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從日本三井礦山案件判決檢視我國公司法上有關規定

林麗香*

The Study of Taiwan's Company Law on the Basis of the Case of Mitsui Mining Co. in Japan

by
Lie-Hsyang Lin

目 次

* 淡江大學公共行政學系專任副教授

壹、前言

三井礦山案件發生於昭和53年（1978年），該公司持有1000股份之股東以同公司之18名董事爲被告，依違反日本商法第210條（關於公司取回自己股份限制）之規定，要求賠償公司一億圓之損失而提起代表訴訟。昭和61年5月29日一審判決確認參加該次（決定買回自己股份違法行爲）常務董事會之5名常務董事及兼任總務長之董事1名因本案違法行爲造成公司35億5千餘萬圓損失並應依原告之請求金額一億圓負連帶損害賠償責任（註1）。平成元年7月3日二審判決維持原審之判斷而駁回上訴，平成5年9月9日最高法院亦相同的維持原審判斷而使本案之判決終告確定（註2）。本案歷經15年冗長訴訟程序，被告等雖身心俱疲，但請求金額一億圓以外之34億5千餘萬圓鉅額損失賠償則枋於民事債權10年之時效（註3），而已不能以擴張訴訟標的方式請求，所以被告無須負擔龐大損害賠償金額與自損失起累計約17年利息而免於破產（註4）。本件訴訟之提起立即成爲日本實務界與學術界注目之焦點，因其中所引起之代表訴訟制度、自己股份之取回與經營判斷原則等皆爲公司法上重要課題。所以日本學界討論本案相關論文資料數量相當多。

日本與我國同屬大陸法系國家，且社會文化背景相近而其公司等企業組織基本架構與我國相同。所以本案判決於日本公司法上所具有之意義，值得吾等留意。本論文之目的除介紹本案例與訴訟爭點外，對於本案所提起之有關問題檢討中所獲得之啓示，而反省我國現行法之規定，冀提供將來修法之參考。

貳、事件概要與訴訟爭點

一、事件概要

三井礦山股份有限公司（以下簡稱A公司）基於多角化經營與股東結構安定化之策略，於昭和50年春慎重的考量吸收合併三井水泥股份有限公司（以下簡稱B公司），而當時A公司業績相當惡劣（從昭和33年3月以來已吾股息紅利可分配），公司方面認爲若不與B公司合併的話，可能有破產之

虞。然而昭和55年11月當時，持有A公司已發行股份總數達25.8%（1550萬股）之股東C，以合併將使自己持股比率降低等理由反對合併，致使該合併計劃顯然無法於股東大會經特別決議通過（因須有3分之2多數決同意）。經A公司經營者多次與C交涉，最後結果C同意將持股全部轉讓與A公司所屬之三井集團。從而同年12月3日經A公司常務董事會中決定，由A公司全額出資成立之子公司即三池開發股份有限公司（以下簡稱D公司）以一股約500圓超過市價約380圓—400圓之價額全數受讓C之持股，其後再將該買進股份轉讓與三井集團所屬各公司。而買進價格與轉讓價格間之買賣差益約數十億圓損失則由D公司完全吸收（註5）。

如此，C公司常務董事會決定後，D公司依計劃於同年12月25日以一股530圓買進C持有1550萬股總額約82億1500萬圓；並於翌昭和51年1月至3月間以一股300圓轉讓與三井集團所屬各公司，結果D公司發生約總額35億5160圓萬之損失。而A公司股價1月平均爲354圓，2月爲325圓，3月爲316圓。又，對C買賣價金之支付完全由A公司經理部門負責處理，其方式爲一部份價金由D公司發行經A公司保證之本票爲之，餘者由A公司出面向三井銀行貸款後轉貸於D公司。A公司於昭和51年2月27日招開臨時股東大會中通過承認與B公司合併之契約書並於同年5月1日正式吸收合併B公司（註6）。

本訴訟之原告X爲於昭和53年3月30日才取得A公司股份1000股之股東，其以D公司買回A公司之股份違反商法第210條規定，且結果造成A公司發生約35億5160萬元之損失。因此，對A公司之董事等提起代表訴訟，請求1億圓之損害賠償。

二、訴訟爭點

㈠股東權濫用與否

本案被告主張原告股東提起代表訴訟爲股東權濫用行爲，其理由：原告股東於本案違法行爲後2年才取得A公司股份故該買回之違法行爲對其本身而言無直接或間接損害；他方原告股東卻仍願意先給付數額龐大之訴訟費用；並經調查原告股東於與A公司交涉過程中東曾稱「打起官司，就能出名」之事實存在（註7）。依日本商法第267條規定「繼續6個月以上持有公司股份之股東得以書面請求公司提起訴訟追及董事責任；公司自前項請求日起30

日內不提起訴訟時，前項股東得爲公司提起訴訟；由於前項期間經過後公司有不能回復之損害之虞時，股東不經請求得直接提起訴訟」，所以只要繼續持有公司股份6個月以上即有資格提起代表訴訟。第一審判決中法院雖認爲原告可能爲提起本訴訟而買進A公司股份且「提起本訴訟之動機可能基於出名之目的，但卻無充分證據足以證明此項懷疑」，所以對被告主張予以駁斥。不過，此判決仍然隱含著若能證明原告股東基於「出名」之目的提起訴訟，則可能構成股東權濫用（註8）。然而此一見解於二審中予以明確駁斥，二審判決「……代表訴訟本身對起訴股東無直接財產利益，該股東若基於替公司行使權利之考量而提起訴訟，即使冀望藉此出名，但僅以此理由認爲該當於股東權濫用，乃不適當。從而判斷提起代表訴訟股東是否構成濫權應相當謹慎，因此除非股東意圖個人利益對公司恐嚇錢財或其他對公司或董事具有不當惡意等特別情事存在，否則不應認爲有股東權濫用之情形存在。而本案並無前述特別情事存在且又無其他足以認爲濫用權限之事由存在」（註9）。第三審判決亦再確認二審判決認爲原告提起本訴訟不構成權利濫用。

㈡股份取得之違法性

被告主張三井股份由訴外D公司取得並不違反自己股份取得之禁止規定。此一主張於一審受明確駁斥「雖然契約由D公司締結，價金支付亦以D公司名義爲之，但D公司爲三井完全出資之子公司。兩者法律上具有個別人格，但實質上利害一致，可謂D公司僅爲三井一個部門而已」法院並確認事實之交易情形，發現該交易完全由三井主導與決定。所以稱「考量諸般情形，形式上雖由D公司取得股份而非三井自己，但從交易實態三井才是契約真正當事人，所以同樣的可能發生自己取得股份之弊端。因此本案雖由D公司取得，但應視爲三井自己取回股份」；二審判決亦作相同判斷而三審更明白指出若不予以禁止則可能利用前述母子公司互相取得股份方式以迴避商法第210條禁止規制（註10）。

他方被告進一步主張縱然被視爲自己取回股份，但該取回乃基於經營判斷上之必要，且於取得後已立即轉讓與他人，僅短暫之取得而已應不違反商法第210條之意旨。針對此一主張一審判決除明揭禁止取回股份（商210條）之意旨「……可能造成各種弊端包括影響公司資本之充實與債權人之保障，

及可能成爲支配公司經營之手段等。而追及責任相當困難，基於立法政策考量採事前預防方式，故除該條所列之例外事由以外應一律禁止」，但此非完全無通融餘地；因此又指出「……如果爲避免公司重大損害而認爲必要時，得斟酌取得股份之比率與損害發生之程度，對於相當數量取得之許可應爲適當的」。而法院認爲法律已明文禁止但本案之事實無充分理由足以例外許可，蓋三井公司現實上無因合併失敗而立即發生破產情形，或股東爲自己個人利益而立即採取行動使公司發生破產之危急狀態存在，所以本案於商法第210條之意旨下亦難以許可的（註11）。不過，以自己股份之取得作爲公司必要對策之見解於二審法院受到排斥，「商法第210條規定不論將來立法論如何，對於本條之解釋公司取回自己之股份除本條明文規定之4種例外情形，及於公司無償取得自己股份或信託公司取得自己股份等類型明顯的不可能發生弊害以外，即使個別案例之判斷上認爲爲實現公司重大利益或避免重大損失等不得已情事即使存在時，亦不應許可自己取回自己股份。蓋以條文無例外規定而爲實現利益或避免損失之理由，對於法律科以嚴苛制裁之違法行爲亦能例外的許可，此解釋根據相當牽強。又假使此解釋可以成立，則法律從而付與公司董監事判斷取回自己股份與否之權限，因此實務上可能發生董監事濫用此權限或判斷錯誤等而造成各種弊端，乃不可忽視之問題，最後更可能因違法行爲橫行而使立法趣旨完全喪失。所以本案縱使有如上訴人主張特別情事存在，但其取得仍然違反第210條之意旨」（註12）。

㈢自己股份取得與損害之發生

被告主張損害之發生乃由於高價買進低價賣出之故，與取回自己股份不具有相當因果關係；且D公司之損失不應直接視爲A公司之損失。不過一審法院認爲「所謂損害非爲與取回自己股份之際同時發生，……與此有相當因果關係及足夠。A公司基於股東結構安定化之考量，使D公司取得A公司股份，並將該股份低於市價轉賣三井集團下之企業，故早已覺悟可能發生數十億元之損失。又客觀上A公司業績持續不振，合併計劃能依計劃早期實現使A公司股價急速高漲，但短期間內欲令三井集團各公司以高於市價之價格全部吸收1550萬股鉅大數量似亦難以期待。從而前述資產之減少，其實於取得自己股份之際主觀上或客觀上應爲可預想之情事。因此本案自己份之取得

與資產之減少間有相當因果關係。……又基於D公司與A公司之關係，D公司之損失可視爲A公司之損失」。第二審法院亦同樣的確認D公司爲A公司完全出資之子公司，且D公司取得A公司股份乃基於A公司本身之指示與計算。所以本件自己股份之取得發生35億560萬圓買賣差價之損失亦應視爲A公司之損失（註13）。

㈣損益相抵

被告主張A公司因B公司合併結果，事業順遂蒙受很大利益，而該利益應從損害賠償額中扣除。二審法院認爲「……損益相抵之利益應與違法行爲間具有因果關係。所以依此趣旨與當事人衡平觀念，本案之利益具有直接填補該違法行爲造成公司損害之目的與機能。……考察被告等所主張之利益或成果，乃由於A公司與B公司合併後或隨著A公司安定股東之增加，而受到多數關係企業之支援協助、或公司與員工努力拓展業務、及經營環境之改善等各種因素存在才能達成。從而若稱該利益或成果與本案違法行爲具有因果關係乃不適當，……因此，難謂該利益或成果能直接填補本案違法行爲所造成A公司之損害」。第三審亦確認二審之判決，認爲被告所主張之利益與本件股份之取得無相當因果關係，所以A公司之損害不能扣除（註14）。

參、代表訴訟之問題

一、代表訴訟與股東權之濫用

代表訴訟爲民國55年倣美、日立法例而導入之制度，於公司怠於訴追董監事對公司應負責任時，由股東爲公司提起訴訟。因認爲股東居於相當公司代表機關之地位而提起訴訟，故稱爲代表訴訟（註15）。以代表訴訟追及董監事責任，於機能上除能填補公司之損害以確保公司財產基礎外，亦含有對董監事違法行爲之制裁以抑制董監事從事違法或不當之行爲。我國公司法第214條規定「繼續一年以上持有以發行股份總數百分之五以上之股東得以書面請求監察人爲公司對董事提起訴訟。董事自有前項之請求日起30日內不提起訴訟時，前項股東得爲公司提起訴訟」，並依公司法第227條對於監察人之責任準用第214條之規定。

所以，我國代表訴訟制度能提訴股東之資格限制包括持股期間與持股數量；換言之我國代表訴訟權爲少數股東權，此與日本之單獨股東權之限制更大，且保有期間亦較日本之6個月之期間更長。而本案之爭點，原告股東於董事違法行爲後2年才取得公司股份，是否具有起訴資格。此依日本法或我國現行法之規定，其法條文字並無限制提訴者須於董監事違法行爲時具有事股東身份；他方前述代表訴訟制度之機能在於收抑制董監事違法行爲之效，所以是否能提起代表訴訟所當重者應於董監事違法行爲存在與否，至於是否具有股東身份於法律解釋不必從嚴（註16）。因此，只要董監事有違法行爲存在，縱然原告於違法行爲後才取得股份，亦不應否認原告之代表訴訟權。雖然美國相當多數州規定提起代表訴訟者須事件當時持有公司股份，而此限制乃出於防止濫訴（註17），我國代表訴訟尚未見有人提起更遑論濫用程度，所以立法政策上目前無此疑慮之必要。而且若不限於行爲時之股東，則新股東隨時可能提起訴訟，此種疑慮至少對董監事有心理壓力，或亦能發生抑止違法行爲之效（註18）。

我國提起代表訴訟之股東，須至少持有已發行股份總數百分之五以上之股東，此雖然異於日本之單獨股東權之立法例，而現實上亦與日本相同並無濫用代表權之疑慮。不過 立法論上持有一股之股東即能提起代表訴訟，因其個人之實質利益相當微小，是否應賦與提訴權仍值商榷（註19）。所以於立法論上與美國相同屬少數股東權乃爲適當的。

二、代表訴訟制度之活用

代表訴訟之起訴股東提起代表訴訟對其本身實質上無直接經濟利益，僅間接於勝訴公司獲得賠償，致公司資產增加使股價上漲或股利分配增加而已，但相對的須負擔相當之風險（risk）與責任。依我國公司法第214條與第215條之規定，其內容如下：1.擔保之提供—股東提起代表訴訟時，法院因被告聲請得命起訴之股東提供相當之擔保。此旨在防止股東濫訴，並於敗訴時能確保對被告董監事之賠償責任。2.對公司之責任—如因敗訴致公司受有損害時，起訴股東對公司負賠償責任。3.對董監事之責任—提起代表訴訟所依據之事實顯屬虛構，經終局判決確定時，提起此項訴訟之股東對於被訴之董監事因此訴訟所受之損害應負賠償責任。而依民法之侵權行爲責任原則，如股

東提起訴訟構成不法侵害使董監事蒙受損失時當然應負賠償責任，所以公司法之此項規定僅彰顯股東對被訴董監事應負之責任而已。而損害賠償之範圍包括被訴董監事爲防禦訴訟之必要而聘請律師所支付之報酬及其他必要之費用（註20）。此外提訴股東應先繳納訴訟費用，所以至少起訴之際起訴股東須持有與訴訟費用相當之資產，才能爲之；又股東提起訴訟其所依據事實顯屬實在，經終局判決確定時起訴股東因此訴訟所受之損害僅能向被告董監事請求損害賠償。故由上述之分析可知我國代表訴訟制度對於企業本身之保護最周到，股東勝訴時企業能直接獲取損害賠償金額，而卻無須負擔任何費用；敗訴時若有損害卻仍可向起訴股東要求損害賠償。

而與我國同屬大陸法系之日本代表訴訟制度之立法例相比較，我國對於原告股東所科予之責任更甚嚴苛。依日本商法第267條與第268條之2所規定之代表訴訟制度，除原告股東應提供擔保、繳納訴訟費用、與不當訴訟造成公司損害時依民法侵權行爲應負賠償責任等事項與我國制度相當以外，1.原告股東對公司賠償責任減輕，日本代表訴訟僅於「敗訴時而其對公司有惡意時才負賠償責任」（第268條之2第2項）。而所謂「惡意」指以損害公司爲目的或有損害公司之故意甚或明知可能造成公司損害卻仍提起訴訟，蓋受敗訴判決時其既判力及於公司，致使公司不能再以訴訟方式對董事追及責任，故因「惡意」使公司喪失權利時當然應對公司負賠償責任（註21）；又解釋上不僅惡意致敗訴，且惡意的僅請求少數金額雖獲勝訴但同樣的能使公司權利喪失致資產不能完全回復，故亦應負賠償責任；並且提起訴訟影響公司聲譽，致公司資金籌措困難造成損害時，惡意股東亦應負賠償責任（註22）。然而我國法規定原告股東於敗訴時致公司發生損害即應負賠償責任，此不問股東之起訴動機如何卻徒令股東負結果責任，毋寧使股東以提起代表訴訟追究董監事違法行爲之正義感更加挫敗。蓋訴訟之提起，其勝訴與否本身即有risk而訴訟過程中影響公司信譽致生任何損害，乃難以預期。因此學者主張原告股東對公司之責任應與對被告董監事之責任要件採相同解釋，即「以提起代表訴訟所依據事實，顯屬虛構經終局判決確定」股東才須對公司負賠償責任（註23）。

2.原告股東支付有關訴訟費用之減輕。(1)律師費用—日本商法規定「股東勝訴時對於應支付之律師報酬得於報酬額範圍內請求公司支付」，所謂勝

訴包括部份勝訴故亦可請求支付。由於股東勝訴時，公司能直接獲取利益故律師報酬由公司支付爲當然之理（註24）；其請求範圍以律師報酬相當金額爲限，所以原告股東若對律師支付不當過高之報酬時，仍僅能請求相當金額而已，而相當金額之決定應斟酌公司於勝訴所獲取之利益程度（註25）。⑵其他必要費用—訴訟過程中除律師費用外，通常仍有其他必要費用之支出例如調查證據費用、與律師研商案情之交通費或旅費等。日本於去年（平成5年6月）商法修正之前，因法律僅明文規定請求律師費用而已，學說上對於其他費用請求之與否見解分歧（註26）。不過 因代表訴訟之提起，原告股東勝訴時公司能獲得損害賠償金額，而隨著公司資產增加全體股東亦能受益，因此除律師費用以外其他合理之費用應由全體股東分擔 ，所以由公司支付之乃適當的，從而現在修正法已規定「非訴訟費用但進行訴訟之必要費用，於費用範圍內得請求公司相當金額之支付」（註27）。然而我國之訴訟費用固然由敗訴一方負擔，但對訴訟費用以外之必要費用並無日本相同之規定，僅依公司法第215條2項規定提起代表訴訟所依據之事實顯屬實在，經終局判決確定時得對被告董監事要求因訴訟所受損害之賠償。而該損害賠償範圍於解釋上當然包括律師費用及其他必要費用，從而被訴董監事於敗訴時不僅應對公司就其違法行爲負損害賠償責任，且須對起訴股東另負賠償責任，此二重責任對董監事而言是否過苛；他方，公司能直接獲益卻無須負任何責任，此責任之權衡是否適當。又 被告董監事之經濟能力是否足以負擔二重賠償責任，換言之原告股東所支付之必要費用是否能順利獲得董監事之賠償尚存疑問，而此一疑問卻能使股東對代表訴訟卻步。所以若如日本之立法例明確規定律師報酬與其他必要費用由公司支付，由於公司資力雄厚而能保證費用之支付能力，不致使股東因訴訟結果受到損害，如此才能鼓勵股東提起代表訴訟追究董監事責任。

3.少額訴訟費用之繳納，股東於起訴時必須繳納訴訟費用。而訴訟費用依訴訟標的的金額之一定比率計算，訴訟標的越大者其訴訟費用越高故股東須持有相當之資產才能起訴，此成爲代表訴訟提起之障礙。蓋若訴訟標的之損害賠償金額過大，股東無力繳納時只有放棄訴訟或僅請求一部份，但卻使公司之權利不能完全實現。例如本案自己股份之違法取得雖造成35億圓以上之損害但原告股東僅請求一億圓賠償金以便能節省訴訟費用，順利起訴

（註28）。所以爲減輕股東之負擔而活用代表訴訟制度，日本於去年商法修正中第267條追加1項「代表訴訟之訴訟標的金額之計算，不能視爲財產權之請求」，而依民訴費用法第4條2項規定「非財產權之請求，其訴訟標的金額視爲95萬圓」故依費用法第2條所定計算方式而算出金額爲8200圓，所以代表訴訟之訴訟費用於現行法皆僅8200圓而已。從而股東能容易提起代表訴訟以追究董監事責任。

日本與我國相同，股東之代表訴訟制度未被廣泛利用，其理由除兩國人民不善興訟之民族性及對股東無直接利益欠缺興訟動機等外（註29），制度本身之不合理限制更使股東卻於提起。所以日本爲活用代表訴訟以抑制經營者不法行爲，故力圖屏除不合理限制而修正有關規定，此實質吾等留意與反省。依日本最高法院統計，現在係屬各級法院之代表訴訟有31件（註30），此固然不能與美國相較，但反觀我國卻未見提起任何一件訴訟，但此並不意味著我國企業經營者未曾從事違法行爲。事實上所謂利益輸送或種種背信行爲等多有所聞，相關訴訟未被提起乃由於現行法之規定下很難提起，此爲制度本身之內在限制之故也。

肆、自己股份取得之問題

一、自己股份取得之禁止

公司禁止取回自己股份於日本商法第210條與我國公司法第167條中皆有明文規定。由於取回自己股份可能發生⑴影響公司資產之充實而妨害債權人之利益；⑵市場操縱以維持公司股價，或利用公司內部重要情報進行內線交易；⑶以有利於特定股東之價格購入其持股而違反股東平等原則；⑷公司經營權之維持等流弊（註31）。然而諸該些流弊非必然發生，亦非完全無防止可能或甚至現行法已有排除流弊之規定，例如上述⑵於證券交易法第155條與第157條之1明確禁止市場操縱或內線交易行爲。不過諸該些違法行爲之舉證相當困難，不容易追及責任，所以立法政策上如本案一審判決中所稱採「事前預防方式」法律原則上禁止，但例外以列舉的限定承認而該限定承認乃基於爲達成各個法律制度目的上所必要（註32）。

日本商法第210條規定四種承認，即⑴股份之消除；⑵合併或受讓他公

司之全部營業一合併而消滅之公司或讓與之公司持有本公司之股份時，則因合併或受讓而取得；(3)行使權利之結果一強制執行或和解等債務人除本公司之股份外無其他財產，則因拍賣或代物清償而取得；(4)股東行使股份買回請求權一對於營業轉讓等之決議、變更章程上股份轉讓限制之決議、合併承認之決議等反對股東之請求買回。與我國例外情形相較除(4)相同外，我國並無(1) (2) (3) 之規定但解釋上亦應能適用（註33）。而學者認爲除法律明文列舉承認事項外，基於上述買回禁止之立法趣旨其範圍應及於實際上不生弊害之其他情形，他方禁止之範圍亦應及於關於買回之脫法行爲。所以日本解釋上適法承認事項包括無償取得、包括遺贈、以公司之名義爲他人之計算而取得（居間取得、信託取得等）、債務擔保而占有等（註34），此於我國並無不能作相同解釋之理由（註35）；至於買回之脫法行爲包括以他人之名義爲公司之計算而取得例如以子公司取回母公司之股份（註36），此於我國之適用上發生問題。

二、子公司買回母公司股份之限制

由於母子公司之一體性，母公司買回自己股份可能發生之流弊於子公司亦同樣發生。所以日本於昭和56年修法之前依上述法律解釋認爲子公司不能買回自己股份，因此利用子公司方式買回自己公司股份之公司負責人依商法第489條1項2號規定可科以刑罰（註37）。而由母公司100% 出資之完全子公司買回股份於通說上固無異論，但對於100% 完全子公司以外之子公司則有歧見，換言之二者之從屬關係應至何種程度才會發生流弊，或認爲從維持公司資本充實而言應重視財產一體性故二者應具有同一公司之經濟實態，或認爲從防止市場操作與經營固定化而言應重視母公司之實際支配力，或認爲除財產結合與支配力外仍應考量法的安定性而二者以過半數之持股關係爲適當（註38）。爲避免爭執與有效的規制自己股份之買回，昭和56年增訂第211條之2禁止子公司取得母公司股份，並二者關係以實質過半數持股決定之。其內容如下(1)因合併或受讓他公司營業之全部、或實行公司權利爲達成目的而有必要者外，子公司禁止取得母公司之股份，(2)母公司與子公司共同持有他公司已發行股份總數過半數之股份，或子公司持有他公司已發行股份總數過半數之股份時，該他公司亦視爲母公司之子公司而不能取得母公司

之股份。

然而我國對子公司取得母公司股份並無明文限制，於實際案例上民國76年以前經濟部採肯定見解，認爲「股份有限公司轉投資其他股份有限公司而具有實質控制關係時，居於控制地位之公司透過轉投資之公司買回控制公司股份與公司自己買回自己股份無異，…應爲我公司法不採」（註39），但至民國81年卻另以一紙行政命令推翻原來見解而允許股份有限公司透過轉投資公司買回本公司股份，其態度改變之理由在於實務界以罪行法定主義之精神因無明文處罰規定故對其移送之案例皆以不起訴處分結案（註40）。從而本案例而言三井公司爲達成合併之目的而利用其完全出資之子公司三池公司買回本公司股份，整個交易過程由其主導正如判決中所言三井公司才是「真正契約當事人」。雖如此但於我國上述解釋下三井公司不構成違反公司法第167條自己股份取回禁止之規制，而產生截然迥異之結果。

刑法上罪行法定主義基於保護行爲人之考量固然應確實遵守，但若僅拘泥於法條文字而使於財產或支配關係已具同一公司之實態者卻仍不受公司法第167條之規範之不當結果，從而此一脫法行爲將使第167條規制形同具文，使任何公司皆可以轉投資方式達到前述取回自己股份之目的而流弊叢生。因此實務界應考量第167條之立法趣旨而視兩公司之一體性程度如何以決定使否有第167條之適用，並於比較法上日本爲避免發生歧見以法律明確規定子公司不得取得母公司股份此乃值得參酌。

三、取回自己股份規制之緩和

取回自己公司股份規制之緩和目前爲日本商法改正上之最重要課題。對於本案地院判決認爲公司取回自己股份除第210條規定4種例外情形外爲避免公司重大損害於必要時，換言之緊急危難時仍有存在餘地，雖二、三審對此見解予以駁回，但此一見解卻成爲今日緩和自己股份取得限制之理由。此外更由於近年日本股價暴跌，不僅企業或個人且經濟全體皆受到相當打擊，而爲活絡資本市場以恢復景氣，故緩和自己股份取得之限制，使公司得買回自己股份以維持股價而恢復投資者信心，被認爲有利之對策，因此企業界積極要求緩和商法對於自己股份取回之限制（註41）。

然而由公司出面維持股價固然有宣示效果，使投資者了解企業之真實價

值遠超過當時市值，以恢復投資者之信心。但他方 卻容易發生市場操作或內線交易等違法行爲，而且公司股價高低之評價包含對公司未來業績預測之不確定因素，公司經營者爲鞏固自己地位是否能對公司現在之股價客觀的公平的判斷亦令人發生懷疑；而爲達成公司有利之宣示效果，其他措施例如增加股息紅利之分配亦同樣能發揮效果，未必須以買回自己股份爲唯一手段（註42）。至於爲避免公司「緊急危難」之理由而解除取回之限制，學者認爲不免有濫用之虞，尤其公司發生經營權爭奪之際，該項買回基於經營者自身利益或公司利益未必容易判斷（註43），且經營者於維持其經營地位之動機上更可能高價收購股份致影響公司財產充實（註44）。

前述自己股份取得之規制乃基於弊害發生之防止考量而立法政策上採事前禁止方式，所以對於弊害能事先採取有效防止措施而因事實上之客觀環境需要，解除禁止並非不可能，例如日本現行法四種例外情形即經過長期爭取與多次商法修正才能完成（註45）。所以今日再度提唱規制緩和，其前提亦相同必須能有效防止弊害，或解除限制所得利益超過限制結果。而對於防止弊害之措施內容應包括：(1)取得財源之限制；(2)取得之限度；(3)取得之目的；(4)取得之手段；(5)及其他措施例如開示制度之加強等（註46）。取得財源與數量之限制乃爲維持公司資產充實與債權人之保障考量，所以認爲取得股份之資金來源不能使用公司之資本金，而僅於公司有盈餘時於該盈餘之可分配範圍內爲之，且取得數量亦應有所限制，或仿ＥＣ公司法第2指令與德、法之立法例以已發行股份總數或票面金額總額之一定比率爲準，並且對於股份取得方法或取得價格等事項應經股東大會決議或承認（註47）。而爲有效防止取回自己股份之弊害發生，對於例外的許可之取得目的以列舉方式規定乃認爲適當（註48）；此外爲防止市場操縱之違法行爲發生對於買回之方法亦應相當限制，包括：(1)禁止公司爲該支股票枝首筆交易或收盤前30分鐘之交易，(2)公司身夠價格不得高於當時市價或最近成交價格，(3)每日買進數量不得超過該支股票4週平均交易量25% 等。又由於公司買回自己股份常能引起股價波動所以買回計劃爲公司重要情報，爲避免內線交易行爲發生應加強公司開示制度（註49）。

與日本相同，我國亦處於股價低迷時期，爲維持股價而活絡市場，亦有緩和自己股份取得限制之提議，因此日本學界之見解與防弊之考量，實值吾

等深思與參酌。

伍、經營判斷原則之適用問題

經營判斷原則爲美國判例法上所發展之理論，依此原則之適用得使公司之董監事責任減輕或免除（註50）。公司董監事對公司因基於委任關係具有忠實義務與善良管理注意義務，而經營判斷原則適用僅於善管注意義務範圍，換言之公司董監事之經營判斷結果使公司發生損害，但該判斷基於誠實且充分之情報即已盡善管注意義務時對該損害不必負賠償責任。由於經營判斷原則之適用使董監事能從經營失敗責任陰影中解脫而勇於任事，創造事業機會。

本案例中被告三井公司董事爲多角化經營認爲與三井水泥公司合併才是最佳策略，而爲排除大股東C之反對合併，令其完全出資子公司以高於市價之價格收購C之股份，使合併順利完成而公司因此經營狀況轉好。本案雖由完全子公司從事收買行動但如判決所稱三井公司才是真正契約當事人，所以三井公司構成違反商法第210條自己股份取回之禁止規定。而於經營判斷原則之適用上，董監事確信爲公司最大利益而執行業務，但該業務行爲違反法令時，仍是否受此原則之保護而可免除或減輕責任？本案判決中法院仍然認定三井公司違反自己股份取回禁止之規定，並以高價收買造成公司35億5千萬圓之損失應由三井公司被告董事負賠償責任，所以對被告所稱「完全爲公司之最大利益」之考量並未予以審酌。從而 日本法上之解釋即使爲公司最大利益，但該行爲違反成文法之規定時則已非董監事得自由裁量之問題（註51），換言之若依國家之判斷應受禁止行爲，縱然能爲公司帶來莫大利益，但董監事之判斷亦不能優先於國家之判斷（註52）。此於我國法上亦能作相同之解釋。

註　釋

註 1：參照商事法務No.1078，43頁—55頁「三井礦山取締役の責任追及請求事件判決」（1986.5.29）。

註 2：吉原和志「完全子會社による親會社株式の高值買取リ——三井礦

山事件最高裁判決」法學教室No.159 (1993.12).

