 Italian Code of Criminal Procedure are reflective of that country's concern with the imposition of checks on abuses of power by dividing the functions of the players and the phases of the disposition of a criminal case. (Rachel A. Van Cleave, 1997) Italian transplant of adversarial system is not only trial structure reform but reform of whole criminal procedure. From the perspective of furthering the proceeding, the trial phase is just one phase of the criminal procedure. Therefore, if we put all our effort on the trial procedure reform and neglect other corresponding procedure reforms, the result may be out of our expect and the different part of procedures may be counteract each other. Adversary criminal trial implements strict trial-centeredness principle: the investigative phase and trial phase are rigorously divided into two procedures, only the evidence that the accusing party has obtained are confronted in open court by the defense party and goes through the barrier of evidence rules be used as the basis of the decision. Accordingly, transplantation of adversary trial must involve reform of investigative procedure and evidence rule. Or the transplant will be fruitless. Furthermore, in adversary criminal trial, the judges are passive and the public prosecutor becomes "public interest party" of the proceeding, in order to repair the ingrained inequality between the parties and realize the goal of fair trial, extending the defendant's defense power is one of the necessary measures. Adversary criminal trial is also one high-price activity, if we cannot design corresponding low-price procedure to shield out such unnecessary cases, the remained cases which really need be taken seriously cannot come into real battle field.

As we all have seen, the adversarial reform of Italian criminal trial has adhered to such whole reform view. Division between the trial phase and investigative phase, establishment strict exclusionary evidence rules, extension of the accused defense power and creation of various efficient procedures all are the concrete embodiment of such view. No others continental system countries, including Japan, can compare with the Italian's reform with respect of depth and strength of the reform.

Whether the transplanted system can reach the expected result of the legislature in judicial practice are conditional, one of the most important factors is whether the ideal of the new system can be internalized by the law executors. In the course of internalization, a difficult repeated testing is the only way. In a comparative analysis of political cultures, Seymour Martin Lipset (1996:21) writes that due to its long-standing emphasis on individualism and mistrust of government, "American began and continues as the most antistatist, legalistic, and rights-oriented nation." American government, including the judiciary, accordingly, is designed to fragment and limit power.

Because of such deep mistrust of government power, the American criminal trial emphasized the self-protection of the parties, not judges or other officers. But the continental countries always emphasize the judge's obligation to find the material truth *ex parte*, which is another power trust culture. Accordingly, the Constitutional Court of Italy felt incompatible with the new Code. The new Code not only weakened the power the judges but also does not satisfy the above ideal of continental Europe tradition which requires to finding object truth. A series of constitutional decisions of the Italian Constitutional Court are inevitable product of these two cultures contradiction. With respect to the present materials, the Italian legislature has won the fight with the judicial system, but the prospect of re-reform remains to be observed.

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## Retrenchment in Malaysia: Employer's Right?

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### Abstract

There are several ways to put a contract of employment to an end. One of them is by way of retrenchment. Termination of employment by way of retrenchment may be relevant when the employer restructures his business. The focus of this article is to evaluate the application of the principle Last in First Out (*LIFO*) in the case of retrenchment in Malaysia. This article will also assess to what extent the courts defend the prerogative of the employer to retrench his employee in the case of redundancy.

**Keywords:** Employment law, Retrenchment, *LIFO*, Employer's power, Redundancy, Industrial Relations

### 1. Introduction

Retrenchment may happen not only during recession but it is also relevant when the economic situation is good. Apparently, termination of service is permitted by law for operational reasons, which is commonly known as redundancy. The word redundant however, is not as simple as it sounds as it is, in fact, it is very subjective. Redundancy occurs when the employee is no longer required to work. There are situations where a contract of employment is subject to some inevitable change. Redundancy may happen due to several reasons such as a downturn in production, sales or economy, the introduction of technology, business relocation, a business merger or a business is sold or restructuring of a company.

Furthermore, with the introduction of automation, industries usually employ very few workers. At the same time, as a result of reorganization, scaling down operation or closure of business, an employee's services may become redundant and thus, his service may be terminated. Thus, in our context, retrenchment means a discharge of surplus of workers. However, retrenchment does not include termination of contract due to other reasons such as illegality or frustration or dismissal on the ground of misconduct (Ayadurai, 1998). In short, retrenchment occurs as a consequence of redundancy. The words of downsizing and retrenchment are used interchangeably. However, the main legislation governing this issue, that is, the Industrial Relations Act 1967, does not define the meaning of redundancy. Thus, for this purpose, reference should be made to common law principles.

In exercising retrenchment, not only must the employer have good grounds to do so, but, the law clearly provides that the employer is required to exercise it fairly. It is the practice that the recognized trade union must be consulted when an employer proposes to make the employee redundant. Section 13(3) of Industrial Relations Act 1967 recognizes management's prerogatives to employ workers or to terminate them with a proper cause or excuse. While the court generally will not interfere with the *bona fide* exercise of power given to the management, it is equally important to note that the employer must provide a proper cause or reason before terminating the employees. Due to this reason, it is the employer who decides on the number of employees to be employed or to be retained by considering their viability and profitability of the business. Thus, when the employer is of the view that the number of the employees is too excessive, he is entitled to discharge the excess employees. Similarly, redundancy occurs where the business needs a lesser number of employees or where the employer had suffered a business downturn due to its loss of major clients as could be seen in *Stephen Bong vs. FBC (M) Sdn Bhd & Anor* (1993) where the court had confirmed retrenchment exercise made by the employer. As there was a clear shrinkage of work, thus, the employees were made redundant. On the same note, in

the Kumpulan Perubatan (Johor) Sdn Bhd vs. Mohd Razi Haron (2000), the Industrial Court held that the massive retrenchment made by the employer was a genuine measure and not done for any ulterior motive to victimize the employees. Further, the court found no evidence that the employer had acted with *mala fide* in the retrenchment process.

## 2. Reference to the industrial court

In redundancy, the retrenched employee has the right to bring the matter to the Industrial Court should he feel his termination of service is unfair and without just cause or excuse (Aminuddin, 2003). However, if the retrenchment exercise is done in accordance with the relevant procedures, then there is a very little chance for the employee to win his case in court. This can be evidenced by looking at the Industrial Court's decision in Plusnet Communication Sdn Bhd & Ors vs. Leong Lai Peng (2005) where it was held that a redundancy situation did exist in this case as a result of reorganization and downsizing exercise made by the company to minimize losses. In the event the issue of retrenchment is referred to the Industrial Court, it will generally look at the following issues:

- (a) whether the retrenchment was justified, that is by looking at the circumstances of the case;
- (b) whether the employer is in a position to give the true grounds for the retrenchment; and
- (c) whether the retrenchment is made *bona fide*.

On justification of retrenchment, there are matters to be looked at by the employer, such as, is there any surplus of employees to allow retrenchment on the grounds of redundancy? It is important to note that there should be a valid reason for redundancy. The main question the court has to consider is whether there was in fact, redundancy. The court is aware that an employer may restructure his/her business and in order to realise that mission, it may involve reduction or downsizing of manpower, in which case, some of the employees have to be removed as they are no longer required by the employer. In 1998, the Industrial Court in TWI Training and Certification (SE Asia) Sdn. Bhd. v Jose Sebastian ruled that as long as the measure taken by the employer is a genuine commercial and economic consideration, it has the managerial prerogative to decide in the best interest of its business arrangements to identify its own area of weakness and then proceed to discharge its own surplus. On this issue, Gopal Sri Ram JCA in William Jacks & Co (M) Bhd vs. S. Balasingam (1997) on p. 241 said:

*"The facts before the Industrial Court showed that the applicant was surplus or redundant which justify retrenchment within the meaning of the test ... Retrenchment means the discharge of surplus labour or staff by an employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action (per SK Das J in Hariprasad vs. Divelkar 1957 AIR SC 121 at p 132). Whether the retrenchment exercise in a particular case is bona fide or otherwise is a question of fact and of degree depending on the particular circumstances of the case. It is well settled that the employer is entitled to organize his business in the manner he considers best. So long as the managerial power is exercised bona fide, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered and indeed duty-bound to investigate the facts and circumstances of the case to determine whether the exercise of power is in bona fide".*

In Hotel Jaya Puri Bhd vs. National Union of Hotel, Bar & Restaurant Workers & Anor (1980), a dispute arose between the National Union of Hotel, Bar and Restaurant Workers (the union) representing the workers and the employer. In this case, a number of workers employed by the Jaya Puri Chinese Garden Restaurant Sdn. Bhd. (the employer) were retrenched by the company as the business was closed due to losses. The restaurant was carried on in premises belonging to the Hotel Jaya Puri Berhad. Both the hotel and the restaurant had the same managing director. The union claimed that those workers were in fact dismissed and not retrenched as the hotel business is still in operation. The Union sought to have the Hotel joined as a party as it had a view that the workers were in fact the employees of the Hotel. The Hotel contended that it was not the employer of the workers in question and thus, the termination of the workers was a retrenchment. However, they are not eligible to retrenchment benefits from the employer (the restaurant) as none of them had completed three years' minimum service. On to the issue of retrenchment, the Federal Court confirmed the Industrial Court's decision in holding that the closure of business was perfectly legal and proper. The termination of service of these workers could not be considered as dismissal and compensation awarded could not be on the basis of dismissal.

In exercising prerogative, the law also prescribes that the employer has the duty to ensure that retrenchment is properly exercised to avoid any claim of wrongful dismissal. It is the rule that if the retrenchment is carried out for collateral purpose such as to victimize the employees for their legitimate participation in trade union activities, such termination is deemed to be made without a just cause or excuse and that termination may be regarded as on *mala fide*. The courts are firm on this point. This stand can be seen in Harris Solid State (M) Sdn.Bhd. & Ors vs. Bruno Gentil Pereira & Ors (1996). In this case, the first appellant (the employer) terminated the services of the 21<sup>st</sup> respondents (the employees) who were all members of the union and the reason given was that the employer would cease operation with effect from 22 September 1990. The employees contended that the termination of the employment is tainted with *mala fide* and



actuated by victimization and unfair labour practice. Based on evidence, the court found that the employer dismissed the employees purely because of their trade union activities. The court then ordered the employees to be reinstated to their employment within one month of the date of award without loss of wages, allowances, bonus, seniority, service or benefits whatsoever.

### 3. Law governing redundancy

In the Malaysian context, section 12(3) of the Employment Act 1955 provides that the employees may be terminated from service when such termination is attributable wholly or mainly to the fact that:

- (a) the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed;
- (b) the employer has ceased, or intends to cease, to carry on the business in the *place* at which the employee was contracted to work;
- (c) the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish;
- (d) the requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish.

The above mentioned section is *mutatis mutandis* to section 81(2) of the Employment Protection (Consolidation) Act 1978 of England. As the definition of redundancy is not defined in the Industrial Relations Act 1967, the court in Credit Corporation (M) Bhd vs. Choo Kam Sing & Anor (1999) has referred the provision regarding redundancy in England in section 81(2) of the Employment Protection (Consolidation) Act 1978 provides as follows:

For the purpose of this Act, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to:

- (a) the fact that his employer have ceased, or intends to cease, to carry on the business for the purpose of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or
- (b) the fact that the requirements of the business for employees to carry out work of a particular kind, in the place where he was so employed, have ceased or diminished or are expected to cease or diminish.

In order to exercise managerial prerogatives to retrench employees, the employer must prove that there is an existence of redundancy in the organization. If there are several reasons taken into consideration by the employer for the retrenchment, the employer has the duty establish the principal reason for such decision. Upon considering the reasons, then, the court has to determine whether the termination or dismissal was fairly or unfairly made. This question should be determined in accordance with equity, good conscience and the substantial merits of the case.

It is a rule that an employer, who proposes to terminate his employees on the grounds of redundancy to consult the trade union where the employees belong to. In addition to the above, redundancy must be exercised in conformation to the Code of Conduct for Industrial Harmony 1975 and signed by the Trade Unions and Employer's Organizations. Section 30(5A) of the Industrial Relations Act 1967 provides that in making its award, the Industrial Court may take into consideration any agreement or Code relating to employment practices between organizations, representative of employers and workmen respectively, in which, such agreement or Code has been approved by the Minister. In addition to the above, section 63A of the Employment Act 1955 imposes a duty on the employer to notify the Director of Labour before any retrenchment can be materialized.

Involuntary termination from employment may affect the employee's personal well-being and the stabilities of his families. Thus, the effected employee is entitled to a minimum written notice from his employer, regardless of anything contrary contained in the contract of service between the parties. If the contract of employment expressly provides for a specific period of notice, these conditions must be observed by the parties. In the absence of such a term, the minimum notice prescribed by section 12(2) of the Employment Act 1955 must be followed. The said statutory notice provides that if the employee has been employed for less than 2 years on the date of notice, the length of notice is 4 weeks. If the employee has been employed for 2 years or more but less than 5 years, the notice is 6 weeks. For the employee who has been employed for more than 5 years, the minimum notice required 8 weeks. Despite the above mentioned principle, the length of the notice can be waived by a mutual consent of both parties in which the employer will have to pay an equivalent payment *in lieu* of notice. Failure to give the appropriate notice will make the employer liable for prosecution under section 99 of the same Act.

The Malaysian law clearly recognizes the managerial prerogative of the employer to organize and arrange his business in the manner he considers best including to retrench his employees provided that it is made *bone fide* for the interest of the employer's business. Clearly, the retrenchment exercise is a last resort to the employer in reorganization. Before

making decision on retrenchment, the employer should try his very best to minimize the reduction of the number of employees. Perhaps, the employer should take the necessary steps such as by reducing its operational cost and at the same time restructuring his position to suit the current needs. The Industrial Court in *Basf (M) Sdn. Bhd. vs. Lee Suan Sim* (2001) recognized that when the employer is in difficulties, he should first embark on cutting operational costs such as introducing salary cuts, stopping increments and promotions exercise, reducing traveling expenses and entertainment allowances. In the event that he failed to stabilize the financial position of the business, he has, if unavoidable, to retrench the employees.

It is my submission that the employer has the prerogative to decide whether or not to retrench his workers as long as the retrenchment is made for genuine reasons. Genuine reasons may be interpreted to include proper exercise of discretion in which it is free from *mala fide* or unfair labour practice. Clearly, the employer's interest is wider than that of the employee.

#### **4. Procedure of retrenchment**

Retrenchment exercise is subject to some governing procedures. The Industrial Court in *Rocon Equipment Sdn Bhd & Anor vs. Zainuddin Muhamad Salleh & Yang Lain* (2005) emphasized that even if redundancy did exist, another question to be considered is whether the retrenchment is done in accordance with the accepted standards of procedure.

Clause 22(a) of the Code of Conduct for Industrial Harmony 1975 (the Code) provides the following measures to be taken by the employer:

- (i) to give as early a warning as practicable to the workers concerned
- (ii) introducing schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement benefits
- (iii) retiring workers who are beyond their normal retiring age
- (iv) co-operating with the Ministry of Labour and Manpower to help the workers to find work outside the undertaking; spreading termination of employment over a longer period
- (v) ensuring that no such announcement is made before the workers and their representatives or trade union have been informed

In retrenchment, the employer must draw up a plan to decide who will be retained and who will be made redundant. The employer must then inform the affected employees as soon as possible so that they have an opportunity to find alternatives or to apply for other jobs either with the current employer or with another employer. Retrenchment must be conducted fairly and not tainted by any unfair legal practice. Thus, while retrenchment is permissible, a justifiable retrenchment exercise could be declared invalid simply because the selection of the employees for retrenchment is not in accordance with Last in First Out (*LIFO*) (Anantaraman, 2005).

#### **5. The Malaysian code of conduct for industrial harmony 1975 (the Code)**

It is the intention of the government to maintain healthy practice in employment industry. Thus, steps must be taken to maintain what is called industrial harmony in the workplace which essentially involves the employer, the employees and their trade unions. The Malaysian Code of Conduct for Industrial Harmony 1975 (the Code) which was endorsed in February 1975 provides a guideline that the employer must make a proper selection on the category of employees to be retrenched. Clearly, if the Code is followed by the employer, it will be able to reduce the level of dissatisfaction among the parties involved and this will create industrial harmony in the country.

There are several guidelines laid down in the Code prior for retrenchment. If no agreement is reached between the employer and the employee on the criteria for selection, the criteria applied must be fair and objective. Clause 22(b) of the above mentioned Code suggests that the employer should adopted an objective criteria, which includes:

- (i) need for the efficient operation of the establishment or undertaking
- (ii) ability, experience, skill and occupational qualifications of individual workers required by the establishment or undertaking under (i)
- (iii) consideration of length of service and status (non-citizens, casual, temporary, permanent)
- (iv) age
- (v) family situation; and
- (vi) such other criteria as may be formulated in the context of national policies

#### **6. Last in first out (*LIFO*)**

The common method used in the exercise of redundancy is Last in First Out (*LIFO*). *LIFO* means the junior employee would have to leave the employment before the senior could be directed to leave (Ramasamy, 2002). This arrangement

has advantages to employees as it reduces the possibility of the management to do selections of terminating employees on the basis of favoritism. If the selection criteria are based on race, religion or gender, the effected employees may claim compensation on the grounds of unfair dismissal. The good point of *LIFO* is it is easy to administer. At the same time the system rewards employees who have so far been loyal to the employer.

The Industrial Court in *Associated Pan Malaysia Cement Sdn Bhd and Kesatuan Pekerja-Pekerja Perusahaan Simen* (1986) held that the *LIFO* principle is subject to two principles. Firstly, it operates only within the establishment in which the retrenchment is to be made. Secondly, the rules are applicable only to the category to which the retrenched employees belong. In *Aluminium Company of Malaysia Bhd. vs. Jaspal Singh* (1978) the Industrial Court held that the principles of *LIFO* have to be followed by the employer in the case of retrenchment. Since the claimant's job was still in existence after retrenchment and the employer has failed to consider that the claimant was the first who joined the company for the post compared to the other two superintendents, therefore the retrenchment was wrongly exercised. The issue of seniority must be considered with reference to the employee working in the same category and not based on the date when they started work for the company (Ayadurai, 1998). In other words, the principle of *LIFO* is only applicable when other things are equal. Any departure from the principle of *LIFO* must be objectively justifiable. As to the status of the employees, the Industrial Court in *Seong Thye Plantations Sdn Bhd vs. All Malayan Estates Staff Union* (1981) reiterated that the employer should take into consideration the status of the employee when it selects employees to be retrenched. The order of selection is non-citizen, casual, temporary and lastly, permanent employee. Thus, in retrenchment, the employer has to first retrench all foreign employees of a similar work capacity before retrenching local workers. On this aspect, reference must also be made to section 60N of the Employment Act 1955 which provides that the employer shall not terminate the services of local employees unless he has terminated the services of all foreign employees employed by him in a capacity similar to that of the local employee.

The Code was implemented more than 20 years. It is respectfully submitted that the Code reflects the government's policy in protecting workers' interest in the country. But, to what extent has the Code achieved its objective in protecting the employee's interest against the employer's decision to retrench its employee? It is to be noted that *LIFO* is not the only consideration. In selecting employees for retrenchment, employees with skills or those who occupy a specialized position may be retained and a poor performer may be eliminated. However, selection for redundancy on the grounds of trade union membership or non-membership is clearly unfair. Thus, the employer must show in detail the selection procedure and must show how they picked those unlucky one. The Industrial Court in *National Union of Cinema & Places of Amusement vs. Shaw Computer & Management Services Sdn Bhd* (1975) held that the court will usually require the employer to show how, by whom, and on what basis the selection for redundancy was made. The burden of proof is on the employer and he must discharge it to the satisfaction of the court. In short, in exercising retrenchment, not only the employer must have good grounds to do so, but he must also avoid unfair labour practice. Even though the ultimate decision is on the employer, he has to observed the proper procedure to avoid legal tussles between him and the retrenched employee which may ultimately undermine the industrial harmony in the country. In the *Kesatuan Pekerja-pekerja Perusahaan Logam vs. KL George Kent (M) Bhd* (1991), the High Court held that it is the duty of the Industrial Court to consider the provisions of the Code in making decisions relating to retrenchment. In this case, there was a provision in a collective agreement between the employer and employees that they agreed to observe provision of the Code. One of the provisions in the Code provides that the retrenched employees should be given priority of engagement or re-engagement. But, this provision was not considered by the Industrial Court in its decision. The High Court in reversing the Industrial Court's decision held that it has made a jurisdictional error when it failed to consider the relevant clause in the collective agreement. Should the collective agreement be taken into consideration, the employer should have given priority of engagement or re-engagement to the retrenched employees rather than bringing in new employees.

The principle of *LIFO* is not rigid. It is a settled law that the Code does not have any force of law. In the 1989 case of *Penang & Seberang Prai Textile & Garment Industry Employees Union vs. Dragon & Phoenix Bhd Penang & Anor* (1989), the court confirmed that the Code has no legal sanction. However, section 30(5A) of the Industrial Relations Act 1967 speaks in permissive terms in requiring the Industrial Court when making an award, to consider the objective of the Code to inculcate fair and good industrial practice. Even though the Code is merely a moral guideline between the employer and the employees and no penalty can be imposed against the employers for their failure to follow its provisions, yet the Industrial Court in *Mamut Copper Mining Bhd vs. Chau Fook Kong & Others* (1997) expects employers not only to adhere to the *LIFO* principle, but also other principles provided for by the Code. Similar stand could also be seen in *Weeluk Corporation (Sarawak) Sdn Bhd vs Wee Siak Luan* (1998) where the court held that a retrenchment is only justified if it is made in accordance with the accepted industrial relations standards, practices and procedures. Thus, as the Code has provided the procedure to be observed, it is the duty of the employer to follow them in order to meet the standard requirement.

Undoubtedly, another question to be considered is whether the employer is in a position to depart from the Code? The courts recognize the importance of making commercial decisions on the part of the employer. Based on the above

principle, the employer may adopt his own objective criteria in making selection. These objective criteria may include the employee's ability and expertise, experience, qualification and the business needs. This is in line with the fact that the employer is vested with the prerogative power especially in matters relating to improvement of his business. A clear rule can be seen in *Supreme Corp vs. Doreen Daniel & Another* (1981) where the employer has been permitted to depart from the principle with a sound and valid reason. In departing from the Code, the employer would surely have his own reason to do so. Thus, it is the duty of the employer to convince the court the factors they have considered in departing from the principle embedded in the Code.

Such departure from the *LIFO* is also confirmed in the *First Allied Corporations Bhd vs. Lum Siak Kee* (1996) where the Industrial Court ruled that the principle of the Code is not inflexible and extraordinary situations may justify variations (Industrial Law Reports, 1996). Thus, a junior employee who has special qualifications needed by the employer may be retained even though a more senior employee has to be retrenched. The court however, did not suggest any specific test to determine such criteria. It is open for the employer to decide what is best for his business. However, the decision to retrench certain employee may be declared wrongful if no sensible or reasonable management could reach to such decision in retrenching the employee as decided in *Malayan Shipyard and Engineering Sdn Bhd Johor Bahru vs. Mukhtiar Singh & 16 Ors* (1991). The burden of proof is on the employer and he must discharge that burden to the satisfaction of the court.

## 7. Conclusion

The rule on retrenchment is not closed. It would seem that the existing provision of the Code is not necessarily followed by the employer. The matter is always for the employer to decide and not for the court to tell what amounts to justification.

It is my humble submission that a departure from the *LIFO* principle, will open doors for the employer to abuse his discretionary powers. The possibility of retrenching employees on *mala fide* will be a much higher if such departure is permitted with very little restrictions. The situation may be worst if the retrenched employee did not bring his dissatisfaction to the attention of the relevant authority.

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## Commentating Constructing the Mechanism of Political Participation in Multi-party Cooperation System

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### Abstract

Constructing the mechanism for the Democratic Parties to participate in politics plays an important part in the multi-party cooperation system. However, many problems existing in China's current political mechanism have prevented the Democratic Parties from playing their roles, such as, the weak consciousness in political participation of the Democratic Parties, the unsound organization mechanism and the backwardness of the institutional construction in political participation resulting from their characteristics and the social reality. In light of these problems, the awareness in political participation of Democratic Parties should be enhanced, organizational construction should be strengthened and the political participation system should be innovated in the process of multi-party cooperation.

**Keywords:** Multi-party cooperation system, Mechanism of political participation, Institutional innovation

Participating in politics is the essence for the Democratic Parties to be political parties. It best demonstrates the function of a participating party and the value of the long-standing Democratic Parties, and the core issue of the multi-party cooperation between the Democratic Parties and the Communist Party of China. In this sense, it can be said that participation in politics is the lifeblood of Democratic Parties. But currently, the situations of China's Democratic Parties in politics are far from satisfaction. This paper attempts to conduct an analysis. First of all, we should know the fundamental characteristics of the Democratic Parties as parties participating in politics.

### 1. The basic characteristics of the Participating Parties in China

#### *1.1 The convergence of political objectives*

Participating Parties in China have the political objectives of their own when founded. For example, the political goal of the Revolutionary Committee of Chinese Kuomintang is to “achieve the revolutionary Three Principles of the People and build a new China with independence, democracy and happiness. The China Democratic League has the political objective that “the people are the master of a democratic China”, “its sovereignty belongs to all the people”, and “the country should implement the constitutional democracy”. China Democratic Construction Association has the “furthest ideal that a country should be of the people, by the people and for the people”. China Association for Promoting Democracy has the political objective of fighting for the democracy and realizing the democracy. The Peasants' and Workers' Democratic Party has the political goal of “fighting against imperialism and feudalism to establish the agro-industrial civilian regime”. China Zhi Gong Dang's political goal is to “fight for the real China's political democratization” and the political objective of the Jiusan Society is to “work hard for the realization of democracy and science”. Taiwan Democratic Self-Government League aims at establishing a democratic coalition government and an independent, peaceful, democratic, prosperous and well-being China.”

With the founding of the People's Republic of China and the gradual deepening of the practice of socialism, the ideals of the Participating Parties have gradually tended to the realistic goal of the Chinese Communist Party, namely, “developing the socialist market economy, socialist democracy and socialist advanced culture, and constantly promoting the coordinated development of socialist material civilization, political civilization and spiritual civilization, and propelling the great rejuvenation of the Chinese nation”. (See note). The convergence of political objectives is the first and most important characteristic of Chinese Participating Parties, which indicates that they are certain to support the Communist Party of China and participate in politics and take the ruling philosophy of the Communist Party of China as their own ideal and put it into social practice. There are two aspects concerning the convergence of political objective of Chinese Participating Parties. As for the major social and political goals, they agree with the Communist Party of China. On the other hand, every participating party has its own political goal. Both are included each other. In detail, the major social and political objectives contain those of the Participating Parties.

#### *1.2 The members are all elites*

Due to historical reasons, Chinese Participating Parties are composed by the elites from all walks of society, who are

representatives of middle and high-ranking intellectuals of various industries or occupations in the middle and large cities. Members of the Revolutionary Committee of Chinese Kuomintang are the representatives of those who have something with the original Chinese Kuomintang and all circles in Taiwan. Members of the China Democratic League are representatives of those engaged in cultural and educational work. Members of China Democratic Construction Association are mainly from the economic circle. Members of China Association for Promoting Democracy are mainly from the circles of education, culture and publication. Members of China Peasants' and Worker's Democratic Party are from the medical and health sector. Members of China Zhigong Dang are representatives of those returned overseas Chinese and their relatives. Members of the Jiusan Society are mainly from the sector of science and technology. Members of Taiwan Democratic League are representatives in the mainland of Taiwan origin. At present, the eight Chinese Participating Parties have the total number of 60 million people, 1% of the total number of the Communist Party of China. After several decades of development, the China Participating Parties have undergone great changes while remaining the advantages. The ranges of industry and occupation of the members have been expanded. And a new meaning is added to the definition of every Participating Party. The original still has the principal advantage with the participation of the elites from other Parties. The Participating Parties are the unification of universality and progressive nature with members of elites from different walks of society.

### *1.3 The loose grass-roots organizations*

The organizational form of a political party is related to its role and social status in society. The Chinese Participating Parties, because they have participated in politic politics, mainly have gained development in medium-sized and large cities and formed only three levels of the Central, provincial and municipal organizations. In the Civil Servant Law of the People's Republic of China, only members of these three levels of organizations are grouped into the scope of the civil service agencies. Different from the three levels of organizational forms, grassroots organizations of the Chinese Participating Parties have loose organizational forms, namely, the heads and members of grassroots organizations have their own appointed tasks and they are only part-time workers for the parties. Members of the grass-roots organizations of Chinese Participating Parties participate in politics through the grass-roots organizations, or through access to the people's congresses, governments, the organizations of the Chinese People's Political Consultative Conference in the non-occupational form. The loose grass-roots organizations of the Parties result in their casual activities and no source of fund of operation.

## **2. Problems of constructing the mechanism of Chinese Participating Parties' participating in politics**

Since the time from the end of the 20th century to the 21st century, driven by building the modernizations and the system of socialist market economy, the mechanism of political participation of various Democratic Parties as the Participating Parties has developed in the direction of modern think-tank with a greatly-improved level of participating in politics. All the Democratic Parties have played a better role in the performance of participating in politics and democratic supervision. However, due to various reasons including the inherent characteristics of the Participating Parties, there exist some problems of participating in politics, which need further improving and bettering.

### *2.1 Weak awareness of political participation and poor conscientiousness and sense of mission of participating in national political life*

On condition that the political goals of the Participating Parties and the political objectives of the ruling party have come to convergence, the Participating Parties have obvious weak consciousness in political participation. In history they have experienced great setbacks in politics. Although since the Third Plenary Session of the 11th Central Committee of the Communist Party of China, the Democratic Parties have obtained relatively rapid recovery and development, their initiative in politics still needs improving. In particular, some Parties are inactive in independent thinking and have weak abilities to participate in the state affairs. They are willing to be the understrapper of the Communist Party of China. A significant number of members are lack of enthusiasm and they think that joining in a democratic party is to make friends, to seek an organizational support or spiritual sustenance. Their joining the Democratic Parties is not a political choice, but out of utilitarian purpose and blindness. All these have vulgarized the nature of the Participating Parties and to some degrees brought some negative effects to the political activities of the Democratic Parties. In addition, the new members of Democratic Parties have some characteristics of intellectuals in social transition. They are well-educated with more personal experience, but lack of political experience, collective and political awareness, and sense of mission.

### *2.2 The unsound organization mechanism can not meet the effective participation in politics*

All Democratic Parties have experienced several decades since their founding. Each has initially formed the political party system and established local organizations at all levels throughout China. However, there are still some problems concerning the organization mechanism, which has greatly influenced and restricted their participation in politics. Firstly, in the replacement of the leading group, the Democratic Parties have adopted the charismatic leadership pattern for a long time. The selection of a considerable part of the leaders is lack of long-term institutional arrangements. The

work procedures are arbitrary and some Political Parties even appoint those from other parties who become members at a surprise speed to be leaders, as can't maintain the continuity of work and participation in politics. Secondly, the loose grass-roots organizations have resulted in the single way and monotonous form of the activities, which has affected the attractiveness and cohesiveness of the grass-roots organizations of the Democratic Parties. Finally, in the new era, the Democratic Parties have expanded in organizations, but the organizational construction can not be in line with it. At present, the cadres of the Democratic Parties are managed according to the Civil Servant Administrative Regulations. The personnel posts are of small number and the personnel flow is comparatively difficult. Therefore, it is not easy to get high-quality personnel and hard to exchange cadres. This also makes the organs of the Democratic Parties lack vitality and affects the improvement of their ability in political participation.

### *2.3 The backwardness of the institutional construction of political participation has prevented the Democratic Parties from exerting their functions of participating in politics*

Since China completed the socialist transformation, the Democratic Parties have become "the political Parties devoting to the cause of socialism" and the Participating Parties officially of the party structure of the multi-party cooperation led by the Communist Party of China after the recognition of "the CPC Central Committee's Opinion on Adhering to and Improving the CPC-led Multi-Party Cooperation and Political Consultative System" and "Constitution of the People's Republic of China". But since the institutionalization of multi-party cooperation started relatively late with low standard, rigid principles and small coverage, the participating system is weak in operation and loose in implementation. For example, members of the Democratic Parties participating in the state administration, their posts in the People's Congresses and governments have not been guaranteed institutionally. And there are no specific documents concerning their democratic supervision, no certain criteria to measure how they perform the duties of participating in politics and democratic supervision. Their undertakings are quite of randomness.

## **3. Some suggestions on improving the mechanism of the Political Parties' in politics**

In order to further improve the pattern of political parties of the multi-party cooperation in China, and build the Democratic Parties into a new force of democratic supervision and political participation, we should establish and perfect the operation mechanism of the Participating Parties confirming to the situation in China, and of the Parties and the characteristics of the times to bring into full play the advantages of China's political party system and the unique roles that the Democratic Parties have played in the socialist modernization and reunification of China.

### *3.1 Consciously enhancing the awareness of the Political Parties, and exerting the full play of the subjective initiative of participating in politics and democratic supervision*

Political awareness is a basic prerequisite and realistic basis for the existence of a political party, and the focus of party building. To consciously enhance the awareness as the political parties, they should correctly understand and handle the relations with the Communist Party of China, and get rid of the consciousness of understrapper. All Democratic Parties should not only accept the leadership of the Communist Party of China politically without offside and usurping of the power, but also, strict with themselves as the independent political parties, lead all the members to enhance the awareness as the Political Parties, improve the abilities of participating in politics to carry out the political participation independently according to the Constitution. Secondly, they should strengthen the education of history and constitutions of all the Democratic Parties and fully understand the course of struggle, treating each other with sincerity and sharing weal and woe with the Communist Party of China, further comprehend the inevitability of accepting the political leadership of the Communist Party of China and the feasibility that all political parties independently carry out their political activities, and ideologically combine accepting the leadership of the Communist Party of China with carrying out the independent political activities. Thirdly, it is necessary to fully understand the characteristics and advantages of China's political party system, and to recognize that China's political party system has summarized the experience of long-term cooperation of the Communist Party of China and the Democratic Parties, which is conducive to the socialist democratic political construction and promoting China's socialist modernization cause. (Wang, 2007, p.31).

### *3.2 Strengthening organizational building and realizing the value of the Participating Parties*

Participation in politics is fundamental for the Participating Parties to exist and the important form to realize the value of their own. On the new historical conditions, the Participating Parties should improve their abilities to participate in politics through the organizational building of their own, and give more valuable views or suggestions concerning the state affairs. First, cadres of the Participating Parties should abide by the organizational procedure. They should be produced by their organizations in the way of democratic consultation and democratic election and kept in record by the organization department, which should be formed as the internal system to eradicate the arbitrariness of appointing cadres in accordance with seniority. At the same time, the Political Parties should inspect and supervise the cadres sent to participating in politics and put forward the suggestions concerning those, unfit for the position, who are removed and replaced when necessary. Secondly, cadres from the Participating Parties should regularly participate in the activities of the organization of their own parties, for those cadres, first of all, are the party members and must



participate in the daily organizational activities, which should be set up as a basic provision of the organization system. Those who have violated it must receive punishment of discipline or even the removal of the eligibility of their participation in politics. Meanwhile, when they participate in the daily activities of their own political parties, as far as the content (except those of confidentiality) and the projects concerned, they must lead the building of political participation within the parties, which should be formed as a fix system, to improve the overall level of political participation and enhance the capacity of the cadres in participating in politics and exert the role of coordination. Finally, efforts should be made to attract members in society, in particular, the building of grassroots organizations, to strengthen the social influence of the Democratic Parties including the tasks of recruiting new party members and party education, the cadre contingent building especially the cultivation of the representatives. (Wu, 2005, p.279).

### *3.3 With the breakthrough of the institutional innovation, the institutional construction of political participation should be strengthened to institutionalize, standardize and formalize the participation in politics and democratic supervision system*

The improvement of the mechanism of political participation of the Participating Parties will inevitably meet the requirements of the socialist political party system to protect the realization of the right of the political participation. At present, the Participating Parties in China have politically participated in state power, the consultations of major state policies and the leadership candidates, the management of state affairs, the formulation and implementation of the state policies, laws and regulations. The key issue is to make multi-party cooperation system clear and specific and operational. How the Participating Parties can participate in politics, how the ruling Party and the Participating Parties conduct consultations and cooperation and democratic supervision in the pattern of the multi-party cooperation must be guaranteed institutionally and procedurally. The Participating Parties should be guaranteed to participating in politics institutionally. And they should have the right of consultation and the right to know major national decision-making, and the institutional arrangement for democratic supervision and work connection. Based on the above analysis, firstly, the appropriate proportion should be ensured of members of Democratic Parties in the People's Congress of national, provincial, and city levels. Secondly, when members of the Democratic Parties are selected to be leaders of the governments at all levels, their ages and seniority of holding post can be properly relaxed and those meet the requirements can undertake the chief positions. Thirdly, it can be considered that priority can be given to select members of the Democratic Parties to be in the leading positions of the prosecution, and judicial organs. Fourthly, all the Democratic Parties should be guaranteed to have the floor to deliver speech and submit proposals at the CPPCC (Chinese People's Political Consultative Conference) session, and the rights in inspection, and participation in investigating major issues and special inspection organized by the authorities concerned. Finally, at the appropriate time, the proportion of positions of the Democratic Parties in governments can be guaranteed to the minimum degrees. (Xiao, 2000, pp.192-193).

In short, we must give full play to the cooperation, the main theme of China's multi-party cooperation system. The Democratic Parties should have a high sense of political responsibility and mission to share political morals, ideology and undertakes with the Communist Party of China, play the role of democratic supervision and political participation circling around the overall goals proposed by the governments and the Party committees at all levels. The Communist Party of China and the Democratic Parties will cooperate closely to realize mutual progress and mutual development.

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### **Notes**

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## Voting Patterns: Evidence from the 2004 Malaysian General Elections

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### Abstract

This paper examines voters' behavior and voting patterns as well as the factors influencing them using survey data of the electorate carried out in selected parliamentary and state constituencies during the 2004 Malaysian general elections. The findings from the study indicate that in the absence of major national issues, local issues pertaining to growing social problems such as urban poverty, inadequate housing, environmental degradation, petty crimes among youth, and drug abuse became more dominant. The issue of the establishment of an Islamic state also seemed to dominate the thinking of much of the non-Malay electorate and women.

**Keywords:** Voting Patterns, General Elections, Malaysian Politics, Electoral Trends

### 1. Introduction

Studies of Malaysian politics since 1998 indicate that important new political trends have emerged. Initially, this became evident during the 1999 general elections where there could be detected an ambivalence among the electorate in their support for the two main coalition parties in Malaysia, the ruling *Barisan Nasional* (BN) or National Front and the Opposition *Barisan Alternatif* (BA) or Alternative Front. The National Front coalition which has been ruling the Federal Government since Independence in 1957 (via its predecessor, the Alliance or *Perikatan*) comprises among others three political parties representing the three main ethnic groups namely the United Malay National Organisation (UMNO), the Malaysian Chinese Association (MCA) and the Malaysian Indian Congress (MIC). The emergence of the multi-ethnic and multi-religious BA coalition suggested imminent and irrefragable changes - a harbinger of a more unified, democratic and egalitarian Malaysia (Gomez, 2004; Loh and Saravanamutlu, 2003). Previous by-elections results also seem to indicate that although the BN won in five of the seven by-elections, the BN has still not managed to retrieve overwhelming Malay support (Welsh, 2004). The Opposition remains a serious challenge to the ruling coalition party particularly in the urban non-Malay constituencies and rural Malay heartland. It is the purpose of this paper to examine the conduct of the 2004 general elections at federal and state levels, in particular, the political involvement of the electorates, voting patterns and voting behavior.

### 2. Methodology and Data

A survey was carried out as one of the means to obtain primary data on the involvement of the Malaysian electorates in politics and its related activities, important issues and their influence on voting behavior in the 2004 general elections. The survey was administered through a structured questionnaire that contains questions on the socio-economic and demographic status of the respondents, their involvement in political parties as well as participation in elections, opinions on important issues pertaining to the economy and politics of the day, both at the local and national levels. One thousand questionnaires were distributed a week before the polling date, out of which 671 forms were returned and the findings presented here are based on these completed questionnaires.

### 3. Background of Respondents

The profiles of respondents are shown in *Table 1*. Although 671 questionnaires were completed, there are variations in the proportion of respondents who did not answer a particular question. In terms of gender, the proportion of males in the sample was slightly larger than the females while the ethnic distribution was heavily skewed on one ethnic group - Malays. The data show quite an even distribution of the respondents by age groups except for those above 55 years, highest academic qualification, as well as across the states. The distribution by occupation also shows its biasness towards the professional and managerial jobs which was closely related to the respondents' academic qualification.

Respondents were asked about their political involvement and participation and its related activities and the results are shown in *Table 2*. The proportion of respondents who were members of a political party is slightly less than half compared to non-members. More than half of them had become members for a period of longer than 5 years (60%).

This indicates that their involvement in political parties had begun at quite a young age considering that about 65 percent of the respondents were 40 years or younger. *Table 2* also lists out the three main motivating factors which influenced the respondents to become members of a political party namely, personal awareness, influence of political leaders or events, and encouragement from family members and friends. It is interesting to note that almost 40 percent of the respondents claimed that their involvement in political parties were driven by personal awareness, and 70 percent of them who went out to vote felt that it was their duty to do so. This is indeed a good sign for the development of a democratic polity as voters believed that they could play a constructive role in the decision-making process of the country.

What is also interesting to observe is the fact that more than a third (35%) of the respondents were of the opinion that their involvement or membership in a political party were influenced by a particular event and/or leader. The last reason cited by the respondents may also help to explain the impact of a particular major event on the electoral politics of the country, as illustrated in the sacking of Anwar Ibrahim as Deputy Prime Minister in 1998 or the resignation of Mahathir Mohamad as Prime Minister in 2003. In fact, it has been argued by many quarters that the appointment of Abdullah Ahmad Badawi as Mahathir's successor had significantly contributed to the landslide victory of UMNO-led Barisan Nasional in the March 2004 elections (Bowring, 2004). It was also contended that the Anwar issue which was overshadowed by the "feel good" factor generated by the pledges made by Abdullah to implement overdue reforms at the 2004 general elections had helped UMNO to win back the support of the Malay electorates which the party lost quite significantly in 1999 (Bowring, 2004). Although 87 percent of the respondents were registered voters, only 59 percent went out to vote in the 1999 general elections. Among those who went to the polls, responsibility as a citizen and the need to choose a good representative were the two main reasons that motivated them to vote. Meanwhile, the basis for not voting in the 1999 general elections were due either to the fact that they were not qualified to vote or were not registered voters at that point in time. A very high proportion of respondents (85%) stated their intention to vote in the 2004 general elections.

*Table 3* shows that about 63 percent of the respondents stated that they would vote for the sake of their party while 32 percent would do so for a particular candidate. This would, in turn, mean that the party would be represented by an inappropriate choice of candidates. Slightly more than half of the respondents (55%) actually knew who their respective Member of Parliament (MP) was while the proportion who knew their elected State Assemblyman (ADUN) was much lower (38 %). Interestingly enough, there was not much variation in the proportion of respondents who thought that they had an effective Member of Parliament or State Assemblyman (57% and 51% respectively). The data indicate that social issue seems to be the most important current or topical issue in the 2004 general elections (32%), followed by issues related to politics (17%), Islam (13%) and economics (13%). The remaining 25 percent cited for the category 'Others' include issues pertaining to education, development and morality. As expected, issues pertaining to former Deputy Prime Minister, Dato' Seri Anwar Ibrahim, which dominated the 1999 general elections did not loom large or was not a critical issue in the last 2004 elections. The 'irrelevance' of the Anwar Ibrahim as an important electoral issue was reflected in the dismal performance of Parti Keadilan Rakyat (PKR) which was formed at the height of *Reformasi* in 1998. Wan Azizah, Anwar's wife was the only PKR representative in the *Dewan Rakyat* (House of Representatives) after she defeated a famous *ulama* candidate from UMNO in a very contentious election for the parliamentary seat (Bowring, 2004).

The data also reveal that 41 percent of the respondents were of the opinion that the main function of the Opposition in the Malaysian political system was to act as a 'check and balance' on the ruling party. Almost 10 percent of the respondents believe that the role of the Opposition was to debate on policies formulated by the Government of the day while about six percent of them were of the opinion that the Opposition could actually provide an alternative view on the economic development of the country. Another five percent of the respondent saw the role of the Opposition as part and parcel of a democracy.

Opinions on selected issues were also obtained from the respondents as shown in *Table 4*. Almost 80 percent of the respondents agree that they needed representatives from the Opposition to help champion certain issues as well as interests of the community. However, about 40 percent of the respondents believe that Barisan Alternatif (BA) was not capable of challenging the credibility of Barisan Nasional (BN). From our interaction with the respondents, they generally agree that many of the problems associated with poor local governance could actually be resolved if rate-payers (voters) were given the right to elect their own local councilors. It is heartening to note that quite a number of respondents (70%) are of the opinion that local elections should be reinstated in Malaysia. The re-introduction of local elections is important in ensuring greater accountability and transparency amongst public officials which, in turn, will help promote efficient services and improve the quality of life for the local citizenry. In addition, the media which continues to report 'without fear or favor' on issues and problems pertaining to local government is key in promoting greater awareness about the importance of public accountability and transparency at the grassroots level. Quite a number of them claim that they had become more aware of the issues and problems pertaining to local governance as they felt that their quality of life had significantly been affected in recent years. In short, the lack of major national

issues in the last elections had contributed to the growing awareness and subsequently, more attention being paid to local issues by voters in urban areas.

As argued by many quarters including the Prime Minister himself, Islam was the most important 'national' issue in the 2004 general elections (Smith, 2004). However, it is interesting to note that the issue pertaining to Islam, namely *Islam Hadhari*, and the proposed establishment of a full-fledged Islamic state by PAS, did not dominate the election campaigns in constituencies or areas chosen for this survey. The responses to the two questions pertaining to Islam/Islamic state (see *Table 4*) were quite unexpected. Almost 50 percent of the respondents believe that the 'Islamic state' proposal by PAS should be supported by all parties. This helps to demonstrate that the Islamic state proposal had also succeeded in attracting the support of those residing outside the Malay heartlands, namely urban Malays in Kuala Lumpur and Selangor. What is even more interesting is that only 25 percent of the respondents believe that the establishment of an Islamic state would pose a threat to the racial harmony of the country despite the active campaign of the UMNO-led Barisan Nasional government in warning Malaysians of the potential 'dangers' of living under the ultra-conservative PAS rule.

#### 4. Voting Patterns

Voting patterns were examined across several selected background variables of the respondents. *Table 5* shows the proportion of voting participation of respondents in the 1999 general elections by party membership, gender, ethnicity, age, academic qualification, and occupation. The tumultuous (1997-98) East Asian financial crisis and the ensuing political upheaval which threatened the legitimacy of the Mahathir regime occurred prior to the 1999 general elections had a significant impact on the participation of the citizenry in the country's electoral process. As indicated in *Table 5*, 25 percent of party members did not cast their votes in that election as compared with 54 percent of non-party members. It was later reported that the decision of the Election Commission not to allow more than 680,000 new voters (mostly young people) to vote were to have serious implications on the outcome of the 1999 general elections.

The disenfranchisement of many new voters has also been reflected in the result of this survey in which more than 80 percent (83%) of those between the ages 21 to 30 did not cast their votes in the 1999 general elections. As shown in *Table 5* there is a major difference in the number of young voters aged 21 to 30 years who cast their votes as compared to those who are in the older category. Only 17 percent of those between 21 to 30 years old voted in the 1999 general elections as compared to almost 90 percent of those who are between 41 to 55 years old. The proportion of respondents who were members of political parties who voted in the 1999 general elections (75%) was much larger than those who were non-members (46%). *Table 5* also shows that a much higher proportion of males, Chinese, older respondents, self-employed and those with secondary education or less voted compared to their respective counterparts. It may thus be concluded that older Chinese male respondents seemed to believe that their participation in the electoral process would have an impact on the outcome of the elections. On the other hand, there is not much difference in the proportion of voters between Malays and Indians. It is also interesting to note that those with tertiary education were less inclined to cast their votes as compared to their counterparts with a secondary school education.

*Table 6* shows the voting preference between the candidate and the party across the various selected variables. Although the proportion of respondents who voted for the party was larger than those who voted for the candidate across constituencies, party membership, gender, age, ethnicity, qualification and occupation, the results indicate that there are variations within some subgroups. Respondents of Kelantan registered the highest proportion of voters who voted for the party, followed by 'Others', Selangor and Wilayah Persekutuan. Substantial difference is also observed between party members and non-members with the latter registering 41 percent in relation to voting for the candidate, which is almost double the proportion of respondents in the former category. There is not much variation in the proportion of respondents who voted for the party or the candidate across the different age groups, gender, ethnicity, and occupation. The proportion who voted for the party differs in academic qualification with 25 percent for certificate or diploma holders and 41 percent for those with at least a university degree.

Another interesting finding of the survey is on the issue of political efficacy of elected representatives. *Table 7* shows that almost half (46%) of the respondents in Selangor believe that their state assemblymen were not effective. More than 50 percent (53%) of the same respondents rated their MPs as not being effective (see *Table 8*). Perhaps, this sentiment would later influence the shift in the electoral support of many Malays from the Opposition to BN in both the urban and rural constituencies in the state of Selangor as reflected in the outcome of the last general elections when several PAS 'heavyweights' were defeated by those from the BN. There is no doubt that the performance record of elected MPs, particularly in urban areas, is important in determining the voters' support in the next elections. From *Table 7*, we can see that voters in Selangor who seem to be more critical of the performance of their representatives before the 2004 general elections were the professionals (almost 40%) and those who were more educated (more than 40%). This is not at all surprising as the more educated, middle-class professionals are generally perceived to be more 'politically' aware about important issues of the day as well as their rights and role in a democracy. It is also interesting to note that even though almost 80 percent of respondents in Kelantan (*Table 7*) were of the opinion that they had

effective state assemblymen/women, many were actually influenced to switch their support from PAS to UMNO, as reflected in the outcome of the 2004 general elections.

Respondents in general were positive about the role of the Opposition in Malaysia's political system. It is again interesting to note that older voters seemed to have a better understanding of and appreciation for the role of the Opposition in Malaysian politics and society. More than 94 percent of those aged 56 and above as compared with 72 percent of those below the age of 31 actually believed that representatives from the Opposition were needed to represent the interests of the community.

## 5. Discussion

The findings of this study suggest that apparently younger voters have less awareness of the role of the Opposition in a democracy and this helps to explain their stronger support for the UMNO-led BN candidates. The older voters, particularly senior citizens exhibited a more sympathetic understanding of the role of the Opposition than those in the younger age group and, correspondingly, they would also tend to be the most optimistic about the future role of BA in Malaysian politics and society.

The electoral theme of *Islam Hadhari* introduced by Prime Minister Abdullah Ahmad Badawi in the UMNO/BN manifesto for the 2004 general elections aimed to promote a better understanding of role of Islam in the nation by being more inclusive and appealing. Thus, Islam Hadhari was deemed to be "non-Muslim-friendly", compared to PAS' version of an Islamic state. Hence, as Khadijah (2007) argued, Islam as a major campaign ploy was touted not only by PAS, but this was also strategically countered by UMNO with its own "brand" in the form of Islam Hadhari in order to win back the votes of disillusioned Malays and simultaneously attract the Chinese electorate alarmed by the prospect of the introduction of *hudud* law. As such, national issues such as the establishment of the Islamic state as proposed by PAS seemed to preoccupy the thinking of many Chinese voters as much as it did for some Malay voters. It is interesting, however, to note that the ideological differences between PAS and UMNO over the issue of the Islamic state received mixed responses from members of the Malay community and their non-Malay counterparts. As evident from the results of this survey, the Islamic state proposal did not have much influence ultimately on the thinking and subsequently, the voting preference of the electorate in Kelantan and elsewhere. It may be concluded that despite the fact that Islam was perceived as one of the most important national issues in the 2004 general elections, the shift in the voting preferences amongst the Malay electorate in Kelantan was not solely motivated either by the "progressive" UMNO brand of Islam or the "fundamentalist" type of Islam as propagated by PAS.

As expected, the growing "politicisation" of Islam in Malaysian politics and society seemed to concern many voters in the Chinese-dominated areas or constituencies. While almost all Malays would prefer a Muslim to be the number one leader of this country, a small proportion of the Malay respondents were fearful about the possibilities of living in an Islamic state. The study also shows that fewer women were supportive of the idea of an Islamic State than men. This could be because of the fear of strict restrictions and losing some kind of freedom that would affect their lives. However, more women than men were of the opinion that leaders in their respective constituencies were doing a fine job.

Therefore, in the absence of any significant issues at the national forefront amidst Abdullah's growing popularity and the concomitant "feel good" factor, Islam "by default" assumed a major prominence in the 2004 general elections, especially amongst the non-Malay electorate. The non-Malays were still reeling from the after-shock of electoral gains of PAS in the 1999 general elections and the party's subsequent triumphant mood as demonstrated by its 2004 manifesto on the establishment of an Islamic state. There was a real fear that the 2004 general elections might represent an advancement of the previous one, with PAS on steady course towards capturing more states and simultaneously increasing its share of the parliamentary seats, thus enabling it within a striking distance of forming the next federal government and the repercussions that emerge from it. By contrast, simply by reversing Mahathir's heavy industrialisation focus (in the quest to achieve Vision 2020) and shifting more emphasis towards rural development, Abdullah was able to effectuate a substantial Malay swing which went the other way at the previous general election. This had meant that Islam did not stand alone as an issue but was inextricably mixed with other political issues such the socio-economic status of the rural base.

However, Islam considered as a national issue was balanced with 'local' issues in certain constituencies. These include issues pertaining to growing social problems including drug abuse and petty crimes among youth in the local neighborhood. These problems, in turn, were believed to be associated closely with the problems of inadequate housing, urban poverty, environmental degradation, mismanagement and poor governance of the local councils, which accounts for emergence of a more vocal civil society in recent years. It cannot be overlooked, however, that the "convergence" of local and national issues could be referenced to the personality of the new Prime Minister, Abdullah Ahmad Badawi - the "Abdullah factor" which for the first time in Malaysia's electoral history propelled the popularity of the ruling coalition to unprecedented heights, as reflected particularly in the number of parliamentary seats won (91%). Abdullah's image and reputation for being, "Mr. Clean" which was carefully projected by the mainstream mass media succeeded in swaying erstwhile undecided voters to support him and the new administration in the hope that

badly needed institutional and systemic reforms from the Mahathir era could be implemented. In summary, Islam as a dominant electoral issue has to be seen in the wider context of personalised politics in relation to the appointment of Mahathir's successor as the new Prime Minister, *i.e.* Abdullah Ahmad Badawi. Likewise, Abdullah's electoral pledges and promise to institute far-reaching reforms to combat corruption and promote efficiency in the delivery system struck a chord at the "heartstring" of local issues.

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Table 1. Profile of Respondents

Variable	Categories of Variable	Frequency	Percentage
Gender	Male	368	54.8
	Female	275	41.0
	Did not answer	28	4.2
Ethnicity	Malay	512	76.3
	Chinese	46	6.9
	Indian/Sikh	79	11.8
	Did not answer	34	5.1
Age	21 – 30 years	242	36.1
	31 – 40	181	27.0
	41 – 55	190	28.3
	56 and older	58	8.6
Constituency	Wilayah Persekutuan	173	25.8
	Selangor	231	34.4
	Kelantan	120	17.9
	Others	147	21.9
Academic Qualification	Secondary Education or less	223	33.2
	Diploma & Certificate	191	28.5
	Degree +	222	33.1
	Did not answer	35	5.2
Occupation	Professional/Managerial	240	35.8
	Sales & Services	55	8.2
	Housewife/Student/Unemployed	95	14.2
	Self-employed	54	8.0
	Did not answer	127	18.9

Table 2. Involvement in Politics and Elections(Percentage)

Item		Percentage
Membership of political party:	Yes	44.3
	No	55.7
Duration of membership:	< 1 year	14.9
	1-5 years	25.4
	6-10 years	20.7
	>10 years	39.0
Motivation to become a party member:	Personal awareness	38.7
	Family/friends	22.6
	Influence by political leader/event	34.8
	Others	3.8
Registered voter:	Yes	87.1
	No	12.9
Voted in 1999 General Elections:	Yes	58.7
	No	41.3
Reason for voting:	Responsibility	70.0
	To choose good representative	26.9
	Development progress	3.2
Reason for not voting:	Not qualified	57.1
	Unregistered voter	24.9
	Others	18.0
New voter:	Yes	28.8
	No	71.2
Will vote in 2004 General Elections:	Yes	84.7
	No	15.3



Table 3. Voting Patterns (Percentage)

Question		Percentage
When you voted, do you vote for the candidate or the party?	Candidate	31.9
	Party	63.3
	Don't know	4.8
Do you know who was elected as your MP in the 1999 elections?	Yes	55.4
	No	44.6
Do you know who was elected as your State Assemblyman in the 1999 elections?	Yes	38.3
	No	61.7
Do you think that you have an effective Member of Parliament?	Yes	57.4
	No	33.1
	Don't know	9.5
Do you think that you have an effective State Assemblyman?	Yes	51.2
	No	29.1
	Don't know	19.7
What are the most important current/topical issue in the 2004 elections?	Social	31.9
	Politics	16.5
	Islam	13.3
	Economics	12.7
	Others	25.6

Table 4. Opinions of Respondents on Selected Issues (Percentage)

Issue	Agree	Somewhat Disagree	Disagree
The government led by Barisan Nasional has succeeded in ensuring political stability and economic development of this country	67.8	23.1	9.2
The 'Islamic state' model as proposed by PAS should be supported by all parties	48.1	30.4	21.5
The 'Islamic state' issue is a threat to racial harmony and unity of the country	25.1	31.7	43.3
We need representatives from the Opposition parties in Parliament and State Legislative Assemblies to represent the interests of the community	79.6	12.8	7.6
Local elections should be re-introduced in Malaysia	68.3	21.0	10.7
The Barisan Alternatif is not capable of challenging the credibility of the Barisan Nasional government/party	41.3	33.3	25.4
Only Muslims can be appointed as Prime Minister of this country	76.7	10.7	12.6

Table 5. Voting Participation in 1999 General Elections by Selected Variables(Percentage)

Variable		Voted	Did not vote
Party membership:	Yes	74.9	25.1
	No	45.9	54.1
Gender:	Male	62.7	37.3
	Female	52.6	47.4
Ethnicity:	Malay	57.3	42.7
	Chinese	69.6	30.4
	Indian	59.5	40.5
Age:	21 – 30	16.6	83.4
	31 – 40	78.8	21.2
	41 – 55	89.8	10.2
	56 +	85.3	14.7
Academic qualification:	Secondary & Below	63.5	36.5
	Certificate/Diploma	57.4	42.6
	Degree & Higher	53.6	46.4
Occupation:	Professional/Managerial	65.1	34.9
	Clerical	45.5	54.5
	Sales/Services	56.4	43.6
	Unemployed/Housewife/Student	51.1	48.9
	Self-employed	81.5	18.9

Table 6. Voting Preference by Selected Variables (Percentage)

		Voted for	
		Candidate	Party
Constituency:	Wilayah Persekutuan	41.5	58.5
	Selangor	37.8	62.2
	Kelantan	15.7	84.3
	Others	31.9	68.1
Party membership:	Yes	24.9	75.1
	No	40.7	59.3
Age:	21 – 30	35.1	64.9
	31 – 40	35.3	64.7
	41 – 55	30.6	69.4
	56+	29.4	70.6
Gender:	Male	34.5	65.5
	Female	32.3	67.7
Ethnicity:	Malay	32.0	68.0
	Chinese	43.5	56.5
	Indian	35.2	64.8
Academic qualification:	Secondary & below	32.9	67.1
	Certificate/Diploma	25.3	74.7
	Degree & higher	40.5	59.5
Occupation:	Professional/Management	33.9	66.1
	Clerical	33.7	66.3
	Sales/Services	50.0	50.0
	Unemployed/Housewife/Student	37.8	62.2
	Self-employed	29.4	70.6

Table 7. Effectiveness of State Assemblyman by Selected Variables(Percentage)

		Effective State Assemblyman	
		Yes	No
Constituency:	Wilayah Persekutuan	75.3	24.7
	Selangor	53.5	46.5
	Kelantan	79.8	20.2
	Others	58.5	41.5
Party membership:	Yes	68.3	31.7
	No	59.1	40.9
Age:	21 – 30	61.5	38.5
	31 – 40	65.4	34.6
	41 – 55	62.5	37.5
	56+	75.0	25.0
Gender:	Male	62.4	37.6
	Female	65.4	34.6
Ethnicity:	Malay	63.9	36.1
	Chinese	62.5	37.5
	Indian	59.4	40.6
Academic qualification:	Secondary & below	70.2	29.8
	Certificate/Diploma	66.7	33.3
	Degree & higher	57.1	42.9
Occupation:	Professional/Management	61.1	38.9
	Clerical	75.6	24.4
	Sales/Services	63.4	36.6
	Unemployed/Housewife/Student	63.4	36.6
	Self-employed	72.5	27.5

Table 8. Effectiveness of Member of Parliament by Selected Variables(Percentage)

		Effective Member of Parliament	
		Yes	No
Constituency:	Wilayah Persekutuan	80.3	19.7
	Selangor	47.4	52.6
	Kelantan	73.0	27.0
	Others	60.5	39.5
Party membership:	Yes	64.1	35.9
	No	62.2	37.8
Age:	21 – 30	67.0	33.0
	31 – 40	63.3	36.7
	41 – 55	59.0	41.0
	56+	63.6	36.4
Gender:	Male	59.7	40.3
	Female	68.6	31.4
Ethnicity:	Malay	65.1	34.9
	Chinese	65.1	34.9
	Indian	50.0	50.0
Academic qualification:	Secondary & below	69.8	30.2
	Certificate/Diploma	64.9	35.1
	Degree & higher	57.3	42.7
Occupation:	Professional/Management	61.6	38.4
	Clerical	75.8	24.2
	Sales/Services	71.2	28.8
	Unemployed/Housewife/Student	64.0	36.0
	Self-employed	54.0	46.0



## On the Nature of Straight Bill of Lading and Cargo Releasing Where a Straight Bill of Lading Was Issued

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### Abstract

As far as the nature of a straight bill of lading is concerned, a straight bill of lading is a document of title. On the contrary, the SWB does not belong to a document of title. Therefore, releasing the goods with production of straight bills of lading does not make any exceptions. However, the regulations of the applicable law to the contracts of carriage, the stipulations of the bill of lading, and the enforcement of the right of control to cargo of the shipper shall be taking into account as well.

**Keywords:** Straight bill of lading, Document of title, Delivery the cargo against original Bills of lading

Is a straight bill of lading a bill of lading (hereinafter referred to as "B/L")? If the answer is yes, does a straight bill of lading possess the function of bill of lading that represents the goods? If a straight bill of lading that represents the goods possesses the functions of the bill of lading, what is the relationship between the functions and the carrier's delivery of the cargo? The maritime law circle has argued these questions for a long time. To clarify some misunderstandings on these questions is the aim of this paper.

### 1. Is a straight bill of lading a bill of lading?

The question that whether a straight bill of lading is a bill of lading always puzzles people. People shall not doubt that a straight bill of lading is a bill of lading since we named the document after a bill of lading. However, a straight bill of lading shall not be negotiated under China Maritime Code (hereinafter referred to as "CMC"), which makes it similar to sea waybill (hereinafter referred to as "SWB") apparently. Therefore, some scholars take it for granted that a straight bill of lading is not a bill of lading but a SWB. Mr. Scrutton says that a straight bill of lading is a SWB under Bill of Lading Act 1992. Another scholar considers the non-negotiable Bs/L shall include straight Bs/L and SWB in common sense. Where the B/L stated "non-negotiable" on the front page and named the consignee, a straight B/L has no difference with a SWB unless otherwise stipulated on the front page of the B/L. (Chu, 2003.p83) A straight B/L does not possess the characters that a B/L does actually. It is only an alias of a SWB. (Xin, 1995.p48).

On the contrary, Professor William Tetley holds a straight B/L is different from SWB and so categorizes a straight B/L into a document of title. (Chu, 2003.p83) An author points out definitely that a straight B/L is a kind of B/L and still possesses the three functions of a B/L according to the general maritime laws and B/L acts of the countries of the world. (Yang, 1999. P20) It is obvious that the difference between a straight B/L and a SWB is the basic annotation on whether a straight B/L belongs to a B/L or not.

What is the difference between a straight B/L and a SWB on earth, if any? In my opinion, the key to the question lies in whether the roles a straight B/L plays in shipping and trade are the same as a SWB does. If the roles played by a straight B/L and a SWB are alike, it is obvious that the two documents have no difference. Or else, we should say that a straight B/L is different from a SWB. The answer will come to conclusions upon what is the nature thereof and whether the carrier shall release the cargo against the straight B/L issued by him. That is to say, whether a straight B/L is a B/L is to

some extent the questions whether a straight B/L possesses the nature of document of title and whether the carrier shall be liable for releasing the goods without presentation of the original straight B/L where it was issued.

## **2. What is the meaning of a document of title? Is a straight B/L a document of title?**

A B/L is a document of title under English and American laws. However, there are arguments on what a document of title is. Some Chinese scholars translate the “document of title” as a voucher of real right or property right. They hold that the transfer of a B/L means the transfer of ownership of the cargo since a B/L is a voucher on which the carrier’s delivery of goods based. Someone argues that a B/L possesses the same characters as property right does. (Zhou, 2003. p43) Because the cargo represented thereby transfers as the B/L does, some scholars deem the “document of title” shall mean the voucher of ownership. Some others take a B/L as a security of obligatory right. (Li, 2003. P34) In addition, some people translate a “document of title” in very general terms.

In my opinion, we should clarify the fact at first that different state has its different meaning to specific legal term under its unique legislation system. If this basic premise were ignored, we would never gain our ends of legal exchange. It is one of important causes leading to law conflict to endue a legal term pertaining to a same legal element with different meanings in different states.