註 3：依日本民法第167條1項債權之消滅時效爲10年。

註 4：松皮菱「三井礦山事件最高裁判決の示すもの」商事法務No.1333，50頁。

註 5：原審詳細內容參照資料版／商事法務27號（昭和61年6月）28頁以下。

註 6：同前揭（註4）資料；春田搏「株式相互保有規制と子會社法人格（上）—三井礦山事件と現行法制—」商事法務No. 1205，2、3頁。

註 7：同前揭（註4）資料；神崎克郎「自社株買戻しと取締役の責任」法學セミナーNo. 382, 30頁。

註 8：同前揭（註4）資料；同前揭（註2）吉原，34頁。

註 9：同前揭（註2）吉原，34頁；河本一郎・龍田節等「三井礦山事件判決ガ提起した諸問題」商事法務No. 1085, 10. 11頁。

註10：同前揭（註6）春田搏3頁；同前揭（註2）吉原 32頁；前揭（註9）河本等 16頁。

註11：同前揭（註8）；前揭（註9）河本等16頁

註12：同前揭（註6）春田搏5頁。

註13：同前揭（註4）資料；前揭（註6）春田搏4.5頁。

註14：同前揭（註6）春田搏 5頁；近藤光男「自己株式取得と取締役の責任—三井礦山事件控訴審判決をめぐって—」商式法務No. 1190, 53頁。

註15：柯芳枝，公司法論 （三民書局）（1988年3月）344頁。

註16：同前揭（註14）近藤 54頁；前揭（註7）神崎 31頁。

註17：同前揭（註9）河本等11頁；岩原紳作・高橋宏志等「株主代表訴訟制度の改善と今後の問題點」商事法務No. 1329, 18頁。

註18：同前揭（註17）岩原等 18頁。

註19：近藤光男「株主代表訴訟制度の會社法上の問題點」ジュリストNo. 1012, 70頁。

註20：同前揭（註15）柯芳枝 346.347頁。

註21：竹內昭夫等編集・新版注釋會社法（6），（有斐閣）382頁。

註22：同前揭（註21）。

註23：同前揭（註15）柯芳枝347頁。

註24：同前揭（註21）380頁。

註25：同前揭（註21）381頁。

註26：肯定說者亦以公司勝訴能直接獲得利益之理由而認爲公司應支付其他費用；否定說者以法律明文限制律師費用而已故認爲當然不包括其他費用，或認爲代表訴訟權爲自益權故不能向公司請求支付其他費用，或認爲即使能請求而該其他費用應僅限於若由公司本身提起訴訟時同樣的必須支出之費用。參照前揭（註21）

註27：平成五年商法修正第268條之2第1項。

註28：同前揭（註4）。

註29：同前揭（註17）岩原等16頁。

註30：同前揭（註17）岩原等12頁；竹內昭夫「株主代表訴訟の活用と濫用防止」商事法務No. 1329, 34.35頁。

註31：竹內昭夫等編集・新版注釋會社法（3）（有斐閣）227.228.229頁；柯芳枝「股份有限公司取得自己股份之研究」公司法專題研究（國立台灣大學法學叢書）50—53頁。

註32：同前揭（註31）竹內等編集230頁。

註33：依我國公司法167條規定公司得收回自己股份情形者如下即：特別股之收回、股東行使法定買回權、股東清算或受破產之宣告得按市價收回其股份以抵償其於清算或破產宣告前結欠公司之債務。

註34：同前揭（註31）竹內等編集 232. 241—244頁。

註35：同前揭（註31）柯芳枝68—70頁。

註36：同前揭（註31）竹內等編集 232.235頁。

註37：日本商法第489條1項2號規定公司發起人、董監事、經理人等以666他人之名義爲公司之計算而不正取得公司股份或設定質權得科5年以下有期徒刑或200萬圓以下罰金。並參照前揭（註9）河本等13頁；前揭（註31）244頁。

註38：同前揭（註31）270.271頁。

註39：參照經濟部76年6月29日經（76）商31726號函釋。

註40：參照經濟部81年10月16日經（81）商226656號函釋。

註41：龍田節・江頭憲治郎等「自己株式取得の規制緩和をめぐって」商事法務No. 1285　7—9頁；岩原紳作「自己股份取得規制の見直す（上）」商事法務No.1334，47.48 頁。

註42：同前揭（註40）岩原49.50頁。

註43：神田秀樹「三井礦山事件に關する理論的問題」商事法務No.1082，7頁。

註44：同前揭（註40）岩原51 頁。

註45：日本商法制定之初嚴格禁止自己股份取得或設質，後經昭和13年，25年與56年之修正逐漸緩和而有四種例外情形出現。

註46：同前揭（註40）龍田等17頁。

註47：同前揭（註40）岩原51.52 頁，龍田等19.20 頁；大隅健一郎「自己株式取得規制の緩和について」商事法務No. 1295 3—5頁，「自己株式取得規制の緩和について—訂正再論—」商事法務N0.1309 36.37 頁；大隅健一郎等「自己株式取得禁止緩和論について」インベストメント 1992.10，97.98 頁。

註48：同前揭（註40）龍田等18頁。

註49：同前揭（註40）龍田等28.22.23頁，岩原50頁。

註50：經營判斷原則日本之法院亦採用之，參照岸田雅雄・會社法入門（日本經濟新聞社）178—181頁。

註51：同前揭（註14）近藤54頁。

註52：同前揭（註2）吉原35頁。

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國際習慣法

黃 異*

Common International Law

by
Hwang I

目 次

* 海洋大學專任教授兼海法所所長
淡江大學公共行政學系兼任教授

壹、前言

國內法是一個比較成熟的法的領域。成熟度高的法秩序（Rechtsordning）卻有一個共通的特點，即：他主要是由成文法所形成，而習慣法及一般法律原則僅扮演輔助的角度。反之，國際法則是一個比較不成熟的法秩序。因此，習慣法形成國際法的主要部份，而條約與一般法律原則，則立於輔助的地位。補可否認的，第二次大戰之後，已使得國際法逐漸在蛻變之中。但在國際法最終成爲成熟的法秩序之前，習慣法的重要性自然依舊。

在國際法學領域中，習慣法一直是一個爭議的焦點。但是國內探討習慣法的文章甚少，而教科書亦經常輕鬆帶過。本文試就習慣法的各個相關問題在行思考 並做合理的結合。若爲區別國際法中與國內法中之習慣法，宜用國際習慣法及國 內習慣法二詞，但爲行爲方面，本文僅用「習慣法」一詞來指稱國際習慣法。

貳、習慣法的產生

習慣法產生要素爲何，主張不一。學說大都著眼於所謂的主觀條件與客觀條件來討論此問題。主觀條見是指法的信念（opinio iuris），而客觀條件則是指 國家實踐。習慣法的產生應兼俱主觀條件及客觀條件，或者僅俱備其中之一即可，則有不同的看法。各學說對於法的信念及實踐之意義，亦持不同看法。而兩者的性質及相互間的關係爲何，也是意見分歧。綜合來看，可歸納爲下列數種說法（註1）：

一、習慣法係由國家實踐形成。亦即，國家的共同一致行爲形成習慣法（註2）。

二、習慣法僅由法的信念所形成。若持有相同之法的信念的國家，增加至一個普遍程度時，則產生習慣法（註3）。換言之，相同之法的信念，共同形成了習慣法。由於各國的法的信念可於極短時間內發生，甚至可瞬間發生，因此，習慣法亦可於極短時間內或瞬間產生。因此，有所謂之「速成國際法」（instant international law）的稱呼（註4）。

前段所稱的法的信念只要存在於國家主觀上即可，其是否加以表達出來，

則非所問。因此，所謂的實踐，僅是法的信念存在的證據而已（註5）。

三、習慣法由法的信念與實踐所形成。但是，法的信念與實踐兩者間的關係爲何，則有不同見解。基此，又可以把此項主張分爲下列三種：

㈠法的信念是法效意思，實踐則是此種法效意思表示方法。國家將法效意思經由實踐加以表達，即爲所謂的意思表示。第一個由某個國家所爲的表示，謂之要約，其他陸續出現者則爲承諾，要約與承諾形成契約。由於實踐在本質上僅能看成是一種默示的表示方法，因此經由其所形成的契約稱之爲「默示契約」（tacit agreement; stillschweigender Vertrag）（註6）。習慣法即由默示契約而產生。

前段所述學說把法的信念與實踐結合起來，解釋成意思表示，並據以說明默示契約的產生與習慣法的存立基礎。

㈡某一國家首先在主觀上發生法的信念，並依此而爲行爲。其他國家隨之爲相同行爲，但這些國家在爲行爲時，其主觀上也同時存有法的信念。質言之：國家所爲的每個行爲必然伴隨有法的信念。此種伴隨有法的信念之實踐，引發習慣法（註7）。

前段所述學說雖然把法的信念與實踐加以結合，但並未將其解釋爲意思表示。因此該說並未主張默示契約是習慣法產生的基礎，而僅單純地認爲附有法的信念的實踐形成了國際習慣法。

㈢某一國家首先爲一特定行爲，其他國家則跟隨爲相同之行爲。另一方面，每個國家在其主觀上亦產生法的信念。而此種法的信念可於不同的時間發生。法的信念可能在爲第一次行爲前已存在，也可能在爲數次行爲以後才發生，也可能在爲第一次行爲時即同時存在。若在國家間形成穩定的實踐與法的信念，則產生習慣法（註8）。

前段所述學說並未把法的信念與實踐加以結合，而是把兩者分別觀查，但兩者並存則形成習慣法。

在前述各說中，除第一說外，其他各說在目前皆有學者主張。但是，第三說中之㈢則爲通說，且爲國際法院所支持。以下將就該說爲進一步的說明。

如前所述，形成習慣法的條件爲法的信念與實踐。「實踐」只是一個概稱，用來泛稱各種的國家行爲。行爲分爲作爲，不作爲與容忍。例如：各沿海國皆主張享有大陸架（作爲），各國皆不在外太空設置具毀滅性之武器

（不作爲），各沿海國皆不阻止外國船隻通過其領海（容忍）。所謂的抗議是一種作爲，不抗議則是容忍。國家爲一組織體，其必然依靠機關來爲行爲。因此，行爲必然是指由國家機關所爲者。但此地所稱之機關爲何，則有不同意見。部份學者認爲，所謂機關僅是代表國家向外爲行爲者（註9）。例如：元首、行政首長、外交部長及駐外大使等。此種機關的行爲固然對於習慣法的產生具有重大意義，但是其他行政機關、立法機關或司法機關之行爲也對於習慣法的產生有同樣重要的意義（註10），否則許多習慣法因沒有「實踐」而致不可能產生，而許多傳統習慣法也無法產生。例如檢察及警察機關拒絕侵入外國大使館爲公務之執行，立法機關訂定外國漁船入漁二百浬海域之法律，法院拒絕傳喚外國大使到庭作證等。這些行爲是導致「外國使館不可侵犯」、「二百浬專屬經濟區」及「外交代表之司法豁免權」等習慣法產生的國家行爲。

國家機關締結條約所爲之行爲，如：簽字、同意、批准等，亦可視爲國家實踐（註11）。但若締約國明示排除此種可能相時，則不可將之納入考慮（註12）。

實踐必須具有「一致性」、「普遍性」與「持續性」。

如前所述，行爲可分爲作爲、不作爲、容忍。因此，所謂的一致性並非從行爲外觀來加以觀查。所謂一致性，係就行爲的「內涵」而爲考察。若由行爲可演譯出相同的內涵（註13），則行爲即具有一致性。此外，所謂一致性，係把所有行爲視爲一個整體而爲考察，若偶有少數之矛盾行爲，仍不影響整體行爲的一致性。

行爲應具持續性，即具有相同內涵的行爲應前後呼應銜接，而展現其連續的性質。

行爲應具有普遍性。所謂普遍性係就行爲之國家而爲觀查。所謂普遍性，並不是指全球所有的國家皆爲行爲，而是指其中之部份，亦即與形成中之習慣法有利害關係的國家（註14）。凡是此種國家皆爲行爲，則該行爲即具有普遍性。前揭所謂的國家是否一定要包括「強權國家」（great powers）在內？有些學者對此問題持肯定之見解（註15）。強權國家固然「在實際上」對於其他國家的行爲有相當的影響力，但是在討論習慣法的形成條件時，則不宜把國家做此區分，因爲在法律上國家應是等量齊觀的。因此，是否強

權國家，對於行爲普遍性的確定不應有任何意義。

實踐要滿足上述三個條件，可能需要較長的時間，也可能只要短暫的期間。但時間的長短並不是實踐必備的特性（註16）。換言之，考慮實踐是否能引發習慣法時，並不考慮其存立時間之長短，而僅檢查其是否已擁有前述三個特性即可。

法的信念是指國家對其行爲所持的一種心態。所謂心態並非指內心的活動（psychological process; innerseeliches Vorgang）而是指國家主觀上的認知或態度，而法的信念亦僅能由客觀存在的各種證據加以認定。前述的國家實踐，也可以做爲認定的依據。

「法的信念」所指爲何？一般都認爲是：「行爲是合法的」（註17）即：「行爲符合特定之法律規範上」。換言之：國家在其心態上已認定某法律規範之存在。由於實際上相關之法律規範尚未存在，因此國家所持之法的信念顯然是一種「錯誤」，有些學者認爲錯誤不宜做爲習慣法產生的條件（註18），因此，認爲法的信念的內涵應是如下：行爲應該是符合法律規範的（註19）。換言之，法的信念表達了對於未來法規產生產生的期望。所謂錯誤是指主觀上的了解與現實狀況有出入「而不自知」。但在習慣法產生的情形中，國家所持有之心態與法律現狀固然不合，但並非不知此種差異。國家事實上是「有意」要調整法律現狀而持有不同之心態。因此，前述國家之法的信念，很難說是一種錯誤。此外，即使法的信念是一種錯誤，也沒有任何理由可以排斥它作爲習慣法產生的條件之一（註20）。我們所討論的是國際法所規定的習慣法產生的條件，若國際法把「錯誤」看成爲習慣法產生的條件，在基本上也無任何困難。

如前所述，習慣法是經由實踐與法的信念而產生。若觀察實踐性質，則不難發現習慣法的形成，或多或少需要一些時間。因此，所謂的瞬間法（instant law）在實際上發生的機率相當的低。

雖然習慣法是由實踐與法的信念所形成，但它的內容可採擇自不同的來源。例如，一般法律原則、國際條約、國內法上的規定、國際組織之宣言，國際禮儀等等（註21）。

在前文中，一直以國家做爲習慣法產生的主體，但目前的發展趨勢是：除了國家之外，其他國際法主體，即：國際組織，亦得參與習慣法的產生。

但是，國際法主體除了國家與國際組織之外，尚有其他種類，而這些國際法主體是否亦能形成習慣法，則視國際法本身有否賦予其產生習慣法的能力。

國際禮儀固然也是一種規範，但不同於法律規範，特別是不同於習慣法。國際禮儀僅是單純地由國家實踐而產生。國際禮儀的例子很多，例如（註22）：涉外民事事件應適用外國法之原則，外國政府首長在本國境內的優先地位，政府改變或領土改變應向外國爲通知之原則，外交書函使用白色紙張，船舶在公海上相遇互爲敬禮等。

由於國際禮儀並非法律規範，因此違反國際禮儀之行爲不會引起國際法上的制裁。

參、習慣法拘束力產生的原因

習慣法拘束力爲何，長期以來，一直是個爭議不休的問題。各種學說大致可歸納爲下列幾個學派（註23）：

一、第一個學派著眼於國家的「意思」（Wille）來說明習慣法拘束力的原因。有些學者認爲習慣法拘束力源於國家單方面願受習慣法約束之意思，有些則認爲習慣法拘束力源於各國間願視某規範爲法律規範之意思合致或共同意思。

二、第二個學派著眼於國家意思以外的現象，並據以說明習慣法拘束力的原因。有些學者認爲拘束力源於「國際社會之精神」（Gemeinschaftspirit）；有些學者認爲習慣法拘束力源於「人類的社會性」（sozialer Natur der Menschen）。

三、第三個學派則著眼於與習慣法不同的規範，認爲習慣法的拘束力應源於另一個或另一些規範。有些學者認爲習慣法拘束力源於具自然法性質的規範，克爾生（Hans Kelsen）則認爲習慣法拘束力源於一個根本規範（Grundnorm）（註24），但克爾生卻進一步主張此基本規範並不具法律規範的性質，而是一個假說（註25）。

習慣法是一種法律規範，其拘束力應僅能源於另一個規範，而不可能是其他的原因。至於此規範的性質爲何，則完全取決於各人（或：研究者）的認知了（註26）。

前揭Kelsen基於位階理論（Stufen Theorie）以乃受限於實證法（註27）而來的主張 — 根本規範爲一項假說 — 實不可採。因爲若根本規範是一個假說，則基於此根本規範而產生的習慣法亦是一種假說，而不會具有「法律規範」的性質。因此，習慣法拘束力必然是源於一個更高的法律規範。

今日的國際社會是由歐洲國際社會擴張演變而來。而早期的歐洲國際社會則是由脫離封建制度而形成之主權國家所組成。初成立的主權國家爲達和平共存之目的，勢必制訂一些規範，經由此種規範而形成國際社會。最初的一些基本規範是經由各國間的「無固定形式之合意」（formloser Konsens）而產生的（註28）。經由此種合意而產生的「基本規範」，包括了認定各主權國家爲獨立自主的國家及其享有的基本權利外，尙規定了習慣法及條約法產生的方法，以及這些法律規範在內容方面的限制。此外，基本規範亦認定各國國內法所共同採納之一般法律原則爲法源之一。

由上段所述可知，習慣法拘束力產生的原因，並非一個法律規範，而是多數的（或謂：一組的）基本規範。基本規範的性質亦是法律規範，但此法律規範則又再植基於更高的法律規範。此更高的法律規範則具自然法性質。這些自然法的相關規範，規定了「無固定形式之合意」爲法律規範產生的方法。

肆、普通習慣法與特別習慣法

普通習慣法是指適用於全部國家的習慣法，而特別習慣法則是指適用於特定少數國家的習慣法。

如前所揭，習慣法是經由實踐與法的信念兩要件而形成。而實踐只要達到普遍的程度即爲已足，換言之，不必全體國家皆爲相同之行爲。但是，習慣法一經產生即對全體國家產生拘束力，而並非僅對曾爲行爲之國家產生拘束力。因此，習慣法通常都是普通習慣法。但是，若某特定國家自習慣法一開始形成時即一直 明確反對該規定，則該習慣法於產生後即不適用於該國（註29）。若部份國家爲相同的實踐，部份則一直持反對態度，則有關之習慣法無法產生，因爲實踐尙未達普遍的程度，此時不能主張謂：習慣法已經產生，僅是不適用反對的國家。

新加入國際社會的國家，是否適用習慣法？一種主張認爲由於新國家對於既存之習慣法的形成未曾參與，因此該規範對於新國家沒有拘束力。但是，一個群體依據國際法（即習慣法）加入國際社會，成爲國際法上的國家，其必然受國際法之適用。因爲，所謂的「國家」是指國際法上的國家，且是受國際法適用之國家。因此，依據國際法加入國際社會之國家，必然要適用各種國際法的規定（註30）。若新國家表明不願接受特定之習慣法規定，而其他國家亦同意之，則該新國家與同意之國家間排除該特定習慣法之適用，但強行法（jus cogens）則不得排除適用（註31）。

特別習慣法亦是經由實踐與法的信念而產生。實踐也必須具有同一性與持續性。但所謂的普遍性，則應包括所有的相關國家，而並非指其中之部份。因此，特別習慣法僅適用於參與形成該習慣法者。

特別習慣法大都發生於有共通特性的國家間。此種共通性，大都指政治、文化、經濟、地理方面者。例如：在拉丁美洲國家間之特別習慣法或在俄國瓦解前在共黨國家間之特別習慣法。惟特別習慣法不得與普通習慣法中之強行法相牴觸（註32）。

在某一特定地理區域中國家所形成之特別習慣法又稱之爲區域習慣法（lokales Völkergewohnheitsrecht; local custom; regional custom）。此外，若特別習慣法由兩個國家所形成，則稱之爲雙邊習慣法（bilaterales Völkergewohnheitsrecht）。在印度領土通過權案（Right of Passage over Indian Territory）中，常設國際法庭即認定，葡萄牙對於在其所屬Dadra與Nagar-Aveli兩地間之印度領土有通過權，而此權利係植基於兩國間所形成的習慣法。

伍、國際習慣法的法典化

在法學領域中，所謂法典化是指把習慣法以文字予以表達出來。基此，習慣法的法典化是指以文字把習慣法加以表達出來。文字必然形諸於書面，因而有法典的出現。

由於習慣法產生的特殊方式，而致習慣法通常僅能爲原則性的規定，且其內容及其範疇經常是不明確的。此外，習慣法各個規定之間亦無明確的系

統關係。但是，經由法典化的工作則可釐清習慣法的內容與範疇。而各個相關之習慣法間的系統關係，亦可經由法典化工作予以釐清及建立。此外，爲了使習慣法更能合理而有效地規範生活現象，可藉法典化的機會，爲補充的規定。

由前段所述可知，所謂之法典化並不是僅單純地把習慣法以文字加以陳述，此種工作事實上並無太大的意義。習慣法的法典化不僅是現有法律規範之文字化，同時也兼含設定新的法律規範。因此，習慣法之法典化經常兼具宣示性與創設性。

習慣法之法典化，都是採用多邊條約的形式。因此，法典化過程——廣義來說——實即締結多邊條約的過程。

若法典化條約生效，則是否表示相關之習慣法應喪失效力？有些學者主張肯定見解，其理由是：新法排斥舊法（註33）。但是，習慣法的內容涵蓋於法典化的條約中，換言之，兩者內容有同一性，而無牴觸。因此沒有適用新法排斥舊法原則的可能性。習慣法與法典化的條約是併存的。此點亦經由一九六九年維也納條約法公約予以證實。該約規定在締約國之間可適用法典化條約或習慣法。但在後者情形中，若習慣法未規定，則適用法典化條約之規定以爲補充。在締約國與非締約國之間則仍適用習慣法。

習慣法之法典化工作，最早發生於十九世紀初期。當時之法點化工作不僅發生於非政府間組織，同時也發生於政府間之會議中（註34），例如：一八一四年至一八一五年之維也納會議（Wiener Kongress）制訂了有關國際河川航行、廢止販賣奴隸以及外交人員階級之規定；一八五六年之巴黎和會制訂海戰宣言（Seerechtsdeklaration）；一八六四年日內瓦減輕戰場上受傷軍事人員死傷公約（Genfer Konvention betreffgend die Linderung des Loses der im Felddienst Verwundeten Militärperson）；一八九九年及一九〇七年海牙戰爭及中立法協定（Haager Abkommen über das Kriegs - und Neutralitätsrecht）。

第一次世界大戰期間，法典化工作暫時中斷，戰後則又恢復。一九二七年國際聯盟於第八次大會上決議召及國際會議，討論有關領海、國家責任及國籍等問題的法典化工作。一九三〇年海牙法典化會議召開，但僅對國籍問題達成協議，即：國籍公約，對於其他兩個問題則未達成任何協議。在一九

三〇年前後出現一些與戰爭有關之法典化條約，例如：一九二九年日內瓦改善軍隊傷病者狀況公約（Genfer Abkommen uber die Verbesserung des Loses der Verwundeten und Kranken der Heere im Felde），一九二九年日內瓦戰俘待遇公約（Genfer Abkommen uber die Behandlung der Kriegsgefangenen）。而此公約由一九四 九年有關保護戰俘的四個公約予以補充。

二次世界大佔後法點化工作又告恢復，聯合國憲章第十三條第一項第一款規定，聯合國大會「應發動研究，並作成決議……以提倡國際法之逐漸發展與編纂」。依據該條規定，聯合國於一九四七年十一月二十一日設立國際法委員會（The International Law Commission）該委員會的主要工作是在推動前項工作。國際法委員會草擬各種條約草案，交由聯合國召集之國際會議來討論並通過之。經由此種方法而產生之法典化公約如下：

（一）一九四五年領海及鄰接區公約。
（二）一九四五年公海公約。
（三）一九四五年捕魚及養護公海生物資源公約。
（四）一九四五年大陸礁層公約。
（五）一九六一年維也納外交公約。
（六）一九六三年維也納領事關係公約。
（七）一九六九年維也納條約法公約。
（八）一九五七年維也納在與世界國際組織關係中之國家代表公約（WienerKonvention über die Vertretung von Staaten in ihren Beziehungen zuruniversellen internationalen Organisation）。
（九）一九八二年聯合國海洋法公約。

陸、結論

歸納上文可得下列幾點：

一、習慣法產生的條件有暗法的信念與實踐。當兩者都存在時，即產生習慣法。實踐是指國際法主體（特別是國家）的實踐。實踐必須符合三個條件：一致性、普遍性及持續性。法的信念是指國際法主體對於實踐所持的態度，亦即：主觀上之認知。此種態度是：行爲符合法律規範。

二、國際禮儀僅由實踐產生，而不具法律規範性質。國際禮儀不同於習慣法。

三、習慣法拘束力源於一些國際法中的基本規範。這些基本規範規定了習慣法產生主體、方法及其應遵行之意旨。

四、普通習慣法是指適用於全部國家之習慣法；反之，適用於少數國家者，謂之特別習慣法。於加入國際設會之國家應適用普通習慣。

五、習慣法之法典化是指把習慣法以多編締結條約的方式倚以文字化。法點化之習慣法——在習慣法領域中——並未喪失其存在。在法典化條約之締約國之間可適用法典化條約或習慣法在締約國與非締約國間則適用習慣法，在非締約國間適用習慣法。

註　釋

註 1：有關習慣法之產生要件爲何，自古以來，即有不少學說。下文所歸納者，僅是近代學者的主張，而不包括早期的學說。

註 2：參見M. Schweitzer, Das Völkergewohnheitsrecht und seine Geltung für neuentstehende Staaten, Berlin, 1969, pp. 14-15.