What is on earth the meaning of document of title? As a legal term originated from the Common Law Legal System, It is naturally that we shall explore its meaning in the traditions of Common Law Legal System. There is no authentic interpretation for document of title in English common law. However, An English Act to Amend and Consolidate the Factors Acts (the Factors Act, 1889) defines the “document of title” in article 1 which reads “(4) The expression “document of title” shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.” That is the legislative interpretation of “document of title” in English statutory law. Of course, the definition includes a warehouse-keeper’s certificate, which though included in the Act of 1825 had been omitted in the Act of 1842, and had been held not to be a document of title. (Gunn v Bolckow, Vaughan & Co. (1875), 10 Ch. App. 491.) However, a B/L is considered a “document of title” all the time. According to Bills of Sale Act of English, the “Documents of title” used in the ordinary course of business as proof of the possession or control of goods or authorizing the possessor of such document to transfer or receive goods, do not require registration as bills of sale. (Bill of Sale Act, 1878, C.31) The English COGSA does not define a B/L. However, it is obvious that a B/L is a “document of title” under Article 1 (b) of the Hague-Visby Rules, which provides that a “Contract of Carriage” applies only to contracts of carriage covered by a bill of lading or any similar document of title. Whereas the Hague-Visby Rules was incorporated in English COGSA 1971, therefore, we should say that a B/L is a “document of title” under English legal system and that the “document of title” used in the ordinary course of business is the proof of the possession or control of goods or authorizing the possessor of such document to transfer or receive goods. An analogous provision can be found in Section 7104, the Uniform Commercial Code of the United States that the negotiable document of title includes a warehouse-keeper’s certificate, a B/L, or any other document of title.

Now therefore, I conclude that:

(1). A B/L is a document of title.

(2). A document of title proves that goods are possessed or controlled by whom and proves that the possessor of the same document has been authorized to transfer or receive goods represented thereby. However, there is no indication that the word “title” in the common law legal system is the appropriate word for ownership or real rights in the civil law system. Firstly, it is common knowledge that the concept of real rights derived from the civil law legal system differs from the concept of property right in the common law legal system. Therefore, it is a faulty expression in legal exchange to take a document of title as a voucher of real rights. Secondly, in any case, the possession or control of the goods does not mean the possessor or controller has the property right of the goods. Since an important function a B/L possesses is to prove that the cargo has already been taken over by the carrier and been in charge of the same person stated in a B/L, a B/L is the evidence that proves the cargo is in whose charge, which does not indicate the status of rights to the cargo. It is essential to prove who is in charge of the cargo for sharing the risks and responsibilities among the shipper, the consignee, and the carrier. This is an acceptable theory in both the civil law legal system and the common law legal system. As for the holder of a B/L or the consignee’s right to transfer or receive the cargo is concerned, a B/L is a warranty voucher against which the carrier undertakes to delivery goods to the holder of the B/L or to the named consignee who is authorized to take delivery of goods from the carrier at the port of destination. Nevertheless, the possession of a B/L is in no case equal to having the ownership or other real rights. The possessor’s right to transfer or receive the cargo is empowered by the shipper, which can be concluded in accordance with the provisions that the relationship between the consignee or possessor of the B/L and the carrier with respect to their rights and obligations shall be defined by the clauses thereof provided in Article 78 of China Maritime Code (Note 1), because

in fact it was the shipper and the carrier who made and entered into the contract of carriage evidenced by the B/L and stipulated the rights and obligations of the consignee or the possessor thereof, and that the carrier pays little attentions to the rights and obligations of the consignee usually, consequently the shipper decides his requests to the consignee on his own entirely. Therefore, the clauses of the B/L or the B/L itself do not empower the consignee to transfer or receive goods, but the shipper does indeed. Thirdly, what is called that the possession of the B/L stands for possession of the cargo is groundless as well. Since the holder transfer or receive goods pursuant to the authorization of the shipper, the word "negotiable" means the cargo represented by the bill of lading can be transferred by the possessor thereof. "Negotiable" does not mean the B/L itself is transferable. Since the B/L is the authorizing voucher that authorizes the transferee to transfer the cargo to others or receive the cargo, it shall be passed on to the transferee of the cargo after the resale contract was made by and between the consignee and transferee so that the transferee could receive the cargo. Therefore, the passing of the B/L is a public expression that the former holder of the B/L has the intention to transfer the cargo represented thereby to the latter and is independent of the possession of goods. Or else an absurd conclusion would be drawn due to the carrier's taking charge of the cargo that the carrier is the owner of the cargo in civil law legal system because possession is the instrument of static public expression for ownership. It is obvious that to receive goods is based upon authorization as well. Of course, the authorization grounds on the basic relation set up by the cargo sale contract or other contract with respect to the disposition of the cargo between the shipper and the holder of the B/L or the consignee. Fourthly, in view of the foregoing conclusions we may understand the reason why the B/L may provide the rights and obligations of the third party acting as a consignee or a holder thereof is that the authorization and basic contract relationship entitled the shipper and the carrier to do so. Fifthly, a B/L is not a security of obligatory right because the possessor's right to take delivery of the cargo or transfer the cargo is based upon contract authorization, and that the B/L itself is just a authorization voucher evidencing that the possessor thereof was authorized to dispose the cargo while not a token of right to possess or own the cargo.

Thus, I consider that the "document of title" shall be translated into Chinese as "a voucher of possession and warranty" since it has the two functions of receipt and authorizing disposition of goods.

Now comes to the question that whether a straight B/L is a document of title or not. It is obvious that a straight B/L is an evidence of status of goods in the sense that a straight B/L indicates the goods are in charge of the carrier. As to the wording "non-negotiable" stated in the B/L, according to the above-mentioned analysis, in fact it means that the goods represented in the straight B/L are non-negotiable, and so it has nothing with whether the straight B/L itself may be transferred. Though the goods are non-negotiated under a straight B/L, they may be received by and delivered to the named person. Since the document of title just proves the holder thereof is authorized to transfer or receive the cargo according to the above-mentioned English law, and that receiving of the cargo does not go beyond the meanings of functions of the title document, so, a straight B/L still belongs to the document of title due to its function of receiving of the cargo. Someone may ask that people also can receive the cargo where a SWB was issued, then why the SWB is not a document of title. Article 3 (1) of CMI UNIFORM RULES FOR SWBS reads: "The shipper on entering into the contract of carriage does so not only on his own behalf but also as agent for and on behalf of the consignee, and warrants to the carrier that he has authority so to do." That means the contract of carriage of cargo by sea is not made for the shipper himself but also for the consignee in the respect of receiving of the cargo. That is to say, that the consignee acquires the right to take delivery of the cargo based upon the presumed agency *ad litem*. In contrast with the SWB, the consignee's right is authorized by the shipper where a straight B/L was issued. The object of legal relationship is also different between the case that the straight B/L was issued and that the SWB was issued. In addition, where a SWB was issued, the consignee's right to take delivery of the cargo relies upon the presumed entrustment of an agent, by which the consignee entrust the shipper to hand over the cargo to the carrier for carriage and delivery to him. In the occasion a SWB is used, it happens frequently that who has the ownership of the cargo is definite and the resale of the cargo is rare. Moreover, the consignee is prone to be the buyer of the cargo or the affiliated company of the shipper, therefore the SWB is used to settle the question that the B/L arrives later than the cargo does. It is obvious that the shipper and the consignee have no intention to possess an authorization voucher of transfer or receiving of the cargo. The shipper names the consignee directly and asks the named consignee to take delivery of the cargo basing on his identity.

Therefore, a SWB is not a document of title because it is neither a voucher of taking delivery of the cargo nor an authorization voucher. On the contrary, the straight B/L is a document of title because it is an authorization voucher of taking delivery of the cargo.

It is thus clear that whether a transport document is a document of title depends upon entirely whether the shipper (the seller as often happens) and the consignee (the buyer as often happens) has intention to transfer the cargo in transit or whether the production thereof is required when releasing the cargo. If the answer is yes, the transport document is a title document and vice versa.



### **3. Does the consignee stated in the box of consignee of a straight B/L shall take delivery of the cargo with production of original the B/L**

There are two basic viewpoints with respect to whether the original straight B/L shall be produced when the consignee declared to take delivery of the cargo. One of the viewpoints deems that the straight B/L is non-negotiable and not a document of title, so the consignee may take delivery of the cargo basing on his identity without production of the original B/L. The other viewpoint deems a straight B/L still belongs to a B/L since it possesses the three functions thereof. Therefore, it is natural that the carrier releases the cargo against surrendering the original B/L. In China, subject to Article 71 of Chinese Maritime Code, it is a condition that the carrier releases the cargo against surrendering the original B/L.

Obviously, the first argument is untenable on the condition that a straight B/L belongs to Bs/L. The question is what is the relationship between the attribute of a straight B/L as a title document and releasing the cargo with presentation of the original straight B/L? Most scholars and practices review the question and conclude basing upon whether a straight B/L is a document of title or not. Those who consider that a straight B/L belongs to a document of title draw a conclusion that the carrier shall delivery the cargo with presentation of the original straight B/L where it was issued. Whereas those who hold that a straight B/L does not belong to a document of title draw a conclusion that the carrier may delivery the cargo without presentation of the original straight B/L where it was issued. (Xin, Jan. 15, 2003. Also, see Jonathan Chambers, 2002. P29) In my opinion, with consideration of the original function of a document of title, a B/L is an authorization voucher evidencing the possessor's right to receive the cargo. Therefore, it is necessary to produce the B/L when the possessor declares he want to take delivery of the cargo; otherwise, he is not able to prove that he has the authorization. Now therefore, I conclude that it is the due contents that every original document of title, including but not limited to a straight B/L, shall be presented before the holder to take delivery of the cargo.

The international practices vary in whether the carrier shall release the cargo with the presentation of the straight B/L. The United States Pomerene Act does not require a straight B/L to be presented for delivery of cargo. The carrier is entitled to deliver to the named consignee although the consignee is required to prove his identity. However, the Pomerene Act required wording like "non-negotiable" shall be stated in the straight B/L. (Note 2) The HK Superior Court held that HK law does not require the production of a straight B/L for delivery of cargo. (Note3) The recent judicial precedents of English indicate that a straight B/L is a document of title. Therefore, the presentation of the straight bill of lading for delivery of the cargo would be necessary even without any express stipulation since the House of Lords ruled it to be a document of title. (Note 4) In Singapore, the carrier shall delivery the cargo to the named consignee against the straight B/L, and shall confirm the consignee's identity as well according to the case of *APL v. Voss Peer*. The Singaporean court of Appeal held that although a straight B/L is made non-negotiable, it does not mean that the parties thereto agreed to abandon the other important nature like the obligation to present the straight B/L for releasing the cargo. It should be further emphasized that to take back the original B/L is the premise for the carrier's delivery of the cargo even a straight B/L was issued. To do otherwise will amount to misdelivery. Holland court held that a straight B/L is a kind of Bs/L that are subject to the Hague rules/Hague-Visby rules and must be presented before the cargo released in "*The Duke of Yare*". So did the Reenes appellate court of France in "*The MSC Magellanes*". The superior court of Malaysia also held the carrier beached the contract because he did not take back the original B/L before the cargo was released, even though he delivered the cargo to the consignee. (Jia, Aug. 3, 2003) The Supreme People's Court Of The People's Republic Of China held that a non-negotiable straight B/L is not a document of title, therefore, the Hague rules is inapplicable to it in "*Guangzhou Feida Electronic Appliances Factory of Wanbao Group v. American President Lines Limited*". However, the court did not make general remarks upon whether the straight B/L shall be presented before the cargo released and simply pointed out the applicable law of that case shall be COGSA 1936 of US. However, in the 13th maritime trial session held in Qingdao, over 50 delegates who come from ten Chinese maritime courts and their higher people's courts participated and got to a common view that the original straight B/L shall be presented before the cargo released regardless the nature thereof and the relationship between such nature and the negotiability of the straight B/L under China Maritime Code. It shows that Chinese judicial circle considers that a straight B/L shall be produced without any exception before the consignee take delivery of the cargo.

According to Article 71 of China Maritime Code, A bill of lading is a document, which serves as an evidence of the contract of carriage of goods by sea and the taking over, or loading of the goods by the carrier, and based on which the carrier undertakes to deliver the goods against surrendering the same. A provision in the document stating that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking. The provision that the goods are to be delivered to the order of a named person constitutes an undertaking indicates that the presentation of the straight B/L is required before the cargo released. A scholar considers the provision shall be interpreted that China Maritime Code deems such a clause in the B/L stating that the goods are to be delivered to the order of a named person is a guarantee clause only. It does not mean that the original straight B/L shall be presented before the cargo released. The scholar observed the lingual meaning of the legal clause obviously, however, he ignored the performance of the undertaking requires the surrendering of the document in order to prove the one who requests the

carrier to deliver the cargo to him has the right so to do. Therefore, only the named consignee represented in the straight B/L produced the straight B/L can the authorized right be proved and can he take delivery of the cargo as well. Although the explicit statement of the named consignee make the carrier know who has the warranted right, that can not guarantee the carrier would not release the goods to the one who has no right to receive the goods. Suppose that a man falsely claims to be the consignee but no production of the original straight B/L, it is very easy happens releasing the goods to the man who has no right so to do. Therefore, the lingual interpretation of law must meet the legislative tenets, otherwise it would be a misconstrued interpretation of the law even though it looks how good to satisfy the requirements of logic and grammar. It is easily to cheat without the requirement of production the straight B/L, therefore, China Maritime Code require the presentation of the straight B/L so as to preventing cargo fraud.

Some scholars consider that a B/L plays different roles in different segments of trade. The function of document of title is non-existent in transport segment. Only when the B/L acts as commercial document or pledge document can the function of the document of title works. (Si, 2000. P18) This is a misunderstanding. In fact, the possession of or control over the goods, for which the document of title stands, means the physical status of the goods is that the goods are in charge of the carrier. It is a basis for ascertaining the custody and protection responsibilities of the carrier. It does not mean the holder of the B/L has property rights or real rights, which was even misunderstood by some west scholars who consider that the possession of the B/L stands for possessing the cargo. That is wrong because the property rights are dealt with by sale contract or other disposition contract and the transfer of ownership as well as other rights are separated from the transfer of documents. Even though in the occasions that commercial documents including Bs/L are required or the document is pledged the nature of Bs/L above-mentioned does not changed. What is pledged or transferred is the authorization voucher instead of the ownership or real rights. People's intention to transfer the goods or pledge the goods constitutes an acceptable arrangement dealt with the rights in the goods and its variation. Whether the holder of B/L can transfer or pledge the goods relies upon whether he has been entitled so to do according to the sale contract or disposition contract. Therefore, a B/L is evidence that the cargo is in charge of the carrier and is an authorization voucher in the transport segment. In contrast with a B/L in the transport segment, a B/L is only an authorization voucher in the trade segment or in the security segment and the holder can take delivery of the cargo thereby to achieve the aim of trade or pledge. Now the conclusion is the title document nature of B/L not disappear both in the trade and transport segments.

Needs to point out is it is wrong that some scholars argue for the straight B/L may transfer between the shipper and the named consignee. (Xu, 2004. P1) The reason is they misunderstood the transfer of a B/L, which means the transfer thereof among the third parties other than the delivery and handover between the shipper and the consignee. The delivery and handover between the shipper and the consignee is to go through the necessary formalities so that the consignee who was authorized could prove his right to transfer or receive the goods. That delivery and handover is not transfer of B/L. Furthermore, the property rights are entirely settled according to the sale contract or contract of cargo disposition made and entered into by and between the shipper and the consignee. The delivery and handover does not resolve the variation of the property rights of the goods. As a result, the viewpoint that takes the delivery and handover between the shipper and the consignee as transfer of B/Li is of no help to illustrate the nature of a B/L as a title document. Mr. Xin Haibao (Jan. 15, 2003) points out that the delivery and handover of a B/L between the shipper and the consignee does not belong to transfer thereof. In addition, to take the delivery and handover of a B/L between the shipper and the consignee as transfer thereof conflicts with Chinese law because Article 79 of China Maritime Code provided that a straight bill of lading is non-negotiable.

Thus, it can be seen that there are no same provisions and practices on whether the straight B/L is required to be presented before the cargo released. Therefore, the key is the choice of applicable law. Needs to clarify herein is whether the applicable law can apply to the specific case or not is subject to the provisions of the applicable law. For example, the Pomerene Bills of Lading Act only applies to the transportation of goods in the United States and from a place in the United States to a place in other country, therefore, where the transportation of goods is unrelated to the ports of the United States, it does not mean that the carrier may release the cargo without presentation of the straight B/L even the Pomerene Bills of Lading Act is the applicable law. Then the case is subject to the provisions on whether the carrier may release the cargo without presentation of the straight B/L, which provided for in the proper law decided according to the conflict rules of the state of the court. In addition, the performance of the right of control over the goods shall be deemed as cancellation of the authorization to the consignee. Therefore, the consignee has no right to transfer or receive the goods any more. However, the straight of B/L still possess the function that evidences the status of the goods.

#### 4. Conclusions

As far as the nature of a straight B/L is concerned, a straight B/L is different from SWB mostly because the former is evidence proving the goods status and is an authorization document, whereas the latter is not an authorization document. Therefore, whatever provisions the states of the world provided for shall not influence the carrier's obligations to

deliver the goods to the holder of the straight B/L against the surrendering thereof in theory. However, in practice, it shall be subject to the applicable law, the stipulations of the straight B/L, and the enforcement of the shipper's right of control over the goods. There is no relative independency between whether a straight B/L is a document of title and whether it is required to deliver the goods to the consignee against the surrendering thereof. All Bs/L are authorization vouchers for taking delivery of the goods and so it is the premise to surrender original documents to the obligor so that he could perform his obligations. Therefore, as a document of title, it is necessary to produce the straight B/L before releasing the cargo.

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## Notes

Note 1, See Article 78 of China Maritime Code.

Note 2, See the Pomerene Act 1916.

Note 3, See "The Brij". The court held that the essence of a straight B/L is nonnegotiable, so it is unnecessary to present thereof before the cargo released.

Note 4, See the "Rafaela S". Also see the "Happy Ranger". The Obiter Dictum of the "Happy Ranger" indicates that it is inadvisable to hold the view is thoroughly correct in the textbook that because a straight bill cannot be transferred by endorsement and so it is not a document of title and does not need to be produced to receive cargo.



## Further Discussion on Hypothecateability of Domain Name Rights

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### Abstract

Domain name rights should be treated as a kind of unattached Intellectual property rights. Intellectual property rights differ from other subject matters of pledge in nature, but its nature is extremely similar to the subject matters of hypothec. It's well in the trend of statutory principle of modern property law to treat Intellectual property rights as subject matters of hypothec. Domain name rights may be hypothecated and realized in two ways. First, it can be classified as Intellectual property rights meeting the essential characteristics of hypothec property rights. Second, it may be subjected to an enterprise's collective mortgage, fulfilling the purpose of mortgage by putting the domain name rights into the enterprise's aggregately mortgaged property. In a domain name rights hypothecation regime, a public notification system should be expressly legislated and a valuation mechanism established and well developed.

**Keywords:** Domain name rights, Intellectual property rights, Hypothec, Pledge

The domain name (Domain Name) is also called the website, the digitized address of the computer connected to Internet, represents the applicant's identity which linked to Internet (Shou Bu, 2003:p205). Appearance of the domain name has brought challenges for traditional civil law and how to reply legally has become the important subject that the modern civil law faces. The case whether the rights of the domain name could be mortgaged have already presented in U.S.A. And the network technology of our country is developed and in more and more prosperous era, enough reasons are being believed that the similar dispute will present too in our country in the near future. So the study on this problem has important realistic meanings.

### 1. The legal nature of the domain name

The domestic scholar roughly has the following views to the nature of the rights of the domain name: (1) Lay aside temporarily. Mainly thinking the nature of the domain name rights can not confirm and need further observation yet to draw a conclusion. (2) The parlance of civil interests. The very close view to laying aside saying on methodology temporarily is the civil interests saying. Think though the domain name has not been protected as a kind of Intellectual property rights by WIPO yet, but might not deny it as a kind of civil rights and interests at least, otherwise the domain name will possibly be in no protected position awkwardly and passively. (3) The Intellectual property rights saying. A lot of scholars think the rights of the domain name belongs to the category of the Intellectual property rights, but the difference among them is very big. (Dong Hao, March 11, 2004). I agree to the Intellectual property rights saying and think the domain name rights is a kind of independent Intellectual property rights.

#### *1.1 The rights of domain name should have the position of rights*

First of all, we should define the relation between the domain name and domain name rights. Like the works and copyrights, trade mark and trade mark privileges, the patent and patent rights in the law of Intellectual property rights, the domain name is different from the rights of the domain name and the domain name is an object of the rights of the domain name. Clarifying the relation between the two would not obscure the nature of the domain name and domain name rights. As regards domain name in the meaning of the object of rights, the domain name is a kind of technological symbol at first. The purpose to design domain name is used for getting in touch in computer networking and online communication, domain name just like telephone number, their function is just make one different with another in Internet. So the initial domain name only has a meaning on technology. However, with the development of the network technology and progress of social economy, the domain name has the value of commerce gradually and has played the

function of "Online trade mark" for the trade company. The trade company often regards the trade mark or the trading company as the sign of domain name and makes use of business reputation loaded on the domain name to expand the propaganda of one's own products in order to bring consumer's attention. So, having a domain name that the public knew and related to the goods is the sign of trade company with good prestige and cognitive of market. Therefore, the domain name begins to have other functions --Function of the identification. Just this function makes the domain name begin to have the nature of "no body thing" Hong Xunxin, the scholar of Taiwan civil law said, "Besides human body, anything could be controlled by human and is exclusive and independence to make mankind meet society living needs, no matter it is body thing or no body thing, it is all a thing in law"(Wang Zejian,2001:p207).I think Professor Hong's view accords with the development trend of the law of modern real rights and it is worth agreeing. So considering the commercial value of domain name, domain name as "body things" in civil law has no question. But do the rights of the domain name have rights nature? Talk openly in accordance with the modern law circles, the nature of rights as the jurist of German Meiker recommend "legal power" is essential subject of rights enjoy specific interests and strength in law of(Long Weiqiu,2003:p120). So the key to distinguish rights and interests is whether these interests are given by the position of law. Law stipulate certain interests by form of conferment as the rights, on the contrary, it can only exist as certain interests but can't become rights. So if you want to know whether it is interests or rights needs to see the regulation of the law. I think the domain name should exist as a right. First of all, the commercial value of domain name loaded needs to protect indeed. If the law doesn't protect, it won't encourage enterprising spirit of oblige and it does not accord with the legislative purpose of the Intellectual property rights. Secondly, according to current legislation both at home and abroad, the protection of domain name mainly depends on Trademark Law and law against competition by inappropriate means to ensure. Domain name and trade mark have similarity, but the difference of the two is very obvious too. In many situations only according to Trademark Law or the law against competition by inappropriate means, the domain name owner's rights is difficult to receive prompt protection, so it is really necessary to give the domain name the position of rights to avoid the deficient protection to the rights of the domain name. After confirming the rights status of domain name rights, it still needs to investigate the position the domain name right in the system of civil rights, because not every civil rights was suitable for the mortgage token.

### *1.2 The domain name should belong to the category of the Intellectual property rights*

The absolute rights which have the nature of property still divides into real rights and Intellectual property rights, so distinguishing the rights of the domain name is real rights or Intellectual property rights reflected the essential attribute of the domain name rights. The one that is worth probing into further is, whether the domain name forms the Intellectual property rights? According to the traditional civil law theory, the Intellectual property rights is the achievement rights of the intelligence and it condenses the creator's work in the Intellectual property rights, but the domain name is only one bunches of expression symbols from the technology. So speaking from the surface, it's hard to say the right of the domain name is the achievement rights of the intelligence. But a noteworthy one is in the design of the domain name work including certain intelligence. Domain name is that the trade company or user uses trade mark or trading company as mark, through a regular period of use, the domain name can play a role in citing prestige of trade company, become "online trade marks" of the trade company and the sign that consumers know the trade company on the net. So the domain name has function of the identification, has already become the sign that consumers distinguish this trade company and another trade company. And according to the stipulations of relevant domestic and international Intellectual property rights theories and international treaties, the concept of the Intellectual property rights has already been no longer confined to the category of the achievement rights of intelligence. The range of the Intellectual property rights has already been expanded to some extent. The rights of the commercial mark have already become one kind of the Intellectual property rights too. "The Intellectual property rights refer to the domination creative intelligence achievement that the civil subject is enjoyed, commercial sign and the rights that repel others to interfere."(Zhang Yumin,2001:p.105) The Intellectual property rights refers to the mark, prestige that people based on one's creating achievement and operational and managing activities to enjoy the rights in accordance with the law.(Wu Handong,2000:p1) International convention concerned Intellectual property rights have expanded and mark rights commercial such as "Establishing World Intellectual Property Organization's convention" in 1967 and "Intellectual property rights agreement" passed with General Agreement on Tariffs and Trade in 1993 has magnified the range of the Intellectual property rights. The rights of the commercial mark has already become one kind of Intellectual property rights which most scholar's approved. So domain name rights as a kind of intellectual property rights exists no problem

## **2. The legal principle analysis of the Intellectual property rights can be the mortgage token**

The mortgage target called hypothec objects or the mortgage too, mean the mortgagor used for establishing the property of the hypothec (Guo Mingrui,1999:p114).Every country has legislated to limit mortgage token, some adopt "the active enumerating type", some adopt "the passivism limiting type", some adopt the two. "The People's Republic of China Assurance Law" limits mortgage token from positive respect and passive respect. But we should notice this development trend in the range of what has been probed into the mortgage token: The mortgage token is expanding constantly with the need of the development of social economy, we can't confine to the range of mortgage token that the

traditional civil law stipulated. Just as Hu Zaiquan said: "The hypothec is subject matters in accordance with the real estate and rights of having real estate, the movable property must give play to it and assure function, but the his kind of system can't meet the need of the society yet because of gradual development of economy." (Xie Zaiquan, 1999: p546). A lot of legislation or theory have already affirmed movable property and some rights can regard as mortgage token too in many countries and regions, for example: "Trade Law of Movable Property Guarantee and "The Civil Code of Taiwan" in U.S.A. and Taiwan have already affirmed movable property and rights belong to mortgage token. "General Incorporeal Property" can be mortgage token in U.S.A., and in the article 882 of "The Civil Code of Taiwan" stipulate: Weigh on the ground, the tenant rights, and allusion quotation rights forever must write a mortgage contract and apply for the quality registration to its administrative department. The contract of hypothecate come into force from the day of registering. I think provision on the mortgage token in our country is deficient, Intellectual property rights should exist as mortgage token but as quality token, because Intellectual property rights accord with the regulation of the mortgage token instead of according with quality token, so it should make a self-criticism.

### *2.1 The Intellectual property rights has nature different from the ones of quality token but similar to the nature of the mortgage token very much.*

First, the rights of the target weighed as the quality according to the stipulations of our country's Assurance Law, such as first kinds of draft, cheque, cashier's cheque, bond, deposit certificate, warehouse receipt, bill of lading and second kinds of share, stock that can be transferred in accordance with the law being all rights of the security, these rights have a common characteristic: It produces in order to eliminate. Generally speaking, the owner's purpose is eliminated because of using once, and does not lie in its long-term repeated usufruct to obtain benefit. And the mortgage token one is generally real estate, movable property and some rights taking using benefit as purpose, the Intellectual property rights is a rights taking repeated use as purpose, so Intellectual property rights and the targets of hypothec have common characteristics in using for incomes repeatedly.

Second, quality token like creditor's rights, other rights of securities such as draft, promissory note, cheque, etc. are relativity rights in nature and the Intellectual property rights is marked with absolute rights. Similar to it, the mortgage token one such as the ownership to real estate and movable property, usufruct based on real estate and so on are absolute rights. So, Intellectual property rights and hypothec have something in common in relative people of the rights. This shows that the Intellectual property rights has similar characteristics that the mortgage token had.

### *2.2 Regarding Intellectual property rights as the target of quality rights is unfavorable to maintain the interests of the pawnor and the realization of the rights of the pawnee.*

With respect to the pawnor, though the pawnor still possess the object, the pawnee control the certificate in the quality rights of Intellectual property rights, so the income punish rights of pawnor will have some restriction. For example, article 80 of Assurance Law of our country stipulates: After the rights offering in article 79 of the law stipulated, the pawnor can't transfer or permit others to use, but after the agreement of pawnee, he can transfer or permit others to use. The transfer fee, licensing fees pawnor got, people of income should pay the creditor's rights or the third person appointing with pawnee first. This doesn't accord with the principle of making the best use of everything and the principle of the owner enjoying absolute rights of thing in Law of real rights. To pawnee, the purpose of the pawnee is to control the exchange value of the Intellectual property rights, but the exchange value of the Intellectual property rights often has special attribute in fact, such as the Copyrights, Exclusive Rights to Use A Trademark, Trading Company Rights, all of these rights can't realize without the assistance of pawnor, quality people value their, so the interests of pawnee also receive certain restriction. So Intellectual property rights as quality token have disadvantage to pawnor and pawnee.

### *2.3 The Intellectual property rights, as the mortgage token, accords with the development trend of the legal principle of modern Law of real rights.*

Legal principle of Real rights requires kind, content, effect, etc. of real rights must have clear regulation and the real rights is invalid or have no effect as the real rights if it's not according with the legal principle of the real rights. Legislation of our country mainly prescribes real estate, movable properties and some rights based on real estates that can establish hypothec, (the concrete as the above-mentioned). So in our country, the range of the rights to mortgage is limited in a very narrow space and the right is mostly used for establishing quality rights. For example, the following rights in 75th regulation of our country's "Assurance Law" can be hypothecated: (1) Draft, cheque, promissory note, bond, deposit certificate, warehouse receipt, bill of lading; (2) Share, stock that can be transferred in accordance with the law; (3) The exclusive rights to use a trademark that can be transferred in accordance with the law, patent rights, proprietary of copyrights; (4) Other rights that can be hypothecated in accordance with the law. Article 79 stipulates: Impawn with the exclusive rights to use a trademark that can be transferred in accordance with the law, patent rights and proprietary of copyrights, pawnor and pawnee should conclude contract in writing and apply for the quality registration to its administrative department. The contract comes into force from the day of registering. If the target of the quality of the legal provisions rights meets the current social economic development's needs, it is certainly

ideal. But the constant changes and lagging of legislations of social economy has determined that the law can not consider the kind and content of the real rights in an all-round way, so there must be shortcomings in the law. In order to avoid the shortcoming that comes from the legal doctrine of the real rights, nowadays the legal principle of real rights in countries with continent law has already been relaxed to some extent. With respect to the theory, there is "legal real rights are ignored", "the law includes common saying", "the real rights admits limitedly in common", "the legal real rights is relaxed", and "the legal real rights is relaxed" is adopted by most scholars among them. "The new kind or different content of real right, whether permit by legal doctrine of the real rights, whether it disobeys the masterdom and absolute protection of real rights and whether it could be announced to ensure trade's security as the criterion for the judgement. If it accords with the criterion and there is benefit and need in the society really, we can regard that it doesn't to disobey with the legal doctrine of real rights, when the operation can be relaxed through the legal doctrine of the real rights, whether real rights on the common law could exist should base on the degree"(Xie Zaiquan, 1999:p48). So, outwardly, the Intellectual property rights as the mortgage one is disobeying legal principle of real rights doctrine, but we can find Intellectual property rights as hypothecate token accords with modern trend of real rights after observing carefully and the law should not ignore this development trend but should stipulate the Intellectual property rights existing as the mortgage token. Certainly, under the frame of the current legislation, before the law has revised the target of the hypothec, we should still follow the demand of the legal doctrine of the real rights, because the token of real rights is legal is one of the demands of the legal doctrine of the real rights.

In a word, the quality of the Intellectual property rights as the quality token has a great deal of places deficient, in order to avoid the existence of these drawbacks in legislation, there is inclination shifted to the hypothec in some aspects. Legislators should face the deficiency and make a response in time in order to meet the needs of development of social economy. Certainly, not every Intellectual property rights can be regarded as the mortgage token. To distinguish the kind of the target of hypothec and quality rights, the most basic reason lies in that the hypothec is the rights not taking occupying as important document of announcement. So, the Intellectual property rights must be able to announce by way of registering and then can be regarded as the target of the hypothec.

### **3. Mortgage system of domain name rights**

#### *3.1 The domain name rights can be the mortgage token*

Foregoing paragraphs expound the characteristic as mortgage token, it has illustrated Intellectual property rights should be target of hypothec rather target of quality rights certainly and necessarily and it has analyzed in terms of civil rights that the rights of the domain name should be a kind of independent Intellectual property rights rather the target of quality of rights in our country. Then, whether the domain name rights as the Intellectual property rights can be regarded as the mortgage token. I think the key to answer this question lies in proving whether the rights of the domain name accords with the essential characteristic of the mortgage token. (1) With respect to that mortgage token should not violate state policies and public interests, domain name rights should protect by law, from the aspect of the legitimacy of the target, it doesn't obviously violate above-mentioned demands to establish mortgages on the rights of the domain name. (2) Domain name rights as mortgage token accords with the value rights, changeable rate and the principle of announcement of hypothec totally. ① The domain name right is a kind of rights worth exchanging. The object of the rights of the domain name is a difficult thing that could be touched, so the rights of the domain name belongs to the category of the invisible proprietary and this is the most obvious characteristic that rights of a domain name is different from the real rights. It is blameless that the right of the domain name is worth exchanging. On one hand, the rights of the domain name is condensing designer's intelligence achievement of work, so it has the value in the meaning of economics; On the other hand, the rights of the domain name is obviously the incorporeal property with use value, so it has two basic attribute of goods like this: Value and use value. According to principle of economics, the property with attribute of the goods used for exchanging obviously having exchanging value and certainly have appraising at the current rate nature. So domain name rights possess value of rights as mortgage token demanded in this way. Domain name rights can be Intellectual property rights used for goods of trade, in the beginning implemented of the system of domain name registration in our country, in order to prevent people who rush to register domain name from utilizing domain name to coerce relevant interests subject to seek illegal interests, our country limit the transfer of domain name, for example, 24th regulation of "Temporary management means of Chinese internet domain name registration" says, the registered domain name can be altered or cancelled, mustn't transfer or buy and sell. So according to this regulation, the domain name demonetizes things, can't be exchanged. But 14th regulation of "CNNIC domain name registration implementing regulations" 2002 make registered domain name can be transferred. In this way, domain name has the nature to exchange as mortgage token, variable price in other words. (3) The domain name rights as the mortgage token is according with the demand of hypothec to announce in the form of registering as the important document. Because foregoing paragraphs demonstration in a certain and necessary respect, Intellectual property rights can establish hypothec, and can announce the in the form of registering. In addition, the Intellectual property rights establishes the quality rights is by way of registering to announcement too under the existing legislative frame, the rights of the domain name, as one kind of the Intellectual property rights, certainly can be announced in the way of registering. So from

certain and necessary respect, domain name rights accords with the demanding of announcement in the way of registering. In a word, the rights of domain name, as a kind of new-typed Intellectual property rights type, accords with an essential characteristic to be the mortgage token.

### *3.2 The structured mortgage system of domain name*

The mortgage of Intellectual property rights represented by rights of the domain name is a piece of new things in the real rights legislation, we must make detailed planning in the form legislating and concrete system designing , and then can realize the science and practicability of legislation . I think we should give the special concern to the rights mortgage of domain name in two following respects.

#### *3.2.1 Way of stipulating of the domain name as mortgage in legislating*

The rights of the domain name can be realized through two kinds of ways in the law of real rights as the target of the hypothec. The first way is enumerating the kind of Intellectual property rights accords to the essential characteristic of the mortgage token in the property that can be mortgaged and the rights of the domain name is certainly included. Through this way we can get the clear and convenient purpose that is suitable to apply of law. Second way is we can give the regulation in assembled mortgage of enterprise property, it is to establish domain name rights in the form of aggregate of an enterprise to mortgage to achieve the goal of establishing the hypothec. The legislative style has been regulated in two real rights law drafts by our country scholar. The 2, 3 items of article 295 in the real rights law draft drafted under the care of professor Liang Huixing regulated: The mortgagor can mortgage the property mentioned above in the lump. Referred property aggregate in item 5 of the first paragraph of this article, refers to the property unit combined property and rights that can transfer and register, such as the specific real estate , usufruct , movable property , Intellectual property rights etc., but it does not include movable property such as airborne vehicle , shipping and locomotive ,etc.(Liang Huixing,2000:p603).442 article of “ The proposed real rights draft of China ”which is drafted under the care of Professor Wang Liming stipulates: The property mortgaged collectively includes all property that mortgagors has and has the rights to punish when establish mortgages, and also include movable property , real estate , usufruct and Intellectual property rights. But the property forbids to mortgage according to the legal provisions must not be the component of mortgage. (Wang Liming, Guo MingRui, Pang Shaoshen,& Mei Xiaying,2001:pp111-112).We can know it easily that the two above-mentioned real rights law drafts to the regulations of the Intellectual property rights mortgages both stipulate in the form of collective mortgage. Such legislative way has adhered to the regulation of our country's current legislation, but the author thinks these two kinds way are not perfect enough. Just as what was stated in foregoing paragraphs, as the domain name rights of the Intellectual property rights totally accords with the demand to be target of the hypothec and the thing lacked is the regulation of the legislation now. But the way to legislate is still very important, the regulated way of the law will influence the suitable result of the law. If we make the domain name rights mortgage in the form of collective mortgage can cause financing discommodiousness, because it doesn't establish the hypothec with the property of the financial group of the whole enterprise in any case. On the contrary, if we stipulate the domain name can settle hypothec singly, that is to adopt the first kind of legislative ways, will meet the needs of financing of factor's different scale.

#### *3.2.2 The design of relevant system of domain name rights to mortgage*

Considering the nature of the domain name rights as a kind of new-type and special invisible proprietary rights, it must perfect in relevant system and guarantee the legislation to have extensive suitability. First of all, we should stipulate the announcement system of the rights of domain name rights to mortgage in relevant legislation .According to the stipulations of our country's current law, chattel mortgage generally adopts the way to occupy and hand to give announcement, special chattel mortgage take announcement in the way of registering and real estate mortgage take the announcement way to register. The mortgage of domain name rights has the characteristics that different from chattel mortgage and real estate mortgage, just as what foregoing paragraphs have said domain name rights is independent Intellectual property rights, in current legislation, the Intellectual property rights stipulates by way of hypothecating and its announcement way is to register. I think, the way of registered announcement has considered the special attribute of the Intellectual property rights and it should insist in the mortgage of domain name rights, otherwise it possibly will jeopardize the third person's interests in the trade of the market. So we should perfect the resignation system of the mortgage of domain name rights in relevant legislation, specifically we should stipulate the registering organ , procedure registering of the mortgage of domain name rights ,etc.. Secondly, we should perfect the value assessment mechanism of the mortgage of domain name rights. Resources of the domain name have characteristic of limited and uniqueness, the domain name as incorporeal property have unique use value and investment value. There is a lot of successful domain name trade in the world. Business . Com occupies the highest price with the knock-down price of 7,500,000 dollars. In numerous domestic famous websites, there are a lot of experiences of buying the domain name too. For instance, Beijing Youth Daily buys yent.com domain name, Shenzhen Tengxun Company buys QQ. Com domain name, Sinochem net buys ZJ. Com domain name, www.qianlong.com buys Qianlong. Com domain name,etc.. The knock-down price of above-mentioned domain names is several tens of thousands of RMB at least and a lot is up to a



million dollars, we can find out the enormous commercial value of the outstanding domain name from it. But what merits attention is the value assessment mechanism about domain name rights mortgage is deficient and there's not a authoritative organ of assessment mechanism of domain name at present. So, it is very necessary to set up or appoints an authoritative organization to evaluate value of the domain name in our country, and we should also make the objective value evaluation criterion of domain name as soon as possible.

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## Notes

Note 1. This text only refers to the right of the commercial domain name besides especially proving.

Note 2. Umbro International Inc is judged by district court and got the request right of about 20,000 dollars to a 3263851Canada Inc company correctly. In order to make this right to carry out, Umbro Company propose the domain name management company NSI to mortgage 38 domain name that Company have to auction in order to obtain the damages in the court. As to this, NSI Company litigate to the higher court of the state of Barginia, and maintain that domain name is one service item that produce by contract between person who utilize. If making it stop serving is tantamount to losing this function, so, the domain name can't be auctioned as the target of mortgage. The high court of Barginia think "domain name is a valuable and invisible new shape of intellectual property right, and do not deny it as the target of the mortgage". The judgement makes NSI Company to stop above-mentioned domain names and forces to carry out the mortgage. NSI Company refuses to obey, appeal to the Supreme Judicial Court of Barginia then. The judgement of the Supreme Judicial Court is that: Because of the following reason, the domain name can't become the target of the mortgage and cancel the original sentence. The domain name is the right based on service contract between NSI Company and persons who utilize, there are dense integral relation between the services of appellant and the right based on this contract, if service can't store, the right is unable to cash. In addition, the right on this kind of contract should not become the target of the mortgage as a kind of "debt". Certainly, not any right on contract can become the target of the mortgage, contract that can obtain certain money and interests can regard as target of mortgage.



## On Party Politics in Early Republic of China and Modern Political Civilization

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### Abstract

A tide of party foundation and activity appears in early Republic of China. During this period, party politics differs from that in western capitalism countries in its growth and decline, which is derived from China's special economic and political features after the 1911 revolution. By studying the growth and decline history of parties in early Republic of China, we find that: the fundamental problem of party politics in early Republic of China is that parties can not satisfy the requirements of modern political civilization.

**Keywords:** Early Republic of China, Party politics, Parliamentary politics, Political civilization

Party politics is originated from representative politics. It is an irreplaceable component of bourgeois democracy and also an achievement of human political civilization. Since the foundation of Republic of China after the 1911 Revolution, bourgeois revolutionary party takes the power. Accompanied with the south-north peace negotiation, China starts the republic constitutionalism experiment. Herein, party politics is an extremely important issue.

Since the foundation of Republic of China, Chinese political situations change significantly. During the collapse of past regime and the formation and consolidation of new, all political forces rush to form parties in order to participate in politics. "People are crazy for founding communities, and parties appear one after another. (Zai Shan)" Statistic data show that the number of national publicized parties reaches 682 from the 1911 Revolution to the dissolution of parliament in Jan. 1914. Hereinto, about 312 parties join in political activities (Qianmu Qiu, 1991, p7). It is an unprecedented wonder in Chinese politics history. Before the northward move of temporary government, domestic parties, besides Alliance Society, mainly include Civilian Association, Social Party, Civilian Community, Labor Party of ROC, Unification Party, Unified Republic Party, Republic Construction Congress, etc.

After the northward move of temporary government, especially before the parliament election, the alternation and recombination of parties are active, forming a "combining more small parties into less large ones" tide. At last, four dominant parties play in the state of early Republic of China.

(1) Republican Party. Republican Party is recombined by Associated Unification Party, Civilian Community, Civilian Association, and Public Union of ROC in order to resist Alliance Society. It is founded in May 9<sup>th</sup>, 1912.

Republican Party extremely emphasizes on national unity and nationalism, supporting national progresses by state power, meeting the world trend, and building China based on peace and interests. All political business should be considered from a national view instead of self-governance of province. In the political conflicts at that time, nationalism means to oppose the Alliance Society, regarding it as the primary political opponent. Republican Party supports Shikai Yuan and wins his great supports.

(2) Unification Party. Merely 8 days later after Unification Party joining in Republican Party, Binglin Zhang holds a meeting in Beijing on May 17<sup>th</sup>, claiming a separation from Republican Party openly. Unification Party resumes its independent status, turning the council system into the Premier system. Binglin Zhang is the Premier. Unification Party has similar political inclination with Republican Party. Hence, Unification Party only lives in a short period since it does not have special functions.

(3) Kuomintang. Kuomintang is founded in Oct. 25<sup>th</sup>, 1912, guided by Jiaoren Song and based on bourgeois revolutionary party. It combines Alliance Society, Unified Republic Party, Civilian Public Party, Civilian Progress Party, and Republican Progress Party together, in order to confront constitutionality party and restrict Shikai Yuan's autarchy. The political program of Kuomintang is: advocate political unification; develop local self-governance; execute nationalization of nationalities; pay attention to people's livelihood; sustain world peace.

(4) Democratic Party. Democratic Party is founded in Oct. 1912. According to Party Constitution and Party Program, Hualong Tang is elected as the chief secretary, and thirty people, including Liang Ma and Zhaochang Chen as executives. The Party Program is: popularize political education, support the freedom guaranteed by laws, construct a solidified government, integrate administrative reforms, and adjust social interests. Democratic Party centers on its vital position in democratic politics, with the hope of consolidating the republic institution by disseminating bourgeois political theories, laws, and coordinating social interests. However, under the condition that state powers are in the hand of Shikai Yuan, an absolute representative of feudalism, and basic democratic consciousness, institutions, and laws are unfounded, it is nothing but an illusion to guarantee the republic by popularizing political education, integrating administrative reforms, and adjusting social interests, not mention "construct a solidified government". It turns into a political slogan that drives Shikai Yuan to strengthen the autarchy. The essential error determines the role of Democratic Party, namely the allies of Shikai Yuan, in real conflicts.

At the very beginning of parliament, Republic Party, Democratic Party, and Unification Party form Progressive Party.

Along with developments and changes of domestic parties, three political parties, namely revolutionary school, constitutionality school, and feudal warlord and bureaucrat school, come into being. First of all, the revolutionary school, represented by Alliance Society and Kuomintang, regards themselves as the creator and protector of republic system. On one hand, they empower to Shikai Yuan. On the other hand, they do not trust Shikai Yuan. Hence, they want to restrict Shikai Yuan. The first way is to make up regulations for him. The second is to motivate organizational power ----- the party to take a portion of power from him. In their opinion, if progressive people can not combine together and work for a common goal, Progressive Party will lose its advantages over Conservative Party. The Republic may be hard to maintain and autarchy of few may come back to life. Therefore, it is a must to construct a "strong and kind" party as the political center power of Republic, which can suppress the autarchy of Shikai Yuan and make Republic of China lasting. Secondly, after the Wuchang Uprising, although the constitutional monarchy of constitutionality school loses its popularity, it is still influential as a political power and idea. They predict it is the constitutionality school that is responsible for the construction of Republic of China. However, the guideline of constitutionality school is to carry out constitutionalism by depending on powers and authorities. Under the condition of losing its monarchy and authority and considering the new political situation, the constitutionality school chooses to follow Shikai Yuan, with a hope of developing its branches in provinces by means of Shikai Yuan's power, what is determined by its history and political status (Wenjiang Ding & Fengtian Zhao, 1983, p600). So, to found a party is not only a way of rising for the constitutionality school, being a condition for confronting the revolutionary school under the new situation, but also a measure to gain more political capitals by forming a political alliance with Shikai Yuan. The constitutionality school becomes active and an important power in party activities after the Wuchang Uprising. Thirdly, the 1911 Revolution overthrows the feudal imperialism but does not ruin feudal comprador power, which includes feudal warlords and old bureaucrat school, guided by Shikai Yuan. Shikai Yuan steals the fruit of revolution by taking advantages over the complex political situations at that time, trying to maintain and develop the absolutism system continuously. However, the democratic tide and the revolutionary school, driven by the 1911 Revolution, force Shikai Yuan to give in temporarily. He allows the existence of democratic forms, including party activities, and makes use of them. Therefore, after the Wuchang Uprising, on one hand, Shikai Yuan instigates his followers to form sorts of communities and parties, preparing for taking the state power. On the other hand, he supports the constitutionality school for participating in battles with the revolutionary school. These facts show that in the political stage of early Republic of China, three political forces are competing for powers fiercely. They take parties as tools to extend their influences.

But, in real political practices, parties' political organizations are extremely complicated. Among hundreds of political parties in early Republic of China, several decades of them are relatively complete, and most of them are similar. And some parties or communities even do not have programs. For most parties, the practical program is the interests or benefits of certain politicians. In early Republic of China, the organizational components of parties are very complex. It is common for one party that includes politicians from the revolutionary school, the constitutionality school, and the bureaucracy. Therefore, in a specific party, it is hard to identify which class or group it stands for. As a result, alternations and changes of parties are frequent and unpredictable. One people may belong to different parties at the same time. During this period, most of important political figures, such as Xing Huang, Yuanhong Li, Tingfang Wu, Xiling Xiong, Hualong Tang, and Qimei Chen, join in six parties.

Therefore, in early Republic of China, numerous parties appear, and complex party competitions continue.

Characteristics of party politics in early Republic of China is caused by the economic and political environment in a

special history time in China after the 1911 Revolution. On one hand, national capitalism gains unprecedented development. Local industrial groups are founded after one another, which serve as physical bases for the emergence of numerous parties. Meanwhile, the decentralization and imbalance of national capitalism in development supply conditions for the frequent changes of parties. On the other hand, China's commodity economy is undeveloped at that time, with lower degree of social structural differentiation and division, and without relevant interests groups. Therefore, the development of parties and party politics is lack of sound social bases.

As for political situations, soon after the Wuchang Uprising, the Qing Dynasty has to release the ban for parties. The *Temporary Rules for Republic of China* regulates that assembly and community are people's basic political rights. Therefore, all politicians regard parties as the best way to realize their political goals. Meanwhile, the disturbing political situation drives civilians to seek for political protection by participating parties. And the rich become target members for all parties. As a result, the party politics becomes more complicated.

Party politics is based on legalization and democratic election. Western party politics helps to realize the integration of social orders in industrial society, forming a power alternation mechanism, power supervision mechanism, and stabilization adaptation mechanism for political struggle, ensuring a stable, regular, and orderly operation of political governance and management.

In contrast, the party politics in early Republic of China develops based on the collapse of feudal imperialism but the autarchy still lives. The party politics in early Republic of China is disorderly, anti-democratic, power-dependent, and power-controlled. At the very beginning, the foundation of parties and their activities create favorable conditions and channels for different political forces participating politics indeed. For example, the first Parliament is elected by people, which is the first institution that possesses the right of legislation and the right of supervising administration. Considering its composing, it includes China's new and old elites at that time. Leaders are professional revolutionists and constitutionality backbones. They dominate the activities of the first Parliament. In the Parliament, pure old bureaucrats, esquires, and intellectualists (never be affected by western thoughts) account for a very small percentage. Their effects on the Parliament are small. Besides, the Parliament is operated by parties, and most councilors are from certain party. Different parties firstly discuss certain important issue internally and make decisions, which will be carried out by their party members in the Parliament. For example, Kuomintang sets up "Kuomintang councilor conference" and makes up 12 rules (1913). As councilors from different parties disagree on certain issue, they will usually choose to reach a compromise out of the Parliament. Kuomintang and Progressive Party have ever negotiated for large loans for many times (1913).

However, along with the development and changes of political situations, party activities stray away from their objectives, principles, and basic regulations. For example, Jiaoren Song, as a Kuomintang, invites Bingjun Zhao, the main backbone of Shikai Yuan, to join in Kuomintang. By persuading present senior officials to join in Kuomintang, he wants to help Kuomintang control the power, which conflicts with the principle of associating party backbone with group interests. After the Second Revolution, in order to take the position of senate President, Kuomintang even wants to cooperate with the notorious Citizen Party, trying to barter several positions of committee president for the support of Citizen Party (1913). On Mar. 20<sup>th</sup>, 1913, Shikai Yuan assassinates Jiaoren Song, depressing the democracy by terrors. In Oct. 1914, he asks gangsters to surround the Parliament, forcing the Parliament to select Shikai Yuan as the President. All these actions destroy the democracy and legalization. Besides, Sun Yat-sen, the leader of Kuomintang, starts an uprising after Jiaoren Song Case. In essence, this action is just. But in procedure, it disobeys the democratic and legalization principle of modern democratic politics. In formal Parliament election, all parties compete fiercely. They make best use of any possible mean, no matter what it is legal or illegal, moral or evil, lacking of a consciousness of peaceful and fair competition (Huiqi Xu, 1988).

The orderly operation of party politics depends on people's rich legalization concepts and developed contract spirits. Western party politics operates on this base. However, the connotation of Chinese traditional politics culture is mainly Confucian ethical politics thoughts, which is based on family system. Families are chiefly sustained by ethics, especially ethical orders and duty allocation. From the Confucian view, the state is based on ethical relationships. State governance relies on the ethics of governors. This politics culture emphasizes on social relationships, especially the obligations among people. People should obey their roles and regulations in social relationships. In political life, authority stands for orders and ethics. Authority may center on certain individuals and combines with powers. People are negatively loyal to authority. The Confucian ethics impacts the political activities of parties in early Republic of China to a great degree, which makes party activities turn into disorderly and irregular activities instead of order activities under the regulation of laws.

The disorderly activities of party politics connect with parties main social bases either. In early Republic of China, the organizational base of party politics is mostly new esquires at that time besides intellectualists and industrial and commercial elites who support bourgeois democracy (or have this inclination). In the first half of 19<sup>th</sup> century, China has more than 1 million esquires, 600 or 200 esquires in average in each county (Wisheng Wang, 2004; Weikun Cheng).

Esquires, as a medium group between officials and civilians, firstly suffer from changes of China's traditional social structure. Most esquires center on rural society and pursue for development in local areas and countryside where the state can not reach. In early Republic of China, most of new nobles are from social grass-roots and edges. They climb onto the top class of society and step into the list of esquires. Compared with traditional intellectualists before the Qing Dynasty, the new esquires in early Republic of China depend on properties and forces instead of morals or authorities. New esquires turn into the dominants of grass roots society and the social base for parties in early Republic of China.

In early Republic of China, new intellectualists are another component of parties. The characteristics of modern intellectualists cultivated by new education system are: move freely in the society, mostly separate from farmers, workers, and business men, and hard to win the trust of the public.

In the organizational condition of parties in early Republic of China, most members of Republic Party are intellectualists between the old and the new states. Landlords and squires also occupy a large percentage. The Republic Party even tries to help corrupt officials to hide evils at the price of honors (1912). Leaders of Kuomintang mostly possess new education experiences and have bourgeois political thoughts (Yufa Zhang, 1985, p193-197). But its members are complex. No matter who are energetic youth, brave fighters, business men, rich men, or officials, Kuomintang take them in (Fangqin Shi, 1985, p410). Kuomintang is gradually turning into a complex of officials, politicians, bourgeois, and esquires (Kaiyuan Zhang, 1981, p432). Therefore, Kuomintang loses its independent interests groups' support, betraying the public, with complicated components, and without economic independence. It is not a real party, not mention the party politics.

Party and party politics are the necessity of modern social development. The development of party and party politics causes the fundamental changes of political battles' basic conditions, forms, and methods. In early Republic of China, the rise of party and party politics leads to the emergence of modern new parties and modern political struggles in modern China, creating new party institutions and parliament system, and developing the fruits of political civilization. But in early Republic of China, the development of party and party politics faces serious problems, in which the most important is that parties fail to meet the requirements of modern political civilization.

Firstly, as for the center of party activities, whether a party gives priority to personal wills and acts according to leaders' intention or gives priority to certain group and pursues for expressing and realizing the common interests of the group, is the most important signal for distinguishing modern parties from old political organization activities. In early Republic of China, the foundation of parties, on one hand, is originated from a fact that certain political elites pursue for realizing their political purposes. On the other hand, some social elites or members look for officials or political protection. Therefore, in organizational activities, political elites and officials become the objects of parties in competition. The wills of dominate elite become the center and principle of party activities, lacking of democracy. As a result, parties are personalized to a great degree. All party activities follow personal wills. Parties refuse to associate with certain group or reflect the wills and requirements of the group, not mention to struggle for the interests of certain group. All party activities are carried out centering the wills of Shikai Yuan or Sun Yat-sen. By this way, modern parties turn into old monarchy political organizations in the organizational aspect, such as Kuomintang and Progressive Party. Or, certain parties are not modern party organizations originally, such as some small parties that support Shikai Yuan. The history proves: these parties will be washed out and changed inevitably.

Secondly, as for the relationship between parties and political powers, modern parties aim at taking the power and the right of supervision in the front of political battle. They rely on certain groups instead of political powers. In early Republic of China, party activities are restrained by power support, which make them turn into tools for power manipulation. They are incapable of real political battles. For example, the expenses of parties are mainly from administrative finance. Kuomintang collects its expenses by its members in central and local governments (Yufa Zhang, 1985, p198-200). Er Cai has ever collected 100 thousand from Yunnan provincial finance as funds for the foundation of unifying the Republic Party (Qianmu Qiu, 1991, p228). Because parties can get few financial supports from the government in early Republic of China, many parties have to accept Shikai Yuan's supports. For example, the expenses of Unification Party are from different fields superficially, but in fact, are completely from Shikai Yuan (1981, p400). The Progressive Party gets more financial supports from Shikai Yuan. Parties depend on Shikai Yuan in economy and lack of independence, which make them cater for Shikai Yuan in politics. Without relevant support from interests group, all parties are under the control of powers. Therefore, they neglect programs or even have no programs. They just serve the power, which betrays the principle of party politics fundamentally.

Thirdly, as for the relationship between parties and the public, it lacks of wide participation of common people as a base. At that time in China, countrymen do not possess political consciousness and passion due to the lack of necessary political motives. Other social organizations, such as labor unions, farmer unions, and commercial associations, do not arouse the attention of parties. Giant warlords control the army but neglect party politics. All parties lose passion and patience for motivating the public and starting "national movement". Facing up with strong warlords, democratic powers fail to combine together to fight back. Sometimes, they may trigger some struggles. But most fail at last.

Meanwhile, democratic powers refuse to cooperate with each other, what benefits the warlords. Under this condition, party politics can not grow well. Its failure is a must.

Fourthly, as for the environment for party development, parties in early Republic of China are not in a basic legal environment. The existence of parties in early Republic of China is not recognized by laws and lacks of legal allowance as well. At that time, due to the fast collapse of old system, new powers could not form a set of effective new system at once. To inherit the tradition becomes the only choice. Facing the political mess in early Republic of China, on Mar. 10<sup>th</sup>, 1912, Shikai Yuan announces to implement the new political product in late Qing Dynasty ----- *Rules for Community and Assembly*, which becomes the only law for the foundation of parties in early Republic of China. However, because the new government is under the control of old powers, the detailed reports and regulation system merely offer more facilities for the control over parties' scales and activities. In the name of maintaining orders and protecting assemblies, the warlords closely supervise parties' assemblies and even interfere with parties' activities. Although the *Temporary Rules for Republic of China* endows people with the right of free community, the *Rules for Community and Assembly* practically restricts and denies the right.

In early Republic of China, the history of parties and party politics development proves: in China's modern history, a "multiple parties" time has ever appeared and existed for a short period, when the bourgeois power has been weakened heavily. Because of parties' loose organizations, complex conflicts, and serious disagreements, no party could accomplish the political task of protecting the Republic and opposing the monarchy.

History experiences still show: it is an unprecedented taste for China's democratic politics indeed. Meanwhile, it offers meaningful fruits for the development of China's political civilization. The appearance and development of party politics and parliament struggles are not for whether certain system is suitable or not but whether the history provides relevant conditions for its foundation and alternation.

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## On Protection and Restriction of Private Property Right

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### Abstract

The Real Right Law of the People's Republic of China is the basic law for regulating and protecting the property rights. The Constitution, as the fundamental law, adjusts the property right relationship too. The protection from Constitution is the precondition and base for protecting property right. The Real Right Law is to fulfill the principle of Constitution that ensures citizen's private property right. To protect the property right, Constitution mainly aims at defending the country against outside. Its basic function is to define the country activity. As for the Real Right Law, it is to protect the property right by defining the property in case of invasion of other civil subjects. Both Constitution and Real Right Law offer protection for private property right and also impose restrictions on private property right. That is the national requisition system. This system imposes strict restrictions to private property right. Therefore, it is necessary to set up firm restrictions and constraints on the requisition system. According to the legislation of other countries, we can restrict and constrain this system from three aspects, namely the intention of requisition, the complement standards, and the process, driving the government to realize lawful administration, and protecting the private property right properly.

**Keywords:** Real Right Law of the People's Republic of China, Constitution, Private property right

After several years of preparation, the first Real Right Law in China is finally in effect. It is indeed a formidable process, carrying numerous hardships and disputes, and arousing wide social attentions and extensive participation. The Real Right Law is a basic law for regulating and protecting the property right. It adjusts the property relationships of equal subjects concerning the ascription and utilization of properties. Constitution is the fundamental law of China. It also adjusts the property relationship. The Real Right Law and the Constitution confirm and guarantee the property right from different angles. And they also impose restrictions on the property right, the national requisition system. Because the requisition system serves as strict restrictions on private property right, and in practice, it may be abused by the government, causing unpredictable losses for citizen's private property right, therefore, it is necessary to restrict and constrain the requisition system strictly, driving the government to realize lawful administration. It rightly proves an old saying in German "the wind may blow through it; the rain may enter; but the King of England cannot enter". It is a classical constitutional idea in constitution history. The issue of the Real Right Law undoubtedly strengthens the protection for citizen's property right based on the protection of Constitution.

### 1. Protection of Private property right

The property right is always an important subject in law field. The laws and regulations of property right are not only about civil laws, but, first of all, a constitutional issue. The property right occupies irreplaceable position in the rights system of Constitution and civil laws. The state is responsible for respecting and protecting the property right. In modern constitutional countries, the property right, the right of life, and the right of liberty are the most fundamental rights of citizen, which collectively reflects human basic values and respects. Most countries deprive the property right as one of footstones of constitutional government in Constitutions. "To acknowledge the private property right is a basic condition of stopping or preventing against the state compulsion and despotism. (Hayek, 1997, p174)" In the evolvement of Constitution, the protection of property right has always aroused more attentions of constitutionalists. In 1789, the *Declaration of Human Rights* in France establishes people's constitutional recognition to the position of property right for the first time. The property right, as a basic human right, wins more highlights in Constitution. To protect the property right actually becomes one of core contents of countries' Constitutions.

Article 13 of the Constitution of the People's Republic of China (1982) regulates: "The state protects the right of citizens to own lawfully earned income, savings, houses and other lawful property." Article 1 of the Amendment to the Constitution of the People's Republic of China (1988) regulates: "The state permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy." Article 16 of the Amendment to the Constitution of the People's Republic of China (1999) makes it clear that "The non-public economies such as the individual economy and the private sector of the economy, operating within the limits prescribed by law, are important components of the socialist market economy." Article 21 of the Amendment to the Constitution of the People's Republic of China (2004) regulates: "The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy." Article 22 of the Amendment to the Constitution of the People's Republic of China (2004) regulates: "Citizens' lawful private property is inviolable. The State, in accordance with law, protects the rights of citizens to private property and to its inheritance." Apparently, "Present Constitution's protection for private property right is not only limited to or merely lays stress on citizen's lawful incomes, savings, houses, and other life materials, but equalize production materials with life materials. As long as the property is obtained lawfully, it should be respected and protected by the Constitution. Another visible change is that: present Constitution protects the property right, not like the former focusing on the ownership, by claiming that the lawful property is free from invasion, realizing the replacement of 'ownership' with 'property right' that has rich meanings, and extending the scope of property under the protection of Constitution. It includes not only the real rights, but also credit rights, intellectual property rights, inheritance rights, stock rights, the use right of state-owned land, and other modern new rights. In a textual sense, the Constitution (1982) and successive Amendments follow the principle of protecting socialist common property. Meanwhile, it enhances the protection for private property right continuously, absorbing citizen's private property into the protection of Constitution." (Hongchang Jiao, 2006, p40)

The protection of Constitution for property right is fulfilled by establishing the constitutional position of property right, realizing the property right actually, and making up relevant standards and process as state basic institution and value system (Dayuan Han, 2006, p31). The Constitution is the fundamental law of China. It has the uppermost validity of law. Then, the protection of Constitution is the precondition and basis for property right protection. On one hand, the Constitution can protect private rights. On the other hand, the Constitution indirectly protects private rights by its child laws -----civil laws. But under certain special circumstance, the Constitution can also protect private rights directly. Therefore, the private rights have to depend on the protection of Constitution (Zhiwei Tong, 2006, p17). The Real Right Law is an important sector of civil law system, which makes the civil rights established by Constitution specific and operational, offering details and adjustments to Constitution that confirms and protects the property right of citizens, legal entities, and other organizations. Undoubtedly, the adjustment object of the Constitution and the Real Right Law is the same ----- social economic (property) relationship (Zheng Pang & Wei Wu, 2006, p33). The Real Right Law is a basic law that regulates and protects the property right. In the aspect of property right protection, the Constitution and the Real Right Law are interconnecting with close association. The Constitution regulates the principle of property right protection and offers a general protection. The Real Right Law details and enhances the scope and contents of property right protection. In addition, the Constitution and the Real Right Law cover different fields. Concerning the property right protection, the Constitution aims at defending against invasions from other countries. Its basic function is to confine the state behavior, define citizens' private spaces where the government should not enter as will. To keep the state out of the door is a powerful barrier that stops the state power invading private spaces. In contrast, the Real Right Law is to protect the property right by defining the border of property in case of mutual invasion between citizens. It protects the relationship in a private scope and forbids the illegal invasion of one private space to another. To keep the evil private subject out of the door is also an important guaranty for citizens' property right (Long Li & Liantai Liu, 2003, p40, 43).

## 2. Restriction of private property right

Any right is under the restriction of law. An absolute right without any restriction does not exist. The private property right is not an exception. Along with the development of capitalism, in governance the bourgeois realizes that unrestricted property right is not complete good for the whole society. So, they take the property right as social obligation, what is a new theory. A French Duguit is the main representative of social obligation theory. After entering 20th century, based on the social obligation theory, most countries add articles about private property right restriction into Constitution besides protection. The Weimar Constitution in Germany (1919) is the first one that has articles about private property right restriction.

The restriction is mainly about the requisition for private property. According to the Fourth Amendments to the Constitution of the People's Republic of China, the state, in accordance with the law, can requisition the land for the sake of public interests. The Constitutions of other countries have relevant articles concerning the requisition system. Therefore, the requisition is a kind of public right of government approved by the Constitution. No matter whether the



owner of property agrees to sell private property or not, the government can deprive private property in accordance with the law. The requisition is basic constitutional concepts and also national basic legal system. As an integrated law system, it concerns different law sectors. It has the character of civil purchase and also the character of administrative activity, concerning the relationship between citizens and government, property right and administrative power. Therefore, the property requisition is always taken as grave constitutional issues, and also basic civil law ----- the adjustment object of Real Right Law.