註 3：B. Chen, Custom: The Future of General State Practice in a Divided World, in The Structure and Process of International Law, edited by R. St. J. Macdonald, D.N. Johnston, Dordrecht, 1986, p. 537.

註 4：B. Chen, op. cit., p. 532.

註 5：B. Chen, op. cit., p. 531.

註 6：參見R. Bernhardt, ungeschriebenes Völkerrecht, Zeitschtift für ausländisches und öffentliches Recht und Vöekerrecht, Vol. 36 (1976), p. 328; A. Verdross, Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts, Völkerrecht, Zeitschtift für ausländisches und öffentliches Recht und Vöekerrecht, Vol. 29 (1969), pp. 636-637; A. Verdross, Die Quellen des universellen Volkerrechts, Freiburg, 1973, p. 50; A. Verdross, B. Simma, Universelles Völkerrecht, 2nd ed., Berlin, 1981, p. 277.

註 7：Schweitzer, op. cit., p. 19; L.Condorelli, Custom, in International

Law: Achievements and Prospects, edited by M. Beljaoui, Dordrecht, 1991, pp. 188-189; L. Kopelmanas, Custom as a Means of the Creation of International Law, British Yearbook of International Law, 1937, pp. 135。

註 8：Verdross, Simma, op. cit., pp. 286-287。

註 9：例如：Kopelmanas, op. cit., pp. 130-131; Schweitzer, op. cit., p. 19; K. Shubiozewski, Elements of Custom and the Hague Court, Zeitschtift für ausländisches und öffentliches Recht und Völkerrecht, Vol. 31 1971, pp. 814-815.

註10：Condorelli, op. cit., p. 191; Verdross, Simma, op. cit., p. 298; M. Akehurst, Custom as a Source of International Law, British Yearbook of International Law 1974/75, p. 8; M. Hagemann, Die Gewohnheit als Völkerrechtsquelle in der Rechtssprechung des Internationalen Gerichtshofes, Schweitzerishes Jahrbuch fur Internationales Recht, Vol. 10, 1953, p. 64; H. von Heinegg, Die weiteren Quellen des Völkerrechts, in Völkerrecht, edited by K. Ipsen, 3rd ed., München, 1990, p. 191; J. M. Mössner, Einführung in das Völkerrecht, München, 1977, p. 35.

註11：Mossner, op. cit., p. 37; Skubiozewski, op. cit., pp. 822-823; M.Virally, The Sources of International Law, in Manual of Public International Law, edited by M. Sørensen, New York, 1968, p. 131。

註12：日本於其對外所簽之雙邊入漁協定，即明白揭示協定之簽訂不影響其對 國際海洋法的立場。例如：Agreement on Fisheries Between the Government of Japan and the Government of Solomon Islands (1978), Art. 6.

註13：此種內涵是指相關行爲所欲引其之習慣法的內容。參見：Schweitzer, op. cit., p. 16.

註14：Schweitzer, op. cit., p. 17; Verdross, Simma. op. cit., p. 280.

註15：Virally, op. cit., p. 137.

註16：Akehurst, op. cit., p. 15; Heinegg, op. cit., p. 193; Schweitzer, op. cit., p. 18; Skubiozewski, op. cit., p. 837.

註17：Akehurst, op. cit., p. 31; Hagemanas, op. cit., p. 73; Virally, op. cit., p. 133.

註18：Verdross, Simma, op. cit., p. 286.

註19：Schweitzer, op. cit., p. 22.

註20：W. Wengler, Volkerrecht, p. 181, note 3.

註21：有關各種來源，參見Verdross, Simma, op. cit., pp. 293-300; Verdross, Die Quellen. . . , op. cit., pp. 114-119.

註22：參見：F. Berber, Lehrbuch des Volkerrechts, Vol. 1, Munchen, 1960, p. 43-45.

註23：參見：Schweitzer, op. cit., pp. 28-35; 黃異，國際法拘束力產生的原因，載於：國際海洋法論集，臺北，1990, pp. 1-14.

註24：H. Lkesen, Principles of International Law, 2nd ed., New York, 1966, p. 564.

註25：Kelsen, op. cit., p. 559.

註26：Schweitzer, op. cit., p. 35: "Es ist dies mehr eine Gewissensfrage als eine klare Beweisfuhrung.

註27：參見：黃異，前揭註，頁七。

註28：Verdross, Die Quelle. . . , op. cit., pp. 20-21.

註29：Virally, op. cit., p. 136; Verdross, Simma op. cit., p. 289; Verdross, Volkerrecht. 5th ed. Wien, 1964, p. 141.

註30：Akehurst, op. cit., p. 7; Virally, op. cit., pp. 142-143.

註31：Virally, op. cit., p. 138.

註32：Verdross, Simma, op. cit., p. 289.

註33：Skubiozewski, op, cit., pp. 46-47.

註34：Verdross, Simma, op. cit., pp. 300-301.

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馬克思法哲學批判與國家觀之評析

洪鐮德*、方旭**

A Critical Exposition of Marx's Critque of the Philosophy of Right and his Conception of the State

by
Hun Lien-Te、Fane Hsu

目 次

* 淡江大學俄羅斯研究所兼任教授
** 台大三民主義研究所碩士班研究生

壹、前言

1843年，年僅25歲的馬克思對黑格爾一部極爲重要的著作《法哲學批判大綱》（1821）展開了最嚴厲的批判，馬克思並沒有批判黑格爾這部著作的全部，而是對其中第 261到 313節分別加以引述和評論。馬克思的評論在他生前並未發表，故可看成他早年遺稿之一。而此一稿件在1930年代刊載之後卻成爲研究馬克思知性歷程不可或缺的一部份。首先，馬克思此時尚未與恩格斯合作，因此未受到英國政治經濟學的深刻影響，而是以黑格爾與費爾巴哈等德國觀念論哲學的概念，來評論黑格爾法哲學之要點；其次，《黑格爾法哲學批判》（以下簡稱《批判》）是馬克思一生中，最清楚地將國家的結構與理想，藉對黑格爾批判有所闡述；最後，由於撰稿後不久馬克思已遷居法國，因此恩格斯所言：馬克思思想的第三個源流—法國空想社會主義亦在這一文稿中略見端倪，在此馬克思一反黑格爾的說法，以普勞階級（註１）作爲普遍階級，突顯了馬克思擔任《萊因報》主編後的社會關懷。

對這樣一本關鍵性的著作，一如《1844經濟哲學手稿》（以下簡稱《手稿》），一直要遲到二十世紀初葉，也即於1927年由Davi d Riazanov才予以刊行，且在發表初期未有英譯本出版；據此，我們可以了解到所謂的正統馬克思主義的問題：以往俄羅斯或歐陸共黨均以成熟時期馬克思的著作奉爲圭臬，但成熟時期馬克思主義則標榜國際革命、階級鬥爭，而少敘及國家與政治，更遑論《批判》、《手稿》中所提及之自然主義與人本精神。這些人道觀點，實非正統馬克思主義者所能接受。因此，西歐思想家或理論家在閱讀馬克思早期稿件之後，便以青年馬克思所透露出的人本精神爲主，既反對資本社會的剝削現象，也對共黨政權的獨裁暴政加以批判，促成了西方馬克思主義之興起。

探究馬克思對國家的觀念，大約可分爲三個時期：首先是青年馬克思時期，其時他尚爲黑格爾門徒。不過我們要注意的是，馬克思進柏林大學時，黑格爾早已去世，因此馬克思所接觸者爲博士俱樂部中青年黑格爾門徒，他們所信持者爲「凡合理者皆是實在的」，而與黑格爾保守的「凡實在者皆是合理的」取向相對立，因此青年馬克思的觀念是從國家爲人的異化出發，體認應然的國家爲人類的自由與理性之體現。這個觀念不但在《萊因報》中表

露無遺，也在《批判》中大加發揮；此時馬克思認爲國家爲一有機的組織，因此他認爲在黑格爾觀念裡，國家調合了等級爭執或其位階較高的說法，都是爲了掩飾實然與應然的鴻溝之幻想；馬克思更應用費爾巴哈的轉型批判法，企圖爲黑格爾哲學去掉神秘化。要之，馬克思認識到現代國家的趨勢是國家與社會相對立，因此他主張建立完全的人民民主制，使國家與社會再次合一，使國家成爲人民的國家，人成爲社會的人。

第二個階段爲國家工具說，在＜論猶太人問題＞與＜評普魯士人一文＞中，馬克思批評了包括英、法在內的政治國家仍然無法解決人民的問題。並以行政權的自相矛盾，論證了自由主義國家中，以特別原則替代普遍法則的情形。因此國家是一個工具，國家本身不具有目的性，此部份實屬於馬克思對國家實然面更深刻的批判。

在第三個階段，延續國家工具說，馬克思認爲國家不僅是工具，更是統治階級壓迫被統治階級的剝削工具。此外，不同於西方自由主義傳統國家學說的說法，相應於法國路易·拿破崙龐大的國家統治階層的事實，他提出了國家的自主說、寄生虫說，視國家爲搾取社會資源的寄生蟲。

我們若以上面的分期爲依據，探究馬克思國家觀念的開展，便會發現馬克思首先處理了國家的應然問題，並與德意志的實然現狀作了比較；第二階段中，馬克思則以英法資產階級的自由主義爲對象，探討了在他以爲是政治先進國家的政治實狀；在馬克思的成熟期，他仍是以當時法國王朝之現狀爲標的，批判了國家的實然面。因此，今日研究馬克思《黑格爾法哲學批判》更具意義，因爲它能使我們掌握到馬克思思想之精髓，也即理解他對國家應然本質的預設，而不至於受到他其餘著作對國家實然表象之批評所影響。

我們在本文中，對《批判》的研究大略是如此開展：

第一部份，處理馬克思所處之時代背景、思想淵源與馬克思思想體系之演展，以闡明其思想之時代意義與歷史脈絡，而有助於理解《批判》在馬克思全部著作中的定位。

第二部份，介紹《批判》各章節精要之處，從而建立青年馬克思國家理論的體系。

第三部份，以文獻的分析作爲方法，俾理解馬克思在《批判》中各個概念之關連，以掌握其後馬克思國家應然面的鋪陳。

貳、馬克思思想中的問題意識

一、歷史脈絡

在我們探討自黑格爾至馬克思的國家哲學時，似乎應當對當時的歷史背景先作一了解，俾能充份掌握其時空的特殊性與限制性。首先我們必須體認到，十七世紀初的三十年戰爭，使名義上的神聖羅馬帝國解體，整個歐陸情勢劇變，當時德意志各邦便面臨著戰亂後的城市與農村的破壞：對內方面，各地區相互分離，生產衰退；對外則被重商主義之英、法及荷蘭包圍，在關稅壁壘下無法拓展對外貿易。於是其時的德意志民族是沒有條件發展資本主義的，中等階級也沒有力量從事於民族主義與普遍的、國家的利益之追求，中等階級只看到地方的與特殊的個人利益。於是我們可以了解：即使當時的普魯士王國也不是現代意義下的民族國家，遑論其他各邦。

西元1789年發生了法國大革命；這一事件對歐洲以至於全世界均產生重大影響：首先，法國廢除了等級議會，代之以普遍投票，使現代國家的內容與形式得以確立；其次，現代國家之民族主義思潮得以鼓動。但從負面的影響來說，法國大革命的暴力傾向使各邦、各王國的貴族更爲戒懼，因此也激發起保守的風潮。

馬克思在＜《黑格爾法哲學批判》導言＞中作了以下的說明：

> 德國歷史上有過一個引以自豪的活動，這個運動世界上任何國家歷史上都沒有進行過，而且將來也不會仿造進行。我們和現代各國一起進行了復辟，而沒有和她們一起進行革命，其次是因爲其它國家受到了反革命的危害；在第一種情形下，我們的君主沒有感到害怕．我們往往只有一度、在自由被埋藏的那一天，才在我們牧師的領導下，處於自由社會。
>
> （《馬恩全集》，1: 454）

對德意志民族而言，其民族意識之形成必然受到拿破崙征服歐陸的影響。1806年，拿破崙取消了德境內二十餘個割據的政權，建立萊因同盟，又爲了法國的利益與封鎖英國之必要，直接促成德意志境內的資本主義發展，但

也從而引發其民族主義與民族資產階級的反抗，使普魯士藉民族獨立與反法運動的藉口，成爲德意志民族統一運動的中心。於是1816年普魯士廢除本邦內關稅限制，1834年與各邦組成德意志關稅同盟，並將奧地利排除在外。這就是青年馬克思所處的歷史環境。

由於與英法的發展模式完全不同，在德意志流行之意識型態，以至於哲學、政治理念也與他國大相逕庭；這也許可以解釋黑格爾爲何不斷強調王權、國家至上，以及與貴族的妥協、和諧之原因；據此，我們也可以解釋：德意志改革是由國家領導抵禦外力，以及國家之內中等與資產階級始終未獲得充份發展之因由。

二、思想背景

此外，在政治發展方面，德國在啓蒙運動中亦未契合英法的科學理性傳統，而有它自己的發展方向，而其最明顯處即爲不似英法自然法中的普遍法則，德國哲學家認爲歷史是在特定意義下，偶然事件的組合；同時相應於上述之政治狀況，當英法政治哲學家正在討論人在國家中之奴役狀態時，德國政治思想家卻相信國家的普遍性，力斥群眾的非理性，而主張國家的理性主義。

談及德國的啓蒙運動傳統，就必需首先述及康德的貢獻。康德主要處理人的認識問題。他既認爲人僅能認識到現象，又認爲物自身是在超驗的彼岸，故產生了唯物與唯心兩種傾向的妥協，也造成康德在《純粹理性批判》與《實踐理性批判》二書中所呈現在認識論與道德論上的矛盾。在他的觀念中，反映了啓蒙運動樂觀傾向的一面，認爲知識爲人掌握外界或外加於實在界的結果；同時卻駁斥了功利取向的行爲基礎。但他始終無法解決神、人與自然的問題，故現實運用上無法擺脫與現存的貴族政治妥協之傾向。

自康德以來，德意志產生所謂觀念論的傳統，這也是恩格斯所指馬克思三大思想源頭之一，也是決定了馬克思哲學上的主要看法。繼康德之後，續有費希特的唯心論，主張自我精神創造一切，又有謝林的自然哲學、統一哲學，最後出現了黑格爾絕對的唯心論、絕對精神說，爲普魯士的君主立憲提供哲學上的辯護。

關於黑格爾哲學的概要，不是我們在此想要處理的重點，或許人們可以

一個問題來釐清此處所必需的概念：人們的觀念是否反映了世界的現實？黑格爾的答案是肯定的，他認爲人將在歷史的進程中圓滿地了解世界，直到獲得一永恆的、獨立於世界的絕對知識、絕對精神爲止；於是人必從自我了解開始，企圖在歷史中獲得較高階段的自我覺醒，而社會的真理亦存於歷史的過程中，歷史不斷向前發展，最後終使人得到意志上的自由與精神上的解放，於是人變成爲神，達到歷史之終結。（以上參考洪鐮德, 1988: 63-72）

由於黑格爾的這套理論有明顯將現存普魯士王國合理化的意圖，因此激起許多學者的批評，包括馬克思亦只接受其方法與歷史演變的法則－即通稱辯證法－，而拒斥其絕對精神的概念。不過關於這點，後文均將作進一步的討論，此處不再贅述。但在青年馬克思的思想背景中，我們當以費爾巴哈的思想作爲結尾。當青年馬克思拒斥黑格爾有關意志的主張時，他所持的概念是：心靈的了解無助於一切歷史的進行；反之，一切歷史均在物質世界中開展，而這就開始與費爾巴哈的主張緊密地加以聯繫。費爾巴哈認爲：人的存在、我們所處的世界是如此的真實，故思想與意識只不過是物質的、肉體的產物；總之，並非由心靈決定物質；反之，心靈才是物質發展而成的最高產物；人作爲一種類存在，是自然的產物，非由哲學決定其存在。因此我們可以了解，費爾巴哈的唯物主義不同於當時所流行的唯物主義，甚至我們應當將其稱之爲自然主義、人本主義，是一種出自對黑格爾哲學批判性的接受，是以在1844《經濟學哲學手稿》，也即俗稱1844《巴黎手稿》中，馬克思高度讚揚了費爾巴哈作品的意義：

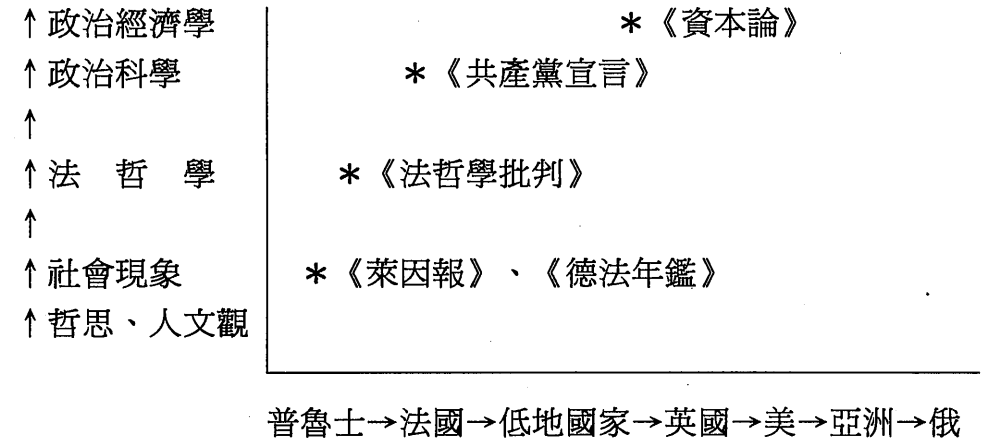
> 實證的人本主義和自然主義的批判是從費爾巴哈才開始的。費爾巴哈的著作越是無聲無息，這些著作的影響就是越深刻、廣泛和持久。（*Marx-Engels Reader*: 68）

因此我們可以了解，青年馬克思的哲學工作，即在對黑格爾哲學作去掉神秘化、去掉唯心化的歷程；轉而在人本的、自然主義的立場上，將人視作經驗的自然存在，從而開展屬於馬克思自己的理念。

三、馬克思的研究方向

若我們以時間與空間的發展來分析，馬克思一生的研究方向可分爲兩類：

首先在研究歷程上，由哲思、而人文現象、而社會現象、而法哲學、而政治科學、終於抵達政治經濟學；在研究方向上，則由普魯士向西移動、而法國、而歐陸低地國家、而英國、而美國、而亞洲，乃至俄羅斯（洪鐮德, 1984）；我們可在一個座標圖上描繪出馬克思智性投注的對象：



因此我們可以了解：在寫作《批判》時的馬克思是在處理法哲學問題的馬克思，是尚未應用政治經濟學來處理問題的馬克思。在此時馬克思尚未完全排斥自由主義的思想，雖然他已經了解到其中不足的部份；同時他是以「人」爲思考與論證的核心。至於阿圖塞將馬克思思想截然二分，分爲前後兩個不同的認知結構，曾引起極大的爭辯。姑且不論阿圖塞的見解正確與否，《批判》的確提供我們掌握青年馬克思哲學思想與其有關國家應然面的看法；況且，終其一生，馬克思都未再對國家此命題作專門性的論述，更顯示《批判》在整個馬克思著作中的特殊地位。稍後我們嘗試從馬克思在《黑格爾法哲學批判》所建立的理論體系著手，藉著他對黑格爾概念的批判，來勾劃出青年馬克思的國家觀。

參、馬克思在撰寫《批判》前的國家觀

就像我們在上面第一節所述，在《萊因報》時期的馬克思並未放棄黑格爾法哲學的觀念。但無疑的，馬克思也並未全然接受黑格爾的學說，因爲他

在報刊的數篇文章上都強調了理性國家的概念。換言之，他僅接受了國家有機體這一提法，而針對貴族制、王權、官僚制等作出了批判。正如他在＜評普魯士最近的書報檢查令＞一文中所述：

> 懲罰方式的法律不是國家爲它，而是一個黨派用來對付另一個黨派，追究傾向的法律取消了公民在法律面前的平等……是一種破壞團結的法律。（《馬恩全集》，1: 17）

因此，國家此一有機體應當是團結的，法律不過是現存歪曲的政治現象的反映；是故他在該文後半中繼續此一理念的闡述：

> 即使公民起來反對國家機構，反對政府，道德的國家還是認爲他們具有國家的思想方式。

在上述引文中，我們應該注意到：馬克思將國家放在主詞的地位，同時以賓詞方式來界定一國公民，也即認爲公民是國家的思考方式，因此再次肯定了國家是一個具有內在目的有機組織，當政府違反此一構成原則－－如書報令－－時，人民應當有反對的權力，故而人民擁有天生的革命權力。

緊接著以上的論述，馬克思提出對實然的批判：

> 在某一機關自詡爲國家的理性和道德的獨佔者的社會中，在和人民根本對立因而認爲自己那一套反國家的思想方式就是普遍而標準的思想方式的政府中，執政黨齷齪的良心卻捏造了一套追究傾向的法律，報復的法律，來懲罰思想、思想方式，其實這種思想方式只是政府官員的思想方式。（前揭書: 17-18）

馬克思在另一篇＜第179號《科倫日報》社論＞中，更爲明確的說明了理性國家的概念；他從反對該社論之基督國家出發，在文章中他問：「難道存在著植物和星辰的一般性質而不存在人類的一般性質嗎？」藉以駁斥海爾梅斯以特殊的基督教精神替代普遍精神的主張。而在該文的最後，提出了他對理性國家的看法：

> 實際上，國家真正的社會教育作用就在於它合乎理性的社會的存在。國家本身教育自己成員的方法是：使他們成爲國家的成員，把個人的目的變成大家的目的，把粗野的本能變成道德的意向，把天然的獨立性變成精神的自由，使個人和整體的生活打成一片，使整體在每個個人的生活中得到反映。（前揭書: 118）

這毋須我們解說就可以了解，此時馬克思完全接受了亞里士多德對於國家的界說，而此一國家對人民關係的應然概念，更延續至馬克思的《批判》一書而獲得完全的開展。不過在此篇文章的最後，馬克思完整的道出其對理性國家的定義：

> 最新哲學持有更加理想與深刻的觀點，它是根據整體的思想而構成自己對國家的看法。它認爲國家是一龐大的機體，在這機體裡，必須實現法律的、倫理的、政治的自由，同時個別公民服從國家法律也就是服從自己本身理性的，即人類理性的自然規律。（前揭書: 129）

於是這種國家自然的有機體所構成的屬性底概念，結合了法國大革命的整體意志的想法，使得馬克思開始對黑格爾以及與他一起擁有的理性國家概念加以深思，他並著手進行改造、引申此一概念，從而接棨出與他所處歷史時空相呼應，有關呈現「真民主」的理性國家。顯然路格（Arnold Ruge, 1802-1880）的＜有關現今憲法與國際法批判＞（1840）一文對馬克思起了相當的作用，其中路格批判黑格爾保守的歷史觀與批評黑格爾無視主權在民之主張均爲馬克思所承接，而成爲《批判》一文中主要的觀點。其次，馬克思站在左派黑格爾門徒的立場，由宗教批判開始，意欲彰顯黑格爾的保守精神，進而延伸到整個普魯士宗教王權本質的批判，這一切說明馬克思進一步改造黑格爾法哲學基礎的企圖是非常清楚、明顯的。

肆、《批判》的主題

從以上的敘述可知，此時馬克思在哲學觀點上仍與黑格爾有著密不可分的關係，是以在《批判》中，馬克思對黑格爾的批判僅限於法哲學部份，意即針對黑格爾有關現實界和保守的政治觀點予以無情的揭露。但要注意的是：

費爾巴哈的黑格爾哲學批判對馬克思的影響。它提供馬克思一種有效的批判方法—轉型批判法：費爾巴哈一直認爲黑格爾哲學充滿了神秘主義的傾向，唯有使主、賓辭倒置方能解讀真正的原意之所在，也只有轉型批判方能使人從黑格爾式的理念下解放，而回歸人本的自然。而馬克思就在運用轉型批判的前提下，對黑格爾法哲學內容加以批判。（Hung Lien-Te, 1985: 190-192）

在《批判》中，馬克思的重點放在市民社會與國家的關係上，是以他是從黑格爾《法哲學》261節開始論述；其寫作方式與稍後之《經濟學哲學手稿》，及稍早的《萊因報》社論相同，均爲繕寫原文後，再加以批評。當然這種筆記型的作品形式較類似於個人的哲思心得，再加上馬克思個人經濟因素的考量，或許就是馬克思始終未曾發表《批判》一稿的原因。在文中，馬克思由討論黑格爾的矛盾性開始，到最後甚至完全推翻其理論體系。也就是說，馬克思肯定了黑格爾對現象的觀察，但他也認爲黑格爾並未掌握真正的本質，也因此馬克思採取了費爾巴哈的方法，對黑格爾加以轉形批判。

就馬克思的觀點，黑格爾是犯了幾項重要的錯誤：

1、將王權神秘化；

2、將市民社會與國家截然二分。

在黑格爾的理論體系中，王權是國家的體現，是絕對的普遍精神，而市民社會則是個別人活動的範圍，是特殊利益的體現。因此國家經整合而超越了個別利益，並建立起超越市民社會特殊利益的法律規範，國家中的官僚等級亦指向圖利全國的目標，以無私的精神爲全民服務，成爲全民表率，形成一個普遍階級。對於這些觀點，馬克思卻持不同的看法：首先，他認爲在歷史上從未有黑格爾所描述之理性國家存在；其次，黑格爾將市民社會與國家截然二分的作法違反了馬克思觀念中「理性國家」有機構成之原則；因此他認爲黑格爾面臨的是觀念無法付諸實現的困境。黑格爾並非揭示了現實之必然，反而是用現存的事實完善其假想的邏輯。馬克思就在此觀點指引下，開始他對黑格爾法哲學的批判；最後更論及了官僚無法形成代表全民利益的普遍階級底原因。在《批判》中，其內容依討論之議題不同，略可分作四部份，就在下文中分節討論之：

一、國家本質的批判

馬克思所引黑格爾的原文起自261節，黑格爾的立論之用意在於要從國家概念中尋找邏輯的歷史表現，因此國家理念將社會自國家中分離，社會成了有限的概念，依附於國家無限的精神之上：國家本身爲一種權力外在的必然。而另一方面，國家又基於統合市民社會的利益，也爲社會的內在目的。就馬克思引用的第２６１節是如是說的：

> 對家庭和市民社會這兩個領域來說，國家一方面是外在必然性和他們的最高權力，它們的法規和利益都從屬於這種權力的本性，並依存於這種權力；但另一方面，國家又是它們的內在目的，國家力量在於它的普遍的最終目的與個人的特殊利益的統一（《馬恩全集》，1: 247）

於是國家作爲一種權力是外在的必然，而國家基於統合市民社會的利益，亦爲其內在的目的。但馬克思認爲這是完全的神秘主義，他指出：

> 黑格爾把家庭與市民社會看作國家的概念領域，及把他們看作國家有限性的領域，看作國家的有限性．．．它這樣做是爲了返回他自身，成爲自爲的，同時，他這樣做，是要使結果恰恰成爲在現實存在的那樣。邏輯的泛神論的主義在這裡已曝露無疑。（前揭書: 250）

馬克思力主只有家庭、市民社會才是國家的本質、國家的基礎。在此他運用轉型批判法，將處於賓辭的市民社會提升到主辭的地位，因而批判了黑格爾觀念的首尾倒置。接續著黑格爾有機國家的概念，馬克思認爲黑格爾誤以爲市民社會與國家的實際差別是理念發展的結果，卻未體認市民社會的實際性，於是馬克思在此將社會與國家間的關係下了一個本質上的定義：