Requisition is lawful and strict restriction on private property right. The extensiveness and liberty of administrative power may harm citizens' property right. Therefore, it is necessary to constrain the requisition system. Conversely, this constraint serves as powerful protection for private property right, defending against the government taking private property by force.

According to the legislation of other countries, we can restrict and constrain this system from three aspects, namely the intention of requisition, the complement standards, and the process.

Firstly the intention of requisition is----- public interests. Only for the sake of public interests, can government requisites private property. What are public interests? At present, there is no specific legal definition. But in theory, a universal recognition is that all social members benefit from public interests directly, such as public safety, mass health, morals, peace, stability, laws, and regulations. The Article 48 in the consulting version (by Professor Huixing Liang) of 'Real Right Law' (draft) says: "Public interests include roads transportation, public sanitation, disaster prevention and cure, science and cultural education causes, environment protection, protection of cultural relics, historic sites, and sceneries, protection of land with public water sources and investigation, frosts protection, and other public interests regulated by the state law.

Secondly, compensations for requisition should follow the principle of justice. The compensation is the most fundamental condition that restricts state requisition, and also the primary guaranty for private property. According to German "equal public burden theory", the state should establish citizen obligations based on justice under any circumstance. As some citizens or one citizen bears more obligations than others under the same circumstance due to the state behavior, the state should adjust and balance the unbalanced obligations. Because the state behavior should benefit all social members, the society should undertake the losses caused by the state behavior. By means of taxation, the state can compensate certain citizen or some citizens for their losses. Then, a new just mechanism will be resumed between all citizens and victims (Yi Fan, 2001, p104). The Declaration of Human Rights in France and the Constitution of the United States strictly forbid the requisition for property right without compensation.

The standards of compensation usually follow the "justice principle". Some countries requires for "complete" compensation, some "justice or fairness" compensation, and some "proper and reasonable" compensation. Some countries regulate the compensation time: in advance or in time. The Constitution of the Republic of Chile (1980) offers most detailed and specific articles about compensation for requisition.

Thirdly, the requisition process is ----- due process of law. Process of law is the most effective way to restrict and stop the abuse of powers. The due process of law derives from England ancient "natural justice" principle. Experiencing the practice of Constitution of the United States, the due process of law tends to be perfect. It expands from the juridical field toward the administrative field and even the legislation field, imposing overall restrictions on state behavior. Concerning the property right protection, the core of Constitution of the United States is the Fifth Amendments: "nor be deprived of life, liberty, or property, without due process of law". And the fourteen Amendments for the states: "nor shall any State deprive any person of life, liberty, or property, without due process of law". According to the requirements of due process, the requisition should firstly have legislation basis, including not only substantive law but more procedural law. Then, offer opportunities and places for people claiming for their rights. Related subjects should listen to the advices. Finally, the juridical institution should control the last process.

### **3. The Real Right Law's restriction on the government**

In recent years, lots of disputes over land requisition happen in China. And there are even blood events among farmers, residents, civil servants, and developers. Many reasons contribute to this fact. One of important reasons is the imperfect requisition system in China.

Firstly, the public interests are unclear. All requisitioned lands are for "state construction". Surely some requisitioned lands are used for building up public facilities, or setting up economic development zones and residential houses according to the overall programming of national economy and social development. But quite lots of requisitioned lands are used for business purposes. The requisition system is abused. Why does the state abuse the requisition system? Reasons are various. Tremendous commercial interests serve as one of fundamental reasons. The state requisitions the use right of lands from farmers or residents at a lower compensation price, and sells to developers at a market price. By this way, the state can get satisfying price differences. Why not? However, the tremendous price differences hurt the interests of farmers or residents. It is not allowable in a legal society and constitutional country. An English John Locke

said: "But though men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislative, as the good of the society shall require; yet it being only with an intention in every one the better to preserve himself, his liberty and property; the power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good; but is obliged to secure every one's property. (John Locke, 1983, p71)"

Secondly, the little and untimely compensation for requisition leads to serious unjust result. Many citizens who have been requisitioned of lands only get little compensations or even nothing, and live a hard life. As a result, it will trigger lots of social problems.

Thirdly, the requisition process is questionable. For example, as programming for an economic zone in certain district of Nanning, not any procedure or notice goes public before the requisition. They just ask farmers to sign their names on a paper. After signing names, farmers must move out. Although these farmers have ownership certificates of houses, these certificates are nothing but useless papers in front of requisition. Tracing the cause of requisition, it is one word of certain governor.

The state frequently invades citizens' property right in practice. No examination system for the requisition behavior, the defects of requisition process, and the arbitrary behavior of the state institutions, impose the great harm on the property right. Therefore, it is necessary to set up restrictions, strengthen the definition of public interests, prevent against the infinite extension of public interest, perfect the requisition process further, and enhance the afterwards supervision.

Before the issue of the Real Right Law, the central and local governments have issued a series of regulations on requisition and removal. However, due to the weak validity and stability, these regulations may be abused in practice. The issue of the Real Right Law undoubtedly offers powerful measures for solving the requisition issue. Article 42, 43, and 44 of the Real Right Law of the People's Republic of China clearly regulates that the government should fulfill lawful administration and protect citizens' private property right.

The issue of the Real Right Law is a milestone in China's legislation process. This law is named as "the basic law of market economy". Its issue will exert fundamental effects on state behaviors. Professor Liming Wang, the President of the Civil Law Society of China Law Society, the Director of the School of Law of Renmin University of China, the main drafter of the Real Right Law, has said, in an interview with a reporter of People's Daily, "The property right, the right of life, and the right of liberty are the three basic rights of citizens. The Real Right Law is not only a basic law that maintains the state basic economic system and protects citizens' property right, but also an important civil law that regulates state administration and ensures citizens' property right. In executing public powers, administrative institutions should build up a consciousness of real right and lay stresses on protection of private property right. For example, when the police fulfill duties, they are forbidden to enter citizens' residences as will, without lawful authorization or in accordance with due process. City administration institutions can manage or punish some illegal commercial behaviors. But they should not damage the properties of violators. One of standards for lawful administrative behavior is whether it respects citizens' basic property right established by the Real Right Law. (Zhiyong Pei, 2007, p13)" The Real Right Law has influential effects on administrative management. It definitely establishes the ascription and utilization of properties, and the scope of private property right. On the other side, it regulates the public power of administrative institutions and the civil servants. As a "backbone" law, the Real Right Law impacts the state administrative behavior at multiple aspects. It puts forward new requirements for the way of administrative management. Administrative institutions should not merely rely on administrative ways in executing their management rights. Administrative guidance, administrative encouragements, administrative contracts, and mother modern management methods and humanism execution methods should be applied more widely. Emphasize on the supervision and service function of administrative institutions. To sum up, the Real Right Law is a basic civil law that regulates the property right. It makes the principle of Constitution specific, driving the state to fulfill lawful administration. The Real Right Law and the Constitution together construct a safeguard for private property right.

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## Human Security or National Security: the Problems and Prospects of the Norm of Human Security

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### Abstract

The emergence of the norm of human security prioritizes individuals' security over national security and conceptualizes poverty as the real threat to the security of individuals. Therefore, it urges for more attention to sustainable development as the functional strategy to ensure human security. However, in its way to ensure human security, the norm underrates national security and overlooks the role of the state in providing for human security. Consequently, the application of the norm of human security suffers from adequate support from the powerful states who are the most potential providers. To improve the efficiency of the norm of human security, it is necessary to include all states along with the non-state actors by reconciling human security with national security.

**Keywords:** Human security, National security, UNDP, ICISS, UNSC, NGOs

### 1. Introduction

A crucial change in the development discourse has come about with the emergence of the norm of human security that prioritizes individuals' security over national security and conceptualizes poverty as the real threat to the security of individuals. This goes counter to the traditional view of security which refers exclusively to the national security interests of the state by using military to ensure the territorial integrity and sovereignty. Therefore, security studies and security establishments have been focusing on foreign and defense policy mechanisms to avoid, prevent and, if needed, to win interstate military disputes. After the cold war during early 1990s, it has become increasingly evident that security threats towards individuals originate more from within the states. This is particularly true about the breakdown of the civil wars in the regions of Balkans, Africa and South-East Asia. Individuals' life is seen as severely threatened in these regions resulting thousands of casualties, forced displacement, rape, ethnic cleansing and many other fatal crimes

against individuals by the perpetrating states. As a consequence, security for non-combatant individuals has become one of the major concerns with huge import within the international community. However, the emergent norm of human security encounters numerous essential difficulties with regard to its practical application, rendering continued sufferings for those people who have been aptly identified as its targeted beneficiaries. This paper is an attempt to focus on those difficulties through an analysis of the debate between the new conceptualization of human security and the traditional view of national security, and also aims to identify potential policy measures to improve the efficiency of the norm of human security.

## 2. From National Security to Human Security

Human development report 1994 by UNDP is a seminal piece in the discourse of human security. It is the first to make the specific claim that individuals should be the referent of security instead of the states since state's security has become less vulnerable while that of the individuals suffers even by their own state. This claim is supported by the fact of declining instances of inter-state war and increasing intra-state wars during the 1990s. Therefore, it declares that the definition of security in terms of 'carefully constructed safeguards against the threat of a nuclear holocaust' has become redundant in the post-cold war era. It stresses two aspects of human security: safety from such chronic threats as hunger, diseases and repression; and protection from sudden and hurtful disruptions in the patterns of daily life (UNDP 1994, p.23). Consequently, it proposes human security in terms of the safeguards against "the threat of global poverty traveling across international borders in the form of drugs, HIV/AIDS, climate change, illegal migration and terrorism" (UNDP 1994: 24). To ensure human security, it stresses that exclusive focus on territories must be replaced by greater attention on people and security through armaments replaced by security through human development. The concept of human security, as UNDP develops, is built on four essential characteristics: universalism, interdependence of components, prevention rather than protection, and centered on people.

According to the UNDP formulation, human development and human security are two preconditions for peace and mutually reinforcing. Defining human development as "a process of widening the range of people's choices", it argues that human security denotes people's ability to exercise those choices safely and freely- and with the relative confidence that those choices would sustain (UNDP 1994:22). Here empowerment of people is a crucial aspect in that individuals should be able, and allowed, to take responsibility and opportunities for mastering over their lives. Therefore, human security is essentially a preventive as well as integrative concept that includes every individual for whom security is meant. Hence, human security can broadly be defined as having multiple components falling within two categories: freedom from fear and freedom from want.

### 2.1 Sources of Threat:

The UNDP report identifies seven prospective sources that include most, but not necessarily all, aspects of human security: economic security, food security, health security, environmental security, personal security, communal security and political security (UNDP 1994:25-33). The report also argues that threats to human security do not only originate by conditions of deprivation, inequality, and instability within the states, but also by the globalization of threats, for example, unchecked population growth, disparities in economic opportunities, excessive international migration, environmental degradation, drug production and trafficking and international terrorism (UNDP 1994:34-38). The ultimate conclusion of the report is that the root causes of threats to human security lies in the structural context of societies that provoke conflict. Therefore, we must go beyond the understanding of physical violence as the only source of security threat and include the structural factors in our analysis of human security. The report claims that resource scarcity, low level of economic growth, inequitable development, and the impact of structural adjustment are important sources of threat (Kong and MacFarlane, 2006:152). Consequently, sustainable development has become the definitive solution to conflict resolution and, thus, to ensure human security.

### 2.2 Who Provides Security:

To the UNDP, dealing with individual security need- especially their basic economic needs- is a central aspect of conflict resolution. Such conviction is supported by empirical data that shows strong correlations between conflict and structural factors i.e., lack of income, food, healthcare, personal freedom, etc (UNDP 1994:25-33). Therefore, it is argued that "soldiers in blue beret are no substitute for socio-economic reform. Nor can short-term humanitarian assistance replace long-term development support" (UNDP 1994, p.38) in order to ensure human security. As a result, all the actors concerned with development including the states are urged to contribute in ensuring human security through sustainable development.

### 2.3 Evaluation:

Ogata and Cels (2003) argue that human security does not replace but seeks to complement and build upon state security, human rights and human development (p.275). Kong and MacFarlane (2006) observe that the new conceptualization of human security stresses on four fundamentals in international relations: *first*, that security is for the individual, *secondly*, that human security is the apt and comprehensive term to capture the threat to the physical survival

of civilians caught in civil wars, *thirdly*, that states and regional organizations can effectively incorporate human security in their foreign policy; and *finally*, that the securitized domains such as economy, environment, health, gender, etc. are also important aspects to be given priority in the state budget along with military expenditures (p. 228-231).

Such a conceptual revision adequately serves two purposes: on the one hand, it helps in the policy battle for resources, and on the other hand, it focuses on a blind spot of the mainstream security studies by assuming the individual as the referent and enforcing the state to accept certain universal norms concerning the protection of individuals within their boundaries. However, the boundless stretching poses a great weakness in the new conceptualization of human security with regard to its effectiveness: everything related to human rights and human development has come under the umbrella of security and competing for priority consideration. As a result, taking effective measures to ensure human security has become impracticable, if not impossible. The case of Darfur in Sudan is a staggering example of such impasse where lots of individuals have been suffering and yet receiving extremely limited attention needed to improve human security conditions.

Konh and MacFarlane (2006) identify pitfalls in three areas in this elaboration of the concept of human security:

1. the term 'security' refers to something deserving priority. In the conventional security discourse, territorial integrity and political sovereignty are given most priority with the expectation that these would ensure all other security needs within the state boundary. Since protection from outside invasion is the precondition to have other securities, -for example, economic, political, environmental, and such- all states focus on this issue. The claim for replacing state-centric security approach by a people-centric approach, although sounds more liberal, has two weaknesses: on the one hand, the claim that less inter-states war and more casualties in intra-state wars does not necessarily prove that national security has become useless; on the other hand, public policy requires prioritizing certain aspects over others, it cannot just give the same attention to everything concomitantly.
2. putting too many items under the umbrella of human security confuses rather than clarifies the causes, and with ambiguous causal propositions, any policy formulation is likely to fail, and sometimes may even backfire.
3. including everything into human security runs the risk of securitizing a range of issues that may unwittingly lead to military solutions to political or socio-economic problems. (2006:237-243)

Hammerstad (2000) also discusses the post cold-war era in which the concept of human security has emerged and the conflict between the normative and practical implications of human security from the experiences of UNHCR. Particularly, she identifies UNHCR caught in a dilemma of serving donor states (that prefer to keep the refugees within their own home country) on which the organization depends for its existence, and protecting and assisting the refugees (who may be persecuted in their home country) the task for which it exists (p.395). For her, this is because the all-encompassing nature of human security blurs the distinction between human rights and human security and also confuses with regard to prioritizing among many goals that are often contradictory with regard to national security interests and human security. As such, she urges to explore the clear cut nature of the link between security and the dignity of individuals and the national security interest of states (p.401).

Along with the problem of ambiguity, the broad approach provides no direction in determining the improvement or failure to improve human security conditions due to the lack of a concrete measurement. As this approach considers almost everything as human security problem, it is virtually impossible to develop an index to facilitate measurement which in turn renders determining effectiveness devious. In fact, the possibilities that the concept of human security brings forth requires precise demarcation of its nature and scope so as to enable activists formulate practicable policies in order to solve real-life security problems of individuals effectively with urgency.

### 3. Narrowing the Concept

The attempts to replace traditional state-centric security paradigm by a development oriented human security paradigm is successfully initiated by the UNDP. Specifically "the initiative in defining human security by providing a list of past humanitarian crises and threats is a very useful descriptive first step, but this does not provide a potential definition of the concept for analytical assessment of human security" (King and Murray 2001:591). Consequently, security scholars attempt to address the problems in such a broad definition of human security and propose correctives. King and Murray propose a definition of human security that includes only the 'essential' elements, that is, the elements that are "important enough for human beings to fight over or to put their lives or property at great risk" (p. 593). Using this definition, they construct 'generalized poverty'- an analytical tool- in order to measure human security which includes income, health, education, political freedom and democracy (p.598).

Ronald Paris (2001) observes that although the expressive and ambiguous definition of human security helps to achieve collective action by the members of human security coalition, it renders any fruitful analysis difficult (p.102). However, he criticizes King and Murray for prioritizing certain values over others without providing a clear justification for doing so and argues that in attempting to simplify human security into a more analytically tractable concept, one has to provide a compelling rationale for preferring certain value. Paris constructs human security as one of the four subfields

of security studies each of which will have its own devices in terms of questions, methods, and propositions. Though his approach has much credit with regard to classifying various approaches to security studies, the 'matrix of security studies' suffers from lack of a rationale for separating certain potential sources of threat- for example, civil war and ethnic conflict- from the list of threats to human security without providing acceptable rationale for doing so.

Kong and Macfarlane (2006) propose a schema for human security that seems to qualify in most of the criteria of an acceptable definition of human security. They stress that, to ensure conceptual clarity and analytical traction, one has to consider human beings as the referent and delineate the threats to human security with obvious justification. They differentiate between the maladies that impinge on human well-being and those that threaten physical survival. In doing so, they propose two basic defining standards: "that the source of threat has to be another individual or individuals, and that the agents of insecurity are organized or they organize themselves to hurt people" (p.248). This definition promises to reconcile the tension between the state and the non-state actors in terms of specifying whether an activity by the state constitutes a threat to human security or not. This also rules out much of the economic, political, or environmental problems that do not threaten directly to physically hurt people. Thus, this definition stresses that the perpetrator is not the nature, but instead it is individual or individuals organized as states, transnational terrorist groups, or political leaders (p.257).

Although this definition centers on people, it does retain an important role for the state or military security. Therefore, it seems to account for the conflicts and cooperation between the security-interests of both the state and people depending on the context. Such a concept of human security is more likely to generate measurable proposition that would ultimately lead to policy formulation in order ultimately to enhance human security.

In fact, the goal of measuring and enhancing human security is impossible without a consolidated and precisely defined concept. A concept is meaningless if it is not effective in policy formulation and implementation by actors interested to work for the improvement of the plight of individuals.

### *3.1 Sources of Threats to Human Security:*

The discussion above eventually leads to single out, from an array of components of human security, only a small selection of factors that constitute as threat to human security. These include civil war, genocide, ethnic conflict, terrorism, organized crime by state (i.e. nation building), war-crime, violent crime, crime against peace, war-induced displacement, rape and abuse of women in war, conscripting child soldiers- all of which share the two basic characteristics of threats against human security: that these all are performed by other organized individuals, and that all aim to cause physical harm to civilians.

While natural disasters or accidents do cause physical harm to individuals, these are not premeditated and performed by other individuals and are not deliberately aimed to physically hurt people, thus do not qualify to be threatening human security.

### *3.2 Who Provides Security?*

The UN has been the vital player in international security and the key performer in building the norm of people-centered security (Kong and MacFarlane, 2006:165). There is a consensus that the state should assume the primary role in providing human security in collaboration with community of other states and non-state actors. But what if a state is unwilling to provide security to its citizens? This situation points to a unique dilemma: the international system considers that "the worst act of domestic criminal behavior by a government is large-scale killing of its own people; among the worst act of international criminal behavior, to attack and invade another country" (Thakur, 2006:244). To overcome this deadlock, the norm of 'responsibility to protect' is enhanced by the International Commission on Intervention and State Sovereignty (ICISS) led by Canada that essentially bridges the divide between the state and international community with regard to the established norm of non-intervention. This new norm of responsibility to protect implies that the state is primarily responsible for the protection of its citizens. If the state defaults- willingly or unwillingly- the responsibility goes to the broader community of states. Further, it embodies three essential elements: to prevent, to react in the event that prevention failed, and to rebuild societies where protection failed (Kong and MacFarlane, 2006:178).

With a balanced composition, the ICISS comes up with "problem-solving formulations for the future" based on narrowly defined sets of problems as opposed to the broad concept of human security attempting to address the wide range of human rights and development issues. The core criterion is: "the physical protection of individuals and communities experiencing or at risk from physical violence" (Kong and MacFarlane, 2006:179). The moral foundation of this norm is that "the security of the state is not an end in itself but is a means of ensuring security for people within its border" (Kong and MacFarlane, 2006:172).

However, the report holds that states are the ideal providers of human security and as such, strengthening the state competence and resilience is the best strategy to ensure human security; and conversely, human security is deeply at risk in conditions of fragile states (Thakur, 2006:257).

### 3.3 Evaluation:

By prioritizing the state as the provider of human security, the ICISS report eventually gives the security council of the UN the central role in the international system. Under the leadership of the UNSC, the international community is expected to decide on whether to intervene on the basis of a threshold characterized by three criteria: the right intension (i.e. to protect civilians in war), reasonable prospect for success, and military intervention as the last resort ((Kong and MacFarlane, 2006:179). Nevertheless, the report recognizes that this norm may fail to work in cases where any of the great powers is the perpetrator or favors the perpetrating state.

The Kosovo crisis highlights this limitation within the UN to address human security when great powers are disinclined to support. As regional organization, NATO took initiative by considering abuse of human rights as a potential cause of local and regional instability and human sufferings as a matter of concern to the alliance. Although this bypassing of the UN created considerable tension and rendered the NATO operation questionable, most regional organizations (EU, AU, SADC, OSA, etc.) have, by now, started increasingly to show interest in such concerns. This confirms the growing acceptance of the newly developed norm of human security. In spite of such recognition of human security within the international community, the United Nations Security Council (UNSC) - the highest institution in the international security sphere- has shown very little effective concern to this. As such, Newman (1999-2000) urges to reform the UNSC in a way so that it may go “beyond transparency to actual empowerment” and “beyond modified representation (of states) to entirely new kinds of participations” (p.234). Nevertheless, such reform in the UNSC would undermine state’s jurisdiction in that it essentially stresses that human security is “ultimately about constituting international relations less on a state-to-state level and more on a people-to-people level” (p.236).

In reality, any norm must be backed up by capable powers to be in effect where the norm of human security suffers in particular. Owing to the lack of sufficient acceptance among the great powers, many initiatives to enact the norm of human security have failed so far. The humanitarian crises in Kosovo, Rwanda, DRC are some striking examples of such failure. Still there are instances of success in some areas that provide much optimism for effective application of the norm of human security exemplified by the international acceptance of the Anti-Personnel Mine Ban Convention. This success is largely credited to the innovative alliance between states, multilateral agencies, the ICRC, and NGOs that proves to be an effective advocacy mechanism (Axworthy, 2001). Axworthy argues that peace and security-national, regional and international- are possible only if they are derived from people’s security. Yet he recognizes that working for such a coalition is not smooth as is evidenced in the WTO summit in Seattle in 1999. Kong and MacFarlane (2006) also identify that the norm of human security may be ineffective even though there is an international consensus in recognizing the threat if that directly contradicts with national security interest. For example, the UN has drafted and adopted a convention aiming to control the illicit trade in small arms and light arms in 2001 that is regarded necessary to enhance human security threatened by the unrestrained use of such weapons especially in the conflict situations. However, this contradicts with national security interest in that small arms and light weapons have significant law-enforcement, recreational and, in some societies, economic usages (p.199). The relevance of small arms and light weapons to national security interest and culture impedes the effectiveness of the convention, while the absence of such links with land mine renders success.

MacFarlane and Weiss (1994) provide a successful example of how UN can collaborate with regional organization in enhancing human security. The military stalemate and an urge for democratization, human rights and economic development in Central America enabled a bottom-up approach where the UN and other regional organization formed a coalition to adapt more rapidly and creatively in coping with the complex and rapidly evolving realities (p.290-291). Although the case of Central America is not generalizable, they argue that it reveals a crucial role for the UN in “the identification of weaknesses and shortfalls in regional capacities to address issues of security” as well as “of ways in which the UN can act to rectify or to compensate for them” (p.293).

Hampson (2006) argues that along with the public good of human security, we must recognize the public good of international order that protects smaller states from foreign invasion. Without national security, human security would remain elusive, and thus “the challenge is never just whether or how to deliver one of these public goods...but how to reconcile them” (p.126). He proposes ‘the portfolio approach’ to using hard power for providing human security. This approach brings together both the middle powers that are agile in grouping together to foster collective action that super powers often fail, and super powers that have the capacity that small and middle powers lack to bring effective results. Such as approach would require for all actors- both state and non-state- the capacity to act as well as adapt to the emergent problems in the context of changing world. The ultimate outcome- success- should be measured “not by the formulaic resort to procedure, institution, or self-interest, but by standard of legitimacy- and good effect” (p.149).

### 4. Conclusion

The emergence of the norm of human security is a significant novel development in the discourse of security. It evidently refers to certain aspects of individual security that have been neglected in the traditional security studies. It has been proved as more than a slogan and able to draw interest among the international community with respect to its



essential connotation. However, a consensus regarding the content of what constitute threat to human security is absent due to the fact that all parties involved- states, international organizations, NGOs and civil society- are championing their own perspective of human security based on their respective interests where national interest continues to dominate. As experiences reveal, the key to attain success is formation of a coalition of the like-minded and interested states and non-state actors. Furthermore, the crucial aspect in such a coalition for the promotion of human security to be successful is to find a way to reconcile the competing national interests with human security. Because, without the backing from power, the strongest possessor of which is the states, any attempt for the norm of human security to have a significant effect is unlikely to come about.

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## Jurisprudence Views on Producing Infant to Prove Rape

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### Abstract

PIPR is a painful way inferior group of social to rescue themselves. In China, police should take the proof burden in rape cases; production infant only testify sexual intercourse between victims and suspects, but not the acts of rape. This shows Chinese lack of evidence consciousness despite litigation increasing, police organs should take the initiative and the protection of human rights and further relief channels.

**Keywords:** PIPR, Rape cases, The burden of proof, Evidence awareness

### 1. Introduction

In the summer of 1999, Anhui province, a 15-year-old girl, who was raped produce infant to taking the criminals to jars; the summer of 2000, Guangdong province, a 15-year-old mentally handicapped girl, is pregnant after being raped, seeking fair treatment to let the innocent babies come to earth; in the autumn of 2000, Guangdong province, a 15-year-old girl was raped by her grandfather, produce infant to preserve evidence for trail; in the winter of 2000, Henan province, a 13-year-old girl, was repeatedly raped and pregnancy, in order to prosecute villain and produce infant; in the spring of 2003, Liaoning province, a 15-year-old mute girl was raped and pregnancy, in order to find the culprit and produce infant; in the autumn of 2005, Chongqing Municipalities, a 14-year-old girl is pregnant after being raped, producing infant in order to punish offenders; in the winter in 2005, Guizhou province, a 14-year-old girl is pregnant after being raped, producing infant in order to expose the lies of criminals; in the summer of 2006, Henan province, a 12-year-old girl produces infant in order to realize the justice in rape case.

The Producing Infant to Prove Rape (PIPR), is an alarming social phenomenon and a shocking methods of collecting evidence! What is PIPR? PIPR is a method to Prove Rape, in which victims produce infant. From a procedural perspective, PIPR means painful ways vulnerable groups of social take to save themselves; on the other hand, it reflects the procedural awareness of victims while lack of awareness of the evidence. Many victims in rape don't know how to protect themselves adequately and effectively. At the same time, PIPR showed that law enforcement agencies is poor in evidence, paying no attention to protecting the legitimate rights and interests of the weak, not providing remedy for the weak. Facing PIPR, everybody especially policeman and investigator should think over: what is problem with our criminal justice system? If the citizens become helpless in danger, what can he do?

### 2. Punishment to Rape

The case of rape is a serious offends to society and victims, which is stipulated in Criminal Code of every country and has a severe punishment.

According to Article 236 of Criminal code of P.R.C, Whoever rapes a woman by violence, coercion or any other means shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years. Whoever has sexual intercourse with a girl under the age of 14 shall be deemed to have committed rape and shall be given a heavier punishment. Whoever rapes a woman or has sexual intercourse with a girl under the age of 14 shall, in any of the following circumstances, be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death: (1) the circumstances being flagrant; (2) raping a number of women or girls under the age of 14; (3) raping a woman before the public in a public place; (4) raping a woman with one or more persons in succession; or (5) causing serious injury or death to the victim or any other serious consequences.

The Sexual Offence Act 2003 of British, s.1 states: (1) A person (A) commits an offence if-(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents. From the Glenn Hutton's opinions, the issue of content is a question of fact and is critical to proving the offence of rape. It is also potentially the most difficult aspect of the offence to prove and that is why the legislation has included some specific sections raising presumptions and conclusions in certain circumstances. If the victim is a child under 13, you simple have to prove intentional penetration and the child's age. No issue of "consent" arises and a specific offence under s.5 is committed.

### 3. Evidence views on PIPR

Combination of the case mentioned above, I think a lot of evidence problem in the field of related issues we should explore and research.

#### 3.1 First evidence view: is it necessary to produce infant to prove rape?

PIPR causes widespread concern in the community, and an important reason for this is the way to achieve justice is unique, there was general understanding is: the price of realizing social justice is too high even though it may keep the criminals to take their responsibility (sometimes in fact, it also may not realize the goal). But the victim girls had to bear a heavy burden: their own mental stress and the due economical problem on the baby. Therefore, there is a problem worth considering: is it necessary to produce infant to prove rape? Is it the only way to produce infant to prove rape? Is it only to produce infant to prove the sexual intercourse between victim and criminal in cases of rape.

In fact, there are many channels to prove the sexual intercourse between victim and criminal in cases of rape, such as hair extract embryonic, amniotic fluid puncture or destroyed after the fetus to preserve an effective organization to identify its evidence and so on. Firstly, the method of extracting embryonic hair refers to the human embryo fertilized eggs after cleavage, and implantation of the blast cyst, by the second week of the weekend, that the first 14 days on the formation of a mesoderm and endoderm under the composition of the two oval-shaped plate mesoderm embryo, formation of human chorionic, At this point the body's other organs are not yet occurred. In other words, in the conception fetal hair after 14 days or so may have been formed through the hair of the embryo extraction and identification. Secondly, the method of amniotic fluid puncturing. Amniotic fluid in pregnancy refers to women with uterine amniotic fluid, which is the maintenance of fetal life by an important and indispensable component throughout the pregnancy. The amniotic fluid puncture is to have a pregnancy in the amniotic fluid through a simple apparatus, taking the number of ml under sterile and then have laboratory tests to determine the perpetrator of the technology. If analysing fetal chromosomes, it normally will take 2 weeks; and if determining AFP, a few days is Ok. Thirdly, the method of wiping out the fetus to preserve the organization. There is no significant difference between this method and PIPR, but the corresponding testing samples of this method is a dead body and PIPR is a living body.

#### 3.2 Second evidence view: is it possible to prove rape by producing infant?

What is the purpose of PIPR? This question may be a bit ridiculous; the literal meaning of PIPR can be seen to testify the existence of rape. But according to Chinese law, crimes constitute four elements: the main body of crime, the object of the crime, crime subjective and crime objective. Among them, the main body of crime of rape is man who reached age of criminal responsibility (14 years old) and had capacity of criminal responsibility, the object of crime of rape is women's sex rights, crime subjective of rape must be deliberately committed and direct deliberately, crime objective of rape is committed forcibly or violently or other means, or having sexual relations with young girls under 14 years of age. Because under 14 years of age, the girl is not yet mature physical or psychological, not knowing the nature of gender relations. Irrespective of using violence or not, people may constitute the crime of rape.

And the main body of crime and the main object of the crime are relatively easy to confirm, nor do they need to adopt PIPR. But the other two elements: subjective and objective aspects of crime are more complicated. How to tell deliberate from non-deliberate? How to identify the violence, coercion or other means to force sexual intercourse with them? It is very difficult to do so. Teenage victims of PIPR is actually a misunderstanding and still face the problem of proof burden. Whether the crime occurred is needing to confirm the sexual intercourse occurring firstly and to prove the sexual violation from women will. The act of producing infant can only prove the fact of whether sexual intercourse occurred or not, and who is the baby's father.

But the act of producing infant can not prove that the latter issue—that is, the violation in the crime of rape—contrary to the will of women. Because the criminals may be argued, "I have a sexual relationship with the victim, but no to violence, coercion or other means." "Both of us are of mutual affection." The case referred in the beginning of this article in Guizhou province, PIPR can only prove the sexual relationship between the victim and Qiu, but can not prove that it is contrary to the wishes of the victims. Fortunately, there has an agreement about the offend between the criminal and the victim, otherwise it is difficult to realize the society justice.

#### 3.3 Third evidence view: is it possible to prove rape by producing infant?

According to the relevant provisions of Chinese Criminal Procedure code, criminal cases in China can be divided into two kinds: private prosecution and public prosecution. The main choice is public prosecution, supplementing by private prosecution. In fact, From the historical development process, the prosecution system had been private prosecution. In ancient times, victims took vengeance on the offender directly. With the development of criminal prosecution system, the scope of the complainant by victims extend to the general public, the general public can also exercise the right to complaints. Along with social development, in-depth understanding of the nature of the crime, single private prosecution have been unable to meet the needs of criminal punishment. In 14th century, on behalf of the state, crime prosecution and procurator organs of the Prosecutor were set up in France. Indictment from countries has gradually

become the main criminal prosecution system in the world.

The rape is a typical case of public prosecution. In rape case, victims don't need to give evidence to state organs. In studying the burden of proof, we have too much concern who should be taken the responsibility between police organs and criminal suspects, but few address Who should bear the responsibility between police organs and victims. From the indictment history, the burden of proof was beyond victim's ability, so police organs should take the burden of proof in rape cases.

From article 84 of Chinese Criminal Procedure code, any unit or individual, upon discovering facts of a crime or a criminal suspect, shall have the right and duty to report the case or provide information to a public security organ, a People's Procuratorate or a People's Court. When his personal or property rights are infringed upon, the victim shall have the right to report to a public security organ, a People's Procuratorate or a People's Court about the facts of the crime or bring a complaint to it against the criminal suspect. so in the case of rape, the only thing victims should do is to report or provide information to, and she only need identify themselves by an aggression upon women's rights, regardless of who commit the crime or how many evidence of crime is. Jurisdiction of Rape acts belongs to the police organs, which should seize the suspect and collect evidence.

#### **4. Jurisprudence thinking about PIPR**

As an act contrary to the wishes of the women, rape is a serial crime that the criminals are forcing the victim to have sex by using violence, threats or injury and other means. In almost all countries, rape is a serial crime, so does our criminal law. The criminals of rape violate victims the inviolability of the sex rights of women, who has the right to refuse to accept anybody except their spouses. The victim in PIPR has been gotten double harm——by the criminals and the social system, legal system and even a specific law enforcement agencies which should protect the rights of victims to ignore the damage. From the existence of PIPR, we should learn something.

##### *4.1 Person has more legal awareness while evidence consciousness remains weak*

PIPR shows that the people's legal awareness has been greatly enhanced in violation of the rights and interests of their own time. (Even if some "detrimental to the reputation" of events such as rape, insult etc which original was ashamed for others to understand.) From various channels, people have the courage to pursue crime, punishment of crimes, knowing how to protect their rights and interests. This is a great progress! This is the action of our national sense of progress, but also the sense of social civilization and progress.

At the same time, victims are lack of the sense of collecting evidence. If the female victims could retain the corresponding evidence of rape in the spot, it is unnecessary to producing infant to prove rape. Just as the formal president Clinton's sexual scandal of United States, victim Lewinsky keeps the skirts so long and can be used as evidence later in court. Many victims in PIPR simply do not have this sense, after being raped, the first thing should be rushed away the evidence (including vaginal secretions and clothing). Some victim in PIPR are being raped many times, but no one can retain any related evidence, such as semen underwear, sanitary napkins or, underwear, towels, bed sheets, towels or condoms, and so on. If doing so, with chelex-100 method of DNA extraction, police can make confident on offender.

##### *4.2 The protection of human rights and the sense of evidence collection should be strengthened*

Investigation department should pay more attention to insist on the protection of human rights. Compared to the other departments in the proceedings, the human rights of criminal suspects is in need of special concerning, which is the main themes of China's research field of protection of human rights in recent years one. However, this does not mean that the investigation attention should be focused only limited to the human rights of criminal suspects, other Participants in lawsuit should also be involved in, especially victim's human rights. A long time ago, victims in criminal proceedings is often seen as nothing to do with the role of their status and rights is very limited or no's. In essence, justice should not be biased in favor of any party, the plaintiff (victim) and the accused (suspects) should not be too cold or favor, the parties should maintain balance in the proceedings. To end this situation, 1996's amendment of Criminal Procedure Code regards the victims as the Criminal parties' status. British report on judicial reform in 2002——Justice for All, also made clear to establish the victims as the core of the achievement of just system of criminal justice, it says that victims and witnesses should give better Treatment. From the historical origins' view, the functions of investigation determine investigators should use the power to detect the emergence and growth of individual victims.

In addition, there are some saying that the fee of DNA identification is more than 3,000RMB Yuan, it is difficulty for the victims, who think producing birth to Infant much cheaper. This is a misunderstanding for China's legal system. According to article 2 of the cost of litigation payment by the State Council. the parties of civil and administrative proceedings should pay for litigation. Article 76 of hearing criminal proceedings on the specific provisions by the Supreme People's Court provides that the indictment filed in the case of civil suit collateral and the people's courts do not charge legal fees. Therefore, whether criminal or civil proceedings are not required to pay an annual fringe litigation costs. Applicants commitment in criminal cases are still basically the same, forensic identification are generally

conducted without charging any fees, appraisal fees and allow victims to bear no legal basis. Of course, it is undeniable that the cost involved in handling cases of identification, due to various factors, by the State in the annual financial resources often is only a small part and the majority of which rely on the unit to resolve. Sometimes, police organs are unable to identify the needed commissioned and should ask help from the social intermediary organizations or other bodies, which spend a lot of money and even affect the quality and efficiency of handling cases. Therefore, in judicial practice, some police organs ask victims to pay their identification costs (particularly those entrusted identification), but this is illegal.

#### *4.3 Situation of lacking of social relief and judicial remedy should be changed*

From a sociological point of view, as a social phenomenon existence in our society, PIPR maybe should be avoided in the beginning. 14-15 years old girl, as children themselves, should have been in the care of the parents and lead a carefree life. However, they were violated illegal, family and school can not build a safety network to protect the rights and interests of minors. The justice departments can not seek justice for them quickly and decisively, helping them out of the shadow of rape, Instead of pushing them to PIPR this bitter road. The results of PIPR are only tri-loser and no winner. The victim is a double harm by unlawful sexual abuse on the one hand, it has been battered physically and mentally; on the other hand it has prematurely into the ranks of the mother, making them the future of the heavy shadow of life. On the education of children born out of wedlock, it is also a kind of unfair. In the next life, children born out of wedlock will suffer discrimination of single-parent families and the father is a rapist. For the community and the state, PIPR shows our society and the state's system a bitter irony: our mechanism for the protection of the rights and interests of minors are too weak to protect them. If there are any schools to teach them some sense of self-defense, if the families can found children's physical and mental changing, if the community can provide several channels of rights, if China Women's Federation and other departments can protect the weak on time for intervention and help for victims, if justice is not so powerless ... ..., then is PIPR tragedy continue?

In fact, while investigation department has an excuse of "there can not collect evidence from a long time ago, our judicial remedy and relief channels did not end. According to our law, the victim may ask the People's Procuratorate for the exercise of the right to supervise or sue to the people Court as a private prosecution directly. Article 87 of Criminal Procedure Code states: Where a People's Procuratorate considers that a case should be filed for investigation by a public security organ but the latter has not done so, or where a victim considers that a case should be filed for investigation by a public security organ but the latter has not done so and the victim has brought the matter to a People's Procuratorate, the People's Procuratorate shall request the public security organ to state the reasons for not filing the case. If the People's Procuratorate considers that the reasons for not filing the case given by the public security organ are untenable, it shall notify the public security organ to file the case, and upon receiving the notification, the public security organ shall file the case. In addition, if there is evidence that proves the accused violate the victims' persons, property rights and the accused should be held criminal responsibility, but the People's Procuratorate, public security organs do not to prosecute the criminal responsibility of the accused, the victims could sue to the People's Court directly as a private prosecution (Article 170 of Criminal Procedure Code). It is known as the "Public Prosecution to Private Prosecution" in our criminal procedure law.

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## The United States' Policy toward Germany 1933--1938

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### Abstract

After the First World War, and before the breakout of the Second World War, the conflict between the United States and Britain was the main conflict in the west. And the United States' policy toward Germany was subject to this conflict. In order to create in Europe a balance of power which was in the United States' favor, and to prevent Britain and France from controlling Europe completely, the United States adopted a neutral policy toward Germany, and did help the recovery of Germany. And Germany wanted to absorb a lot of fund to recover her economy and rebuild her army, with the hope of regaining the position as one of the western powers. So it was necessary for both two countries to maintain good relationship between them. But with the rise of Nazi Germany, Hitler did adopt a very aggressive diplomatic policy, which seriously harmed the United States' interests. So the United States' policy toward Germany began to change. This thesis tries to analyze the United States' policy toward Germany before the breakout of Second World War.

**Keywords:** Aggression, Neutral policy, Isolationism

### 1. The expansion of Nazi Germany

#### *1.1 The rising of Nazi Germany*

On January 30<sup>th</sup>, 1933, the Nazi regime came to power; Hitler became the chancellor of Germany. The Nazi regime very soon showed its real face by diminishing democracy in Germany, by glorifying war, and by threatening its weaker European neighbors. In October, 1933, Hitler's Nazi Germany withdrew from the Disarmament conference and from the League of Nations. On March 16<sup>th</sup>, 1935, Germany formally renounced the clauses of the Versailles Treaty concerning its disarmament, and openly announced that Germany would increase its army to 36 divisions. The rise of Nazi Germany had a very strong impact on the balance of power in Europe, and seriously hurt the United States' interests in Europe. So the relationship between the United States and Germany began to change. The United States' government had realized that the real purpose of Nazi was to control Europe, and farther more the whole world. Therefore with the growth of Hitler's increasing ambition of expanding German territory, the relationship between the United States and Germany became more and more subtle.

#### *1.2 The formation of Rome-Berlin Axis*

On Oct 2<sup>nd</sup>, 1935, Italy invaded Ethiopia. In July, 1936, a rebellion led by Franco broke out in Spain. Nazi Germany and Italy immediately sent troops to Spain to help the rebels against the Republic of Spain. On October 24<sup>th</sup>, 1936, Nazi Germany and Italy signed an agreement to start a complete cooperation with each other. Germany recognized Italy's conquer of Ethiopia in return for economic concession. Hence, the Rome-Berlin Axis was formerly constituted. The following month Japan associated herself with the Axis by concluding anti-communist pacts with Germany and then with Italy. In the Far East, Japan used troop clashes at the Marco Polo Bridge in July 1937 as an excuse for her invasion of China. By the end of the month Japanese soldiers had seized Peking and Tientsin. Germany annexed Austria in March 1938,

### 2. The United States' neutral policy

#### *2.1 The isolationism in America*

"In the 1930s, isolationism became a kind of national secular religion in America." (Leuchlenburg, 1974, p.91). In the eyes of most American people, what was the best way to keep America out of war was the urgent question that the

Roosevelt administration had to answer. "Disillusionment with World War I not only strengthened the convictions of the isolationists but nourished a pacifist movement that won millions of supporters." (Leuchlenburg, 1974, p.91). Many American people were misled by Nazi Germany and believed that Versailles Treaty was an unfair treaty. So quite a lot of them showed sympathy for Nazi Germany and Italy, who, they thought, were just asking for enough living space for their people.

Under the pressure of domestic isolationists and pacifists, President Roosevelt was left with little room to adopt any actions against the expansion of Nazi Germany though he was clearly convinced that Hitler meant war. From 1933 to 1936, the United States was still suffering from the great depression of the 1930s, and at this time, Hitler's action still had not become a serious threat to the United States' interest in Europe, so Roosevelt administration had to attach prior importance on the American domestic affairs. Therefore the Roosevelt administration did not react to Hitler's actions of expansion actively, trying to immunize itself from Europe's quarrels. The government of the U.S. preferred a neutral policy toward Germany.

## *2.2 The neutral policy of the United States*

After Italy invaded Ethiopia, on August 31<sup>st</sup>, 1935, the United States Congress passed its first Neutrality Act which stipulated an embargo on implements of war to belligerents. This act forbade American ships to carry munitions to nations at war and empowered the President at his discretion to deny protection to American citizens travelling on belligerent ships.

In July, 1936, when German and Italian troops intervened in Spain to help Franco against the Republic of Spain, the President of the United States decided a neutral policy toward Spain. In May 1937, the American Congress passed a new Neutrality Act which extended the arms embargo and the ban on loans to include civil conflict. However, fearing that a total embargo will harm American economy, the American Congress worked out a policy of "cash-and-carry" "which provided that once the President had proclaimed the existence of a state of war, no nonmilitary goods could be shipped to a belligerent until the purchaser acquired full title and took them away himself." (Harcourt, 1968, pp.713-714). As a matter of fact, this Act, instead of deterring the aggressor, deterred the victims. Leo Huberman (1947, pp.330-331) said, "We helped Franco. We helped him by continuing to export arms – to Germany and Italy – arms which were used by Franco to fight the legally constituted democratic government and to bomb and shoot women and children. In January, 1939, the President himself admitted that our policy had worked – in reverse. The aggressor, not the victim, had been aided."

## **3. President Roosevelt struggled to preserve world peace**

### *3.1 The change of diplomatic balance in Europe and Far East*

From the weakness of the United States and other western countries in the face of German and Italian aggression in Spain, Hitler and Mussolini had seen that they had little to fear when they launched their next offensive. By the end of 1936, the diplomatic situation in Europe was entirely different from what it had been when Hitler first came into office. The balance had been broken. Italy, Germany and Japan now had a working partnership. France had lost her former strong power and declined into a relatively isolated nation. Her old allies in Central Europe were departing her, while the new partnership with the Soviet Union was still far from reality. Likewise, the relationship between France and Britain was no longer close or trustful. Such change in diplomatic relations in Europe enabled the Rome-Berlin Axis to seize the initiative during the next three years and to score triumph after triumph with virtually no opposition. In the Far East, Japan used troop clashes at the Marco Polo Bridge in July 1937 as an excuse for her invasion of China. By the end of the month Japanese soldiers had seized Peking and Tientsin.

From the American point of view, the change of international situation, on one hand meant the danger of war; on the other hand, it might give her a good opportunity to emerge as the leader of the world. This is because that, for one thing, the expansion of Nazi Germany was a challenge to the United States' interests in Europe and a potential threat to her security; and for another, the target of the expansion of Nazi Germany was first directed at Britain and France, not the United States, leaving the United States a good opportunity to strengthen her influence over the world.

### *3.2 The United States' policy toward Europe*

In the middle of 1930s, the main challenge that the United States faced came from Europe. Though, in July, 1937, Japan openly went to war against China and directly harmed the United States' interests in the Far East, the United States paid more attention on Nazi Germany. The Roosevelt administration didn't want to be a leader in solving the Far East crisis because, from the United States' point of view, its interests in Europe were much more important than its interests in the Far East.

Under the pressure of isolationists and because of the limits of Neutrality Acts, President Roosevelt had to declare openly for several times that the United States would not intervene in the European affairs. But he had been preparing a plan to preserve the world peace since 1936. By preserving the peace in the world, especially in Europe, and

restructuring the League of Nations, which was then dominated by Britain and France, President Roosevelt wanted to make the United States a leading force in the final settlement of the European crisis; thus solve the conflict between the United States and Germany, and then, to create a new order of powers which would be under the control of the United States.

### *3.3 Roosevelt's effort to preserve peace*

President Roosevelt never gave up efforts to preserve peace in the world, especially in Europe because it was in the United States' interest. From 1936 to 1937, Roosevelt had made the following proposals to the leaders of the countries concerned, attempting to avoid war in Europe. He proposed to "give consideration to the possibility of the restoration of German colonies; meanwhile, providing a economic outlet to Germany in central and eastern Europe to prevent her from expanding for markets and economic resources; thereafter, on the condition of neither letting Germany achieve the hegemony in European continent nor being at war with her, to achieve the final settlement of the European crisis politically and economically." (MacDonald, 1981, p.14) and then "convene a conference of neutral nations to set forth a peace program based on certain standards of international behavior to solve European crisis." (Harcourt, 1968, p.715)

From what have been mentioned above, we can say that President Roosevelt's adopted a policy of appeasement toward Nazi Germany in order to preserve peace in Europe. Roosevelt tempted to satisfy Nazi Germany's demand to some extent so that the United States' interests in Europe could be saved.

### *3.4 The reaction of Britain and Germany toward the Roosevelt's effort*

However, preserving peace in Europe wasn't an easy job. It depended on the response of European countries. Because of the United States' domestic isolationism and economic problems, Roosevelt administration didn't want to intervene in European affairs directly by political means. If he wanted to preserve peace in Europe, he had to depend on the cooperation of Britain, Nazi Germany, Italy, and France, especially Britain and Germany. However, at that time, the relationship between the United States and Britain was not good. Britain did not trust the United States. Chamberlain suspected that the real purpose of Roosevelt's effort was to break the balance of power formed after the First World War and create a new one which was under the dominance of the United States. So Chamberlain preferred to deal with the Germany and Italian directly by himself, without the intervention of the United States. And by improving British relationship with Germany and Italy, Chamberlain wanted to preserve the balance of power which was in the interests of Britain. Thereafter, Chamberlain's policy of appeasement toward Germany excluded the United States. In January 1938, Roosevelt sent a letter to Chamberlain suggesting convening an international conference to discuss a peace program in Europe. "But the British prime minister, now wholly absorbed in the appeasement policy, briskly rejected the American initiative on the ground that it ran the danger of 'Cutting across our efforts here'." (Harcourt, 1968, p.715) Hitler didn't show much enthusiasm about Roosevelt's effort, either. His attention was focused on central and eastern Europe. He thought Britain and France were two countries that were the key elements in realizing his European dream. So he did not attach great importance on the relationship between Nazi Germany and the United States.

### *3.5 Roosevelt's insistence on preserving peace in Europe*

The respond from Britain and Germany discouraged Roosevelt from keeping making his peace preserving effort. So in 1938, the United States took the policy of "watching the change" in Europe. But, as a matter of fact, Roosevelt did not really give up his effort. This is because the Roosevelt administration did not wish the balance of power to be so seriously broken as to harm the United States' interests. In September, 1938, when the Czech crisis deepened, Roosevelt made another try. On September 26<sup>th</sup>, 1938, Roosevelt sent telegram to the heads of Britain, France, Czechoslovakia, and Germany asking them to solve problem through negotiation. He said: "The traditional policy of the United States has been the furtherance of the settlement of international disputes by pacific means. It is my conviction that all people under the threat of war today pray that peace may be made before, rather than after, war." (Richard, 2005), and this "On behalf of the 130 millions of people of the United States of America and for the sake of humanity everywhere I most earnestly appeal to you not to break off negotiations looking to a peaceful, fair, and constructive settlement of the questions at issue. I earnestly repeat that so long as negotiations continue, differences may be reconciled." (Richard, 2005) And on September 27<sup>th</sup>, 1938, Roosevelt sent the following message to Hitler: "The two points I sought to emphasize were, first, that all matters of difference between the German Government and the Czechoslovak Government could and should be settled by pacific methods; and, second, that the threatened alternative of the use of force on a scale likely to result in a general war is as unnecessary as it is unjustifiable. It is, therefore, supremely important that negotiations should continue without interruption until a fair and constructive solution is reached. My conviction on these two points is deepened because responsible statesmen have officially stated that an agreement in principle has already been reached between the Government of the German Reich and the Government of Czechoslovakia, although the precise time, method and detail of carrying out that agreement remain at issue." (Richard, 2005)

Roosevelt wanted to solve the Czech crisis forever. However, both Britain and Germany, which were then standing on



the centre of the political stage of Europe, did not want the intervention of the United States. On September 29<sup>th</sup>, 1938, under the manipulation of Hitler and Chamberlain, the Munich settlement came into being.

### End

Nazi Germany was the prim culprit who launched the Second World War. The United States was an economically strong country who had long wanted to be the leader of the whole world. The German expansion was sure to threaten the United States' most important political and economic interests in Europe. But because of the strong pressure of isolationism within its own country, plus the unprecedented economic crisis, and because there were still some contradictions among the United States, Britain, France and Soviet Union, the Roosevelt administration had limited measures to intervene in the European affairs. The United States government had to carry out a neutral policy toward Europe.

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A Comparison of Two Legal Models of Social Governance in China:  
Public Law and Private Law  
----Appeal for Reforming Chinese Legal System  
of Civil Liability and Administrative Penalty

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**Abstract**

Under the perspective of law, there are two social governance methods: public law model and private law model. This article, through case study approach, comparatively analyses the two social governance methods: their forming cause in law, their expectable social effectiveness, and their relationship with “strong government” model in China. In order to promote the reform of social governance of the “strong government” model where public law prevails, this article further appeal for Chinese legislator, under the spirit of scientific legislation and the thought of returning rights to individuals, restructure Chinese legal system of civil liability and administrative penalty by systematically emending existing laws, regulations and rules concerning civil/commercial affairs and administrative activities, and establishing reasonable legal mechanism of compensation.

**Keywords:** Social governance method, Public law model, Private law model, Strong government, Chinese legal system reform

**1. Introduction**

In the process of deepening reform in China, the function and role of government at all level have been being one of the focuses. The goal of the administration reform in China is to establish limited and responsible government in which rule of law prevails (We Jianbo 2006). After the case concerning social security funds was discovered in Shanghai in October 2006, to reflect on the shortcomings of “strong government” model, has become the most outstanding element of the Shanghai Municipal Government Work Report (the news came from “21st Century Economic Report” on 30 January ). The reflection was made by Shanghai local government from the angles of politics and administration (Han Zheng 2007). In China, few articles discuss that the “strong government” model under the perspective of law, as a social governance method, how it has been formed? What shortcomings it does have? How the shortcomings can be corrected?

From legal point of view, there are two social governance methods: public law model and private law model. This article, taking the approaches of case study and comparative study, discusses the three issues mentioned above. The case was a famous administrative penalty case, concerning the commercial fraud of Shanghai Xianhe Hospital (note 1) in private medical service that has been investigated and dealt with by the relevant competent departments of Shanghai Municipal Government. Through the case study, the article comparatively analyzes the two legal models of social governance: their forming cause in law and their expectable social effectiveness, as well as their connection with “strong government” in China. In order to correct the shortcomings of the “strong government” model, the article appeals for reforming the legal system of civil liability and administrative penalty in China,

**2. Facts**

It was reported by “Nanfang Zhoumo”, a famous weekly-newspaper in China, that “Shanghai Xianhe Hospital imposed the most severe administrative penalty” on 10 February 2007. According to the report, Shanghai Xianhe Hospital (hereinafter referred to as “the hospital”) in the process of providing private medical services (note 2), swindled numerous patients by various medical fraud. A typical case was that, on 31 October 2006, unmarried woman, Hong-Yan Wang was diagnosed as the disease of “infertility” by the hospital, and then, she was implemented a

“specific treatment”, which was called as “womb and abdomen laparoscope united operation” (note 3). In sequence, her younger sister was also diagnosed the same “disease”, performed the same “operation”. For “accepting” the “specific treatment”, the two sisters totally spent around 80,000 Yuan.

Another medical fraud in the hospital’s medical service was that in order to take in very high medical service fee, the hospital fraudulently told the patients there was “Dong Chong Xia Cao”, a very expensive Chinese plant medicine (Actually, there was not), or the medicine had enough amount (actually, the amount was far less than that of prescribed) in the mixed Chinese medicine waters that were prescribed and cooked by the hospital for these cheated patients.

It was through these medical frauds, these cheated patients’ funds were taken away. (“Each of them was swindled out of more than 30,000 Yuan”).

How many patients’ rights and interests have been fraudulently infringed by the hospital during its practice? The exact number was unknown. However, there were two facts have been confirmed: (1) within two years after the hospital was set up, because of advertising and other marketing means, the patients came to the hospital were so many that the “womb and abdomen laparoscope united operation”, which was advertised as the characteristics of the hospital’s service, had to be carried out from morning to midnight every day. (2) Shanghai Municipal Health Bureau (SHMHB) received several patients’ complaints against the hospital every day after the case was exposed by Xinhua News Agency, CCTV (China Centre Television) and other media in China.

On 31 January 2007, CCTV deeply reported the case with the title of “Operational knife? Slaughtered knife?” in which the truth of a number of patients were carried out the illegal treatment-----“womb and abdomen laparoscope united operation” by the hospital, was exposed.

### **3. Handling of the Case**

On 6 February 2007, SHMHB ascertained that the hospital illegally provided the medical service in the diagnosis and treatment of “infertility” during its practice and the conduct seriously violated the Regulation on Medical Institution Control, an administrative regulation enacted by State Council in 1994. Based on the facts, SHMHB decided cancelling the hospital’s Medical Practice Licence, which is one of the most severe administrative penalties under Chinese administrative law.

On 9 February, given that the hospital was discovered serious commercial fraud because of replacing extremely expensive Chinese traditional medicine “Dong Chong Xia Cao” with another very cheap material(s), the Shanghai Municipal Food and Drug Administration (SHMFDA) decided formally transfer the case to the Shanghai Municipal Public Security Bureau (SHMPSB) for criminal investigation.

Meanwhile, a large number of medias, including the CCTV international, widely and deeply reported the handling of the case on both home and abroad, in order to illustrate the Chinese Government’s efforts in the protection of citizen’s basic civil rights and the improvement of people’s livelihood in 2007, which was called as “people’s livelihood” year by Chinese government.

### **4. Jurisprudence Analysis on the Administrative Penalty Decision -----Under the Perspective of Social Governance Method in Law**

The case belongs to a commercial fraud in the process of providing private medical service in which the patient(s)’ personal rights and property rights (private right) suffered seriously from illegal damage. If the court finds that the hospital’s medical fraud violated China’s Criminal Law, the hospital and relevant responsible persons should be subject to criminal prosecution. Given the issue of the criminal sanctions falls outside scope of the paper, which is not be discussed more in this article.

The main question discussed in this article is, should the case and other similar cases where private rights have been suffered from actual infringement, be handled by administrative penalties (public law model of social governance), or remedied by civil liability (private law model of social governance), which of the two social governance methods is more reasonable? It is self-evident that the judging standards regarding the reasonableness, of course, should be decided by following factors: namely, which one is more conducive to: (1) the remedy for the victims (reasonable compensations), (2) the warning to illegal wrongdoer, (3) the encouragement for law-abiding people, (4) the contribution to public finance, (5) the respect for the citizens’ rights, and (6) the constraint to administration power. Speaking essentially, to consider which one is in more beneficial for the formation of socialist market-oriented economic order and the establishment of a harmonious society that is filled with fairness and justice in China.

#### **4.1 Legal Cause and Its Defects of Public Law Handling Model of the Case**

The case was factually handled by the competent administrative authorities in accordance with the administrative laws and regulations; its result was to be imposed an administrative penalty against the hospital. Hence, the social governance method is called as public law model.

It should firstly be confirmed that the revocation of the hospital's Medical Practice License in this case, totally complied with the existing administrative laws and regulations in China, in both substantive and procedure law, particularly, the relevant provisions regarding the administrative penalties provided by chapter 6 of "the Regulation on Medical Institutions Control". There was not any wrong in the administrative penalty imposed by SHMHB under the current Chinese administrative law. Therefore, this article does not have any implication of blame against the relevant government authorities.

However, when we thinking over the public law handling model of the case under the perspectives of jurisprudence and social governance method, by a comparison with the private law handling model (using private law to remedy private rights infringed), for example, reasonable compensatory damages together with the necessary punitive damages, it can be found that there are many drawbacks in the public law model to deal with these cases in which the private rights have suffered from commercial fraud and other intentional infringement. These defects can be attributed to "strong government" model, which is not conducive to the formation of Chinese socialist market-oriented economic order and the establishment of the ideal community where the rule of law prevails.

First, the investor(s) and main responsible person(s) of the hospital have taken in huge ill-gotten gains by fraudulent medical services and illegal means. After revoking the hospital's Medical Practice License (even investigating the criminal liability of the main responsible person(s) under China's Criminal Law, and putting them into a prison for years), they can still enjoy the rich life with the ill-gotten wealth. Obviously, this is particularly not conducive to dissuade publics to follow the laws and regulations.

Second, the method of the administrative penalty is not helpful to solve the victim's problems in livelihood. In this case, the social problem of victims' livelihood has not been solved under existing unsound legal system of civil liability in China. To solve well the victims' livelihood requires adequate compensation. The private law remedy method flickering humanitarianism thought, may play the roles and functions in encouraging law-abiding persons, compensating and comforting the victims, and depriving the persons who deprive other! In any commercial community where the currency is regarded as a general equivalent, the authority of rule of law can be established only by depriving the illegal predators. However, China's existing legal system of civil liability, which based on the "General Principles of Civil Law" and other civil law, adopt the principle of limited compensation to remedy victims' actual loss, and lacks scientific legal system concerning punitive damages. These defects in the legal system of civil liability, forced Hong-Yan Wang and other victims, complained to the media or competent administrative authorities, but did not bring a claim to the courts! As a result, the credibility of justice in China has gravely been challenged.

Third, under the views of legal economics and public finance, the cost using the public law model to protect private right is far higher than that of the remedy of private law. In this case, SHMHB, SHMFDA, and SHMPSB have intervened for the investigation one by one. The social governance method of public law model significantly increased public expenditure. Taking SHMHB as an example, SHMHB began the investigation on 9 January 2007; the cancellation of Medical Practicing Licences was decided on 6 February. During the period of nearly one month, supposing three servants participated in the enforcement of the administrative regulation, per capita fee (wage, welfare and official expenses) provided by public finances amounted to a monthly rate of 15,000 Yuan, then, the public finances would has spend about 45,000 Yuan on the case for the enforcement of the administration law on medical institution. It can be estimated that, therefore, the public finances must be paid about 150,000 Yuan for handling the case if considering the participation of SHMFDA and SHMPSB. This means that the lawless and unscrupulous merchants while possess ill-gotten wealth, live a rich life, makes all law-abiding taxpayers in our community to pay for their illegal acts! On the contrary, through the direction and guidance of a sound legal system of civil liability, the victims are willing to claim for damages to the court. Under the circumstance, the illegal infringement persons must pay for their violations of law. Therefore, this case also, from another perspective, reveals why the public finance is always in deficit, why Chinese government failed to invest more funds to public enterprises like education and public healthcare service.

Fourth, the revocation of the hospital's Medical Practice Licence under the relevant provisions of the "Regulation on Medical Institutions Control", means that medical institutions right to "life and death" are controlled by healthcare administration authority. Reflecting on these provisions under the perspective of rule of law, the essence of this practice is still the follow with the tradition of planned economy era, in which using administrative power to directly allocate productive elements. The practice does not comply with the principle of resource allocation decided by market demand. In the market of private medical services, medical institutions would truly respect their patients' rights and interests when these patients may decide the medical institutions' fate only by the remedy of private law through the direction of sound legal system of civil liability. If using the of administrative law method to decide the medical institutions' "life and death", under existing legal environment where the rule of law is still a dream sought in China, what we can only see is that the generally existence of the rent of seeking power, and the ignorance to the patients' rights and interests by the profit-oriented medical institutions.

In addition, China's existing administrative law empowers healthcare competent department to decide the both "life and

death” of the medical institutions. This is a legislation that state powers are concentrated on certain government departments, which is the root causes that the state powers are taken up by government’s departments, and fostered the formation of the sector monopoly interests and the shortcomings of “strong government” model. In the UK, Under *Att-Gen v. Lindi St Clair (Personal Services) Ltd (1981)* (2.Co. Law 69), the registration of companies is responsible by the registration office, and the cancellation of the registration of the companies, should make a prosecution by legal supervisory authority, and decided by the court in accordance with the law. It is worthy of our attention to the separation of powers at micro-level under English law.

Finally, the cancellation of the hospital’s Medical Practice Licence, may also leave over other negatively effects on our community: (1) to whom the victims may claim for compensation once the hospital was legally terminated (the subject of civil liability for the medical fraud); (2) the hospital, as a taxpayer, was abolished; (3) hundred(s) of medical staffs in the hospital were facing unemployment and re-employment; (4) the hospital’s medical equipment facilities were idled. (See table 1, the causes and its defects of public law handling model of the case under existing law.)

Insert Table 1 here.

The above analyses suggest that the legal cause in forming the “strong government” model and its shortcomings in China is that the government, in the process of governing economic and social affairs, neglects the fundamental role and function of private Law (civil and commercial Law), and is habitual to, sometimes even eager to expand, confirm and “defend” its administrative power by (administrative) legislation; in sequence, by virtue of the expanded administrative power to deal with the economic and social affairs that, under its very nature, should fall within the scope of autonomy of citizen community, and therefore, adjusted by private law.

#### *4.2 Benefits of Private Law Handling Model of the Case and Its Requirements for China's Legal System Reform*

How about the predictable outcome of the case and its social effects if China possesses a better legal system of civil liability? The sound legal system of civil liability includes at least two elements: (1) a reasonably compensatory damages for tort and/or for breach of contract under the principle of fully compensation; (2) a necessary punitive damages, namely civil penalties, for punishing and warning civil wrongdoer. The sound legal system of civil liability may effectively prevent illegal conduct or intentional breaking contract, may reasonably provide remedy for the victims of torts and broken contract, and may effectively punish the illegal tortfeasor. The sound civil liability legal system is the embodiment of scientific spirit in civil legislation, which reflects the general rules to build a harmonious society under the conditions of market economy.

According to Anglo-American private law, the remedy to illegal infringement should be the compensation for the victims in accordance with the market value of all actual losses, including direct and indirect, material and spiritual, physical and mental damage. In addition, as far as the intentional infringement in economic and commercial fields, the American law (for example, *TXO Produc. Corp. v. Alliance Resource Corp.* (S. Ct 1993), and *BMW of North American Inc. v. Gore* (S.Ct.1996)), in order to appease the victim, under the specific circumstance of every case, imposes punitive damages that are equivalent to the amount of several decades to several hundred times of the victims’ actual loss( note 5). And then, different state may levy the income tax of the proceeds of punitive damages ranging from 33% to 75% on the victims by the law (Jerry J. Phillips, 1999). In the aspect of administrative law, Angle-American law while mainly governs the public interest and public affairs, restrict administrative power in accordance with the principles of due procedure, seldom involves the case of private rights “protection”( Michelle M. Mello, 2003).