> 家庭與市民社會是國家真正的構成部份，是意志所具有的現實的精神實在性，他們是國家存在的方式。家庭和市民社會本身把自己變成國家。他們才是原動力。（前揭書: 251）

因而他確信：黑格爾是在抽象邏輯中建構現實，是以其他形式的規定來代替具體的規定，因而是「非本質」的，是「對邏輯學的補充」。故馬克思

主張必須排除形式主義，要從國家的現實來驗證邏輯的合理性，至於所謂的國家精神僅是各種不同權力展現的方式而已。

二、國家制度

此文爲黑格爾原文275到286節的批判，黑格爾認爲國家之內是王權、行政權、立法權的三權分立：以立法權規定、確立普遍性的事物，由行政權確保特殊領域從屬於普遍性，而以王權充作普遍意志決斷的主觀權力。黑格爾在275節如此敘述王權：

> 王權本身包含著整體的所有三個環節：國家制度與法律的普遍性，作爲特殊對普遍關係的諮議，作爲自我規定的自我決斷的最後環節，這種自我規定是其餘一切東西的最後歸宿，也是其餘一切東西現實性的開端，這種絕對的自我規定構成王權本身的必須首先加以發展的特殊原則。（前揭書: 268）

因此君主立憲制成爲歷史上最好的制度也是最終的制度，其決定是以君主的決斷作爲國家意志的最後決斷；於是人不再是肉體的動物，而必然是國家的個人，而國家主權即君主任意決斷的權力，國家之人格僅存於君主一人之身上。

馬克思卻認爲國家是人的社會之特質底存在方式，人不能如黑格爾之主張作爲抽象的存在；因此對立於人抽象存在的君主主權，馬克思主張人民主權—人民的具體存在。馬克思論證說，民主制是歷史的規律，君主制不過是一個不徹底之民主制，君主制中由部份決定整體，人民從屬於政治制度，是真正特殊利益的體現；而真正的民主制中，各環節均不具本身之外的意義，是以國家政治制度僅爲人民存在的一個環節，並不構成國家本身，也因此是由人民來規定政治制度，國家因而是人自由之產物、自由之體現。故法律並非規定人的存在，而是法律爲了人而存在。

在此處，馬克思清楚地爲其國家之應然面下了定義：

> 在這裡〔民主制〕，國家制度不僅就其本質說來是自在的，而且就其存在、就其現實性說來也日益趨向自己現實的基礎、現實的人、現實

的人民，並確定爲人民自己的事情。國家制度在此表現出它本來面目，即人的自由產物。（前揭書: 281）

我們因此可以了解，不同於黑格爾主張普遍與特殊的調和，馬克思堅持的是普遍與特殊的統一、一種與自然的統一；馬克思並採取了歷史之演進作爲其立論的基礎：他認爲希臘羅馬時代，政治與私人領域尚未分離；中世紀時期，確立了社會經濟關係與私有財產，生活與國家同一，但人完全不自由，是徹底的異化；現代國家則強調了政治領域的分離與私人生活的抽象化。他採納了黑格爾的看法，將政治國家等同於國家制度，因此他論證說：「政治國家的彼岸存在無非是要確定它們這些特殊領域的異化。……是人民生活的宗教，是同人民生活現實性的人間相對立的人民普遍性的上天。」（前揭書: 283），而馬克思理想中的民主制則是政治與社會領域的再次融合爲一，是一種經過揚棄後的齊一。

如果我們接受國家僅爲一種政治制度，是人民自我規定的一個特殊環節的這種看法，那麼我們就不難理解馬克思爲何將具有現代特質的共和制政體與中世紀時代君主制度相提並論、看成齊一。因爲無論是何種制度都被他看作是人民生活的宗教，所不同者在君主制是完整的異化，而共和制是異化內的否定。（洪鎌德, 1993: 7-9）

是故在本部份內容的最後，馬克思批評黑格爾的君主世襲主張認爲它只是種動物性再現的證明，也就是黑格爾只看到了君主是王族子嗣的動物性相續關係，卻未證明君主只靠出生的事實即可決定王位的繼承。

縱觀馬克思的民主制，我們可以得到以下幾點結論，以爲馬克思論述的總結：

1、民主制以人爲主體·

2、民主制的國家政治制度爲人所決定·

3、民主制才是一切國家形式的本質·

4、真正的民主制中，國家將日漸消失·

因此馬克思心中的民主制，可謂完全不同於歐美現代國家的民主制。在他的眼中，英法傳統民主制不過是現代國家的政治形式，故爲國家應然面需加以進一步揚棄的部份。是以我們不當簡略地將馬克思劃歸於英法自由傳統

的承續或反動，而應將馬克思的理念視爲是以人爲本位、歐陸浪漫傳統下自由觀念的一支。（前揭文: 11-12）

三、行政權—官僚階層

此段包括287到297節，首先黑格爾對行政權作了一段說明：

> 執行和實施國王的決定，一般說來就是貫徹和維護已經決定的東西，即現行的法律、制度和公益設施等等，這和作決定這件事本身是不同的。這種使特殊從屬於普遍事務由行政權來執行。行政權包括警察權與審判權，他們和市民社會中的特殊物有更直接的關係，並通過這些特殊目的來實現普遍利益。
> 在這些特殊權力中，維護國家普遍的利益和法則，把特殊權利歸入國家的普遍利益和法制之中，這都需要行政權的全權代表，執行權的國家官吏以及最高咨議機關來照料，而這些人和機關都匯合起來，成爲和君主直接接觸的最上層。（《馬恩全集》: 294）

再加上此段引文後的敘述，黑格爾明顯地強調市民社會與國家分離的必然性，而官僚階層即爲上下間之中介物。官僚階層的成員是高級官員，是全民高度智慧與法律意識的集中，因此被要求大公無私和溫文和善，同時以直接的道德與理智教育加以養成。爲了防止其獨斷，有賴於王權由上而下與同業工會由下而上的監督。而市民社會中的矛盾即有賴官僚階層與同業工會的調整而消除。官僚階層便從而成爲國家之中的普遍階級。

馬克思認爲黑格爾的立論只掌握了形式上的意義。

首先，官僚階層與同業工會之間是存在有矛盾的，馬克思認爲兩者處在唯心與唯物的兩端，爲了彰顯官僚階層至高的中介性與其國家利益的代表性，官僚階層是反對同業工會的；一旦國家面對現實，市民社會的理性復甦，官僚階層必爲了自身利益而扶助同業工會。馬克思因而認爲，官僚階層是形式主義的國家，其內在目的就在使其自身成爲國家的目的。因此官僚的等級即爲知識之等級，在此中介作用之中，上層依賴下層的現實性，下層依賴上層的指導權，官僚制即在此掌握了秘密的本質，掌握了國家。

於是我們可以理解官僚爲何崇拜權威，爲何要以考試來決定政治特權。在權威崇拜之下，一切均指向現實化、唯物化，而轉向唯物崇拜的機械主義，

「權威就是官僚的知識原則，崇拜權威就是他的思想方式。」（前揭書: 302）

總之，黑格爾的觀點是認爲，官僚階層作爲國家之中的普遍階級，是提供公共財與公共服務的，相較於其他階級，我們以固定收入保障官僚階層對普遍利益的追求，也因此官僚階層超越其他階級而爲普遍階級。馬克思卻看出了官僚階層只會利用國家而謀取自己的私利，因而不成爲普遍階級。稍後，他接受了普遍階級的概念，卻認爲：只有被所有階級壓在最下層的階級才有普遍利益可言，也就是普勞階級。而馬克思更指出「問題不在每個市民是否有可能獻身於作爲特殊階級的普遍階級，而在於這個等級是否有能力成爲真正普遍的等級，即成爲一切市民的地位」。從而確立了普遍階級的特性。

四、立法權與等級制度

此段包括298至312節，黑格爾首先論述立法權爲國家的一部份，因此國家制度並非由立法權所規定。反之，馬克思卻以市民社會先於國家存在的論點，主張立法權應先於政治制度而存在，因之黑格爾的論述便產生了矛盾：既稱立法權爲國家制度所確立，又怎麼可能使法律完善和使制度發展? 因此馬克思將立法權定義爲代表人民意志並反對特殊政治制度的人民權力。這是由於立法權完成了法國革命，它反對的是特殊的、老舊的國家制度，而行政權則代表主觀的任性意志，反對一切的限制，以符合王權的現實。因此，國家制度必須真正表現人民的意志，國家制度和立法權之間的衝突，只不過是國家制度本身的矛盾，由是可知國家制度不過是上下勢力之間的契約關係，國家制度無權改變這種整體的關係。

黑格爾接著提出他對等級制度的看法，他認爲國家必經等級制度而進入人民主觀意志，而人民亦經此參與政治，於是等級起了積極的中介作用，與行政權統合，以確保主權與特殊利益間不致隔閡對立。馬克思則指出，黑格爾的分析中沒有考慮到等級雖以國家與市民社會爲前提，但等級僅具立法權。他認爲黑格爾雖然看到此一矛盾，卻又將此矛盾視作理所當然。馬克思認爲由等級制到代表制，處處只表示了國家與社會的分離，因此人在此產生了矛盾：也就是官僚組織對社會組織的對立，使人在形式上與物質上對立。要成爲真正的公民就必須放棄市民資格，而進入一種個體的、抽象的存在。由是馬克思遂指出：

國家的公民和作爲市民社會成員的市民也是彼此分離的。因此，人就不能不使自己在本質上二重化……要成爲真正的公民，要獲得政治意義和政治效能，就應該走出自己現實性的範圍。（前揭書: 340）

馬克思並觀察到，歷史發展使政治階級變爲社會階級，因此彼岸（政治上或法律前的）的意義雖然平等了，人在此岸（市民社會、日常生活）仍存有專制與不平等。中世紀的等級不平等僅殘餘在官僚體制中，社會裡的等級標準已從需求、勞動轉移到一些任性，不穩定的事物之上（一如金錢、知識等等）。於是馬克思藉此來爲普勞階級下定義，認爲它是：直接勞動、直接生產，但其所有權與財產卻遭剝奪的人群。

馬克思接著論證了等級制之中介性：他認爲等級之中介是虛幻的，它只反映了組織在政治上的對立。因爲既然市民社會已有政治的上下隸屬關係，自然不需要等級制、等級議會之中介。但若需要任何的中介，則人民必定是一群散亂的個體，使市民社會無法組成或選出代表來爭取其利益。至此馬克思批評黑格爾只是將中世紀的等級制，披上現代立法權的外衣，成爲一名不符實的大雜燴，完全在爲君主立憲鋪路。

在較後的部份，馬克思批判了黑格爾的最後的兩個論題：地產的長子世襲制與立法權的行使問題。馬克思指出黑格爾既主張家庭是長子世襲制的基礎，故財產有不得轉移的封閉性和獨特性。但黑格爾又認爲感情是家庭的生活基礎，因此在以家庭爲基礎的等級中，顯然缺少了家庭生活的倫理、情義，故私產的繼承與家庭的倫理是矛盾的。推廣到地產上，則可知道地產亦因不得轉移而失去了家庭的意志與社會的連繫。所以財產並非如黑格爾所認識是意志的體現，意志無法支配地產，因爲地產是固定的，繼承反倒由出生之動物性、偶然性所決定，是以地產擬人化，意志成了財產的賓詞。並且在長子世襲制之下，長子擁有天賦的立法權，其結果黑格爾反而主張以此天賦的使命來對抗由選舉而產生立法權的偶然性，可說是完全輕視了人的權利。

接續著上文的說法，黑格爾最後提出了他對政治制度的設計：爲了避免市民社會的不穩定性，因此以廣泛的代表制來掌握人民的立法權。代表制的國會機構有二：上議院，即貴族院，由市民社會的政治等級與地產所有來決定；平民院即眾議院，由同業工會，也就是市民社會的政治組織所組成。黑格爾並依此駁斥「國家爲一切人的事物」之看法。針對黑格爾這種主張，馬

克思以民主因素當作合理形式的現實因素來加以對抗，蓋在社會中，單個人是作爲一切、全面的人來參與國家的事務，馬克思遂指出國家與個人的關係：

> 合理的國家……不是一切人都應當參與一般國家事務的討論與決定，因爲單個人是作爲一切人，即在社會的範圍內並作爲社會成員來參與一般國家事務的討論和決定。不是一切人都單獨參加，而是單個人作爲一切人來參加。（前揭書: 390）

就馬克思而言，黑格爾的錯誤在於未能克服等級代表與單個人的兩極矛盾，他因而力倡市民社會中的群眾全體參與立法權行使，從而使政治社會回歸現實社會，讓人民透過普遍選舉掌握政府的權力，成爲國家的成員。因此人民必須有意識地掌握國家，於是「他們的社會存在自然就是他們實際參加了國家」，國家就是一般事物，當選舉權大幅地擴大，人民普遍地掌握權力後，市民社會已擴大甚而淹沒了政治國家，由是，政治國家的形式終告消亡。

馬克思在有關立法權的討論中，由批判憲法非由人民決定起，到確定國家成爲特殊與普遍利益的有機結合，而人作爲「一切人」終止。他並非系統性的論述國家的各個層面，而是在釐清國家之概念，因而他甚至未詳述其民主制的現實面與設計，我們必須對此有所體認，方能掌握馬克思「青年黑格爾式」的哲思取向，理解其應然與實然不同層面的討論與批判，才不致爲其不同的討論主題所混淆。

五、小結

總結馬克思在《批判》中的立論，係由肯定黑格爾對現象的觀察出發，嘗試以轉型批判法提出對現象之分析。在黑格爾的分析中，係以各階層的分離對立爲前提，而以絕對精神爲基礎，尋求一對立面的和諧。而在馬克思的觀念中，各階層的分離係實然現象，是應然面的扭曲，而政治現象即爲各階級間矛盾的呈現，一旦對立被超越，矛盾與階級間的分離即被揚棄，於是政治重新成爲人的生活，階級間的和諧超越了分離，於是一個完整的機體復歸齊一與和諧。因此馬克思揚棄了黑格爾國家控制市民社會的看法，他認爲國家是一幻象，是人民在政治異化領域中投注精神的於彼岸、於天堂。反之，只有社會才是真實的存在，成爲一切領域的根源，也唯有民主制才是有機社

會、國家的內涵與形式。

馬克思有關真民主的看法，其實根植於整個西方的啓蒙傳統，非僅出自對黑格爾的批判。首先必須溯至亞里士多德對理想國家的論述：對亞氏而言，國家是社會集團的最高形式，因而是一自給自足的社會，不僅提供了生活必需，並且應當存有一道德目標：追求整體社群的完善，亦即潛在於理想民主制中的內在之善（intrinsi cgood）。而所謂的內在之善包括人群的慎思、理性的運用，使公民能自覺地追求知識；欣賞、創造藝術；享受人生；從而形成道德人格、發揮個體的個性（individuality）；因而國家與社會是齊一的，是人群爲了文明發展而自然形成的社會。（*Marx-Engels Reader*: 282-286; 洪鎌德, 1993: 1; Lloyd: 163-166）

正如《批判》中所述，馬克思認爲希臘城邦民主是一種未經過外化的政治形式，必須經過辯證式的保留與揚棄，才能到達真正民主的境界。所揚棄者即爲比例式衡平（proportional equality），以求將平等推至整個社會中的個人；保留者卻爲自我的完整（integrity of the self）與個性的展現這兩項要求，而在社會中尋求與他人的和諧合作，俾自己的表現與實現得以完成。於是在此基礎上，馬克思同時也吸納了斯賓諾莎對民主共和國的倫理概念，主張民主制才能使個人因知識、才能、博愛而獲取自由；民主是一種使全體人民發揮力量的政體，同時解決了社會生存與自然生活的對立。

另一方面，馬克思承繼了法國革命有關民主與自由的訴求，這種爲了冀求人類平等的口號，不僅造成了大革命後諸多社會主義主張的呈現，也同時也影響了馬克思對理想社會的建構，是以盧梭的主張在馬克思的民主理念中起了直接的作用。盧梭在民主理論上的最主要貢獻即在他提出了「主權在民」的主張，來衡量人生而平等的天賦權利。不同於個人主義的主張，盧梭認爲隨著文明進展，自然狀態中的道德、平等已然被腐蝕，是以人類以自私自利的精神對他人壓榨剝削，即所謂個人意識的失真；是以主權必須訴諸擁有全意志的人民全體，是人民的公意形成了權威的合法性來源；個人是不可靠的，只有社群的自治與公意表達才能使個人的自由與尊嚴獲得保障。

在盧梭的論述中，我們無疑地可發現許多日後受到馬克思轉化的觀點或預設，一如巴黎公社的建構概念，或是人類自由在社會範疇的體現，均可視爲盧梭對馬克思民主主張的影響。但這種過於簡化、樸素的民主觀念，往往

導致集體認同對個人認同無情的迫害，壓抑個體去接受虛幻建構出的集體意識，是以批評家多指摘盧梭爲後世「極權式民主」的導師，而馬克思也接受並擁有此種對集體投入的民主概念與預設，俾體現他理想的社會營構。（洪鎌德, 1993: 5）

總之，馬克思在《批判》中是以民主對抗黑格爾的君主，以普勞階級對抗黑格爾的官僚階級，以全民投票及選舉權的擴大來對抗黑格爾的等級制度。這也是馬克思對國家應然面的設計，與他其後的國家觀－實然面的分析－成爲很大的對比與歧異。

伍、馬克思在《批判》之後的國家觀

青年馬克思在批判黑格爾法哲學之後，繼續在幾篇作品中對國家的概念有所發揮。其中最重要的幾篇文件分別爲＜論猶太人問題＞與＜《黑格爾法哲學批判》導言＞。在這幾篇文章裡，馬克思繼續發揮他國家的有機屬性與以人爲依歸的政治觀點，企圖再次地闡發國家應然和諧的理論。

在＜《黑格爾法哲學批判》導言＞文中，馬克思再次強調了對德國國家，以至於政治國家批判的重要性；他寫道：

> 應該向德國制度開火！一定要開火！這種制度雖然低於歷史水平，低於任何批判，但依然是批判的對象……在同這種制度進行鬥爭當中，批判並不是理性的激情，而是激情的理性……批判已經不在是目的本身，而只是一種手段。
> 這裡指的是描述各個社會領域間的相互傾軋……也就是描述專以維護一切卑鄙行爲爲生的、而且自己本身也無非是一種以政府的形式表現出來的卑鄙事務的那個政府機構的一切。（《馬恩全集》, 1: 455）

至於＜論猶太人問題＞則共有兩篇，其中較有談及國家屬性的當屬第一篇：對布魯諾・包爾載於1842年11月《德意志年鑑》論文的批判。布魯諾・包爾實爲青年黑格爾學派的核心人物，因此他站在批判宗教的觀點，批判猶太教以至於猶太人的解放。馬克思認爲，包爾的批判是大膽而尖銳的，因爲包爾採納了費爾巴哈的觀點，認識到非但基督國家不能解放猶太人，同樣猶

太人的宗教本質也阻礙了猶太人的解放，想要消滅猶太人與基督教的對立，只有先消滅宗教。但馬克思也同時指出，這樣的批判是不足的，包爾的問題在他「只批判了『基督教國家』，而不是『一般國家』，沒有探討政治解放與人類解放的關係」，這是把德國的特殊情形加以普遍化。我們由此可知到，馬克思是將國家的問題與人類解放的問題，放在天平的兩端做等量齊觀，而他要解決的爲國家普遍本質的問題，以作爲揚棄國家的基礎。在此處，馬克思即是以類生活爲基礎，說明了國家的本質：

> 在政治國家真正發達的地方，人不僅在思想中、在意識中、而且在現實中、在生活中都過著雙重的生活－天國的生活和塵世的生活。前一種是政治共同體中的生活，在這個共同體中人把自己看作社會存在物；後一種是市民社會中的生活，在這個社會中，人作爲私人活動，把別人看作工具，把自己也降爲工具，成爲外力隨意擺佈的玩物……在國家中，及人是類存在的地方，人是想像中的主權的虛構的份子，在這裡，他失去了實在的個人生活，充滿了非實在的普遍性。（前揭書: 428）

因而在此處，馬克思已將現存的政治國家，乃至於民主制國家看做人民生活的異化。人只有在作爲物的市民領域中生活著，在異化的政治領域中，人民幻想著平等與主權在民。事實上民主是多數暴力的統治方式，因此人民不但脫離了真正的群體，同時也被民主的假象所欺罔，是故民主乃爲人在政治領域的異化，是宗教異化的世俗方式。至此我們決不能誤解馬克思的民主國家即爲西方自由主義傳統下的民主制。馬克思並非完全否定民主制的貢獻，而是他的民主觀必然發生於自由主義民主中利己精神之揚棄，爲此他演繹、開展了他的概念：

> 〔人權〕不是建立在人與人結合起來的基礎上，而是建立在人與人分離的基礎上……是狹隘的、封閉在自身的個人權力。
> 這種自由使每個人不是把別人看作自己自由的實現，而是看作自己自由的限制。
> 可見，任何一種所謂人權都沒有超過利己主義的人，沒有超過作爲市民社會成員的人……在這些權利中，人絕不是類存在物，相反地，類

> 生活即社會卻是個人的外部局限……把人和社會連結起來的唯一紐帶是天然必然性，是需要和私人利益，是對他們財產和自己個人主義的保護。（前揭書: 438-439）

相應於馬克思在＜關於費爾巴哈的提綱＞中明示的：人是其社會關係的總和，我們就可了解馬克思的民主、自由、以至於人的價值都是放在人與他人互動的前提之上來談這些價值問題，絕非西方傳統中以個體爲單元的自由人權。因爲馬克思認爲這些民主人權是以人的自私與孤立爲其前提，這些人權的實施與強調，只是人追求私利、保護私益，在政治領域上的異化現象。

在這一段時間中，我們可以了解到馬克思在國家、政治國家甚或政府這幾個概念上常有互相通用的情形，也許這也是造成概念上混淆的原因之一；但若我們能把握馬克思對國家應然的看法，則我們就應該了解國家是仍有其應然的正面價值的，但由於政治現象構成了人民異化生活的一環，以致於現存的政治國家或政府，都應成爲我們批判的對象。

其次，由《批判》本文，我們可看出黑格爾對國家與社會的關係，在明顯地指出二者的分離，反之，馬克思批判了黑格爾理念的妥協性。由上面的討論，我們可以了解到，馬克思爲了解決兩者的矛盾與歧異，因而力圖使兩個領域重合，最終要達到國家的廢除· 不過就其對國家性質消亡的歧異，我們還可以進一步分辨馬克思與恩格斯觀點的不同。就恩格斯而言，國家是會凋零、消亡、被歷史的進程廢除的。在《反杜林論》中，恩格斯論證說：

> 無產階級取得國家政權，首先就把生產資料變爲國有財產。但這樣一來，他就消滅他自己之爲無產階級，這樣一來，他就消滅一切階級區別和階級對立，同時消滅國家之爲國家……國家曾是整個社會的代表，是社會集中爲有形的團體，但國家之所以成爲這樣，只因爲他是當時獨自代表整個社會那個階級的國家……當國家終究成爲全社會的代表時，他就會自行成爲贅物了。國家不是被廢除的，他是自行消亡的。（《馬恩全集》，20: 305-306）

由此可見，在恩格斯的觀念中，國家是因爲功能喪失而不再有存在的必要的；而列寧亦據此發揮其黨國理論，在《國家與革命》一書中加以闡釋。

馬克思則是由辯證原則掌握國家性質的更替，他用Aufhebung這個名詞

來表達其觀念，他贊同黑格爾對國家超越與保留之意涵，因此馬克思覺得消亡的是國家的形式，至於國家之普遍性原則則應保留。因此他會認爲公民投票也不過是一個必經而抽象的步驟，只是公民投票是抽象的完成，也因而造成抽象的消亡，使人重新掌握現實－－重新達到國家與社會的合一與復歸。

總結青年馬克思較爲後期的著作，我們可以發覺馬克思對國家應然面的論點越見穩定，一種以人爲基點的看法藉由異化觀念貫穿其幾部重要的作品之中。或許馬克思便因此不再去討論國家的組織建構，他可能覺得他的工作重點，更應該放在對實然面的批判中，因而在其壯年乃至其成熟時期的作品中，馬克思著重於對國家此一幻象的批判工作，這便構成後來他把國家視爲階級統治與壓榨的工具之原因，也一度把國家當成寄生蟲看待，予以無情批判的原因。

陸、結論

如前文所述，馬克思對黑格爾的批判主要是在責難其未能掌握事物真正的本質，而僅將存在的現實合理化。因此我們可以確定年輕的馬克思不但接受了黑格爾的方法，在本質上他更是黑格爾的門徒。當我們體認到這一點，就不難挖掘出成熟馬克思未明顯表達的人本，哲思取向，更能體會到恩格斯與馬克思在某種程度上的分歧。至於馬克思之所以寫作《批判》的原因，他在＜《黑格爾法哲學批判》導言＞一文中則做了相當完整的描述：

> 批判的武器當然不能代替武器的批判，物質力量只能用物質力量來摧毀；但是理論一經掌握群眾，也會變成物質力量。理論只要說服人，就能掌握群眾；而理論只要徹底：就能說服人。所謂徹底，也就是掌握事務的根本。但人的根本就是人自身．．．這樣的批判最後歸結爲人是人的最高本質這樣一個學說，從而也歸結爲這樣一條絕對命令：必須推翻那些使人成爲受辱、被奴役、被遺棄和被藐視東西的一切關係。（《馬恩全集》，1: 460）

這不僅可代表馬克思撰寫《批判》的原因，甚至也是馬克思一生從事理論建構，乃至革命行動的標的－－尋求人的解放。因而以《批判》作爲馬克

思完整之理論表述的濫觴似乎並不爲過。接下來我們就以此觀點出發，從一些貫穿於馬克思理論的概念問題切入，探討馬克思社會觀的連續以爲結論（Hung Lien-te, 1985）。

首先，前面我們已經討論過，馬克思反對黑格爾將官僚階級視作普遍階級，他同時指出了官僚制即形式上的國家。但馬克思也的確保留了黑格爾有關普遍階級的概念，只是他將其直指到他所謂：歷史上的大階級——普勞階級· 因此馬克思從《批判》開始便採取普勞階級作爲歷史動力發展與社會衝突的解釋。一如中世紀時期，資產階級爲了維護財產而支持民族國家，反對宗教與專制，但資產階級這種關懷普遍利益終究會消退的，在短暫的、歷史的進程中，普勞階級跟著在歷史上出現，它終於代表社會中普遍的利益，乃至於終極的利益。我們從此可以了解，馬克思是從對黑格爾批判的哲學思辨中，確立了普勞階級的地位與屬性，而非源自政治經濟的實證分析。

在＜《黑格爾法哲學批判》導言＞中，馬克思徹底而完整地描述了無產階級的歷史地位與其解放社會的動力：

> 德國解放實際的可能性到底在哪裡？
>
> 答：就在於形成一個被徹底的鎖鏈束縛著的階級，即形成一個非市民社會階級的市民社會階級，一個表明一切等級解體的等級；一個由於自己受的普遍苦難而具有普遍性質的領域，這個領域並不要求享有任何一種特殊權利，因爲他的痛苦不是特殊的無權，而是一般無權，它不能再求助於歷史權利，而只能求助於人權，它不是同德國國家制度的後果發生片面矛盾，而是同它的前提發生全面矛盾，最後，它是一個若不從其他一切社會領域解放出來並同時解放其他一切社會領域，就不能解放自己的領域，總之是這樣一個領域，它本身表現了人的完全喪失，並因而只有通過人的完全恢復才能恢復自己，這個社會解體的結果，作爲一個特殊階級來說，就是無產階級。（《馬恩全集》，1: 460）

當然在馬克思早期的作品中，如《手稿》便提到了普勞階級的訴求即廢除私產，廢除所有現存生產關係的奴役關係，以尋求人全面的解放，而這都是自黑格爾普遍階級所得來的觀念，並在《批判》中獲得更清晰明白的表述。