Imaging China’s legislature is willing to reconstruct Chinese legal system of civil liability and administrative penalties under the spirit of scientific legislation and the ideology of returning the rights to individuals, namely: (1) in the side of improving current civil liability legal system, except for the compensation to the victims’ actual losses in accordance with its market value, in order to punish the intentional violations, such as intentional infringement in the economic and commercial fields, impose the illegal tortfeasor to pay the victims punitive damages that are 20-50 times of the amount of the actual loss; then, levy the income tax that is 20% of the proceeds on the victims (note 6). (2) in the side of reforming the legal system of administrative penalties, for those cases in which private rights are actually infringed, should apply civil fines (namely the punitive damages) to replace administrative penalties, such as administrative fines, the closure for rectification and the revocation of licence (business license), and etc.. The administrative penalties apply only to those cases in which while private rights have not yet suffered actual damage, a potential hazard to public safety or other public interests has been imposed upon. Under this legal framework, the expectable outcome of the case and its social effects would be quite different from the factual situation of the case:

First of all, the victim like Hong-Yan Wang in this case will be able to obtain 1.0 million Yuan after-tax income due to the remedy of private law. Its social effectiveness, not only may reasonably provide relief for the victims, deprive of the depredator---- the illegal tortfeasor, maintain fairness and justice for our community, but also may encourage public’s supervision to commercial fraud and other breach to good faith in business operations.

Moreover, the income of public finances will be increased, and the expenditure of public finances will be reduced.

Under the ideally legal framework, firstly, there will be a direct reduction of various official expenses by administrative agencies in handling the cases of private rights infringed. Secondly, there will be a significant increase in the punitive damages income tax. The taxation is considerable public revenue, which is a necessary measure that deprives the illegal income of dishonest merchant. All types of bad faith business practices not only directly infringe the legitimate rights and interests of the parties (consumers, customers, employees, etc.), also undermines public interests in our community, such as destructing the market economic order, increasing the transaction costs of business on the level of whole society. Thus, it is reasonable and feasible to set up the taxes, so that countries and individual victims are entitled to deprive the property of unlawful merchant.

Furthermore, the exhausted burden of administrative agents in handling individual case in which private rights were infringed would be significantly reduced. As an important result of the reduction, civil servants are able really to think about and deal with public affairs that individuals and enterprises in our community can not handle by their autonomy. For example, in the field of healthcare, the public affairs include: (1) the guarantee in providing public healthcare services; (2) the organization in constituting technical specifications; (3) the publication of healthcare information; (4) the guidance for patients properly receiving medical services; (5) the guidance for investment layout of medical institutions; (6) the investigation and handling of potential patient safety problems; and (7) the protection of public safety for medical treatment; and etc.

In addition, government's intervention to economic and social affairs may be restricted to a reasonable limit. Where the things fall within the scope of individual autonomy in our community, public power, in principle, should not take an interventionist stance. In the side of investment and operation, business operator's "life and death" should be truly determined by market forces (the choice of consumers and users). Under the circumstance, the basic role of market mechanism in allocating resources would be played in real.

Last but not least, the credibility of justice can be enhanced and the supervision to justice can be strengthened. It is self-evident that the credibility of justice in China would be naturally enhanced when the justice may bring actual and legitimate interests to individuals in our community, especially to those persons who are in disadvantages in status, education, wealth and position, and etc. Additionally, the essence of the reconstruction of China's legal system in civil liability and administrative penalties is a re-allocation of state power between the people's court and (20-30) government departments. It is conducive for the National People's Congress in strengthening the supervision to justice. The reconstruction of the legal liability system, together with clear and workable civil liability legislation, can also restrict the judges' discretion. Thus, it is also positive in controlling judicial corruption in China.

In summary, the legal reform in the liability system, which stresses fully civil remedy and limited administrative penalties, with the characteristic of minimum administrative intervention to economic and social life, will allow tortious victims receive adequate compensation, enforce civil wrongdoer who is in the breach of integrity in business to pay drastically the compensation, and let the government obtain better governance with less intervention. Under the legal system framework, citizen's legal consciousness and feelings would be naturally developed, the authority of rule of law would be naturally established, the market economic order in China would be naturally formed, and the government's prestige would be naturally set up! (See table II, private law handling model of the case and its expectable social effects under the ideal law).

Insert Table 2 here.

## **5. Conclusions**

The core of private law is the remedy to private rights. Sound legal system of civil liability constitutes the legal basis for reasonable remedy. The protection to private rights that is rooted in the sound legal system of civil liability is the most reasonable and effective, its function and value can not be replaced by any "strictly" means of administrative protection. Over-expansion of administrative power will be restricted due to the existence of the sound legal system of civil liability, and the society governance method in which private law prevails will be gradually formed in China.

Under the perspectives of law and social governance, the disadvantages of "strong government" model are also obvious, even if our every government department and every civil servant of the government department wholeheartedly serve their people. The legal cause in forming the "strong government" model is that there is a "weak" civil liability and "strong" administrative penalties in current legal liability system in China. The approach to remove these disadvantages needs a transformation in social governance method from current public law model to ideal private law model in China. To achieve the transformation, legal reform is required, which should be undertaken under the spirit of scientific legislation and the thought of returning rights to individuals. The goal of the legal liability system reform is to restructure Chinese legal system of civil liability and administrative penalty by systematically emending existing laws, regulations and rules concerning civil/commercial affairs and administrative activities in China, and establishing reasonably legal mechanism of compensation. Only by doing these, the socialist market economic order with good faith and fair dealing can be established, the authority of rule of law can be set up, a great citizen community with a limited

and responsible government can be built, and the ideal harmonious society filled with equality, justice and humanism will become true.

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## Notes

1. The hospital is private medical institution invested by Lin, a Fujian's Putian villager. There is NOT any connection with Peking Union Medical College Hospital.

2. Private medical service is also called as profit-making oriented medical service. This is distinct from public medical services in which the main purpose is for providing nonprofit health care services for publics. Therefore, the fraud in private medical services, by their very nature, is a commercial fraud.

There are three criteria to distinguish private medical services from public medical services in China:

The first, who is the investor of the medical institution. Generally speaking, the state-owned and collectively owned medical institutions' healthcare service belongs to public medical services; private or foreign-capital medical institutions belong to profit-making medical institutions. The nature of medical service provided by mixed-ownership medical institutions should be treated in accordance with their specific conditions.

The second, who decides on the price of the medical services. Public medical services implement government-decided price or government-guided price. The price of private medical services is decided by the market pricing.

The third is tax situation. While nonprofit medical institutions are non-taxable bodies, profit-making medical institutions, as taxpayers, are required to be registered by Chinese tax agency.

It is necessary to take all the above three criteria into account when confirming whether a medical institution is profit-making or nonprofit in China.

Under the legislative practice in many countries and/or regions, such as the United Kingdom, Taiwan province of China, the law applicable to nonprofit medical institutions and profit-making medical institutions is different. Therefore, the legal reform programme advocated in this article does not apply to nonprofit medical institutions.

3. The medical fraud in this case, was determined by following two factors: for one thing, there is not at all the "womb and abdomen laparoscope united operation" in clinical medicine. There is only two separate "the operation under womb laparoscope" or "the operation under laparoscope". For another, the applicable scope of the diagnosis of "infertility" must be the woman who has married for at least two years without a successful pregnancy.

4. The author of the article advocates that as a commercial fraud, the case should also be applied to the provision 49 of China's "Consumer Protection Law". According to the provision, the Hong-Yan Wang should be awarded another 40,000 Yuan as punitive damages. However, whether the law is necessarily applied to private medical services, the point of view in China's courts and academic sector is not unanimous.

5. In the case of *TXO Produc. Corp. v. Alliance Resource Corp.* (S. Ct 1993), the plaintiff was awarded \$ 10 million punitive damages, which was 526 times of \$ 19,000 compensatory damages awarded to the plaintiff. In *BMW of North American, Inc. v. Gore* (S.Ct.1996), the plaintiff was awarded \$ 4,000 for direct loss plus \$ 2 million punitive damages because the defendant sold a "new" car to the plaintiff with a renewed old car.

6. The basic national conditions in China are the main considered factors for the design on Chinese punitive damages system: (1) the per capita income and per capita GDP in the United States is about 20-25 times than that of in China; and (2) China is and will be in the primary stage of socialism for long-term.

Table 1. Causes and Its Defects of Public law Handling Model of the Case  
Under Existing Legal System in China

	<b>Public Law Sanctions:</b> Administrative Penalty	<b>Private Law Remedy:</b> civil compensation
<b>Legal Authorities</b>	Chapter 6 Penalties, Regulation on Medical Institutions Control	The relevant provisions of Chinese civil law: General Principles on Civil Law, Contract Law and the related judicial interpretations.
<b>The Result or Expectable Result</b>	Cancellation of the hospital's Medical Practice Licence.	Every victim like Hong-Yan Wang is entitled to be awarded compensatory damages for direct economic losses (paid medical fees and its interest loss) about 40,000 Yuan, (note 4) but after deducting attorney fees and other litigation expenses, the factual gain of these victims are little.
<b>Victims' Choice (Value Orientation)</b>	Complained to competent administrative departments.	Did not bring the case to court (do not believe in the law).
<b>The Social Problems Brought by the Public Law Handling Model</b>		Illegal and unscrupulous merchants are still rich by the medical fraud, the victims' problem in livelihood remains unresolved, the shortcomings of the "strong government" model have been highlighted: (1) administrative power decide the allocation of resources; (2) high administrative expenses; (3) the power is liable to be leased and abused because of the concentration of the power and the lack of effective supervision to the power; (4) the reemployment and unemployed of the hospital's staff after it is closed; (5) patients' interests do not be truly valued and respected by the medical institutions, etc.



Table 2. Private Law Handling Model of the Case and Its Expectable Social Effects  
After Legal Reform in China

	<b>Private law remedy:</b> Civil Compensation	<b>Public Law Sanctions:</b> Administrative Penalty
<b>Goal of Legal System Reform</b>	To establish reasonably legal system of compensation and restitution, except compensating various factual loss, which should be calculated in accordance with its market value, in order to punish the intentional infringement in economic and commercial fields, to award punitive damages that is 20-50 times of the victim(s)' actual loss amount to the victims, then, levy the income tax of 20 percent on the proceeds.	To amend the existing administrative laws and regulations; administrative penalties are applied only to the cases in which private rights have not yet suffered actual damage, thus, the remedy of private law can not be applied. For example, in the case of using non-medical professionals to practise, a potential hazard has imposed upon the public health safety, but patients' personal and property rights have not yet suffered actual infringed.
<b>Expectable Results</b>	Assuming that the actual losses of every victim is 40,000 Yuan, and that punitive damages is calculated by 30 times, then, each victim can be awarded $4 + 4 \times 30 - 4 \times 30 \times 20\% = 1.0$ million. After paying lawyer's fee and other litigation expenses, every victim's factual income is still considerable.  Public finance revenue can be: $4 \times 30 \times 20\% \times$ the total numbers of victims.  If the hospital is insolvent, it may file for bankruptcy, the hospital is closed. However, it may conclude a settlement agreement with the victims for amortization; as a result, the hospital may continue to be operated. (market mechanism)	No the need of intervention by (health) administrative power. The executive power can only be applied within the scope of public affairs in which individuals are unable to be in autonomy.
<b>Victims Value Tendency</b>	To bring a claim to court for remedy (believe in the law)	Does not complain to administrative agencies for intervention
<b>Expectable Social Effectiveness</b>		may provide reasonably relief for the victims, may warn civil wrongdoer, may cultivate civic belief and consciousness of law, may enhance the credibility of justice, may achieve the legislative purposes of China's laws and regulations, may reduce the burdens of administrative authorities, may increase public revenue, may prevent the abuse of administrative powers, may overcome the shortcomings of "strong government" model, may foster citizen community, and achieve the goal of politic reform of a limited and responsible government.



## On the Universal Value and the Socialist Democracy

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### Abstract

The universal value has become the focus of dispute among the common people and the thinking public. This paper, taking understanding scientifically the nature of the universal value as the starting point, analyzes the dispute of capitalism and socialism on the universal value and has found the reason resulting in the situation. And it further pointed out theoretically that the scientific way by which socialism wins the leading power is to establish the socialist democratic political system based on the proletarian universal value. Then, the paper, combining the history and reality, makes a bold imagination and analysis on how the universal system of socialist democracy can be practiced in the socialist countries or other world and draws the final conclusion that the universal socialist democratic system will help the socialism triumph over capitalism.

**Keywords:** Scientific understanding, Universal value, Create, Universal socialist democratic system, Liberation of all mankind

It is no doubt that democracy is a good thing! But there are different opinions about which democratic system is better and can be the more representative of the direction of the development of human society. In 2008, Obama and Hillary performed well and caught numerous eyeballs in the Democratic Party primary election of the U.S. presidential election. Such an African origin black as Obama and a woman as Hillary may have the future to become president, as makes countless people at a time believed that the capitalist democratic political system was the ablest to represent the direction of the development of human society, and embody the universal value.

What is the universal value? It is the common human value, objective and valid everywhere. It is interpreted in the world as "freedom, democracy, and human rights". However, the real problem lies in the fact that, can the capitalist democratic political system best reflect the universal value? Is the socialist democratic political system not able to reflect it? Since the socialist democratic political system should be superior to capitalist democratic political system from the angle of the class nature of serving the majority of the workforce, why in reality, can it not have the discourse power of the universal values? What we should do facing with the passive situation?

This article believes that we should acknowledge the commonness that the universal value belongs to all human beings and realized the class personality that different users have, which is in line with the dialectical materialism. To break the ideological fence is the key for socialist democratic political system to defeat capitalism democratic political system. That is, on the basis of proletarian universal value, it should critically absorbs capitalist democratic political systems including such historical achievements of human civilization as multi-party competition system, universal suffrage and representative system and the tripartite political system, transform them in a socialist way and create the new socialist democratic political system, namely, the universal socialist democratic system. The system representing the direction of human development and carrying the universal persuasiveness is bound to promote the historical process from capitalism to socialism.

### 1. Uncovering the essence of universal value.

In recent years, controversies on the universal value have become much hotter, displaying a confused situation in ideology. Seen through these phenomena to find the essence, the argument without conclusion lies in the root causes that people have not understood the commonness and personality of the universal value, and different classes have different class attributes though the universal value is expressed in the same words. It is undeniable that "freedom, democracy and human rights" have been proposed by the bourgeoisie. However, the achievements of civilization of any class are actually the mutual wealth of all mankind, which can be continued and developed naturally in any society and in any period of history. As far as these basic principles of the Marxist historical materialism are concerned, it is beyond doubt that "freedom, democracy, and human rights," are the basic elements of the universal value. These basic elements,

at the individual level, specifically refer to the “right to live”, “right to grow”, “right to vote”, “freedom of religion”, and “right of demonstrations”, “freedom of speech”, and so on; while at the national and state level they refer to the “good governance”, “equality and mutual benefit” and “peaceful coexistence” and so on and so forth.

On December 10, 1948, the United Nations including the former Soviet Union and Eastern European socialist countries adopted and promulgated the “Universal Declaration of Human Rights”, which requested that it should be “a common standard of achievements for all peoples and all nations” (see the Prelude), confirmed that “everyone is entitled to have all the rights and freedom carried in the Declaration without any distinction of race, color, sex, language, religion, political or other opinions, nationality or social origin, properties, birth or other status” (See Article 2), and clearly pointed out that “the will of the people, which should be expressed in periodic and genuine elections by universal and equal election by secret or free voting, is the basis of governmental authority.” (See Article 21). All the socialist countries are now the members of the United Nations, and the supporters of the “Universal Declaration of Human Rights”.

Supporting or agreement itself is determined by the class attribute of socialist countries. Should a regime serving the majority of the laboring people have reasons to disapprove the “freedom, democracy, and human rights” related to the interests of the majority of the people? Therefore, the universal value, with “freedom, democracy, and human rights” as the basic contents, has the generality of the common value of all mankind. However, when different countries use it to serve their own ruling class, or when the international commonwealth of different classes utilizes it as a tool to implement the class interests and ideology, the universal value has the different class individuality. For example, relative to the commonness of all the human beings in the “Universal Declaration of Human Rights”, the universal value that the United States and other Western capitalist countries advocates and promotes out of class interests is of the typical bourgeois character. Similarly, the universal value advocated by the socialist countries has the proletarian individuality. The commonness and individuality are contradictory to promote the development of things, as is in line with the united law of opposites of dialectical materialism.

The reason why the universal value of the bourgeoisie is deceptive lies in that it steals the name of the common value of human beings uses commonness to conceal its individuality so as to lay a foundation for making ideological confusion of the laboring people especially within the socialist countries. Clearly understanding the deceptive essence of the universal value of the bourgeois class, the deceived working class can get rid of the ideological control from the bourgeoisie at the theoretical level, and the vanguard of the proletariat and the vast majorities of activists can extricate in reality from the temporary incomprehension or even the groundlessness of the universal value to confidently adhere to the universal value of the proletariat on the basis of “freedom, democracy and human rights”, thus completely destroying the discourse hegemony of the bourgeoisie on the universal value.

## **2. How does the bourgeoisie grasp the discourse power of the universal value?**

The discourse hegemony means the dominant interpretation power of different expressions and standard-setting power, whose essence is the objective embodiment of the development of productive forces and the universal persuasiveness of national system. At this stage, the situation is that the bourgeoisie has mastered the discourse hegemony of the universal value, and been able to in accordance with its own interests declare who meets the demand, who does well and what system is advanced. It also has the objective capability to organize assistance or sanctions of international political, economic, cultural, military, media and other fields according to its own judgment.

How does the situation come into being?

First is due to the objective factors. The capitalist countries since the British bourgeois revolution in 17th century has existed and developed for more than 300 years. Having experienced the development process of all the bourgeois revolutions, three scientific and technological revolutions, colonialism, economic crises, the upsurge of proletarian revolutionary, the two World Wars, the Cold War, the colonial liberation movement, and so on, interacting with the internal and external factors, regulating themselves in the different contradictions, they have developed and improved increasingly and got greatest abundance in wealth by relatively vertical comparison. By contrast, the proletarian socialist country born in 1917 only had experienced a short time of existence and development, and could not compare with the capitalist countries in peak period in productive force and scale. For economic base determines the superstructure, the socialist countries are bound to be in a temporary weak side in the competition of the discourse power of the universal value, so does in political, cultural, diplomatic, military, public opinion fields.

Second is due to the subjective factors. Since the October Revolution in 1917, the proletarian socialist countries in the course of the democratic political system construction and development have experienced twists and detours and paid high cost for its growth. Such typical cases as the Soviet Union cleansing campaign in the 1930s, Poland and Hungary events in 1956, the extreme leftist rule of the Cambodian Communist Party in the 1970s resulting in the death of one million people, ten years of Cultural Revolution in China from 1960 to 1970, and the life tenure at leading posts, personal cult, father-to-son succession in leadership, too much intervention of the state in individual freedom, the

limited election, the undemocratic way of the election, and the shortage of the rule of law existing to different degrees in socialist countries have seriously hampered the development of socialist democratic political system and damaged the good image of the socialist system in the heart of the working people all over the world. The cost is so high that it may require several generations of the communists to save the loss with painstaking efforts. For example, at the 20<sup>th</sup> National Congress of the Communist Party of the Soviet Union in 1956, Khrushchev's secret report against Stalin released and shocked the whole world. A large number of members of the Western Communist Parties quitted the Party, and Western communist movement dropped rapidly from the peak of development after World War II, and mauled heavily. Socialism at a time seemed to become genies or ghosts and the international communist movement got into an unprecedented predicament. By now, the "despotic dictatorship" and "secret police" are still the terms that the Western media and some people use to evaluate the socialism.

If we do not adopt the scientific attitude of seeking the truth from the facts to analyze the above-mentioned subjective and objective aspects, we will never understand why the socialist system superior to the capitalist system in nature can not be understood by the majorities of the working people from the capitalist countries, why the working people in the capitalist countries vote for the bourgeois political parties as the ruling party instead of a proletarian party which is actually there. It is just because the socialist democratic political system has not developed to be more convincing than the capitalist democratic political system with the multi-party competition system, universal suffrage and representative system, and separation of powers as the basic contents, the bourgeoisie can grasp the hegemonic discourse of the universal value, and embezzle the commonness of mankind to cover up the individuality of bourgeoisie attribute. The long continuation of this situation results objectively in that such universal value of mankind as "freedom, democracy and human rights" seems to become a capitalist private property on the surface which can be left to the mercy of random, and some socialists lack of scientific theory takes "freedom, democracy and human rights" as the taboo and misunderstand it as the bourgeois ideology.

### **3. The theoretical foundation for creating the universal socialist democratic system.**

What socialist democratic political system can be established superior to capitalism not only in nature but also in the actual and visible content and form?

A viewpoint believes that the democratic political system with the former Soviet Union as a prototype for the modern socialist countries is almost a perfect system which does not need fundamental reform but a little regulation and it is certain to be accepted by the masses wholeheartedly. The system and the capitalist democratic political system have, with different names, nothing with each other. This viewpoint ignores the fact that it is its own backwardness that leads to the loss of the discourse right of the universal value, and the fact that the former Soviet Union, the originator of the system, was disintegrated in 1991 where although more people have missed the Soviet Union's stability and great power status, they are unwilling to return to the past political system. Is it simply due to the current stability? Why not think of danger when in safety? To view things from isolated, static, unilateral and superficial perspective is philosophically metaphysical, and is against the principles of Marxist dialectical materialism and historical materialism.

Dialectical materialism and historical materialism are the world outlook and methodology by which the proletariat understands and transforms the world. According to the three basic laws, the unity of opposites, inter-conversion of quality and negation of negation of the dialectical development of the things by the dialectical materialism, capitalism and socialism existing in the unity of human society at the same historical stage are opposite and mutually exclusive. In the two basic fields of social life of economic foundation and superstructure, realistically they criticize mutually and learn from each other but, philosophically, go up spirally from affirmation and negation and the negation of negation, continuing to reach a brand new stage. As we know that the socialist market economy today in the socialist countries results from the dialectic development between the planned economy at the beginning of the socialist countries and the market economy in the capitalist world.

From the perspective of historical materialism, the new relations of production in the socialist market economy result in critically absorbing the kernel of the capitalist market economy and making a socialist transformation in the process of historical development. The kernel is the market economy. It has no class attributes. Whatever class applies it, it will bear the scars of that class. This process has proved that the planned economy, the artificially created relations of production, is not in line with the development of productive forces. Then, in the field of superstructure determined by economic base, the socialist democratic political system of the former Soviet model in line with the planned economy was also negative. The new production relations of socialist market economy are in line with the level of development of productivity. They also request that a new socialist democratic political system in the superstructure should agree with them. This is a result that can not be transferred by man's will. It is determined by the objective laws of the social and historical development.

Then, what is the democratic political system in line with the socialist market economy like? Historical materialism believes that the existence and development of a society has evolved and is inseparable from the history. There is a relation of natural continuation and development between society and history because things do come from somewhere.

According to this scientific theory, the proletariat must, like what it has done in the field of economic infrastructure, find the source from the achievements of civilization in the capitalist social and historical development, specifically speaking, and the source from the capitalist democratic political system based on the bourgeois universal value. The inheriting and developing way is to critically absorb the kernel of the capitalist democratic political system and give a socialist transformation. Here the kernel refers to the universal value with “freedom, democracy and human right” as the basic content and the specific form of expression including the multi-party competition system, universal suffrage and representative election system, the tripartite system, and so on.

In the field of superstructure, Marx and Engels, the great tutors of the working class, set up a good example for us in inheriting and developing the achievements of the bourgeois civilization. In the 1840s, they created dialectical materialism and historical materialism on the basis of critically absorbing the “reasonable kernel” of idealism and dialectics of Hegel, a bourgeois philosopher and the “basic kernel” of mechanical materialism of Feuerbach to establish the Marxist philosophy. In that case, why don’t we critically absorb the kernel of the capitalist democratic system and carry out a socialist transformation?

It is worth mentioning that, the old type of the democratic political system itself in the former Soviet Union is not in line with the subjective results according to historical materialism. So as a whole it can be denied. However, as the process of the political experiments by the proletariat, it has become the history of the development of human society and can and should be inherited and developed because the system includes the wisdom of early builders of the proletarian countries and some positive factors such as the rapid and efficient decision-making ability, and the cohesion of dealing with vital matters with all efforts, and so on. Its successful experience and lessons from failures are valuable for the proletariat and conducive to make the socialist transformation on the capitalist democratic system. Therefore, the denial of it is a philosophical negation with affirmative factors in it, as is the proper meaning of the scientific Marxist philosophical proposition.

Acting on the scientific principles of Marxism, after the dialectical process of development, a new universal socialist democratic system has come to the world. The system will be able to meet the requirements of the development of socialist market economy to promote the great development of social productive forces. The system has both the support of the universal value with “freedom, democracy and human rights” as the basic content and the external manifestations superior to the capitalist democratic political system. The more important is that it has the unique advanced nature of representing the interests of majorities of the working people. Since the socialist countries have such institutional advantages, can’t they recapture the discourse right of the universal values convincingly?

#### **4. The assumption of practicing the universal system of socialist democracy in the socialist countries.**

Practice is the sole criterion for testing truth, and any scientific ideas or theories must be verified and improved in practice. But the precondition is that the new theory must come up with specific ideas based on studying and summing up the history and reality, the content of which must be objectively scientific and feasible to win numerous practitioners, then can be applied to practice gradually and get the chance of verification and development. The development of Marxism has such a typical process. And the theory of the universal socialist democratic system must also follow this law. But most important of all is to put forward the idea of practicing the universal socialist democratic system in the socialist countries.

Nowadays all the socialist countries are practicing the democratic political system with the absolute leadership of the proletarian Party at the core. In the premise of the existence of the former Soviet Union, the system was created with the former Soviet Union as a model and the conditions of each country. It has penetrated deeply into all aspects of social life of each socialist country and played a vital role. Therefore, there are some objective difficulties for the universal socialist democratic system to practice in the socialist countries. There exist many specific seemingly insurmountable problems for the cadres and the masses. For example, will it cause instability? How can keep the working class in power if the multi-party system and universal suffrage are implemented? Will the separation of powers lead to inefficiency? Is it necessary to still keep the proletariat’s absolute leadership over the people’s armed forces? Will the Party organizations at all levels exerting the political role still exist? Will the media, cultural institutions of public opinion and social organizations become the communicators of the bourgeois ideology? Will the superiority that socialism has demonstrated disappear? All of these issues are objective and difficult; however, they are by no means the reasons against progress. The working class, representing the most advanced productive forces and mastering the powerful ideological weapon of Marxist philosophy, should have the ability to overcome these difficulties.

The first difficulty is on the issue of stability. In order to have a smooth transition, we should firmly adhere to the principle of gradual and orderly progress. Objectively, the current socialist countries being surrounded by the capitalist countries, the steady construction of the universal socialist democratic system is conducive to prevent the joint offensive by the bourgeoisie. At the height of historical responsibility, we should know the inevitability of transition to the universal socialist democracy, meanwhile, we can not make an artificial acceleration by going beyond the economic base and superstructure and other objective conditions, and make artificial deceleration ignoring the reality of

backwardness. The artificial acceleration will make the economic base and the superstructure in sudden inadaptability and cause fundamental chaos. A case in point is the former Soviet Union. It was disintegrated rapidly because the rapid change of political system causing a chaos which can not be overcome in a short term and the collaboration of the domestic and foreign hostile forces. The man-made slowdown will make the superstructure unsuitable for the economic base. According to qualitative and quantitative exchange law of dialectical materialism, the gradually deepening contradictions, when accumulated to a certain volume, will result in an irresistible qualitative change.

By contrast, due to cater for some people's lucky psychology, man-made slowdown is more deceptive and dangerous. The wrong behavior any person has done for mitigation and negative avoidance seems to maintain the stability of socialist countries. But in essence, he has lost the armed thought of dialectical materialism and historical materialism, and become an idealist who stubbornly adheres to his individual wrong consciousness, as conceals and connives the continuous growth of social contradictions, and finally facilitates the qualitative change of the capitalist restoration. What is more awful is that the paralytic effect of a longer seemingly stability, if there forms the artificial slowdown of a large group of people in socialist countries, before a qualitative change comes, capitalism will be restored in some countries. It is a domino effect. For example, the socialist countries in former Soviet camp had not carried out major reform for several decades, resulting in unsolvable conflicts. The qualitative change of these countries actually led to the discoloration of the former Soviet Union, Eastern Europe, Mongolia and about ten African socialist countries (such as Angola, Benin, Mozambique, Congo) which had not been acknowledged by orthodox. The trend of historical development is irresistible so only by conforming to the trend and making a timely reform, can socialism be invincible.

The second difficulty is on the multi-party competition system and the universal representative suffrage. Since we know the limitations of the capitalist democratic system lies in its class attribute, as long as we change the attribute, some progress factors of it will be critically absorbed by the socialist democratic system. The multi-party competition system in socialist countries can be expressed that a number of proletarian party with different names, such as the Communist Party, the Labor Party, the People's Revolutionary Party and so on, must identify with Marxist but can have minor differences in specific policies or strategies. Various political parties can display to their best the features of implementation and the personal charisma of the candidate politicians before the masses of working people by rich forms and transparent process of the election, a free and fair direct universal suffrage supervised by the state election administration and the UN observers. The representatives, produced by the universal suffrage, form the socialist legislature, which can be named as the people's congress, congress, or legislative assembly. The political party holding the majority of the seats comes into power. If there is no majority of seats, combined ruling can be formed. In the premise of keeping the socialist nature, the local democratic elections and the political system at all levels can learn from the mature system of capitalist countries.

As the national bourgeoisie is under the leadership of the proletariat in the socialist countries and the international balance of power makes the socialist countries not get rid of the malicious interference by the joint forces of international bourgeoisie, the non-proletarian political parties can not be allowed to appear temporarily but the advanced elements of the national bourgeoisie can be absorbed into the proletarian party politics to participate in the politics. It is similar with what bourgeoisie has done to ensure its position as a ruling party in the capitalist countries. Both embody that the ruling class has the will to guarantee the class attitude of the power. In order to be more deceptive and paralytic, what the bourgeoisie has done is to allow the proletarian party to exist in a certain range. But as long as the proletarian party has any chance to seize political power, the bourgeoisie will take all measures to strangle it. Examples about it are many, too numerous to be recorded after World War II. Proper cases in point are that America had anti-communist McCarthyism during the period of upsurge of the communist movement after World War II; the Communist Party of France was blocked to take the power by the International Joint bourgeois in 1947; in 1965 the right-wing Indonesian army supported by the United States slaughtered 300,000 communists; in 1973 the United States helped the right-wing military coup of Chile to overthrow the left-wing elected Allende government; in 1996 the US-led international bourgeois threatened and induced the Russian voters and the Russian Communist Party was defeated unfortunately. All these facts have proved that when the class rule is threatened, the bourgeoisie will tear off the disguise of "freedom, democracy and human rights" and adopt the measures to make a joint and unscrupulous repression. Of course, this is also determined by the international class power balance and the reflection that economic base determines the superstructure. Similarly, when the proletariat has dominant force, it can also allow the national bourgeois political parties to exist within reasonable scope. Since the participating Parties existing in socialist countries have been the socialist organizations of workers, they can be totally transformed into one or more political parties with Marxism as the guiding ideology, and can also be incorporated into other Marxist political parties. By contrast, they are willing to conduct such changes.

The third difficulty is on the tripartite political system. The power balance system represented by the tripartite political system of administration, legislation and jurisdiction has the theoretical basis, that is, the consensus of all mankind of absolute power resulting in absolute corruption. The capitalist tripartite system has left the impression that the national decision-making is of low efficiency, as is determined by the class nature it serves the bourgeois. In the development

history of capitalist countries, the lobbying organizations siding for various interests groups of bourgeois always control the state operation. When the bourgeoisie is consistent in the interests, the three powers will coordinate one another with a high efficiency. But when the bourgeoisie is inconsistent or incompatible with the interests, the three powers must be highly inefficient, leading to low efficiency of decision-making, thus safeguarding the interests of the bourgeoisie in the name of democracy. For example, the proliferation of firearms in the United States causes the death of 30,000 people each year. But why cannot the comprehensive firearm ban act be passed because the government, congress and the Supreme Court pass buck? The fundamental reason under the pretext of the outdated constitutional rights is because it violates the interests of the military capitalists. The National Rifle Association (NRA), a powerful lobbying organization in the United States is the right speaker standing for their interests.