其次，一如在《黑格爾法哲學批判》的最後部份，馬克思藉由對長子世

襲制的批判，從而反對黑格爾的貴族精神。首先他指出長子世襲與家庭基礎相矛盾。其次他以轉型批判法指出：地產使人的意志成爲財產的財產，成了意志的主體；因此，只有地產是不可轉移的，人的道德，理性反成了可轉移的東西。而這也就是馬克思在《資本論》中，對商品拜物教所持的看法。因此馬克思是在黑格爾哲學範疇下，以理念指引出歷史之分析，故不同於其他社會學家。也因此馬克思在《手稿》中，對無政府主義，粗鄙的共產主義乃至於公妻主義等大加撻伐，認爲這些主張是極端的自私主義與獸性作祟，的確這些想法對講究思想體系博大精深的馬克思而言，在哲學上是不具正面評價的。而恩格斯本著實證的傳統，恰可與馬克思截長補短，以政經分析來補充馬克思辯證概念之不足，也使政經分析成爲壯年馬克思所研究的重點。

因此我們可以了解到：《批判》實爲馬克思社會理論之發端與走向唯物主義的里程碑，馬克思的社會理念確實不同於極左，無政府主義者之主張，而成爲所謂的馬克思主義、社會主義、共產主義之所本。就馬克思而言，人才是一切問題的核心，因此人是民主制中的類存在物，故馬克思的共產主義是人本定位的共產主義。共產主義下的人，是去掉原子化的、整全的、社會化的人，是故人非自我封閉的的個體，人是社會關係的總和。這部份的觀點，在接續的作品如《手稿》中續有發揮。由是可知，全面的人與共產社會都成了釐清馬克思概念的重要指標。（Hung Lien-te, 1984: 38-41）。或許我們可用馬克思《經濟學哲學手稿》中對全面的人的論述，作爲我們這篇文章的結論：

> 正像社會本身生產作爲人的人一樣，人也生產社會。自然界的人的本質只有對社會的人說來才是存在的；因爲只有在社會中，自然界對人說來才是人與人聯繫的紐帶……才是人現實的生活要素；
> 爲了人並且通過人對人的本質和人的生命、對象性的人和人的作品的感性的佔有，不應當僅僅被理解爲直接的、片面的享受，不應當僅僅被理解爲所有、擁有。人以一種全面的方式，也就是說，作爲一個完整的人，佔有自己全面的本質。（前揭書: 81）

要之，只有在此基礎上，我們對青年馬克思的思想，乃至於馬克思早期的國家觀，才能有一個比較深刻而公正的評斷。

註　釋

[註1] 普勞階級係由德文Proletariat 翻譯而成，早期中譯爲普羅階級；由於臺灣市面出現普羅汽車、普羅生飲水機等係由professional前音節翻譯而成，爲了有別於對普羅的濫用，改以音義接近的普勞，參考洪鎌德，1994註釋。

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An Attempt at understanding Taiwan's Economic Development

by
Cheng-Feng Shih*

解釋台灣的經濟發展

施正鋒

摘 要

在過去三十多年來，台灣經歷傲人的經濟發展記錄，但其解釋則尚無定論。本研究的立足點是政治與經濟是糾葛不清的，甚至我們可以說經濟工具只不過是政權用來達成政治目標的手段之一，此目標即如何使其權力達到最大，並且能無限期執政。我們檢視的因素有外部環境、殖民的遺跡、國家的角色，以及族群間的鴻溝。

Key words: Taiwan、economic development、colonial legacy、alien regime、ethnic cleavage.
關鍵詞：台灣、經濟發展、殖民遺跡、外來政權、族群鴻溝。

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* Associate Professor and Chair, Department of Public Administration, Tamkang University, TAIWAN
淡江大學公共行政學專任系副教授兼系主任

INTRODUCTION

Over the past three decades, Taiwan has experienced one of the most remarkable record of economic development -- rapid and sustained growth and egalitarian income distribution.[1] In a World Bank study, Taiwan is listed as one of the "few exceptions" that have escaped the gloomy predictions of Kuznets -- the U shaped relationship between growth and distribution (Chenery et al., 1975: p. 285). Right now, Taiwan is not only exporting manufactured goods, it is also boasting of exporting the so called "Taiwan's Experience." How do we explain such an accomplishment?

While retrospecting Taiwan's developmental path, I shall endeavor to sort out the major factors contributing to and the primary constraints underlying Taiwan's economic development, including the external environment, the colonial legacy, the role of the state, and ethnic cleavage. At the same time, I will pay due attention to the political implications under economic policies and strategies applied. My intellectual belief is not simply that politics and economics are intertwined, but also that economics measures are but one means a regime can apply to attain its political goals -- how to maximize its power and how to stay in power as long as possible. Before doing these, a brief discussion of my epistemological, ontological and theoretical dispositions is in order here.

THEORETICAL CONSIDERATIONS

There is emerging a huge body of literature on the story of Taiwan's economic success. The unit of analysis includes system, state, and society. Some even argues that cultural advantages are central to economic success in East Asia (Hofheinz & Calder, 1982; Kahn, 1979).[2] With all the labyrinth, three identifiable approaches may serve for our research guide-

line. Proponents of modernization theory, which adopts the free market principles of neo-classical economic theories, are enthusiastic in using Taiwan as a favorable showcase for their approach. On the other hand, preachers of dependency theories in general deem Taiwan too aberrant to be duplicated elsewhere, or simply dismiss it too "anomaly unique unrepresentative" to deserve attention (Gregor & Chang, 1982: p. 64). Finally, there is a seemingly promising statist approach that attempts to synthesize dependency theories with a perspective that emphasizes the role the state.[3]

It appears that Taiwan is by no means an "ideal type" of the Third World country. Still, is it merely a "special case" that, as some dependentistas have alleged, defies any attempt at generalizing regularities in the study of economic development, and the strategies of which can not be replicated elsewhere? Searching for regularities is definitely one of my epistemological commitments. However, I do not think that the task is probable unless we are able to discern on what conditions Taiwan has attained its economic development.

Ontologically, I agree with Wendt (1987) that the relation between the international system (or structure) and the state (or agent) is dialectical. In other words, while the structure of the international system confine the activity of the state, the states as a group may alter the structure of the global system. Similarly, the relationship between the state and the society is dialectical too. Theories we have studies so far are only partially satisfactory.

While modernization theories emphasize the importance of internal factors, dependency theories focus on the primacy of external factors. Combining they both, some statists stresses the mediating role played by the state over the systemic dictation. Still, by underscoring the primacy of the state over the society, most statists neglect the external factors. At best,

statism tells us that the state may play an active role under certain conditions. I believe that a more fruitful perspective should encompass three tiers: the system, the state, and the society. While the relationship between the external factor and the internal factor is dialectical, that between the state and the society is also dialectical.

In the case of Taiwan, however, there is a hierarchic relationship among the three. That is, external factors largely decide the general framework, within which the authoritarian regime and ethnic cleavages operate, although the NICs as a whole may challenge the pre-determined structure. It is difficult to categorize colonial legacy. Although the rule in Taiwan had historically been colonial, I tend to treat it in the category of authoritarian regime.

EXTERNAL ENVIRONMENTS

External variables lie in the center of dependency theories. With all its various versions, it is generally interpreted that distortion of economic development in the periphery is the result of its link with the capitalist core. More generally, it is argued that external variables, whether in the form of the structure of the capitalist world system or of direct foreign manipulation, are crucial in determining, if not constraining the extent of development in the Third World. On the other hand, modernists also suggest that certain forms of assistance to the Third World are necessary for them to take-off, especially when domestic savings are not adequate for investment in the earlier phases of development.

Taiwan's past experience is no exception. Being an relatively open economy, Taiwan had been engaged in international trade and welcome foreign investment, though with some restrictions. It had also been a major recipient of American aids. External factors have in the past influenced

Taiwan's path of economic development in two ways: the capitalist world system provided Taiwan with a good environment for its ascent; and the "dependent" relationship with the "benign" United States had drawn it aids, investment, and the market for its manufacture. I shall look into how these three types of "dependency" have been related to Taiwan's development.

Having been defeated by the Chinese Communists on the China mainland in 1949, the Nationalist (or *Kuomintang,* thereafter KMT) government took refuge in Taiwan. After the outbreak of the Korean War, the bleak KMT regime regained its special relationship with the U.S., because of its stanch anti-communism political attitude and Taiwan's new strategic value as a thorn to China (Shih, 1994). The Seventh Fleet was then deployed in the Strait of Taiwan, and the American geopolitical lines of defense were extended to Taiwan, which paved the way to integrating Taiwan, along with such "chosen few" as Japan and South Korea, with the capitalist world economy (Cumings, 1984: p. 20).

From the period of 1950-1965, Taiwan received huge amounts of economic and military aids from the U.S., besides military protection. Without them, the KMT could not have survived its serve financial crises. Timely U.S. aids thus helped the KMT consolidating its authority in the earlier 1950s, when the deficit and runaway inflation made it vulnerable to discontent from the hostile native Taiwanese. Later on, the aids constituted about 40% of the gross capital formation, or about 10% of the gross domestic product, and ranked the fifth in the world in the American aid per capita (Barrett & Whyte, 1982: pp. 1068-70; Ho, 1978: p. 237).

Given the importance of U.S. aids, the U.S. must have had considerable leverage on Taiwan's economic policy making and implementation, especially on the way how the aids were appropriated. American advisers would sit in the meeting of Taiwanese economic planning agencies, and

even possessed the privilege of veto (Gold, 1986: pp. 68-69) For instance, aids were strictly appropriated and at one time constituted 74% of investment in infrastructure. It is also noted that the KMT, anticipating American aids, had to undertake programs of economic development as early as 1949 (Gregor, 1981: p. 29). Kahn (1979: p. 449) also bluntly points out that the purpose of the initial economic plan was designed to please American advisers.

When import-substitution of primary products had exhausted the domestic market in the 1960s, the U.S. Agency for International Development (USAID) strongly encouraged, or pressed, the KMT to move into export-promotion in order to shore up its sluggish economy. Consequently, the KMT was urged to liberalize its economic policies, such as currency reform, and easing import and export tariff regulations (Little, 1979: pp. 472-75), which did greatly contribute to remarkable economic growth rates in that period.

Then, why had the American influence not led to Taiwan's dependence, in terms of economic manipulation as suggested by dependency theories? As Evans (1987: pp. 209-10) rightly points out, the main purpose of American aids was to strengthen the ruling apparatus of the KMT in the face of Communist aggression. Therefore, a self-sustained economy, rather the interests of American MNCs, was the main concern.

Similar prediction of distorted development as a result of investment dependency had also been avoided. One possible explanation is the KMT's traditionally distrust toward foreign investment, inherited from the Chinese nationalistic ideology embodied in the so-called "Three Principles of the People." Accordingly, it had long resisted the temptation to attain industrialization through international borrowing. Since foreign direct investment was introduced in the late 1960s, it had never constituted more than 10%

of the gross national product (Amsden, 1979: p. 368). Further, the KMT had been skillful in selecting sectors open to international capitalists, primarily in sectors where further exports were expected or where technology transfers were anticipated. On the other hand, key sectors, such as heavy industries and banking, had been restricted (Clark, 1987; Amsden, 1979). It was also required that investment be done in the form of joint ventures.

The timing of investment, or the sequence of industrialization, should also be taken into account (Evans, 1987; Haggard & Cheng, 1987). During the turbulent 1950s, Taiwan was less an attractive place for direct investment. As Clark (1984: 13) has rightly perceived, when foreign investment eventually grew important and began to flow in, early import substitution industrialization in Taiwan had already been accomplished and the indigenous entrepreneur was in a better position to find his own niche than its Latin American counterparts did. Thus, direct investment in Taiwan and Latin America differed in timing (or sequence of industrialization), sector open to international capitalists, nature of investment, and its magnitude. Underlying these were the less predatory attitude of the U.S and the distrust of the Chiang's toward international investment.[4]

To provide for favorable investment terms and political stability, the KMT did allow foreign capitalists to exploit the Taiwanese labor.[5] Under the Martial Law, which was declared in 1949 and lasted until 1987, collective bargaining buttressed by strike was absolutely proscribed. Not only foreign capitalists but also other interest groups located in the cores were involved in the exploitation process. Zenith, for example, once threatened to switch its investment to other Asian countries if the proposed Labor Law was passed. There was also pressure from the lobbyists of American labor organizations who deemed the passage of the law would increase labor costs in Taiwan and therefore lower its competitiveness in the market. Lack

of genuine union also prevailed in plants owned by the indigenous entrepreneur.

Trade dependency had been a more serious problem for Taiwan. Owing to its diplomatic isolation internationally, it was forced to concentrate its exports to the American market. As Taiwan's economy is highly vulnerable to economic recession in the U.S., it is often said that when the U.S. gets an influenza, Taiwan will immediately sniffs. Being well aware of the danger of dependence on the American market, the KMT has reluctantly given up its "Hallstein Doctrine" -- direct trade with the Soviet bloc is now allowed and trade with China if via a third party. Still, Taiwan's market concentration was not qualified as dependency. Since the bulk of its exports were mainly processed food or manufactures, rather than raw materials or primary goods, the terms of trade were not easily manipulated by its trade partners.

Nonetheless, economic growth based on outward-oriented expansion may not be feasible for all countries at all time. While Kuo (1983: pp. 176-77) is right in attributing Taiwan's rapid economic transition to world-wide prosperity in the 1960s, Kahn (1982: p. 208) doubts such world economic prosperity will occur again. Moreover, as Western countries are erecting all protectionist trade barriers to discourage imports from East Asia, the American economic hegemony and hence the robustness of the capitalist world system remain to bee seen. Moreover, with the rapprochement between the U.S. and China, the strategic importance of Taiwan has been drastically reduce. The American administration is less willing to compromise on trade issues. In recent years, some traditionally restricted sectors in Taiwan have been opened to international capital, such as banking and insurance. In this regard, the warnings from dependency theories should not be ignored, at least for any serious long-term consideration.

External factors generally provide the context in which national actors arrive at their optimal policies. In the case of Taiwan, their impacts have not been deterministic so far. Judging from disparate degrees of economic development accomplished by countries who have operated within the same milieu, I find that the periphery is not necessarily rendered passive. The government may find its niche to the extent permitted by the U.S. for geopolitical consideration. Accordingly, the society is not a destined loser. Allied with the state, the indigenous capitalist may outrival the international counterpart as soon as technology is transferred.

COLONIAL LEGACY

Since Taiwan had been ruled by the Dutch, the Spanish, and the Japanese colonists, it is generally concluded that Taiwan is a classic case of colony. For instance, in Gregor's view (1981), Taiwan is evidently not a "special case" but rather a "model instance" of dependent development. Accordingly, it is argued, if dependency theories are valid, there should not have been economic growth in Taiwan, or the development should be distorted.

It is true that most colonies were dissatisfied with their exports of primary goods, of which the prices were easily manipulated by the cores. Similar asymmetric patterns of trade still prevails in most LDCs, who are frustrated by unfavorable terms of trade and volatile world prices for these goods. However, it was not the case in Taiwan during the Japanese colonization, which lasted from 1895 to 1945. The colonial government not only provided Taiwan's agriculture with infrastructure, technology and funds, but also a secured market.

In order to develop Taiwan as the bread basket, and later as an extended industrial base, the coercive Japanese colonist had integrated it into

the Japanese economy. Massive agricultural innovations and funds were provided to Taiwanese farmers. Further, Japanese colonists provided Taiwan with a protected market for its rice and cane sugar with prices higher than other areas in Asia (Chang & Myers, 1963: pp. 42-46). It must have been a paradox for dependency theorists to discover that the first organized Taiwanese protest was against the release of the Japanese protection of Taiwanese rice.

Taiwan's infrastructures, including irrigation, electricity, and modern communication system, were initially constructed by the Japanese to support agriculture. The policy to expand industry was accelerated in the 1930s for the preparation of war; and modern factories were set up during that period (Ho, 1978: pp. 70-79). All these provided for strong foundations for future industrialization.[6]

Though Taiwan's economy during that era may have been dependent on Japan per se, its economic growth rate from 1911 to 1938 was surprisingly more than 4% (Barrett & Whyte, 1982: p. 1071). Indeed, living standards in Taiwan under the Japanese colonization were "far better" than in Korea and most parts of China (Ho, 1978: p. 97). Moreover, the welfare of the Taiwanese peasants in the earlier twentieth century may even have exceeded that of the Japanese peasants (Ouchi, 1967, as cited in Amsden, 1979: p. 348). As a result, the Japanese were less hated by the Taiwanese than by the Koreans. I may even argue that Taiwan was no more a Japanese colony, in terms of extractions, than Iowa is a colony of the U.S.

Even if Taiwan was a colony, considering Japanese massive investment and reinvestment, colonization is not necessarily a zero-sum evil.[7] Why had the Japanese been so generous to Taiwan? Their ultimate purpose of developing Taiwan was to facilitate their invasion of China and Southeast

Asia. Compared with Western colonists, the Japanese seemed to have taken a long-term planning to integrate Taiwan as a part of the empire. Therefore, the Taiwanese were fortunate enough to share some benefits with their colonizers incidently. In this sense, we may judge Taiwan's colonial experience was deviant from others'.

THE ROLE OF AN ALIEN REGIME

It is becoming a popular impression that Taiwan's economic development is the result of the accumulation of a series of successful strategies, including land reform, agricultural development, import-substitution, and export-promotion. To make these strategies work, the argument goes, it demands intricate coordination of natural endowments, international environments, and the hard-working people. At the center of these is the governments that had reigned in Taiwan -- Japan and the KMT regime (Amsden, 1979; Cumings, 1984; Gold, 1986; Clark, 1987; Liu, 1987; Huang, 1989).

More generally, it is observed that economic growth in East Asia has not occurred because of laissez-faire, but because of the guidance by the governments. In Kahn's view (1979: p. 120), the kind of government that lies between democratic and totalitarian models seems appropriate for development. Cumings (1984) also suggests that "bureaucratic- authoritarian regimes" can accumulate power, strengthen central planning, discipline labor, and change the structure of the society. All these observations seem to prescribe that authoritarianism is an indispensable evil for economic development. In all, there is a tendency to collapse to all these into the all-encompassing term, the state.

The disproportional mammoth government of the KMT was removed to Taiwan in 1949, which absorbed the Japanese bureaucracy and police

surveillance in no time. The new regime turned out to be more authoritarian, if not stronger, than its predecessor: the party, the bureaucracy, and the armed forces were integrated into a body loyal to one man, Generalissimo Chiang Kai-shek. In the sacred name of "recovering the mainland," the KMT, as a numerical minority, was able to justify its absolutist rule.

As I have argued in my earlier study on statism (Shih, 1993b), it is not clear whether it is the state or other forces that have really dominated policy-making in Taiwan. I would argue that it is the party (KMT) that has been the center of power for the past forty years. As a cliche in Taiwan says, "there is no distinction among the party, the administrative bureaucracy, and the military." While all major policies are made in the Central Standing Committee of the party, the KMT penetrates the society by installing a parallel apparatus within all major organs of the society. The political commissar system, borrowed from the former Soviet Union, had largely contained the power of the military, at least until the early 1980s.[8] While installing a so-called "Second Personnel Office" in governmental agencies to monitor internal activity, the KMT made sure that the head of the administration at all levels was its party member.

It is generally agreed that fundamental to Taiwan's economic development is the highest priority the government gave to economic development, as it realized its survival was dependent on the health of the national economy. The first priority of the KMT, except for how to defend itself from the Chinese Communist's invasion, was how to sustain the regime with an economy on the brink of collapse. As an alien regime, the KMT fully realized that since its political legitimacy was not founded on popular sovereignty but on coercion, it had to seek appeasement, if not loyalty, of the native Taiwanese through economic benefits and thus to distract them from the appeal of self-rule, or independence, and secure its minority rule.

As Geertz (1963: p. 213) suggests, one way to ease tension arising from primordial sentiments is to divert discontent elsewhere. Crane (1982: p. 105) also points out, coercive rule without prosperity is less tenable. Once recognizing the imperative of economic development, the KMT was accordingly forced to adopt a series of economic policies to serve the aim of holding on to power.

Furthermore, the KMT, as avowed true believer of "Three Principles of the People," was by no means fervent adherent to laissez-faire. Therefore, key sectors of the economy had been tightly under state control, such as steel, auto, petroleum, and banking, in order to avoid the "defect" of Western capitalistic economy, that is, monopoly, which may in turn challenge its political control. Thus, it had in the past steadfastly refused to allow, for instance, American investment in insurance business even under severe pressure. We may argue that past experience and, to a less degree, commitment to ideology, may play a very important part in preventing external manipulation.

Nevertheless, the role of the government was confined to promoting favorable conditions for entrepreneurial activities, which was deemed by the private sector as much too conservative and passive. The conservatism was due to its past experience in the mainland, where it was not only defeated militarily, but also economically by skyrocketing inflation. Thus, the basic economic guide-line had been "progress in stability," implying that economic stability, thereby political stability, outweighed economic growth.

ETHNIC CLEAVAGE

Although statists point out the necessity to examine the relationship between the state and social forces, their focus is largely on the dominant class. Except Evans (1987) and Rueschemeyer and Evans (1985) and, to

a less degree, Haggard (1986), most statists tend to neglect how ethnic cleavages may have affected state autonomy. Whether in the form of a strong state, an authoritarian regime, or a vanguard party, power politics in Taiwan may be better understood from the vantage point of ethnic pluralism. In the guise of state interests, policy-making had been largely determined by such urgent questions as how to survive the regime and nourish it in an isolated island. Since the KMT regime had been sustained by loyalty of Mainlander emigrants from the beginning, how to further interests of this ethnic group was crucial. Thus, while the KMT may have been deemed as a Mainlander party, the newly established Democratic Progressive Party was largely deemed to represent the native Taiwanese.[9]

However, ethnic cleavage is rarely considered as an important factor in explaining political development in Taiwan, let alone economic development.[10] One major reason for the neglect is the failure to recognize that there is any ethnic differentiation at all, which is understandable since most people in Taiwan are descendants of Han-Chinese immigrants (except some aborigines of Malay-Polynesian origins) and thus share similar, if not the same, cultural characteristics. However, as Zolberg (1968: p. 626) perceives, two groups belonging to the same cultural unit ethnographically may magnify their few differences into distinctive political differences.

According to their different degrees of attachment to the island and their distinct historical experiences, the population may be divided into two ethnic groups: 15% are the politically dominant Mainlanders, who fled Taiwan after 1949, and 85% are the subordinate native Taiwanese, whose ancestors sailed to this island centuries ago.[11] Linguistic differences constitute the basis of ethnic solidarity: while the Mainlanders use Mandarin, the Taiwanese use either Hoklo Taiwanese or Hakka Taiwanese,[12] which are mutually unintelligible. Linguistic differentiation would play any important

role as a criterion of group solidarity only after the February Incident in 1947.

Conflict theories, in a broad sense, are useful in explaining the development in Taiwan in so far as the major function of the central authority is interpreted as to use monopoly of power to preserve unequal distribution of political resources between two ethnic groups. For example, there had never been any general election between 1949 and 1991, and those representatives elected had been guaranteed their tenure until the "recovery" of the mainland. Consequently, the Taiwanese could never win any bill in the Legislature Yuan even though they were numerically majority. The frustration of the Taiwanese was particularly significant among those who served in the government agencies and felt they upward mobility had been thwarted as all major positions are retained for the Mainlanders.[13]

At first glance, the economic explanation is less feasible here, however, since the subjugated ethnic group as a whole possessed an economic advantage somehow. Scholars generally agree that the far-reaching land reforms, undertaken in the period of 1949-1953, could not have succeeded if the KMT had not been an "alien" regime (Ho, 1978; Kahn, 1979). With fresh memory of the white terror after the February Uprisings, landlords complied without any resistance.[14] Except for economic consideration, another intention underlying the KMT's determination to launch land reforms was to destroy the power bases of the embryo land- owning Taiwanese middle class, who had led the 1947 uprisings against the KMT rule.

Since the Taiwanese had few opportunities for advancement to higher political or military position, business happened to be the only field available to them. As long as they did not attempt to challenge the KMT's political legitimacy, the KMT had no reason to suppress their economic activities. And the Taiwanese keenly received the message and complied

tacitly until the second half of the 1970s, when they began to ask for power sharing.

It must be curious why the KMT had not supported a Mainlander capitalist class. The fact is that it did try but without success. In its early attempt at import-substitution, the KMT started with the development of the Mainlander textile industry. It was only after the insistence of American advisers that it reluctantly lessened its discriminatory economic policy. Again, it was Mainlander capitalists that gained immediately from the trade liberalization (Gold, 1986). The auto industry has long been monopolized by a Mainlander family close to the Chiang family (Arnold, 1989). While most Chinese capitalists fled to Hong Kong rather than to Taiwan, those Mainlanders fleeing to the island were mainly staffed in the armed forces, administrative agencies, state-run enterprises, or the education system, and were better taken care by the government.[15] With the "iron bowl" in hand, they thus had little interest in the private sector.[16]

Cardoso (1973) explains the underdevelopment of the Third World in terms of the cooperation of the local elite class and international capitalists. Why had there been less evidence of the alliance between the Taiwanese and foreign capitalists? For one thing, it was the Mainlanders rather than the Taiwanese that control political and military power, which impeded the cooperation. Secondly, as we observed earlier, there had been few Mainlander capitalists in the earlier stages of economic development to form such an alliance as found in Latin America. Therefore, power distribution based on ethnic cleavage had precluded the cooperation between the local elite and the international capitalist.[17] Similarly, the KMT's success in suppressing the labor movement in the past was largely due to the fact that few Mainlanders were in the labor force.

Past development in Taiwan had demonstrated a certain degree of

ethnic division-of-labor, with the Mainlanders dominating political power, and the Taiwanese cultivating economic activities. However, the pattern was not worked out through consociational arrangement. Rather, it was determined by the Mainlander elites, who judged that political control buttressed was most crucial to the survival of their own ethnic group.

CONCLUSIONS

Taiwan was lucky enough to be chosen as a client state of the U.S. in the 1950s because of its strategic status. Its survival was actually made possible by the out-break of the Korean war. It also took advantage of economic booming as a result of the Vietnam war. Over the years, Taiwan, in the wake of Japan, took the precious chance to harness the product cycle to start its industrialization at a time when the international economy was booming.

However, since Taiwan's economic growth was based on exports of manufacture, its economy was vulnerable to international economic recession and, recently, protectionism. With the decline of Taiwan's strategic importance, the American administration was less willing to challenge pressure from American economic interests. The forced open-door policy in the service industry was but one importance indicator. Thus, the advice of dependency theories deserves attention.

In terms of political power, Taiwan was a classical case of colony. But we can not deny the fact that the Japanese legacy did pave the way for Taiwan's economic development later on, especially in terms of investment in infrastructures and in agricultural modernization. Thus, Taiwan's colonial experience seems to be most extraordinary among all.

The existence of an authoritarian government had been of ambivalent values. As alien regimes, both the Japanese colonists and the KMT were in

a better position to implement the economic policies they deemed indispensable for their survival, especially for the latter. During the Chiang's reign, Although the KMT may have been insulated from demands of the indigenous Taiwanese, but it failed to insulated itself from the Mainlander group.

The role of ethnic cleavage in development thus could not be overestimated. When the subordinate Taiwanese were gaining economic power, their demand for more political participation were bound to increase. Therefore, the original tacit compromise of power-sharing could no longer endure the challenge of the Taiwanese, especially those who had never experienced white terror in the 1940s. Equally important was the growing awareness among the Mainlanders of the importance of participating in economy. If they had succeeded in forming a coalition with the technocrat and the military, the further alliance with international capitalists would have been possible, since few of them were in the labor forces.

As for equity, I must caution the reliability of data collected. For one thing, the base year chosen matters. Data collected in the early 1950s have least reliability. Also, the sample was said to be nonrepresentative. Furthermore, income transfers as a result of hidden payments for those on the state payroll, such as free housing ore rent support, food subsidy, discount for utility and tuition, to name a few, are not included for calculation (Gates, 1979: pp. 384-86).

If income distribution had been more egalitarian, it is certainly not the case in the 1980s. More and more evidence shows that the society was witnessing the emergence of class stratification. While the labor and the farmer were questioning when they could have their fair share in the process of economic development,18 and the middle class was complaining that their real income is lowering. Again, I suggest we take a longer time

frame to judge Taiwan's accomplishment.

A word of normative value is in order here. People of Taiwan and other NICs were under widespread political oppression while they were achieving "economic miracles." As the case of Taiwan had illustrated, its political development was far behind its economic accomplishment. The Taiwanese have had ambivalent feeling toward both the Japanese and the KMT authoritarian regimes: they were forced to comply with the alien rulers' policies and two times they shared benefits with them. It would require value judgement as to whether self-determination or butter-and-bread is more important.

Finally, we are not convinced that political development, measured by participation and democratization, can be substituted for economic development. It is also doubtful whether economic growth may lead to political development.

ENDNOTES

1. It is cautioned that data collected by the state-run statistic agency may not be so reliable as they appear, although the statistic system had long been well developed by the Japanese colonial government. For one thing, it is well known among economists in Taiwan that the data are always "adjusted" so that they look fit the trend. Secondly, we must discern what the base year is. Usually, the data compiled immediately after the war until the beginning of the 1950s have less reliability. I shall discuss degree of equity later.

2. This ethnocentric view, though shared by some Western scholars, fails to explain why there is also emerging economic booming in some ASEAN countries, such as Thailand, Malaysia,and Indonesia. Of course, proponents of this perspective would further point out the presence of overseas Chinese in those countries. Since there is no way to pin down such a character, I shall leave aside its consideration.

3. Since I have devoted a separate study on the utility of this approach elsewhere, I shall minimize its discussion here unless necessary.

4. This picture changed significantly in the 1980s, especially after Chiang Ching-kuo's pass away. For one thing, Chiang, trained in the Soviet Union, had less trust in the US than those technocrats educated in this country. Further, facing mounting protectionism, Taiwan has to compromise in exchange for continued access to the American market.

5. It is generally recognized that MNCs are comparatively more benign than indigenous ones in terms of welfare programs.

6. In reality, some later projects to shore up domestic economy through public spending in the aftermath of the oil crisis in the early 1970s were based on former Japanese planning (e.g. Taichung Harbor).

7. Even until now, some Taiwanese still possess a romantic illusion: if Taiwan were still part of the Japanese Empire, they would have shared the prosperity and pride that the Japanese enjoy, as described in Vogel's *Japan as Number One* (1979).

8. In his old days, in order to neutralize the powerful Gen. Wan Shen, Chiang Ching-kuo almost dismantled the political commissar system by allowing professional soldiers to take over this monitoring responsibility.

9. For latest development, see Shih (1993a).

10. Exceptions are Gates (1981) and Wu (1989).

11. The dichotomy is only one of the three dimensions of ethnic relations among the four ethnic groups in Taiwan. The other two dimensions are Han-Chinese vs. Aborigines, and *Hoklo* vs. *Hakka*.

12. These are essentially two southern dialects of Chinese.

13. Although President Lee Teng-hui is a native Taiwanese, he was hand-picked by late Chiang, rather than being elected in the popular election. His real power remains to be seen in the coming presidential election scheduled in 1995.

14. There were accounts of incidents when landlords were summoned to the office of land-reform coordination. While they were asked to sign the contract renouncing their land by Mainland officers, hand guns were displayed on the table.

15. These categories are usually called as a "military-civilian servant-education" group. The government has thus far consistently offered those in the sectors at least 5% wage raise annually, even in economic recession.

16. Their interest did not arise until the demise of Chiang in the 1970s, when they were disillusioned that returning to the mainland was hopeless.

17. Nevertheless, as we notice more and more retired generals are staffed in state-run enterprises, caution must be made against premature prediction for the future.

18. A farmer demonstration in 1988 turned into the most violent incident since 1947.

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Political Structure and the Emergence of the Yushin Regime

by
Chang-Hun Oh*

政治結構以及維新體制的出現

吳昌憲

摘 要

許多研究在探討高度威權的維新體制爲何出現之際，大多忽略掉政治結構的脈絡，因此把體制改變當作是對於社經動亂或是政治危機的一種反應。

本研究以爲，儘管維新體制的產生導源於朴正熙總統意欲無限掌權所致，但朴正熙的動機之所以能實現，其關鍵性的政治脈絡則在於原有的威權式政治結構，即強有力國家，以及國家權力集中於朴正熙一身。

Key words: Yushin Regime、political structure、Park Chung Hee.
關鍵詞：南韓、維新體制、政治結構、朴正熙。

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* Instructor, Department of Political Science, Yeungnam University, SOUTH KOREA
韓國嶺南大學政治外交學科講師

INTRODUCTION

On October 17, 1972, South Korean president Park Chung Hee suddenly declared martial law throughout the country and imposed the highly authoritarian *Yushin* regime (1972-1979).[1] Although Korea had never had a sustained democratic rule, political institutional arrangements in the pre-1972 period included important democratic elements. The Yushin regime was the first attempt in post-independence Korean politics to stabilize an extreme form of authoritarianism with a high level of repression and the overt denial of even limited democratic competition for the state power.[2]

While it is clear that the optimistic version of modernization/political development theories did not fit to the empirical reality of the emergence of the harsh authoritarianism, those perspectives that attempt to explain the emergence of the Yushin system has not been very satisfactory. First, Guillermo A. O'Donnell's bureaucratic-authoritarian (B-A) model (1973), when it was applied to the Korean case, depicts a much higher degree of political, social, and ideological pluralism in pre-Yushin Korea than actually existed and thus misspecify the model of Korean politics (Im 1987; Kil 1986; Han 1985). In Korea, consolidation of a strong, anti-Communist state, and high economic growth without extreme economic inequality produced a situation in which there was little political mobilization of the popular classes. It was in fact a political desert for the popular forces, and in this sense the Korean political system was similar to Taiwanese one (Cumings 1987; Koo 1986).

Another perspective emphasizes the lack of democratic tradition in Korea (Weinstein and Kamiya 1980). According to this view the emergence of the Yushin system is not something surprising, because authoritarian rule has dominated throughout Korean history. This view ignores important

democratic elements that had coexisted with authoritarianism, and thus fails to ask the important question of why such a highly repressive regime emerged within the same political culture and tradition.[3]

The third view argues that it is Park's determination to remain in power indefinitely that destroyed the "fragile" democratic institutions (Reischauer and Henderson 1973). The leadership's commitment to authoritarian rule is certainly a crucial variable, but we have to explain how Park's will was realized.

Finally, there is a view that there were a variety of internal and external crises that contributed to the emergence of the Yushin regime (Kim 1978). Those who take this view does not provide an adequate evidence that shows a perception of the crisis existed among the political elites and the public and that the existing political system did not have the capacity to solve the problems resulting from those internal and external events.

In comparative perspective, all of the perspectives discussed above are seriously deficient in their neglect of political structures from which the more authoritarian regime emerged.[4] This is surprising because political structure is different among countries, and in the case of Korea, political structure provided with a crucial context in which the Yushin regime was imposed.

Crucial empirical questions we have to answer in the examination of the emergence of the Yushin regime are: first, whether there were economic and political crises that were serious enough to generate demands for regime change; second, which groups (or individuals) in the state and society demanded or supported the regime change; and third, how the political structure of the pre 1972 Park regime contributed to the emergence of the Yushin regime.

ANTI-COMMUNIST STATE AND ITS IMPACT ON KOREAN POLITICS

To understand a political context of the imposition of the Yushin regime, one should first look at the nature of the anti-Communist state in Korea. The anti-leftist state was established after the Japanese colonial rule as an outcome of the operation of political and external variables -- a result of the incorporation of Korea in a bipolar international political system after World War II. Korea was occupied by the U.S. and the Soviet Union, which for the geostrategic interest, structured the power relationship among political and social groups in each of their occupied territories. The experience of the Korean War, and the subsequent ideological and military confrontation with North Korea furthered the trend toward a rigid anti-Communist state in South Korea.

The establishment and institutionalization of the security- conscious anti-leftist state in Korea had a crucial impact on the dynamics of Korean politics by constraining domestic political processes: It restricted political rights and freedoms and opposition activities and narrowed the scope of political conflict by virtually eliminating the possibilities of the reemergence of any significant leftist forces and political mobilization of popular classes. The anti-leftist state, then, significantly altered the context of political conflict in Korea. The anti leftist state also was accompanied by the dramatic expansion of the military institution with a broad conception of national security, which contributed to the overthrow of the democratic regime by the military coup in May 1961. Despite the formal civilianization of the regime since 1963, the state, now firmly backed by the military and the newly created intelligence apparatus, strengthened its control over society.

THE DEGREE OF SOCIOECONOMIC DISORDER

It has been pointed out by many that the emergence of the "new authoritarianism" in the developing countries, particularly in Latin America, was associated with economic crises. Whether one accepts O'Donnell's B-A model or not, there is a general consensus among observers of Latin American politics on the existence of varying degrees of significant socioeconomic disorder and political crises before the emergence of the new authoritarianism (see O'Donnell 1978; Stepan 1978). Faced with these crises, at least initially there seemed to be significant support among those both in the state and society for regime change (see Stepan 1985). In the case of Korea, there was neither the economic crisis nor political polarization.

Korean economic performance in the pre-Yushin period sharply distinguished it from those Latin American countries that turned into more authoritarian regimes in the 1960s and 1970s. The labor intensive, export-led industrialization pursued by the Park regime since the early 1960s produced a rapid economic growth with a relatively low level of economic inequality. During this period, Korea was transformed from one of the world's poorest countries to one of the most successful developing countries. Consequently, Korea was now beginning to be regarded by many as an economic model for other developing countries (Cole and Lyman 1971). The GNP in 1972 made a real increase of 10.2 per cent over the previous year.

On the other hand, there existed negative aspects of Korean economic development with certain sectors in society -- farmers, urban poor, and workers --- receiving less benefits from economic growth. Active members of the political opposition criticized the regime on the ground that too many

favors were given big business through various preferential allocations of financial resources. Many people also felt that the government emphasizes economic growth at the expense of equality. Other issues such as slow rural development, regional imbalance, labor problems, foreign debts, and Japanese economic influence were pointed out by the opposition. These criticisms were expressed in strongly- worded terms by a minority of outspoken opposition, but a significant proportion of the public also shared the sentiments on some of these issues.

The identification of problems in economic development, however, did not produce extreme political polarization, however. At the fundamental level, there was a broad consensus in society as well as state on capitalist industrialization based upon export. The popular classes were politically passive and conservative, and there was no significant group that called for radical socioeconomic change or that threatened the existing socioeconomic order. This is one of the most important characteristics that distinguished Korea from many other developing countries.

The riot by the urban poor in Kwangju, a newly developed satellite city near Seoul, in August 1971 was a sudden explosion in an extreme hardship that was *created* by the inadequate policy planning and execution.[5] In no sense did it show changes in political attitudes and behavior of the urban poor: Once their demands were met those who participated in the riot returned to political passivity.

In the process of Korean industrialization, the interests of the workers were not satisfactorily accommodated. Particularly in labor intensive, small and medium industries, there existed a serious problem of bad working conditions and low wages. However, the workers remained politically conservative and weak in part due to government control of labor activities. Consequently, the labor protests were purely economic-oriented and conser-

vative in nature, isolated from other social and political groups, small in scale, and generally non-violent. Labor disputes increased in 1971, but most of them were resolved before developing into open protests. When they developed into protests, they did not create any atmosphere of crisis.[6]

Among various social groups, it was students who constituted the strongest challenge to the government in 1971. The student demonstrations started in spring 1971 to protest against the government's decision to intensify "military education" for students. General unpopularity of and mistrust in the authoritarian political leadership led students to believe that the intensification of the military training on campus was an attempt for political control of students.

Faced with strong resistance from the students, the government practically reversed its decision on the military education. However, the student protest movement was intensified toward the end of June, as the issue of election frauds was added after the presidential and Assembly elections. In September, the students renewed their rallies and demonstrations, some demanding total abolition of the forced training and criticizing corruption in the government.

Although student protests did not create a massive turmoil, their persistent occurrence became a serious problem for the regime. In October, the government imposed a garrison decree in Seoul and troops occupied 10 major universities in the city. 1,900 students were arrested, and 185 student activists were expelled from 23 schools across the country. The government also weakened severely the autonomous student organizations at the universities. After these measures, student protests ended. The government lifted the garrison decree in early November. By the time the Yushin regime was imposed, Korea did not see student protests for almost a year.

The biggest social challenge to the regime then came essentially from

students, and the major issue was on political authoritarianism rather than economic problems. The incipient emergence of the criticism of socioeconomic structure, particularly by a small number of active and progressive oppositionists was not strong enough to create any atmosphere of serious socioeconomic disorder and political crisis in both the state and society.

Ironically, it is much more likely that a good economic performance by the Park regime rather than the economic problems contributed to the emergence of the Yushin system to the extent that it was Park and a handful of his loyalists who decided the regime change and they were very proud of the regime's economic achievement (see Park 1976, 30).

NATIONAL SECURITY AND NATIONAL UNIFICATION

There were two publically claimed reasons for the regime change: national security and unification. According to the Park's announcement on October 17, 1972, one of the reasons for the imposition of the Yushin regime was the " harsh challenges of rapidly changing international relations."

In fact, Park suddenly declared a state of national emergency on December 6, 1971, more than 10 months before the emergence of the Yushin regime, and ordered the people to "strengthen national security." The government soon introduced the Special Measures Law on National Security, which was designed to vest the president with extensive emergency powers. According to the regime, those measures were necessary because of the "drastic changes taking place in international scene" including the admission to the United Nations of Communist China and the "fanatic war preparations" by North Korea." [7]

During the time, there was some concern about national security. The announcement of the Nixon Doctrine in July 1969 and the withdrawal of

the 20,000 American troops in June 1971 created some concern among government officials about the prospect for eventual withdrawal of all U.S. troops from Korea. This would increase security threat as it could be interpreted by North Korea as a weakening of the U.S. commitment to the defense of Korea. The normalization of the relationship between the U.S. and China also led to a temporary suspicion among Korean leaders whether any "deal" would be made by the superpowers on Korean issues. These concerns among state officials, however, did not create a crisis atmosphere among the public.

In fact, the regime's claimed view of the national security crisis at the end of 1971 was not shared by many observers. The public was surprised by the sudden declaration of national emergency. The New Democratic Party and other political opposition came out to oppose it by arguing that it is simply a measure to repress political opposition. The U.S. State Department said that it did not agree with Park's evaluation of the danger posed by the North Korean threat.[8]

In fact, there was no sign of increased hostilities on the part of the North. On the contrary, the incidents between South and North Korea declined sharply after 1969. North Korea announced its reduction of the military expenditures for the 1971-76 period in September 1971. Furthermore since 1971, the South and the North had been engaging in the first cooperative meetings between their Red Cross organizations. Thus the declaration of the national emergency and the promulgation of the Special Measures Law does not seem to be a reaction to any *objective* sign of increased possibility of North Korean attack.

Some people argue that the declaration of national emergency in December 1971 was a reaction to the various serious events that challenged political stability or capitalist industrialization, and that it was these events

that led to the regime change. While it is possible that a combination of various factors such as the increased social challenges to the regime, the North-South contact, and the changes in the U.S.-China relationship were perceived by Park as presenting a potentially serious political disorder, a more likely reason for the declaration of the emergency was that Park felt that the strengthening of domestic control was needed to maintain political order that would facilitate the regime change.[9] Whatever the reasons for the declaration of the national emergency in December 1971, the issue of national security received much less attention by October 1972. In fact, a direct North Korean threat disappeared even in the publically stated rationale for regime change.

It was the issue of peaceful national unification that provided with the most important claimed project for regime change. Affected by the environmental change involving the normalization of the U.S.-China relationship, preliminary meetings between the South and North Korean Red Crosses had been held since September 1971 to discuss the issue of the families separated during the Korean War. On July 4, 1972, the South-North Korean Joint Communique was suddenly announced by the North and South Korean government. The communique implied a radical departure from the previous North-South relationship and seemed to open a new horizon for national unification. According to it, efforts would be made by South and North Korea to seek a peaceful, independent unification of Korea "without being subject to external imposition and interference" and to fulfill national unity by transcending "differences in ideas, ideologies, and systems." [10] Both sides agreed to stop hostile actions against each other, and various cooperative exchange programs would be also promoted.

For South Koreans who had lived under the rigid anti- communism and the constant threat of a North Korean invasion, this was a truly

shocking event. The majority of the public welcomed it with high expectation for peace and national unification. North-South talks continued after the joint announcement. As the news media captured these events, the public expectation for peace and unification increased. It was in this context that the Yushin system was declared.[11]

Park said that the Constitution and the political structure of the nation were "fixed in the Cold-War era" and therefore were not suitable for improvement of relations with North Korea. A purpose of the regime change was "to emphasize unity in order to have a dialogue with the North" because South Korea "cannot afford to risk political unity when North Koreans have complete control over everything their people say and do." [12] The emphasis on the unification issue was clear when Park said that if the constitutional amendments for the Yushin regime were not approved in the national referendum, "I will take it as an expression of the will of our people against the South-North dialogue." [13]

In his declaration of the extraordinary measures on October 17, the only target for his attack was on political parties and representative institutions which "are obsessed with factional strife and discord" and which could not be "entrusted with the national task of peaceful unification." [14] Internal socioeconomic problems were not even touched in his statements precisely because there was no internal socioeconomic disorder that could justify the regime change.

LEADERSHIP'S COMMITMENT TO THE AUTHORITARIAN RULE

The unification and security issues were essentially used by Park and his loyalists to justify the imposition of the Yushin regime. The real motivation for the regime change was to prolong Park's rule for his lifetime.

Without his desire to remain in power indefinitely it is highly unlikely that he would have changed the regime the way he did. A crucial aspect of the Yushin system is that it provided for Park's indefinite rule with extreme concentration of power in him.

Park initially came to power by the military coup in 1961, which overthrew the democratic regime. Because of the significant domestic opposition and heavy U.S. pressure, a formal democratic system was restored in 1963. The new constitution, which adopted a presidential system based upon direct popular election of the president, contained a limitation of two four-year terms for the presidency. Park was elected in the 1963 and 1967 presidential elections.

Significant election irregularities were committed by the ruling group in the 1967 National Assembly elections, and as a result, the ruling Democratic-Republican Party (DRP) attained the two-thirds majority in the Assembly, which was necessary for the constitutional revision. The constitutional amendments, which extended the tenure of the president to three terms, were passed in the Assembly in 1969.

Park was once again elected president in 1971, but since the constitution allowed only three terms, he would have to step down in 1975 unless he could find other measures to continue his rule. However, no formal constitutional means were available. In the 1971 National Assembly elections, the ruling DRP, by capturing 113 seats as opposed to 89 seats for the opposition New Democratic Party, received less than the two-thirds of the seats. Furthermore there were two main competing groups within the DRP hoping to seize government power after Park's third term. Immediately after the election, then, it became rather clear that Park's opportunity to change the constitution again for the maintenance of his rule had become remote. It was the exhaustion of options to maintain his power through a

formal democratic process that led Park to decide on the imposition of the Yushin regime.

One can only speculate why Park changed the regime in 1972, not in 1973 or 1974. He possibly thought that if the new authoritarian regime was imposed by the end of his rule, the motivation would be clearer to the public and would confront stronger opposition. He also might have wanted not to give time for those within the ruling party who wanted to be Park's successor to consolidate their position. Furthermore, the North-South dialogue and the changing international situation were available as the issues that provided Park with the justification for the regime change.

Underlying Park's decision on regime change was not only his "will to power" but also his belief in the undesirability of democratic institutions in Korea. He was the man who led the 1961 military coup against the democratically elected government and imposed the two-year military government. Besides the most fundamental motivation to seize state power, he wanted to achieve "national resurrection" (*Minjok Joongheung*), by building a rich and strong nation. In Park's view, political conflict and other waste should be avoided to achieve rapid economic development.

He imposed various authoritarian methods upon society in the name of political order and efficiency, but as long as Park had a constitutional means to continue his rule, a formally democratic and less authoritarian regime was maintained. Now after his third term, there seemed to be no more constitutional possibility to continue his rule. But Park found nobody beside himself who could continue to lead the "modernization of the fatherland and national resurrection." He was proud of his achievement in economic development and probably confident in further pursuing it. The underlying commitment of Park to authoritarian rule finally surfaced in full force. He stated soon after the imposition of the Yushin regime:

> Until now, [we] used to disturb stability, practiced inefficiency and excessive consumption, and could not overcome the conflictual factional struggle and political tactics. This is because we unwisely tried to imitate closely the other's democracy. We can no longer waste our precious national power in imitating other's democracy. . . .We should achieve stability and maximize efficiency in all aspects to achieve prosperity and the glory of unification (Cited in Han 1982, 501).

The secret preparation for the Yushin system involved a handful of people surrounding Park. Because of its secrecy, it is not clear when the regime change was decided by Park and his close associates loyal to him. Secret meetings had been held since May 1972 to prepare for the regime change, and recent information released by Kang Chang-Sung, the former chief of the Army Security Command (1972-1973), suggests that there is a strong possibility that Park decided the regime change soon after the 1971 elections. In an interview with this writer, Kang stated that he was sure that the decision of Park to change the regime was made immediately after the 1971 elections.[15]

Almost all the state and political elites, let alone the public, did not know that preparation for a new political regime was going on. Thus the declaration of martial law and subsequent regime change was totally unexpected.

Despite the absence of demands for regime change either in the state or society, it was the political structure with strong coercive capacities of the state and the centralized power concentrated in Park that made possible Park's motivation realized.

STRONG STATE AND WEAK SOCIETY

We have noted that the strong anti-leftist state provided a significant

constraint for political activities of social groups. Weak society went together with the expansion of the coercive instruments of the state, particularly the military, that had an enlarged conception of national security with a low tolerance for any leftist groups and ideologies.

Since Park took power in 1961, the coercive capacities of the state to control social groups increased further in an absolute sense.[16] Unlike the Rhee regime (1948-1960), which used the police and various pro-regime groups to threaten and repress the opposition, the Park regime relied on the Korean Central Intelligence Agency (KCIA), which was created immediately after the coup and replaced the police as the most important instrument for domestic political control in normal times. The KCIA became involved in any issue that was considered important not only for national security but for regime stability and Park's power.

Given the broadness and the ambiguities of the provisions of the Anti-Communist Law and the National Security Law, the agency had wide latitude to apply them to the political opposition. Besides the investigative power, the agency used its policing power -- arrest, detainment, and interrogation -- as well as threats, terrorist activities (on a minor scale and intensity), and even bribes to repress the opposition and to control society. While the KCIA was far from attaining total control of Korean society, the KCIA greatly increased the resources available to the state for repression.

Another reason for the increased state power was the support the Park regime received from the military. Park acquired legitimacy from the military because of economic achievement and by the way he ruled the country -- with discipline and decisiveness. Park must have been an ideal leader for most military officers who put political order as the highest value due to the continuation and even the occasional increase in the perceived threat from North Korea. The military (particularly those forces surrounding the

Seoul area) and the Army Security Command were occasionally used to control anti-government activities.

While the strength of the state increased, the social challenge to the regime by no means disappeared. The Park regime faced particularly serious opposition during the period of 1964 and 1965 when it was engaged in the negotiation of the Korea-Japan normalization treaty. Due to the massive protests led by students and supported by the press, intellectuals and religious leaders, the government resorted to extreme measures by declaring martial law in June 1964 and a garrison decree in August 1965.

There were indications that Park's effort to control the press brought some success by the end of the 1960s with the apparent decline in the ability of the press to criticize the regime. However, the regime was less effective in controlling college students. Major demonstrations occurred in 1969 when the regime introduced constitutional revision which allowed Park to run for a third term. And then in 1971 students protested on a variety of issues including the intensified military training on campus. We have seen, however, that the student protests were effectively suppressed in 1971.

While there is no evidence that the military demanded the regime change, it was ready to support Park when he decided to impose the new regime. The sources of the loyalty of the military to Park and the apparent unity of the state are better understood when we look at the power structure within the state.

CENTRALIZATION AND CONCENTRATION OF THE POWER STRUCTURE WITHIN THE STATE AND THE RULING GROUP

Countries differ in their degree of centralization and consolidation of

the power structure within the state. Even if the coercive power of the state is strong, the power structure among the state elites may be pluralistic. In this case, the unity within the state would be on a more voluntary basis, and the shift in the overall power balance among them and their alliance with different social groups would be an important process in regime change (and maintenance). The case of the pre-Yushin Park regime shows the evolution toward a highly centralized regime with power concentrated in Park. In this case, because of the weight at the top of the power structure, the political outcome was not based upon a more pluralistic struggle among political forces.

There were furious factional struggles within the ruling group during the military government (1961-1963). Park gradually eliminated his rivals in the military and firmly controlled the military and the intelligence agencies by the mid-1960s. Since his successful consolidation of power, Park's main concern was the prevention of the emergence of any independent power base that might have a capability to challenge his power. The KCIA played a crucial role in consolidating and maintaining Park's centralized power within the state. It gathered information on the activities of the ruling DRP assemblymen and the high ranking government officials, especially those who were considered politically ambitious. Anybody or group who looked disloyal to Park's rule could be investigated, and if necessary, interrogated and sometimes physically abused. Since the loyalty to Park of most ruling group members was not questioned, direct coercion was generally not used, but the expansion of the independent power of the politically ambitious politicians was clearly limited.

Park's firm control over the military was exercised primarily by the Army Security Command (ASC), which maintained "a strict surveillance over all high-ranking officers and their relationship to each other" (Kim

1971, 156). Any potential signs of coup attempts -- even critical remarks about Park -- were investigated and punished accordingly. As a result, the freedom of the military officers to criticize the regime openly was very restricted. The chief of the ASC made a written report everyday to the president, and in cases of what he considered important matters, he reported directly to the president without reporting to the Minister of Defense or the Army Chief of Staff.

The control of the military was exercised partly by prohibiting a strong link of the military to social and political groups. The active military officers were not in principle allowed to be engaged in active political or economic activities. Indeed the relative isolation of the military from the society was an important characteristic of the Park regime that distinguished it from some other military or military-backed regimes.

Although there was interaction between the high-ranking military officers and the DRP politicians, their ties were never allowed to develop into a strong, autonomous power structure. The military officers' connection with the opposition would be most dangerous to their career.

While strictly preventing the majority of military officers from political involvement, A small number of officers had to be politicized due to Park 's need for them for political purposes. High-ranking officers who had a close tie to him occupied politically important positions. Park also gave special favors to selected elements of the middle- level officers. These officers were exclusively composed of the graduates of the elite 4-year Korean Army Academy, and generally from Kyungsang Province. Secretly organized as *Hahna* Club,[17] they became more politicized military elements loyal to Park. They were appointed to strategic military posts crucial for the regime stability. They also received favors in promotion.

While power within the state was highly concentrated in Park, a lim-

ited pluralism and factionalism existed among more powerful military officers and politicians below Park. Competition for Park's ear and even antagonism, often deliberately promoted by Park, checked and balanced one another.

There was a limited pluralism within the ruling group until 1971. Thus when Park decided to revise the constitution to allow him a third term, there was initially significant opposition within the ruling DRP. Many, if not most, of them were supporters of Kim Jong Pil. To get the two-thirds of the National Assembly votes that were necessary for the constitutional revision, Park, the KCIA, and pro-revision forces were involved in persuading and even threatening the DRP members. Kim Jong Pil himself was successfully persuaded to support the revision.

After the 1971 presidential election, there still remained at least two major factions within the DRP, the Kim Jong Pil faction and the Four-Men faction. The elimination of the Four-Men faction in the "October 2nd Disobedience Incident" (*Ship-yi hangmyung padong*) in October 1971 reduced further the degree of pluralism within the ruling group. The use of highly coercive measures against them suggests that Park had already decided to prolong his power by the time.