However, the socialist separation of powers is of the proletarian attribute because government, parliament and judicial bodies are composed by the representatives on behalf of the interests of the proletariat and the working people, which has determined that as long as it is in line with the interests of the working people the socialist powers will coordinate with one another with high efficiency. Good cases in points are in these aspects of combating corruption and building a clear government, improving the people's livelihood and promoting the development. On the condition that it is not in line with the interests of the working people, the tripartite socialist powers will play a role of checks and balances. It is by no means inefficient, but to prevent major errors and achieve a scientific and democratic decision-making. In the system, there will be no such a phenomenon that individuals or groups of high social position can change the state policies and the historical process on their own knowledge. For example, Mikhail Gorbachev, the former leader who was yearning for social democracy and his small group in the former Soviet Union solely promoted the gradual change of the Soviet camp to the drastic collapse. In this case, it is the Soviet mode which is lack of checks and balances of powers that buried the Soviet Union.

Then what kind of tripartite political system should be implemented? There are various kinds of tripartite systems, such as American mode, British mode, French mode, Russian mode and the variant version of Mr. Sun Yat-sen's "five powers", etc. Socialist countries should set up their own according to the respective national conditions by utilizing the experience of others. This is the essence of science of Marxist combination of theory with practice.

The fourth difficulty is about the problem of the proletarian leadership over every social aspect. Proletarian leadership over all walks of society is the foundation to reflect the socialist superiority. In a universal socialist democratic system, the leadership of the proletariat will show up in a new form in line with the universal value. First, all the proletarian political organizations of the Communist Party, the Communist Youth League, the Young Pioneers existing in governments, army, legal organizations, enterprises and the social institutions will be retained. They no longer belong to any specific political party but to the vanguard of the proletariat, an entirety, existing in a form of many political parties of the working class. The proletarian political organization is no longer a political party. Therefore, the name of "the Communist Party" will not be reused any more. Instead, it can be named as the "communist alliance." The titles of the Communist Youth League and the Young Pioneers are of neutrality and can be used continuously. The essence of these organizations is to extend and display its neutral position in the state machine of competitive parties and social units as the proletarian will of the ruling class. They will no longer exercise the administrative functions that had not belonged to them. But they will exert their exemplary roles in the ideological mobilization, publicity and education, mass organizations, etc.

Secondly, these new proletarian political organizations will be led by the socialist congress, which embodies the entire will of the proletariat. Specifically speaking, the actual administration is the committee of ideology in congress. The ideological committees at every level are the departments in charge of the ideology. As these political organizations no longer have administrative power, so they will not hinder the governments in reality and have no interference with the lawful activities of social units and social groups. At the same time, as the political organizations with widespread influence over the whole society, they and their congress will be supervised and restricted by the executive and judicial powers, concretely manifesting the separation of powers.

In the universal socialist democratic system, many non-public but lawful private media, institutions of public opinion in culture, independent trade unions, and civil societies will come into being. The state administration in charge of ideology should lead the establishment of proletarian political organizations in all the scale social units and social groups of all the ownerships so that the advanced elements of the proletariat can find their home organizations and ideological position. This will basically guarantee that the social units and social groups are of socialist nature and subject to the leadership of the proletariat. As long as they do not object to the state nature and break the law, they may supervise the three powers or even can attack the ruling party and the state leaders and become the true "fourth power".

Furthermore, the socialist state constitution can clearly prescribe that any behavior of individuals or political organizations that is likely to harm the fundamental principles of the dominant position of the socialist ideology and the state socialist nature can be banned only through a simple majority of the congress, as is in line with the principle of democracy. In a country with sound national democratic political system where "freedom, democracy and human

rights” are fully respected, the social contradictions will be resolved timely. It is not convincing to publicize opposition to the state nature. The capitalist countries ruled by a small number of people can achieve that and keep a long-term stability, so do the majority ruling socialist states.

Such a universal socialist democratic system experiencing the process from theory to practice will have the advantages of the two established democratic political systems of socialism and capitalism, which is consistent with the standard of the universal value and can ensure the socialist nature of a country to be unshakable. The laboring people can not only fully enjoy the “freedom, democracy and human rights”, the rapid and efficient decision-making, the cohesion of concentrating efforts on vital matters, the ruling aim of serving the people, the unity and mutual aid when disaster strikes, the assistance from the soldiers who can give their lives for the benefits of the people, and the exemplary role of the vanguard. All have embodies the superiority of socialism. In such cases, the viewpoints of finding some excuses of national conditions and those who believes they reject the democracy because the working people are lack of quality are worth nothing. At the same time, those who can not find the right direction of the socialist democracy both in theory and practice are forced to be influenced by the bourgeois democratic thought can also find their way out. Of course, those comrades with such viewpoints, if their intention is for the protection of the socialism, the masses of working people will embrace them to be back to build and enjoy the universal socialist democratic system.

### **5. How can the universal socialist democratic system be put into general practice in the world?**

As the vanguard of the proletariat, at any time, the Communist Party should not forget the proletarian internationalism, and the ultimate mission of liberating all mankind. Marx and Engels wrote in the “Communist Manifesto”, “the workers do not have the motherland”, and “the proletarian class itself is national”. The seemingly contradictory discourse has dialectically revealed that the proletariat is of the national, international and global nature. They also wrote, “what is the relationship between the communists and the entire proletariat?”, “they do not have any interests different from those of the entire proletariat”, “on the one hand, in the struggle by the proletariat in every country, what the communists stress and adhere to is the interests of the whole proletariat regardless of nations; on the other hand, at every stage of the proletariat fighting against the bourgeoisie, the communists have always represented the interests of the entire movement.”

Then, what is the common interests for the world proletariat at this stage? The common interests, in the basic fields of social life in the economic base and superstructure, is to desiderate to find and verify the advanced production relations and the democratic political system in line with them to make the working people especially those in the capitalist countries be convinced to consciously promote the historical process that socialism can replace the capitalism. At present, the advanced production relation that the proletariat has found is the socialist market economy, and the advanced democratic political system is the universal socialist democratic system. The communists are the proletarian vanguard to achieve the common interests. Of them, communists in the modern socialist countries are the major force because they have the power and can practice and develop the socialist market economic system and the universal socialist democratic system. At present, the socialist market economy has achieved initial results, and it is important for the universal socialist democratic system to keep up with it.

In the current phase of history, the objective law of man’s historical development and the proletarian internationalism demand that the communists, the fearless proletariat, should practice the truth that socialism is superior to capitalism. As long as the socialist countries establish the universal socialist democratic system in line with the socialist market economy, the interaction of the two is bound to promote the huge leap in productivity, the great abundance of material and spiritual civilizations, and completely surpass all capitalist countries in the economic base and superstructure. At that time, the working people in capitalist countries will be aware of the advancement from capitalism to the socialism, as is bound to be a great leap from the inevitable kingdom to the realm of freedom. And capitalism will inexorably be replaced by socialism.

In this practice, there may arise some directions of development as follows.

The first one is the counterattack of the bourgeois. The development of human society shows that the old ruling class is reluctant to withdraw from the stage of history. When the socialist countries completely surpass all the capitalist countries, the working people in the capitalist countries will vote the proletarian party to be the ruling party and the proletarian party in power will more confidently implement the policies and reforms to serve the working people, which will inevitably violate the interests of the bourgeoisie. Bourgeois conservative forces will not be reconciled to be defeated and they will united and adopt various means to give obstruction and sabotage. However, the social and historical development has reached a higher stage, the working people have arrived at a new height of understanding, and the international class balance of power is conducive to the proletariat, so the obstruction and sabotage will not get successful. When the conservative forces of bourgeoisie employ the violent means against the revolution, the masses of working people will be forced to use revolutionary violence to wipe them out. In other words, in this case, the transition from capitalism to socialism will be completed by violent revolutionary means.



The second one is the possibility of a peaceful transition. In the process of the social and historical development, as to the strength of the bourgeoisie and the proletariat, the decline of one means the growth of the other. In some countries, because the bourgeois conservatives are not strong enough to suppress the working people by means of violence, the working people can put the political party of their own class in the ruling party's position for a peaceful long term. The bourgeois political parties will be increasingly marginalized because the class they service is in a position of the minority of population. In the new socialist society, their existence is only for obtaining the rights they should have. It is no longer a social force and will finally wither away with the disappearance of the bourgeois class.

The third one is about the early breakthrough to some local scope. At present, in some under-developed countries of capitalism, or even in some developing countries where feudal residual powers still exist, the universal socialist democratic system may have made early breakthroughs. Today when the universal value with "freedom, democracy and human rights" as the basic content is established, some communist parties that took the power through the armed struggle is not likely to set up the political and economic systems of the former Soviet mode. It is of great possibility that they may become a pioneer of the universal socialist democratic system. And in some countries where bourgeois political parties are not strong, the proletarian parties may also be elected to be the ruling party. The above two cases have appeared in Nepal and the Republic of Moldova and other countries, as is worth noticing. However, the early breakthrough is rather instable, as is determined by the balance of strength of today's world classes. Whether they can steadily grow depends on their performance in reign and the demonstration of the whole working class in the world and its vanguard. Particularly, the performance of the Communist Party of socialist countries is of great importance.

## 6. Conclusion.

From the perspective of the entire proletariat, applying the world outlook and methodology of Marxist philosophy, combining history with reality, we can come to the conclusion that the universal socialist democratic system will be a new democratic political system created by the proletariat, which is universally convincing and feasible in the world and stands for the direction of the development for the human society. It is an interpretation given by the proletariat in the scope of superstructure that the universal value of mankind occupies the dominant position, a dominant standard of value. In other words, the universal socialist democratic system is of the universal significance for all human beings. It will together with the socialist market economy promote the historical process of human society from capitalism to socialism.

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## Systems Analysis of Globalization

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### Abstract

At the time of globalization, people begin to scan and consider global problems, seek the global strategies to solve these problems and adopt corresponding global actions. People are taking the global system as the understanding object and the rebuilding object. When the global system occurs in human views, the proper understanding tool is needed to help us observe and consider it. The system theory is thus an understanding tool. The idea and method of the system theory can be utilized to research and explain the phenomenon of globalization, and as a result, to discover and find the essential and rule of globalization. This article will analyze the structure of global system, the attributes of global system, the governance of global system, the state of global system and the evolution of global system.

**Keywords:** Globalization, System theory, Science analysis

Human has entered into the time of globalization, and people begin to consider global problems, seek the global strategies to solve these problems and adopt corresponding global actions, all that indicates that people are taking the global system as the understanding object and the rebuilding object. The global system is the sign of the globalization time. When the global system occurs in human views, the proper understanding tool is needed to help us observe and consider it. The system theory is thus an understanding tool. The system theory is the combination of natural science and the human social science, and it possesses wide theory development and actual application foreground when breaking human subjective localization and solving important problems faced by human. "The system theory reflects the trend of modern science development, the character of modern social production, and the complexity of modern social life, so its theory and method can be extensively applied (Hu, 2007, P.30)". The process of system analysis to globalization is the process to scientifically understand the global system. The idea and method of the system theory can be utilized to research and explain the phenomenon of globalization, for the purpose of discovering discover and finding the essential and rule of globalization. This article will analyze the structure of global system, the attributes of global system, the governance of global system, the state of global system and the evolution of global system, and express the author's individual opinions related to the topic of globalization.

The existing base is to utilize the idea and method of the system theory to study and explain social phenomena. On the one hand, scientists' researches about the system include not only the natural system but the social system. As for the complex adaptive system universally existing in the nature and human society, Johan H. Holland applied himself to seek the common principle, he pointed out that "we have seen that the harmony and the durative of every system all depend on the extensive reciprocity, the assemble of multiple elements and adaptability. We also notice that many confused problems such as center downfall, AIDS, lunacy, degradation, and the durative of biology system in modern society would continually exist until we really understand the mechanism of these systems (John, 2000, P.4)". On the other hand, modern sociologists have begun to use the opinion of the system theory to establish the social theory and study the social problems. "After the middle period of the 20th century, the functionalism becomes the leading research view in the sociology. One famous modern sociologist is Talcott Parsons who was the most important theorist in the study of functionalism. The functionalism which often occurs together with the evolutionism is the first theoretical visual angle in the sociology. Through treating the society as some basic systems, the functionalism theory offers a sort of approach to study the complex social system. Every part in the society is regarded as the system with certain "function", or certain influences to fulfill certain basic demand. In this way, we can find how the subsystem implements its influence, which can explain the existence and operation of the system. This sort of theoretical explanation has many problems, but at least, the functionalism offers programs to describe the largely complex system (Jonathan, 2006, P.34)". Another modern socialist is Luhmann who had studied from Parsons for a time and surpassed his teacher. "The most important system theorist in the sociology is Niklas Luhmann. Luhmann developed the research method of sociology combining Parsons' structure function theory and the common system theory, and introduced the concepts of cognitive biology and artificial intelligence (George, 2005, P.85)". For two scholars, the former didn't name the theory with system, but based

on the system theory, and the latter not only named the theory with system, but also based on the system theory. Facing the problem of globalization, we should go along with both sociologists' roads and continually develop and explore the new field of the system theory.

### **1. Structure of global system**

The structure of any system is represented as two main aspects including composition and relationship.

The global system is a multiple structured system, and according to the decomposition from the top to down, it contains the human social system and the natural environment system. The human social system contains the political system, the economic system, the law system, the military system, the religion system, the media system, the information system, the education system, the literature system, the sanitation system, and the physical system and so on. The natural environment system contains the atmosphere system, the ocean system, the land system and the biology system. At the time of globalization, the global system has entered into human cognitive view. Before the time of globalization comes, the global system has already existed actually all along, but it didn't enter into human cognitive view. At the globalization time, the global system has achieved the high-level degree, and its structure is increasingly complex. But before the globalization time comes, the global system was in the low-level degree and its structure is relatively simple in the human first and consideration.

In human brains, the most striking hypo-subsystem of the global system is the independent country distributed according to the geography, and the country possesses the highest dominion recognized by human, but the human recognized global dominion surpassing the country has not come into being. So the global system is still the system with loose structure to this day. In fact, every country is the system with compact structure. Whether the global system can be evolved to the system with compact structure which is similar to the country is still an unknown, and if possible, what conditions should be possessed or when the required conditions can be possessed is also an unknown.

The opened loop is a character of the global system structure. Back to the natural state, the global system is not the system designed by human, and it is the system occurred spontaneously with the activities that human explore and understand the nature, and adapt and rebuild the nature. Up to now, the global system is still an opened loop system without complete feedback mechanism. Human has not possessed the sagacity and ability to design the global system. In uncertain future time, human may independently design the global system, and make it self-correct and self-perfect, and change the global system as a closed loop system with complete feedback mechanism.

The expansion is another character of the global system structure. Historically, the global system was in the continuous course of expansion in all ages, and the extensive contents of expansion involves many aspects including the expansion of main body scale, the expansion of self system, the expansion of ability and energy, and the expansion of exterior influence. No one knows whether this expansion would bring advantage or disaster, and whether it is an infinite expansion with far foreground or a expansion approaching the limitation gradually, and whether the human rational selection is to continually push this expansion or stop this expansion.

"The complexity of the system is the problem about the quantity of composing factors and the diversity, and the problem about the organizational structure and the refinement of operation correlation (Nicholas, 2007, P.8)". The individual is the components with the least particle level in the human social system, and the most advanced and complex single biological system evolved from the nature. The organizational configuration and the correlation in the interior middle level of human social system suddenly enhance the quantity of the complexity. "The world that we live in is a large complex system, and the complexity of the nature is infinite (Nicholas, 2007, P.1-2)." According to the human existing knowledge level, the global system possesses the complexity which can not be described and expressed, and any language glossary, mathematical formula, and topology figure about the complexity can not really and clearly reflect the complexity possessed by the global system. "Not any one formula or blueprint can fully expatiate on the complexity of human condition (Mel, 2000, P.306)." At present, the global system faced by human is the system with highest level complexity in all human repositories. For the composing element, composing unit, interior relationship and exterior relationship of the global system, no one can give scientific and rational explanations. "The cognitive management and practical management of the complexity are the topic to challenge the world, and the globalization is one part of the problem and its solution. Philosophers try to but hardly solve various puzzles induced by the complexity in the modern world (Nicholas, 2007, P.7)."

The stability is one important character which can reflect the state and configuration of system with the time on the structure. The system with stable state and configuration on the structure possesses relatively stable composition and relationship, and various components and various relationships are combined together, and the system possesses the function force and the support force needed to sustain the structure state and configuration, and various function forces and support forces are balanced each other. The stability of global system is weak, and the crisis and threat which induce the collapse of global system structure not only exist but increasingly deteriorate. Two world wars in the 20th century and continual local wars are examples that part of human has gotten in insanity and inhumanity in spite of

themselves, and the knell of unstable global system. "When the homicide machine in the world becomes more and more crazy, we must solve the problem how to prevent war in order to defend modern civilization and avoid it become human abattoir. Few people would publicly like war and everyone would complain the costs of war (Sidny, 2006, P.176)." Those nuclear missile weapon repertoires established in the half of the 20th century in the name of defending national security and exerting top scientific technologies indicated that the ability that human destroy themselves had completely exceeded the suicidal measurement standard. "The arguments about nuclear weapon had early arouse human dread to the suicidal fearful foreground, and after the Chernobyl Accident, this dread was first concreted (Beck, 2000, P.202)." The ecological environment destruction in the process of universally developing national economy indicated that the behaviors of human destroyed homes and dig their own graves were not controlled effectively. "The terms such as greenhouse effects, is relative to atmosphere change, pollution, forest denudation, unbalanced increase of population, the species annihilation of numerous propagations, inundantly destructive potential, the political and economical mechanism with many limitations, and impertinent attitudes and expectations are always put forward by people (Skirbekk, 2007, P.57)." The population boom have made the earth unable to bear the burdens. "If we don't take actions right now, we will not hold the present earth any longer, but a piece of deserted land with over ten billion populations. The earth can not support ten billion people, at last come to destruction. Wars or diseases such as AIDS and innutrition will threaten the whole unstable society (E. G. Nisbet, 2001, P.336)." Therefore, the global system is not a stable system or it has not possessed enough stability.

The relationships of mutual acceptance, mutual benefit and complementation are represented as the harmony of system. The harmony of global system is being constructed, and this is a long process evolved from the out-of-order direction to the order direction. If this process can be realized, it will reduce the probability of intense concussion and the interior energy consumption, which can increase not only the microcosmic individual freedom but the stability of macrocosm. Contrary to the harmony expected by human, "the conflict theory sets out a picture full of blood and fire, which includes race conflict, national conflict, culture conflict, civilization conflict, and anarchy that the whole world gets in. Conflict theorists hold pessimism to the future globalization, but some problems they emphasize are quite urgent, especially for many developing countries. These problems not only threaten the peace of some countries and areas, but are important obstacles to the peace and development of the whole world (Yang, 2002, P.52-54)." The consequent is that any system lacks the harmony is very serious, and the global system is not the exception. "Just as what we see, the modern global crisis contains many dangerous seeds including admittedly genocidal possibility. However, from another view, every danger may contain opportunities to exceed and change crisis (Mel Gurtov, 2000, P.98)." The settlement of global crisis needs to establish the harmony of global system including the global harmony concept and the global harmony mechanism. Because the main body of human is first the human of individual, then the human of family, the human of region (clan, village, city), the human of nation, and the human of country in turn, and the basic area of human thinking span is [the human of individual, the human of country], so the main body of human universally possesses the limitation of recognition and the limitation of benefit. These limitations on cognition and benefit are essential reasons to seriously obstruct the construction of the harmony of global system.

## 2. Attributes of global system

The emergence is the most important attribute of system. Experts scientifically explain the emergence of system. "Bertalanffy emphasizes that any system is an organic unity, and it is not mechanical composition or simple addition of various parts, and the unitary function of system is the character which each factor can not show. This character becomes the headword of research in systematic science, i.e. the emergence, that is the new unitary character (the emergence phenomenon) large of systematic components produced in their mutual communications, and the emergence can not be explained reductively, i.e. it can not be explained by the sum of parts (Hu, 2007, P.29)." The emergence of global system is more and more notable. Many global systems faced by human are the necessary reflection of the emergence of global system. Individual, nation and country are components of global system, and the relationships among their wills, behaviors and the state of global system are not linear relation but nonlinear relation. Various behaviors of individual, nation and country induce the global system to get into the bad mess that any individual, nation and country would not see. The emergence is reminding human that global threat doesn't come from the exterior but the interior, and the local doings are the root to induce the unitary collapse.

The layer property of system is one of dimensions of system attribute. The global system a multiple structured system and every structure possesses its special layer division. The layers of human social system are mainly the layers presented in the form and scale of organization, and the layers of natural environment system are mainly the layers presented in the space distribution, extents and kinds. The political system, economic system, law system, military system, religion system, media system, information system, art system, sanitation system, physical system in the human social system respectively have different layer divisions of organizational forms and scales. The atmosphere system, ocean system, land system and biology system in the natural environment system respectively have different layer divisions of organizational forms and scales. The most basic layer of the human social system are millions human, the layer with highest governance influences is hundreds of countries, and the layer approaching the peak includes UN and

its affiliated international organizations. Other special layers still need to be deeply researched continually.

The association of system is also one of dimensions of system attribute. Generally speaking, the association exists in various components of system, and it also exists in system layers. Especially the importantly, the association exists in multiple structures of global system. The association can be divided into different types according to function, effect, state and time, for example, the good association and bad association, the adaptive association and antipathy association, short-term association and permanent association, discontinuous association and sequent association. Human only knows a little of the complex interior association of global system, and it is almost impossible to adjust these associations only in virtue of wisdom and conscience. The association of global system is still in the free stage, and it is unknown whether it can go into the stage of consciousness. The association also includes strong association and weak association. The history of global system is the history of association from weak association to strong association. Fatedly, there exists a threshold value of association intension, and when the interior association intention of global system overstep this threshold value, human began to realize the coming of the globalization time.

The unity of system is also one of dimensions of system attribute. "The core idea of the system theory is the unitary concept of system (Hu, 2007, P.29)." With the increasing frequencies of communication over the limitations and obstacles among various continents, regions, oceans and cultures in the human society, the global system only emerges increasingly as a unity. Developed and modern global traffic network and global communication network are pulses and arteries linking the global system as the unity. As viewed from the system association, the close association of various components of global system makes it complete the construction of unity formation. However, the construction of unitary consciousness and unitary thinking is groping in the dark. As a whole, the global system has a complete body, but lacks a suit of value concept and behavior rule with complete matching and healthy sense. The cognition of the unity of global system needs standing on a very special angle to observe and consider, i.e. exceeding the individual position, class position, national position and country position everyone can depend on to exist, and just like the earth can not overcome the gravitation of earth, few people can break away from the position gravitation of the society, so few people can observe and consider the global system from the exceeded angle. In fact, this exceeded angle can not be achieved by any human. Even if human can think of it, they can only adopt the thinking method of dummy reality to make them stand on this exceeded angle to observe and consider the unity of the global system.

### **3. Governance of global system**

"One of direct results brought by the development of globalization is the increase of contradictions between the global problems and the deficiency of existing political entity management ability, so it is a very actual and urgent problem of how to mobilize the forces in the world to solve global problems (Yang, 2002, P.194)." The actuality of global system governance is that each does things in his own way. Supposed that the human society can start unprecedented development project of global system and seek the development approach changing the actuality, we must solve a series of basic problems of global system governance. "The challenges faced by human are not opposite each other, but it is whether we can establish a sort of word governance to stop conflicts and solve conflicts, in spite of the fact whether these conflicts are economic, commercial, cultural and military (J. Orstrum Mdler, 2003, P.14)." This sort of world governance is the governance of global system.

The historical course puts forward the demand of global system governance in modern times. "The former UN secretary-general U Thant firstly put forward the pressure of security for the global countermeasures: I don't want to romance and exaggerate, but according to the information obtained as the UN secretary-general, I can make such conclusion, i.e. the member countries of UN may establish a sort of global fellowship to stop arms race, improve the environment of human inhabitation, reduce population boom and offer needed tendency for the development when putting the arguments for a long time in ten years. If this sort of fellowship can not be constructed in the coming ten years, I am very worried about the above problems that will develop to very serious degree until it can not be controlled. This secretary-general's warning called the turn unfortunately. Though our planet is not destroyed so far, but the depth and extension of those problems put forward by U Thant certainly have developed the degree that we almost can not control (Mel Gurtov, 2000, P.4)." Other scholars also hold same opinions and express same worries. "We have controlled our home, and human is blindly reining the earth. Without the cognition and percipience to the future, one collision will destroy us, so we should stop and repair our steps. If we study to govern, we can go through the solar system in virtue of our civilization. And if we don't study, what we leave to the biosphere probably is only the relic of earth after we dispose (E. G. Nisbet, 2001, P.354)."

The next problems of global system governance are who should govern, what governance organization should be established, what governance object and governance mode should be confirmed, and what strategy and method should be adopted to govern. On the existing level of human civilization advancement, these problems must be vexed. The important point to research in these problems is in the process but not the result. Up to now, "the world society is the 'society' without world country and world administration (Beck, 2000, P.31)." Accordingly, the global system is the "system" without global country and global administration. There is not convinced answer for the problem whether the

world country and the world administration or the global country and the world administration should be established. Through further researches to the global system governance, experts and scholars can exert various methods to rationally design and scientifically demonstrate the future ideal society for the human. But in actual actions, "we must utilize various political actions to realize more effective international cooperation. And then, the global existing and anticipated problems can be controlled (Beck, 2000, P.156)."

The tenet of global system governance should benefit the whole human. From this headstream, we can deduce that the future ideal society of human is to bring the global system governance into the scientific and rational orbit, establish the democratic, equal and free social system from everyone to various layers of the whole world, which can furthest maintain and guarantee all individual benefits, give attention to all national actual benefits and long-term benefits, promote the balance development and sustainable development of all nations and countries, ensure the mutual harmony and mutual adaptation between the development of human society and the natural ecological environment, effectively prevent and avoid the global disaster which may influence human, and effectively reply various threats faced by the whole mankind, and maintain and ensure the security of the whole people.

On the road leading to the future ideal society of human, we need overcome the obstacles existing in human, i.e. the limitation of recognition and the limitation of benefit. For example, individual strong nations or countries attempt replacing the global benefit with the benefits of their nations or countries, attempt replacing the global will with the wills of their nation or countries, and attempt establishing the local hegemony over the unity, and this sort of global system governance is certainly not extensively accepted by all nations and countries. The premise to realize the global system governance is that human achieve the uniform cognition to the object, strategy and behavior of the global system governance. "Human should be educated to possess global opinions and speak from the global view (Mel Gurtov, 2000, P.337)."

#### 4. State of global system

It belongs to the rational cognition category to analyze and describe the state of global system. The course of globalization closely goes with the arousal of human sense. From Revival of Learning to Great Geographical Discovery and Religion Reform, from science revolution to initiation revolution and the industrial revolution, a series of heavy hammer smash half of the chains, which liberates half of the human sense from the theological superstition, and makes human grasp the scientific tool to know the nature, therefore, the human cognition to the pure objective nature has achieved the rational level. However, human still can not hold the scientific toll to know the human society, and the human cognition to the half subjective and half objective human society has not achieved the rational level. The half of the human sense has not been liberated from the ignorant fetters.

Because the sense of human behavior is influenced by the components of cheat and anti-sense and it is diagnosed and analyzed by the subjective wills and requirements of system health and system perfection, many problems objectively exist in the state of global system. On the microcosmic layer, human can not effectively solve the harm induced by individual self-concern behaviors to others, family, team, organization, society and environment. On the middle layer, human can not effectively solve the problem that various force groups monopolize national regime and implement autarchy governance. On the macro layer, human have not established the effective mechanism which can conciliate conflicts of value concept and actual benefits among nations and countries, and harmonize the relationship between human social development and natural ecological environment of the earth. Therefore, the state of global system can be continually improved along with rational direction in above aspects. "Real history is knitted by real tribulations which can not be correspondingly reduced because of the increase of measures to eliminate tribulations (Max Horkheimer, 2006, P.32)." No matter from which layer in the system or which position on the earth we consider, the human live is still far away from the justice society that human expect. "Up to now, the problem puzzling us is why paupers are poorer and poorer and rich men are richer and richer (Herbert, 2005, P.142)."

Both sign and essential of sense are based on the science. "Science is a great glossary in our times, but nobody can really consider and review it. For the problem which things compose the science, there is not a uniform or lineal definition all along (William, 2006, P.4)." That should mainly aim at the domains of human science and social science. On the one hand, "because the present anthropology is dissevered by different influences which sometimes conflict each other, so many anthropologist lacks a sort of clear figure feeling or intention feeling. Many anthropologists don't know what values early scholars' research values possess, and don't know what values their own researches have (William, 2006, P.11)." On the other hand, "when we introduce the theory of sociology, we will find that different scholars will develop different theories, and the differences among them are huge (Jonathan, 2006, P.18)." "The bone of contention rests with whether the theory of sociology can become into science. Some human think it can and some human think it cannot, and someone keeps neutral (Jonathan, 2006, P.1)." For the strict meaning, the development levels of human science and social science are still in the primary stage which corresponds to the primary mathematic stage in the mathematic domain, or the geocentric theory stage in the astronomy domain, or the element theory of "gold, wood, water and fire" in the physical domain, and though the description and cognition to the research object possess certain

reason but that is indistinct and injudicious. For example, the basic theory in the domain of social system engineering is still comparable weak, and one important branch decision theory is not propitious to deeply analyze the complex problem, and the present decision theory and its application are only limited in the bilateral decision model for the situation composing, and the multilateral decision model has not been established. For the object optimization, the decision theory is still limited in the unilateral decision model, and the public decision model has not been established. The decision model is going to transform from the simple decision theory to the complex decision theory. The main body of strategy, the object of behavior and the relationship of benefit and loss are basic concepts which should be first cleared. The breakthrough of theoretic researches about multilateral decision and public decision will offer more convictive scientific tool and method to analyze the solution of the problem of social system engineering.

Aiming at the research of the global system, the cooperation of human science and social science should be further strengthened. On the global layer, the social system engineering needs the participation and cooperation of many subjects and domains such as the domain of social psychology. The direct feeling indicates that the same as the mutual jealousy, suspicion and hatred existed ~~in~~ among individuals, they also existed among different nations, different countries, different cultures, and these unhealthy psychological reactions and actions not only seriously disturb the good developments of national relationship, international relationship and multilateral culture relationship, but also possess negative functions to produce hatred, deepen difference and induce conflicts. The cause and effect of this negative phenomena lack not only deep theoretical research, but the practical countermeasures of prevention. Therefore, the global layer inaugurates new research direction for the macro social psychology.

### 5. Evolution of global system

The human civilization is the highly general description for the development of human society, and the evolution of global system can be analyzed based on two dimensions including the civilization character and the civilization type.

According to the character of civilization, there are two sorts of civilization. The first sort of civilization is the civilization between human and nature, i.e. the civilization produced and developed in the relationship between human and nature. The second sort of civilization is the civilization between human and human, i.e. the civilization produced and developed in the relationship between human and human. Every sort of civilization puts up different types in different historical terms.

For the first sort of civilization, the development course of human civilization, i.e. the evolution of global system, can be divided into five eras including the era of region, the era of globalization, the era of solar system, the era of Milky Way galaxy and the era of whole universe from far past to infinite future. The order, character, range and civilization type of every era are seen in Table 1. "In the 21st century, the development of spaceflight technology is developing new civilization space for human. Tsiolkovskiy said that the earth is the cradle of human, and human can not live in the cradle for ever. The ideal of this spaceflight pioneer is gradually changed into exploring actual action today (Wang, 2001, P.429)." Therefore, the first sort of civilization of human society has entered into the transition stage from the era of globalization to the era of solar system.

For the second sort of civilization, except for traditional standard giving priority to the productivity, the definition of civilization must be peaceful and harmonious at least. Human cannibalism war is absolutely the behavior that human deviate from civilization and Human wildness and beastliness in the war is absolutely not the humanity of civilization. If only wars exist, human society is not civilization. The ability to create and maintain the peace is one of necessary important signs in human civilization. In the dimension of the second sort of civilization, the entire lifecycle of human development can be divided into three stages including former wild stage, middle stage with half civilization and half wildness, and upper stage of civilization. Up to now the development of human society has not only civilized glory and resplendence, but also uncivil sin and darkness, so the course of the second sort of civilization is still in the stage of half civilization and half wildness.

This is the general explanation for the evolution of global system by the character of civilization and the size of type. As viewed from the global system, by means of the computer glossary to compare the modern human civilization, and the first sort of civilization can be called as the hardware civilization which is in the relatively mature and developed state, and the second sort of civilization can be called as the software civilization which is still in the relatively puerile and undeveloped state.

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Table 1. The development course of the first sort of civilization

Order of era	Character of era	Range of era	Type of civilization
The first civilization era	Era of region	From origin to the Great Geographical Discovery, the global abroad emigrations begin	Land civilization
The second civilization era	Era of globalization	From the Great Geographical Discovery, the global abroad emigrations begin thus far	Land civilization + ocean civilization
The third civilization era	Era of solar system	From the accomplishment of globalization to the planet immigration in the solar system	Land civilization + ocean civilization + primary outer space civilization
The fourth civilization era	Era of Milky Way galaxy	From the planet immigration in the solar system to the planet emigration in the Milky Way galaxy and out the solar system	Land civilization + ocean civilization + middle-level outer space civilization
The fifth civilization era	Era of entire universe	From the planet immigration in the Milky Way galaxy to the immigration out the Milky Way galaxy	Land civilization + ocean civilization + super outer space civilization

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