From the perspective of the power structure, then, the Yushin system could be successfully imposed because Park already exercised effective personal control over all the coercive institutions in a highly centralized system. Ambitious ruling party politicians would have opposed the regime change, and there was no significant demand for regime change even within the state.

CONCLUSION

Our analysis of the socioeconomic conditions and political situations in

the pre-Yushin period suggests that, unlike the case of Latin American countries, there was neither socioeconomic disorder nor political crisis that created social demands to change the regime. Even within the state and the ruling party, there was no active discussion or demand for the regime change. The regime change was caused by Park's determination to remain in power when the constitutional option to continue his rule was no longer available. Realizing the opposition they would face, Park and his loyalists prepared the regime change secretly and carefully well before its imposition, and executed it by using coercive state instruments, particularly the military, in a coup-like fashion.

It was essentially the political structure which made Park's motivation realized. Unlike other countries, Korea already had an authoritarian political structure -- a strong state with its coercive power concentrated in Park -- before the emergence of a highly authoritarian regime. In this sense, the emergence of the Yushin regime was essentially a change from soft authoritarianism to hard one. While the pre-Yushin political structure had cultural roots, it was also crucially influenced by the nature of the rigidly anti-leftist state that was established under the bipolar international political system in the post-liberation period and consolidated in the post-Korean War political situations.

ENDNOTES

1. Yushin literally means revitalization. Because the Yushin regime was imposed in October, it is also called *Shiwol* (October) Yushin.

2. Even after the military coup in May 1961, the junta promised to restore democracy after they accomplish their "revolutionary tasks." The military rule lasted for two years (1961-1963).

3. For an extensive analysis of the democratic aspects of Korean politics in the pre-Yushin period, see Oh 1991, pp. 128-193.

4. A couple of Korean scholars emphasize political variables in their examination of the emergence of the *Yushin* regime. Jang Jip Choi (1983) identifies the "overdeveloped state", and Park's motivation for his indefinite rule. Jong-bok Lee (1985) adds two more variables to Choi's analysis: the power structure concentrated to Park and the diminishing U.S. influence.

5. The riot lasted six hours and resulted in the injuries of 100 policemen and demonstrators and the prosecution of 23 people.

6. A formal chief of the Army Security Command stated flatly that "labor issue was not a major concern" for the regime during this period. Interview with Kang Chang Sung in May 1990.

7. *Korea Annual,* 1972, p. 21

8. *New York Times,* December 7, 1971, p. 4.

9. In an interview with this writer, a former high-ranking military officer who dealt with sensitive information, said that there was no increased military threat from the North and the measures taken by Park essentially resulted from the legitimacy problem. He, however, did not want to elaborate on this point. Interview in May 1990. Another high-ranking government official in charge of intelligence matters also suggested that the international situation and North Korea at the time did not pose increased threat to warrant the measures Park took. See Lee 1986, p. 172.

10. For the full text of the Joint Communique, See *Korea Annual,* 1973, pp. 377-378.

11. North Korea by revising their Constitution in December 1972 also strengthened the power of Kim Il Sung. This produced later a speculation among the attentive public that both North and South Korean leaders used the dialogue to strengthen their own power.

12. *New York Times,* October 20, 1972.

13. *New York Times,* October 18, 1972.

14. *Korea Annual,* 1973, p. 370.

15. Interview in May 1990. When this writer asked for the evidence, he simply said that the personnel change involving several high-ranking government officials following the elections was done differently than was expected before the election. According to him. the purpose of this personnel change was to prepare for the regime change. Kang said that he had not been involved in the preparation. In a matter like this, it is generally im-

possible to get hard evidence. But the former general repeatedly affirmed that the decision was made soon after the elections.

16. For a discussion of 2 types of resources that government use to suppress the opposition, and the relationship between the distribution of these resources and the different regime types, see Dahl 1971, pp. 48-61.

17. *Hahna* means simply "one". The organization was also called *Il-shim* (One Mind) Club. It appears that these names were designated essentially to emphasize the unity of the organization and the loyalty to Park.

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Natural Law, Natural Rights, and Philosophical Foundation of American Political Culture*

by
Tsong-Jyi Lin**

自然法、自然權利及美國政治文化的哲學基礎

林聰吉

摘 要

長期以來，自然法即是政治哲學中的主要論題之一。本文首先藉由各家對自然法的定義，企圖釐清自然法概念的意涵及目標。其次則對自然法概念的歷史發展做一探討，其中尤以柏拉圖及亞理斯多德思想中的自然法概念爲焦點。第三部份則敘述自然法概念如何透過近代思想家，如格勞秀斯、霍布斯、洛克等人的學說，而豐富其概念內涵，並成爲自然權利思想的發軔。最後則探討美國建國初期的思想家們，如何從自然權利學說中擷取「人權保護」及「有限政府」的理念，使自然法的豐富意涵成爲美國憲法和政治文化的基礎。

key words: natural law、natural rights、stoics、rationalism、individualism、social contract、radicalism、limited government.
關鍵詞：自然法、自然權利、斯多噶學派、理性主義、個人主義、社會契約、理性主義、有限政府

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** Instructor, Department of Public Administration, Tamkang University, TAIWAN
淡江大學公共行政學系專任講師

INTRODUCTION

From Plato, and Aristotle to modern political theorists, the idea of natural law has gradually become one of most important theses in political philosophy. This paper, first, attempts to clarify the concept of natural law. Then, several political philosophers' arguments, especially those of Plato and Aristotle, will be raised to describe the development of natural law theory. Moreover, this paper will discuss the theory of natural rights which originates from the theory of natural law. Finally, the argument will concentrate on the relationship among natural law, natural rights and the foundation of American political culture.

WHAT IS NATURAL LAW ?

Definitions and Purposes

Natural law theorists assume that there is a human nature shared by all men. According to these theorists, man is rational and can determine his own ends. As for natural law, it can provide man the rule toward these ends. Therefore, in Maritain's definition, natural law is "an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the necessary ends of the human beings." [1] Wild also defines natural law as "a universal pattern of action, applicable to all men everywhere, required by human nature itself for its completion." [2] Moreover, Wild elucidates the meaning of "completion" which is similar to Maritain's "attune itself to the necessary ends of the human beings". Wild asserts that human beings have a tendencious character which is at first imperfect or incomplete, but "they are ever tending further towards something they now lack" [3] and, finally, human beings can achieve their self-completion. This process of completion, as

Wild states, is the goodness for the existence of being and, most importantly, it must base itself on the understanding of natural law.

From the above, it is evident that natural law has a positive meaning to human beings, because human goodness is the realization of natural law. Furthermore, this realization is not only for the good of an individual being, but also for the common good of all men. Therefore, in a further explanation, natural law defines certain universal rights and obligations prescribed by such realization. As Hart said, "natural law theory in all its protean guises attempts to assert that human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) other than that of survival." [4] Hence, applied to the community, natural law becomes the principles which justify political authority. Under natural law, authority should be exercised according to "the manner labelled the Rule of Law, and with due respect for the human rights which embody the requirements of justice, and for the purpose of promoting a common good in which such respect for rights is a component." [5] Meanwhile, natural law also explains the moral obligations of all men in community.

In this sense, the principles of natural law are traced not only in moral philosophy or ethics and individual conduct, but also in political philosophy, jurisprudence and the life of citizens. [6] Natural law becomes the solution for the key problem of human existence, i.e. the relation between the real and ideal. The purpose of natural law is to bridge the gap between fact and value, between "is" statements and "ought" statements. Based on natural law, "values become judgments about some factual matter; a value judgements is a reasoning desire." [7] "A question about the justification of some envisaged end can be rationally answered by showing that it is in agreement with the natural end of man." [8] In moral philosophy, natural law

is the standard of human behaviors. In political philosophy, according to natural law, we can legitimately criticize and reevaluate present laws and institutions. Consequently, natural law, which bases its assumption on faith in human nature, has become the guide to lead the development of human society.

Natural Law in Plato's and Aristotle's Thoughts

The basic argument in Plato's *Republic* is the concept of justice. According to Plato, there is a natural harmony within both the individual and the state. For the individual, this harmony consists of the rule of reason, assisted by the spirit in restraining and directing man's appetite. Corresponding to this natural harmony in man is a parallel hierarchical harmony in the state, which means the rule of the philosopher king over guardians and artisans.[9] In Plato's view, justice means conformity to harmony, and justice is the criterion of an ideal state. As for natural law, this term is not Platonic.[10] From the *Republic* to the *Law,* law is still imperfect and Plato views any given law as an inadequate representation of the eternal principles of justice. Justice is never a legal matter for him; he never sees society as a legal society.[11]

However, Plato's concept of justice can be related to the basic assumptions of natural law theory. Plato believes that there are universal principles inherent in nature which impose a moral obligation on all men, and Plato emphasizes that such objective principles can be discerned by human reason. Besides, Plato asserts that law should be based on the understanding of justice, and the goal of any genuine law is the common good which involves making men virtuous.[12] In the above sense, it is evident that there is a fundamental unity between the principles of justice and natural law. However, unlike modern theorists of natural law who try to

bridge the gap between value and fact, nowhere in Plato's works can be found such an attempt. Because in the Plato's theory of justice, value is fact and fact is value.

As for Aristotle, the concept of "nature" can be found in his thought, and it is usually related to "end". For Aristotle, the essential nature of a thing can be discovered by determining its purpose or end. This in turn can be derived from its structure or normal functioning.[13] Therefore, "what each thing is when fully developed, we call its nature".[14] This teleological method can be used to discover natural purpose and to derive values from them. Furthermore, based on this teleological analysis, Aristotle demonstrates that man is a naturally political animal that could only live and develop himself but in the state. Through the state, man can achieve the natural purpose -- the collective pursuit of the life of virtue.

Although the concept of nature is based on the teleological analysis, there are some concerns about natural law in Aristotle's works. In Book V of the *Ethics,* Aristotle establishes the distinction between natural and conventional justice:

> "There are two sorts of political justice, one natural and the other legal. The natural is that which has the same validity everywhere and does not depend on acceptance; the legal is that which in the first place can take one form or another indifferently, but which, once laid down, is decisive." (*Ethics,* 1134b)

However, Aristotle does not develop this concept of natural justice to relate to the modern meaning of natural law. Even he states a more ambiguous passage later.

> "Among the gods, indeed, justice presumably never changes at all; but in our world, although there is such a thing as natural law,

everything is subject to change." (*Ethics,* 1134b)

In the Rhetoric, Aristotle draws a distinction between particular and common law and he refers to "a common law is the law of nature".

> "Law is in part particular and in part common; the particular is that which different peoples establish among themselves, and is in part unwritten and in part written; the common law is the law of nature. It is what all men, by a natural intuition, feel to be common right and wrong, even if they have no common association and no covenant with one another." (*Rhetoric,* I, 1373b)

From these quoted passage, it is evident that Aristotle believes in the existence of some common legal principles which are universal and based on the nature. However, he makes no attempt to "spell out the details of this universal law nor to use it to invalidate existing law." [15] In Aristotle's argument, the description and evaluation of what is good in human society is not carried out in terms of a systematic law of nature.[16] From the *Ethics* to the *Politics,* Aristotle based his philosophy on a teleological assumption, as Barker outlines Aristotle's political philosophy, "Politics is ethics; to treat the end of a society is to treat the end of the individual, for both have the same end. There is one end of man's action, happiness: there is one science of that end, politics." [17] In such an argument, apparently, the connection between natural law and teleology was not made by Aristotle.

The term "natural law" is used neither by Plato nor by Aristotle. Nevertheless, both philosophers have laid the foundation of natural law theory. Plato and Aristotle, respectively, view nature as harmonious and purposive, and assert that there are some moral and objective principles. Most importantly, both argue that these principles are accessible to all men

by the use of human reason. Consequently, the above arguments have become the fundamental assumptions of modern natural law theory.

From the Stoics to Middle Age

Based on Plato's and Aristotle's concept of human nature and moral principle, the Stoics take the ontology of law into the explicit form of "natural law". The Stoics provide an interpretation of natural law, and make it one of the most fruitful of legal and political foundations.[18] The Stoics assert that nature is an objective reason, and it is by virtue of man's rational power that he can "understand the reason that is in the universe and live according to the rules of nature." [19] Such concepts became the most important thought in the works of Stoics and the Roman jurists. In Cicero's discussion of natural law:

> "Of all these things about which learned men dispute there is none more important than clearly to understand that we are born for justice, and that right is founded not in opinion but in nature. There is indeed a true law, right reason, agreeing with nature and diffused among all, unchanging, everlasting, which calls to duty by commanding, deters from wrong by forbidding." [20]

Moreover, Cicero stresses that human laws and institutions should be constructed on natural law:

> ". . . the same (natural) law, everlasting and unchangeable, will bind all nations and all times; and there will be one common lord and ruler of all, even God, the framer and proposer of this law." [21]

Throughout the Middle Ages, the concept of natural law still occupied an important position in political philosophy. However, different from the

faith in human reason in the thoughts of Plato and Aristotle, the concept of natural law was founded on the divine principles in the Middle Ages. Though the idea of a "higher law" was widely accepted, it is regarded as the product of God's will. Hence the law of nature "was identified with the Bible, with the teachings and laws of the church and with the teachings of the Fathers of the Church." [22] Nevertheless, some concepts developed in this period contribute to later natural law theory. For example, Aquinas states in the *Summa Theologica:*

> ". . . Every human law has justice so much of the nature of law as it is derived from the law of nature. But if in any point it departs from the law of nature, it is no longer a law, but a perversion of law." [23]

Based on this argument, Aquinas concludes that if things are commanded without justice, then they are not law and men are not obligated. The identification of just human law with natural law provides the basis for a theory of resistance.[24] Besides, in the Medieval Age, churchmen and jurist sought a basis for restraining the powers of both temporal and spiritual rulers. Therefore, the concept of limitations on the powers of the rulers was born. This doctrine, together with "the medieval principle of property rights with which the king might not interfere, formed an essential basis of the later theory of natural rights." [25]

NATURAL LAW AND NATURAL RIGHTS

As the Western world evolved from the Medieval Age, modern political philosophers had endowed natural law theory with more vigorous modifications. Consequently, the theory of natural law has been transformed into a theory of natural rights, which had a great impact on human history.

The Formation of Rationalism

In the medieval period, with the spirit of Christianity, most political philosophers asserted that natural law had a divine origin. However, the rise of rationalism in 17th and 18th centuries undermined this theological presupposition of natural law theory. Hugo Grotius, who has been regarded as the founder of the modern theory of natural law,[26] attempted to prove the self-evidence of natural law based on human reason. In his definition, natural law is "the dictate of right reason, indicating that any act, from its agreement or disagreement with the rational nature, has in it moral turpitude or moral necessity." [27] Then Grotius notes that a law to be ascertained should resort to the use of man's rational nature, not the God's word.[28] Besides, Grotius claims the self-evidence of natural law:

> ". . . for the principles of that (natural) law, if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses." [29]

Furthermore, Grotius compares natural law with mathematics and concludes that natural law, like mathematics, can not be altered even by God.

> "Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend. . . . Just as even God cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically evil be not evil." [30]

In addition to Grotius, Pufendorf, Vattle and Burlamaqui have contributed to the rational construction of natural law theory.[31] In their works, they emphasize the basic importance of natural law which can be discovered through the use of human reason and moral sense. As a result, rationalism

has gradually replaced the theological presuppositions as the basis of natural law theory in 17th and 18th centuries.

Individualism and Social Contract

Along with rationalism, individualism was risen and became the foundation of modern democratic theory. Sharing the same assumption with rationalism, individualism claims that all associations are voluntary and the right to command could not rest on divine principles. To reconstruct the relationship between individual and society, the theory of social contract was created and it attempted to found civil society on an act of will of human beings. As Thomas Hobbes asserts in the *Leviathan:*

> "I authorise and give up my Right of Governing myself, to this Man, or this Assembly of men, on this condition, that thou give thy Right to him, and Authorize all his actions in like manner. This done, the multitude so united in one Person, is called a COMMON-WEALTH." (*Leviathan,* Part II, Ch. XVII)

After Hobbes, John Locke also claims:

> "The only way whereby any one devests himself of his natural liberty, and puts on the *Bonds of Civil Society* is by agreeing with other men to joyn and unite into a Community, for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. . . . When any number of Man have so *consented to make one Community or Government,* they are thereby presently incorporated , and make *one Body Politik,* wherein the *Majority* have a Right to act and conclude the rest." (*The Second Treatise,* Ch. VIII, Par. 95)

From the preceding quotations, it is evident that, based on the princi-

ples of natural law, both Hobbes and Locke recognized the existence of natural rights. Meanwhile, the theory of social contract implies that there is a moral obligation among individuals in order to secure the social order. Speaking clearly, every one should regard "another's reality as human and recognize there are some constraints on what they may rightly do or not do;" [32] then a civil society can be established. Most importantly, the relationship between the natural rights and social contract is different in Hobbes' and Locke's arguments. According to Hobbes, human beings should give up their natural rights to political authority, while Locke argues that natural rights could never be abandoned, and the purpose for establishment of political authority is to secure natural rights. Such a difference can be found in the above quotations. As Hobbes asserts, "I authorise and give up my Right of Governing myself, to this Man, or this Assembly of men", while Locke emphasizes "in a secure enjoyment of their properties", and he points out in later chapter,

> "The great and *chief* End therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the *Preservation of their Property.*" (*The Second Treatise,* Ch. VIII, Par. 124)

Consequently, Hobbes' theory of social contract has led to a complete transformation of the original rights. In contrast, Locke's insistence on "inalienable natural rights" has successfully based natural rights on the assumptions of natural law theory.

Natural Rights and Resistance

For a long time, the two different English terms -- law and right, were indicated in the same name of ius by Western lawyers, who are influenced

by the study of the Roman Law. In their opinions, law and right are not antithetic, but correlative. " There is a right in as much as there is a law." [33] In the 17th and 18th centuries, this point of view was accepted by the theorists of natural law. Most importantly, when the theory of natural law developed further, the emphasis had been put on the meaning of " right", not "law". In this sense, natural law does not merely mean "the rule of action", but also recognize "the right to act". For the modern theorists of natural law, man possesses rights because "it is a person, a whole, master of itself and of its acts, and which consequently is not merely a means to an end, but an end, an end which must be treated as such." [34] As a result, natural right is based on natural law, and the modern theory of natural law is not a theory of law at all, but also a theory of rights.

Another traditional factor also contributed to the development of natural law theory in this period. Medieval political theory had provided a doctrine of resistance to unjust or unlawful government, which has been stated in the above paragraph. This doctrine "lived on through the Renaissance, the Reformation and the Counter-Reformation." [35] In the 17th and 18th centuries, this tradition had been related to the theory of natural right, i.e. if political authority invades the rights, then man could abolish or change the authority. Consequently, the modern theory of natural law is not only the theory of natural rights, but also the theory of revolution. The most distinguished advocate is Locke as he asserts in the *Second Treatise of Government:*

> ". . . whenever the *Legislators endeavour to take away, and destroy the property of the People,* or to reduce them to Slavery under arbitrary Power, they put themselves into a state of War with the people. . . . Whensoever therefore the *Legislative* shall transgress this fundamental Rule of Society. . . . By this breach of Trust they

Forfeit the Power, the People had put into their Hands, for quite contrary ends, and it devolves to the People, who have a Right to resume their original Liberty, and by the establishment of a new Legislative." (*The Second Treatise,* Ch. VIII, Par. 222)

THE PHILOSOPHICAL FOUNDATION OF AMERICAN POLITICAL CULTURE

From rationalism, individualism to radicalism, these ideologies have given modern natural law new meanings and tremendous vigor. The doctrine of natural law has served as a clarion call for action in many upheavals of 17th and 18th centuries. In 1776, American used this doctrine to justify their revolution against British Government. As The Declaration of Independence claims:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed; That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, . . ."

Though most of the content of this document is drawn from the natural rights philosophy of Locke, many natural law writers also had significant influence on the American Revolution. Inheriting from modern natural law theory, Americans have constructed the foundation of their political culture and, furthermore, established their political system.

The Protection of Human Rights

The inalienability of natural rights has been clearly expressed in the

Declaration of Independence. In addition to Locke, for Americans, William Blackstone is one of the most influential natural law writers and, meanwhile, he provides the main argument in defense of natural rights. In the *Commentaries,* like other writers, Blackstone confirms the existence of natural law and states that, based on reason, human beings can find it. Moreover, Blackstone relates natural law to natural rights, which is in his term "the pursuit of happiness":

> ". . . in consequence of which mutual connection of justice and human felicity (God) has not perplexed the law of nature with a multitude of abstracted rules and precepts. . . but has graciously reduced the rule of obedience to this one paternal precept that man shall pursue his own true and substantial happiness. This is the foundation of what we call ethics or natural law." [36]

In the later chapter, Blackstone states further about natural rights:

> "This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endowed him with the faculty of free will." [37]

Learning from the arguments of Locke, Blackstone, and other advocates of natural rights, the idea of inalienable rights becomes the core tradition of American political thought. According to this idea, absolute individual human rights are derived from natural law. Hence, there is a sphere of private human activity inviolable in all circumstances. It "holds individuals and their rights to be prior to the civil society and the state, not dependent on social arrangements for their existence but only for their protection, and, therefore, interprets rights as morally inviolable limits on

the permissible operation of political authority." [38] The above belief has been reflected in the American Bill of Rights. In this document, the protection of human rights is clearly listed:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (Article I)

Besides, the Bill of Rights asserts a due process of law to protect human rights:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.....nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ." (Article V)

The Limited Government

It is evident that, according to the assumption of natural right theory, rights itself are regarded as the end and political authority is merely the means to secure human rights. Therefore, the principles of limited government become another significant part of American political thought, and serve as an effective instrument for the implementation of the Bill of Rights.

In England, the supreme authority is the Parliament,[39] "which is not limits on its power except that of natural impossibility. . . . Parliament is internally balanced between the King and the Houses of Lords and Commons, but there is no higher body, including the judicial. . . ." [40] However, for the colonists, the idea was undermined by several influential works.

In *Calvin's Case and Bonham's Case,* Edward Coke had claimed the superiority of natural law and common law to the acts of Parliament. As he states in *Bonham's Case:*

> ". . . that in many cases, the common law will control acts of Parliament, and sometimes adjudge them utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an action to be void." [41]

Coke's idea was widely recognized and accepted in the colonies. For example, after about one and a half centuries (1764), James Otis cited Coke's statement and asserted that "Should an act of Parliament be against any of God's natural law, their declaration would be contrary to eternal truth, equity, and justice, and consequently void." [42] According to this argument, Otis claimed that the courts should declare the Sugar Act void because it taxed the colonists without their consent.

Based on their belief in the superiority of natural law, American disprove the idea of "Parliamentary sovereignty". Instead, they prove the idea of limited government. In practice, the principle of separation of power is applied to American political system and, most importantly, judicial review represents the spirit of natural law in this system. The judicial review can refuse to give effect to legislation repugnant to the Constitution or official action in excess of powers provided by the Constitution. In such a process, what judicial review relies on is the spirit of natural law, and what it advocates is the end of natural law--natural rights.

CONCLUSION

The idea of natural law results from three propositions. First, there is

a nature common to all men -- something uniquely human makes all of us men rather than other animals. Second, as Aristotle points out, that "something" is rationality, then we can learn what the general ends of human are. Third, by taking thought, we can related our moral choices to these ends.[43] Based on the belief of above propositions, human history has become a history of striving for these "ends", since "man is man everywhere and in all times and places, natural law is both universal and flexible." [44] However, for all men, it seems an endless road. As in America, the concept of human rights has been accepted and implemented in the Western democracies today, while other problems have arisen. Taking America as an example, John Cogley asserts:

> ". . . the American consensus about what is good and bad, what is to be done and what avoided, may be breaking down. We often mean well enough but we do not quite know what we mean. We want to do the right thing but we do not know what is right. We muddle along, making uncertain choices, and finally, when the uncertainty becomes pervasive, aimlessness sets in." [45]

Founding their political culture on the belief of natural law, American have successfully set up an independent country which regards protecting human rights as its end. However, after two hundred years, American Revolution is proved unfinished. There is a moral vacuum in American society. To overcome this crisis, in my opinion, the only way is to revive the root of American political culture -- the spirit of natural law.

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德國聯邦眾院黨團的運作及其功能

郭秋慶*

The Operation and Function of Party-Fraction in German Parliament

by
Chiu-Ching Kuo

摘 要

黨團在責任內閣制的運作中占有凸顯的地位，德國黨團制度規劃完善，議員與黨團的關係，有開放性，也有約束性，在民主程序下運作得相當順利。責任內閣制的國家中，英國的黨鞭制度在國內較受人探討，至於堪爲代表歐陸責任內閣制的德國，其黨團制度整體的規劃不同於英國，實在值得深入分析。本文即試圖剖析德國黨團的建立、組織、運作、與功能，期盼能擴展學界的了解。

關鍵詞：責任內閣制、黨團、國會。
Key words: responsible、cabinet、fraction、parliament.

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* 淡江大學專任副教授兼德文系系主任

壹、前言

現代民主政治當中，政黨是最重要的政治機構，此一事實在德國可以由其基本法（憲法）第二十一條看出，該條文規定「政黨的任務是協助人民政治意志的形成」，因此各種不同的政治構想、利益、或需求均可以藉著政黨導入一個和平的與可控制的制度化民主過程當中，進而轉化成公共政策。

政黨在面對人民的需求，提出政治訴求。若政治訴求成爲政黨決議，此時政黨尋求將其轉化成公共政策，國會的黨籍議員便需要努力爲政黨決議作辯護，由於黨團(Fraktion)能夠發揮整体黨籍議員的意志，加上其與政黨在人事上密切的銜接，所以在民主憲政的運作中，黨團具有呈現人民政治意志的傳承功能。

德國聯邦眾院的黨團運作，長期以來顯示高度的團結性，這實在是基於黨團內工作劃分的完善，以及黨團透過不對外公開討論達成決議促成的。也就是說，德國聯邦眾院黨團就整体而言，對外呈現出團結的意志；就個体而言，其成員亦能夠充分擁有政治創制權。

貳、聯邦眾院黨團的建立

德國國會黨團首度於威瑪共和一九二二年帝國眾院議事規則獲得制度性的確立，戰後西德基本法（憲法）並沒有出現黨團的概念，聯邦眾院黨團是由過去威瑪共和舊議事規則加以規範，稱每屆聯邦眾院必須確立黨團基本人數。依此，第一屆聯邦眾院確立最低人數爲十名，當初九個聯邦眾院政黨當中，有八個政黨達此標準成立黨團，但是不久由於共產黨黨團降至十五名以下的成員，拜恩黨(Bayernpartei)與中央黨脫黨議員組成擁有二十二名成員的聯邦同盟 (föderalistische Union)，以及大多數經濟重建會(die wirtschaftliche Aufbauvereinigung)議員投靠德意志黨(Jekewitz, 1989: 1033-1034)，促成第一屆聯邦眾院於一九五二年一月會期尚未結束時，將議事規則規定的黨團最低人數提高到十五名，造成聯邦眾院祇剩下五個黨團，至一九五七年第三屆聯邦眾議院結束時，黨團數目再度降至三個，即基民／基社會黨黨團、社民黨黨團，以及自民黨黨團。這種三個黨團的聯邦眾院維持至一九八三年第十

屆聯邦眾院才有所改變，也就是綠黨進入聯邦眾院建立第四個黨團。

基本上，基民黨與基社黨屬於兩個政黨，但是它們建立一個聯邦眾院黨團，這是因爲聯邦眾院議事規則規定，相同政黨的議員能夠組成黨團，若遇有例外情況，僅需由聯邦眾院同意，因此雖然基民／基社黨不是相同政黨，仍能夠共同成立黨團。不過當一九六五年第五屆聯邦眾院基民黨喪失政治優勢時，聯邦眾院出現對基民／基社黨共同建立黨團的爭議，反對黨要求應將此事交由聯邦眾院表決，如果獲得多數的同意，才能准予成立。

此一爭議最後於一九六九年三月「小型國會改造」(Kleine Parlaments-reform)中獲得解決，聯邦眾院修改議事規則，對於黨團成立條件做了進一步的規定：黨團最低名額根據聯邦選舉法第六條門檻條款的規定，確定爲聯邦眾院議席的五%，亦即以二十六名議員爲最低名額 (Busch and Berger, 1989: 112-113) 。若有政黨秉持相同政治目標，並且沒有在各邦彼此競爭，亦准予成立黨團。從此，基民黨在拜恩邦不再投入選舉，而且基社黨在其他聯邦地區亦不再投入選舉，每當選舉結束時，雙方立即簽訂協議共同成立黨團，所謂的基民／基社黨黨團遂具有充分的正當性，不必再擔心會遭受批評(註1)。

一九八三年第十屆聯邦眾院以來，除了長期主導聯邦眾院議事的基民／基社黨、社民黨、以及自民黨，出現綠黨這個第四個黨團，但是兩德統一後的首次聯邦眾院選舉，綠黨已不再進入聯邦眾院，即使新興的民社黨 (Partei des Demokratischen Sozialismus)與德東的聯盟九十／綠黨(Bundnis 90/ Grunen)分別擁有十七名議席與八名議席，不過此時依照聯邦眾院議事規則的規定，成立黨團最低名額爲聯邦眾院議席的五%，亦即三十四位議員，故兩黨均不具備成立黨團的資格，不過透過聯邦眾院的決議，仍准許它們在議事享有特別的待遇 (Schick and Zeh, 1993: 13)。

一、黨團法律地位

德國聯邦眾院黨團在憲政制度中的定位，基本上吾人無法從基本法（憲法）獲知，即使該法第五十三條亦無明確交待。 雖然聯邦眾院議事規則第十條對黨團的組成有了規定，然而議事規則僅爲聯邦眾院自行訂定的內規，並不具備法律位階。德國學界曾經嘗試透過一般法律的結構原則，解釋黨團

法律地位，祇不過闡述的意見十分分歧，而且其中祇有國家法學家 G. Kretschmer 對黨團法律地位作理論的建構(Kretschmer, 1984: 34-38) 。

其實，若藉著聯邦憲法法院判決，是可以獲得黨團法律地位的推論，此爲聯邦憲法法院政黨財政判決：「黨團密切地與政黨結合是正確的。政黨當中，尤其是聯邦眾院黨團與隸屬黨團的議員，對於國家決策具有影響力，亦即影響高級政府官員與聯邦眾院決議。但是黨團仍不同於政黨，它是屬於國家機構 (Staatsorgan) 。」

聯邦憲法法院繼續指出：「黨團是聯邦眾院的一部分，且爲常設分部。它由聯邦眾院議事規則獲得承認，並得以確立自己的權利。它是憲法生活必備的機構，主導由憲法及聯邦眾院議事規則所規範的聯邦眾院之議事運作。它某種程度上操縱聯邦眾院內的立法程序，而且藉此減輕立法程序中的工作負擔。祇因爲黨團是聯邦眾院常設分部，而不是政黨組織的一部分，故其在國家機關的爭議中，有資格提出議案。黨團基於是聯邦眾院分部，便具有組織化的國家機構之特質(註2) 。」

由以上聯邦憲法法院對黨團地位的確認，証實黨團作爲聯邦眾院的分部，是一個國家機構，具有履行憲法任務的責任，但是它對於黨團在何種組織形式下，獲致法律能力，仍未能充分的答覆，因此不妨將黨團視成一個公法性質的團体，它結合政治上志同道合者，組成有意志能力與行爲能力的代表多數人之組織，在如此建構下的法律機構，也就使得黨團獲致了法律的能力 (Busch and Berger, 1989: 115) 。

二、黨團行政及其財源

德國聯邦眾院黨團擁有自主的行政中心，其中黨團學術助理室、黨團新聞室、及及黨團檔案室尤其重要。以第九屆聯邦眾院黨團行政中心爲例，總計有三百九十一名工作人員，分別爲基民／基社黨一七五名，社民黨一五七名，與自民黨五十九名。黨團學術助理室的學術助理基本上是配置給黨團工作小組 (Arbeitskreis) 或黨團工作群 (Arbeitsgruppe) ，協助其蒐集立法資料與提案的擬訂等，並且聽命於黨團工作小組或黨團工作群的指 揮。黨團新聞室由黨團發言人領導，發佈黨團立法草案意旨與黨團政治主張等，有時也會公佈黨團內個別議員的聲明。黨團檔案室可以彌 補聯邦眾院的檔案，

特別是無法完全公開的資料(Schäfer, 1982: 144)。

早期黨團行政僅由聯邦眾院提供免費的辦公室與會議室，至於黨團財源主要由議員對其黨團繳交的黨團費構成，但各黨團規定不一，由每月五十馬克至五百馬克不等，另外聯邦政府預算中象徵性補助黨團開支，一九五〇年總計三十萬馬克。後來基於一九六六年聯邦憲法法院「政黨財政判決」中，將黨團判定成「聯邦眾院常設分部，具有國家機構的特質」，因此在議員的要求下，黨團開始由聯邦政府預算中獲得法定補助費。此項補助費依照聯邦政府財政計劃的說明，每個聯邦眾院黨團每月獲得基本費 (Grundbetrag) ——在野黨黨團另外多獲得四分之一基本費的額外費用——與依照黨團勢力分配的附加費(Zuschlag)(Jekewitz, 1982: 324-326; v. Arnim, 1987: 14-20) 。

聯邦政府預算支付黨團經費的額度，完全交由聯邦政府財政計劃決定，並不需要接受公佈或審計的控制，其缺點是形成目前政府補助黨團款項不斷增加，因此未來應該考慮立法控制超額補助黨團的現象。

參、黨團制度及其工作劃分

新科聯邦眾院議員加入黨團之前， 需要填寫意志聲明 (註 3)，待該議員進入黨團，由於黨團擁有自律權，務必服從黨團自行訂定的章程、議事法則、或工作規章。每屆聯邦眾院開議時，通常會進行選舉與分配黨團內部各單位人選，像黨團大會 (Fraktionsversammlung)、黨團理事會 (Fraktionsvorstand)、以及黨團工作小組（群），待人選產生後，黨團便對其成員擁有約束力。此時黨團即可以通知聯邦眾院議長，正式展開黨團在聯邦眾院的運作。

一、黨團大會內部的運作

黨團大會由黨籍議員組成，當聯邦眾院黨團預備與召開黨團大會時，就基民黨／基社黨而言，其交由黨團主席負責，但是就社民黨與自民黨而言，其交由黨團理事會負責。當三分之一以上基民／基社黨黨團議員或其黨團工作小組、四分之一以上社民黨黨團議員、或六名以上自民黨黨團議員要求召開黨團大會時，亦得以召開。

黨團大會通常在每星期二下午舉行，由黨團主席或副主席主持。基民／

基社黨黨團大會中由議員選出主席、黨團工作群主席、聯邦眾院委員會督導(Obleute)與副督導； 社民黨黨團大會以秘密方式選出主席、 副主席、團幹事(die parlamentarischen Geschäftsführer) 、黨團理事會成員、以及黨團工作小組主席； 自民黨黨團大會選出黨團理事會成員；至於綠黨僅有發言人委員會(Sprecherrat)，由議員選出三位權利平等成員組成 (Rausch, 1971: 66-67; Kretschmer, 1984: 88-92)。

黨團大會中討論一般政治目標，並且進行意見協商，在通常秘密的意見協商中，常有不確定的結局。多數共識並不總是可以預見的，多數共識經常是在討論的過程中形成，因此黨團議員有機會駁斥他人的意見，甚至少數黨團議員亦能結合不同利益取向的議員，以形成多數的共識，黨團大會的討論實在印証多元民主駕凌認同理論的道理。當然，黨團大會最後會以表決作出一致的決議，如此的決議，基本上應該也是爲黨團表決中失敗者所接受。再者，在黨團大會中，黨團工作小組或黨團工作群會報告它們對排入議事日程的內容之意見，對此黨團成員均有權利表達他們的看法，最後嘗試確立一致的政治與實務方針。一般而言，黨團大會決議在聯邦眾院院會中是有約束力的，若有黨團成員要在院會中表達相反立場，他應該通知黨團大會或黨團主席，因此黨團大會既是政治討論的場所，亦是政治意凝聚的地方(Kretschmer, 1984: 92-94) 。

黨團大會在主席邀請下，經常有專家或利益代表參與表達意見，像基民／基社,黨的聯邦政府官員、聯邦參院議員、邦議會黨團主席、歐洲議會基民黨團議員、以及基民／基社黨兩黨秘書長等。所有受邀的客人，雖然沒有投票權，而不會觸及具有法律效力的黨團決議，但是他們的影響力不容低估，有時他們在與黨團成員諮詢與協商下，也會某種程度上影響黨團意見或意志的形成 (Linck, 1980: 511-513)。

二、黨團理事會內部的運作

基本上，黨團理事會依照自己的規章運作，但是其組成、職權、與工作方式頗爲相似。黨團理事會成員在黨團大會中選舉產生，通常以二連任議員當選的機會較大。基民／基社黨黨團根據其工作綱領 (Arbeitsordnung der CDU/CSU-Bundestagsfraktion) 第十三條規定由黨團大會選出黨團主席、副

主席、黨團幹事(註4)、黨團工作群主席（發言人）、法律顧問、以及其他黨團成員組成黨團理事會，傳統上首席副主席由基社黨邦團体 (CSU-Landesgruppe)主席兼任(註5)。基民／基社黨第五、六、七屆聯邦眾院黨團理事會成員爲四十五名，至第十屆聯邦眾院黨團理會成員亦爲四十五名，分別爲主席、十一名副主席、六名代理副主席、四名黨團幹事、二名法律顧問、二名聯邦眾院主席團 (Prasidium) 成員、以及二十九名其他黨團成員（包括黨團工作群主席）。該黨黨團理事會主席與首席副主席任期爲整屆聯邦眾院，其他成員則兩年後改選(Kretschmer, 1984: 102-105)。

社民黨黨團根據其議員規則 (SPD-Geschäftsordnung) 第九條規定，由黨團大會秘密選出黨團主席、副主席、黨團幹事、以及其他黨團成員組成黨團理事會，其選舉過程首先由舊黨團理事會提出按照姓名字母排列的推荐名單，並且三天內選舉產生。社民會黨第五、六、七屆聯邦眾院黨團理事會成員爲三十名，至第十屆聯邦眾院黨團理事會成員爲四十名，分別爲主席、八名代理副主席、五名黨團幹事、二名聯邦眾院主席團成員、以及二十六名其他黨團成員。黨團理會成員當選後，首先任期一年，然後分別任期一年半，不過黨團幹事的任期爲整屆邦眾院 (Schulte, 1969: 68-82；Kretschmer, 1984: 102-105)。

自民黨黨團根據其議事規則(FDP-Geschäftsordnung)第五條規定，由黨團大會選出主席、副主席、與黨團幹事組成黨團理事會。社民黨第五、六、七屆聯邦眾院黨團理事會成員爲七名，至第十屆聯邦眾院黨團理事會成員六名，分別爲主席、三名代理副主席、二名黨團幹事（由主席建議下選出）。自民黨黨團理事會每年進行改選，遇有距離會期結束少於兩年時，即由新選出的理事會續任至會期結束再行改選(Kretschmer, 1984: 102-105)。

各政黨黨團理事會通常在星期一下午開會，由黨團主席主持，基民／基社黨黨團理事會會議由其黨團執行理事會 (geschäftsführender Vorstand)召開，基本上採取秘密方式進行，但是不排除將黨團理事會的決議透過公報 (Kommunigue) 的方式,發佈給大眾傳播媒体，以發揮其對黨團整体意志的影響 (Lohmar, 1975: 154-156)。黨團執行理事會由主席、副主席、與黨團幹事（對基民／基社黨而言，還有法律顧問）組成，其在黨團理事會開會前，通常會預先商議重大問題，再召開黨團理事會會議，並向黨團理事會報告其

任務執行狀況 (Kretschmer, 1984: 104-105)。黨團理事會會議的內容特別有關於：(一)協商院會在該週議程內需處理的事項，舉凡聽取黨團工作小組或黨團工作群的報告與其建議的法律草案、協商法律的修正案、提名代表黨團立場的發言人、與討論有關黨團工作小組或黨團工作群建議的院會攻防措施，包括應付其他黨團大概會採取的言詞辯論；(二)詳細處理黨團的倡議，此乃法律的草擬、黨團的大質詢 (Groβe Anfrage) 與小質詢 (註6)、或提案；(三)擬訂長期政治倡議，並交付有關的黨團工作小組或黨團工群進行研辦；(四)討論與各別利益團体合作事項 (Kretschmer, 1984: 103)。

三、黨團工作小組或黨團工作群內部的運作

各政黨黨團基於專業化的原則，均成立聯邦眾院黨團工作小組或較低層級的黨團工作群，其目的主要在應付聯邦眾院委員會的立法工作，以便爲黨團預先塑造出基本政策方針。爲此，黨團工作小組或黨團工作群進一步設立黨團督導 (Obleute)，參與每一個委員會的工作 (Apel, 1970: 223-232; Kretschmer, 1984: 94-96) ，並且儘量說服其他黨團督導，以貫澈黨團工作小組或黨團工作群在委員會內的主張，故其地位不容忽視。基民／基社黨督導爲其黨團工作群主席下的副發言人，社民黨黨團督導通常是黨團工作小組的主席。

一般而言，黨團工作小組或黨團工作群當中，對政策意見作基本的討論與協商，經常持續數星期之久，其內容不外乎：一、提出立法草案，並且爲此廣泛蒐集與檢証民意的反應，甚至召開公聽會；二、塑造優先考慮與務必堅持的立法項目之共識，與可「討價還價」（bargaining）的範圍；三、研議如何應付反對黨提出質詢；四、研擬提案等(Kretschmer, 1984: 96-99)，甚至黨團工作小組或黨團工作群必須與聯邦或邦政府進行協商，以及與友好的利益團體或學界進行協商，以實現溝通式民主。如果黨團工作小組或黨團工作群裡獲得一致的看法，可交由其主席或其他數位發言人向黨團理事會提出報告，黨團理事會審訂其能否整合於黨團整個的政策架構之中。一旦黨團理事會批准，即以提案方式放入黨團大會的議程，尋求建立黨團內部的共識(Kretschmer, 1984: 98)。也就是黨團工作小組或黨團工作群的政策構想必然與黨團理事會以及黨團大會的政策構想一致。

此外，黨團工作小組或黨團工作群成員在參與委員會的工作上，根據聯邦眾院議事規則第五十四、五十五、與五十六條的規定，黨團依其在聯邦眾院議席比率參與委員會的工作，並決定其議員參與專門委員會與特別委員會。原則上，每名議員祇參加一個委員會，若欲參與其他委員會，該議員僅能當作副成員（stellvertretendes Mitglied），何況委員會審議時間是同時進行的，因此不易形成雙重委任的情形(Handschuh, 1985: 68-69)。再者，議員有興趣的委員會，通常不一定能夠如其所願地參加。一般而言，黨團安排議員參加外交委員會，是基於其在外交政策上的聲望；安排議員參加內政委員會，是基於其在公職的經驗；安排議員參加預算委員會，是基於其在財政的專業知識。由過去各政黨參加委員會的情形分析，基民／基社黨議員較偏向參加財政委員會、農業委員會、工作暨社會秩序委員會、以及國防委員會；社民黨議員較偏向參加工作暨社會秩序委員會、交通委員會、以及國土規劃、建築、暨城市公共建設委員會，而且社民黨議員對國防與農業問題的興趣不像基民／基社黨議員那麼強烈(Lohmar, 1975: 147-149)。

基本上，黨團工作群是黨團工作小組內較小的單位，其針對聯邦眾院專門委員會管轄領域，負責處理黨團工作小組分配的特定事項。實際上，此一單位僅有基民／基社黨設立，但是自從第九屆聯邦眾院以來，基民／基社黨就不再成立黨團工作小組，而使黨團工作群成爲自主單位，其他政黨像社民黨與自民黨則僅設有黨團工作小組(Ellwein, 1983: 250-252)，因此像最近具代表性的第十屆聯邦眾院基民／基社黨黨團工作群計有十七個，分別爲一、法律；二、經濟；三、內政、環境、暨運動；四、食品營養、農業、暨森林；五、交通；六、郵政暨通訊；七、國土規劃、建築、暨城市公共建築；八、財政；九、預算；十、工作暨社會秩序；十一、青年、家庭、暨健康；十二、外交政策；十三、國防；十四、德國政策暨柏林問題；十五、經濟合作；十六、研究暨科技；十七、教育暨科學。如此的基民／基社黨黨團工作群工作方針，大致上是配合聯邦政府與聯邦眾院委員會性質作區分的。社民黨黨團工作小組計有六個，分別爲一、經濟政策；二、社會政策；三、公共財政；四、法律制度；五、內政、教育、暨運動；六、外六與國防政策、德國內部關係、歐洲暨援外政策。自民黨黨團工作小組計有五個，分別爲一、經濟、財政、暨農業政策；二、工作、社會、暨健康政策；三、內政、暨法律政策；

四、教育暨科技；五、外交與國防政策、德國、歐洲、暨援外政策。綠黨黨團工作小組計有五個，分別爲一、經濟、財政、預算；二、婦女、暨社會事務；三、法律暨社會；四、和平、裁軍、暨國際事務；五、環境暨生態(Schäfer, 1982: 378-391)。

黨團工作小組（群）通常於會期中的星期二上午開會，黨團工作小組（群）主席在其中扮演關鍵性角色，他要關心其黨團工作小組（群）對聯邦眾院委員會的關係，甚至必須負起代表黨團主張的任務。基民／基社黨黨團工作群主席是由其黨團大會選出，此主席不但領導黨團工作群，並且爲其發言人，同時他是黨團理事會成員。社民黨黨團工作小組主席由其黨團大會選出，但是先由黨團理事會建議人選下選舉產生，他自從第十屆聯邦眾院以來，同時是黨團副主席。至於自民黨黨團工作小組主席由其成員直接選出(Kretschmer, 1984: 94-96)。

肆、政府黨團扮演的角色

當一個黨團掌握聯邦眾院絕對多數議席，便可以單獨組織內閣，此政府黨團主席基於是聯邦眾院多數的領導人，擁有強大的地位，可以主導選舉總理與任命部長，而且其黨團成員有機會被徵召入閣。由於總理當選人會與其黨內高層人士協商訂出施政綱領（Regierungsprogramm），因此政府中的黨團成員成爲政府黨團與政府之間的聯繫者(Hauenschild, 1968: 131-136)。若不是單一政黨獲得絕對多數聯邦眾院議席，便需要與其他的聯邦眾院政黨共同組織聯合政府(Koalition)(Ellwein, 1983: 256),而且一般情形在聯邦眾院選舉之前，主要政黨之間爲此通常會先協商達成聯合內閣協定（Koalitions-abkommen）(Busch and Berger, 1989: 120-122)。根據統計得知，德國第一屆聯邦眾院至今均是由多黨組成聯合政府，出現最多政黨組閣者是第二屆聯邦眾院的聯合內閣，計有基民／基社黨、自民黨、難民黨(BHE)、德意志黨(DP)、與一位無黨籍議員，不過六〇年代以來，大致上由基民／基社黨或社民黨配合自民黨共同組織內閣。

一旦多黨聯合內閣形成，參與組閣的政府黨團爲了確保繼續持政，不但需要關切民意走向，導引其支持內閣施政，而且政府黨團之間更需密切地與

內閣合作。在選民的眼光中，塑造政府黨團與內閣之間團結一致的形象，最大的政府黨團主席對此責任重大，他肩負促成多黨內閣未來一致的政治行爲之任務。有關多黨聯合內閣的運作，基本上在政府建立初期，已經確立未來聯邦眾院會期間政府黨團與內閣互動摸式。有時候政府黨團是內閣履行施政責任的助手，像基民／基社黨黨團在艾德諾內閣時代，尤其是一九五三年至一九六一年(Lohmar, 1975: 150-153)；有時候內閣是政府黨團履行施政責任的助手，像基民／基社黨與社民黨的大聯合內閣(Gro βe Koalition)時代，以一九六六年由總理、副總理、以及政府黨團主席組成的「克雷斯勃隆小組」（Der Kressbronner Kreis）爲真正的領導團體，對於政府部會政務與政府黨團工作小組（群）研擬的事務作密切的協商，最後確定大聯合內閣的基本政策方針(Knorr, 1975: 20-30)。「克雷斯勃隆小組」的決議對大聯合內閣具有約束力，因此顯然侵犯到總理一般大政方針（Richtlinien-Kompetenz）的職權。換言之，大聯合內閣時代，政府黨團主席獲得優勢地位，季辛吉（Kiesinger）總理與布朗特（Brandt）副總理的施政，若沒有基民／基社黨黨團主席巴色爾（Barzel）與社民黨黨團主席施密特（Schmidt）的參與，是不具有行動能力的。

然而，一般而言內閣在面對聯邦眾院時，基於行政領導文官體系的道理，掌握較爲優越的施政地位，而政府黨團祇能借助其入閣成員獲得施政走向的資料，因此政府黨團可能是內閣的「夥伴」、「佣人」或「禁衛軍」，亦即政府黨團對內閣施政的影響力，完全取決於政府黨團的大小(Busch and Berger, 1989: 120-122)。

由於內閣在立法過程中依賴聯邦眾院的支持，內閣通常會先與政府黨團進行協商，再面對聯邦眾院，有時它也會適當地配合政府黨團的要求，作法上經常是透過其政府黨團主席向整個黨團說明施政內容，以及與政府黨團交換意見，甚至邀請政府黨團主席參與內閣會議(Busch and Berger, 1989: 120-122)。當內閣與政府黨團獲致政策共識之後，政府黨團成員在擁有充分資訊之下，便得以在聯邦眾院院會與委員會中利用國會議員的權利，給予自己的內閣更多闡述施政理由的機會，甚至有意識地替內閣政策作辯護。

尤其是德國多黨聯合內閣中，政府黨團之間的施政走向務必彼此認同，否則亟易拆夥。爲此，參與內閣的政府黨團爲確保施政目標的實現，均會共

同簽訂聯合內閣協議（Koalitionsvereinbarungen），以便促成政策合法化過程中聯邦眾院的多數順利形成。德國建國初期此聯合內閣協議都儘可能密秘進行，而無法公開，但是六十年代以來，多黨聯合內閣願意公開協議，而且大眾傳播媒體也樂於加以披露，有助於多黨聯合內閣完成的施政獲得公開的肯定(Busch and Berger, 1989: 120-122)。

祇不過聯合內閣協議不可能詳細規定施政內容，政府黨團之間出現對政治問題不同的意見，應是十分正常的現象，然而政府黨團爲解決彼此間若干爭議，常會借助分期履行的協定（Stillhalteabkommen），或者求助聯合政府協調會（Koalitionsgesprache），以期在無法全然貫徹自己主張下，也能夠促成共同政治目標的實現(Kretschmer, 1984: 94-96)，譬如第十屆聯邦眾院以來，科爾總理經常利用星期一召開黨團主席、政府黨團幹事、以及執政黨內部高層人士的聯合政府協調會，謀求達成共同行動綱領（Handlungsprogramm），解決內閣中政黨之間存在的重大爭議。

伍、黨團團結的形成

當政黨候選人當選爲聯邦眾院成員，政黨無法因故開除他，也無法對他下達約束性指令，議員完全以國家的整體利益爲考量重點，這種自由委任（das freie Mandat）的內涵，透過基本法（憲法）第三十八條獲得確保，該條文稱「議員是全體人民的代表，不受委託與指令，祇服從自己的良心。」因此，聯邦眾院議員基本上有其極爲自由的議事空間。不過，在德國聯邦眾院的議事規則僅供給黨團重大的國會權，形成黨團擁有優於個別議員的地位，而成爲主導聯邦眾院日常活動者，黨團的權利其實就是國會控制權(Thaysen, 1976: 70; Ellwein, 1983: 253-254)。在聯邦眾院內，以聯邦眾院議長而言，黨團提出議長候選人，而且通常最大黨團的候選人當選；以議員參與委員會而言，黨團依其勢力大小，就分配到的名額指派參與委員會人選，通常派遣至少一名議員至各委員會 (註7)，包括專案研究委員會（Enquete-Kommission）；委員會主席人選亦依黨團勢力大小爭取當選 (註8)。

在聯邦眾院提議權上，以立法草案與提案而言，黨團簽署立法草案之後，才能夠向聯邦眾院提出，並列入議程，至於議員提案亦需獲得黨團支持才能

成立，否則便需要獲得聯邦眾院議員達百分之五的連署始能成立。在聯邦眾院監政權上，以質詢而言，除了一般口頭質詢之外，黨團可以於院會中向政府提出有關政治論爭的大質詢與探尋特定領域的小質詢，而且黨團可以在一般口頭質詢結束後提出「當前議題時間」(Aktuelle Stunde），要求政府予以答覆(Thaysen, 1976: 70; Ellwein, 1983: 253-254)。

德國聯德邦眾院既然由黨團主導其運作，而且一切聯邦眾院的決議需要獲得多數議員的同意，因此黨團成員形成一致的意志便顯得重要。基本上，黨團不會壓制個別議員，議員能夠在黨團大會上對於立法措施、政治方針、以及議事活動等，自由的與開放的討論，以及充分協商各種意見。由於黨團成員勇於表達自己的政治看法，如此凝聚出的黨團意志，對於有異議的黨團成員而言，比較不致於對外堅持己見，反而能表現出黨團之間緊密的結合，發揮黨團在聯邦眾院的影響力。

萬一有黨團成員對於重大問題不配合黨團決議，黨團可以取消他的黨團資格，或要求該議員退出委員會，改換其他黨團成員參加。議員本身亦會考慮他在黨團的表決行爲受到媒體報導後，地方黨部或許不再提名他參選，何況選民對他的期待是實踐其政黨的訴求。不過，議員仍可以基於自由委任的精神，宣佈退出黨團，甚至加入其他黨團(Thaysen, 1976: 71-73)。第一屆聯邦眾院計有二十九名議員，第二屆聯邦眾院有二名議員，但是自從第四屆聯邦眾院以來，最多祇有一名議員（第九屆聯邦眾院較爲例外，有七名議員）退出黨團；至於加入其他黨團者，第一屆聯邦眾院有十八名議員，第二屆聯邦眾院有十一名議員但是自從第七屆聯邦眾院以來就不再發生此種現象了。

陸、結論

德國聯邦眾院議員的活動中，務必經常關切三大對象。第一是政黨，因爲政黨的地方黨部決定議員能否再度被提名競選，以及在政黨名單上的名次(Listenplätze）；第二是黨團，因爲黨團決定個別議員在聯邦眾院的工作範疇與扮演的角色；第三才是國會，議員因著獲得聯邦眾院較重要的任務，而有機會增加其在聯邦眾院內外的聲譽（Ellwein, 1983: 240）。其中，雖然各政黨均秉持議員是自由委任的精神，而形式上不約束結合議員的黨團在聯

邦眾院的行爲，但是政黨與黨團基於相同的政治信念與目標，政黨的政治理念又有待黨團促使實現，因而會形成政黨與黨團領導人士一致的「內造政黨」形態，此種「內造政黨」形態在德國由主導國會運作的黨團表現，實在具有十分獨特的性質。一般而言，英國內閣制下的平民院，執政的多數與反對黨明顯地對峙，反對黨並不與內閣分享重大決策的機會，爲此不斷運用院會對法案進行辯論，而不重視委員會專業的立法工作，如此的國會形態可謂是「論壇國會」（Redeparlament）。反觀德國聯邦眾院亦爲內閣制之一，但是黨團卻決定國會的運作，呈現出與英國亟爲不同的「工作國會」（Arbeitsparlament）風貌。

德國聯邦眾院黨團地位的凸顯，其實源自聯邦眾院議事規則的規定，尤其是經過一九六九年「小型國會改革」與一九八0年修訂議事規則，聯邦眾院的組織與工作方式授與黨團在立法過程的優先權利，因此聯邦眾院發展成「黨團國會」（Fraktionenparlament） 的型態，黨團在聯邦眾院即使面對來自政黨不適當的強制性要求，亦能夠保持相當自主性，全然主導聯邦眾院的決策過程。此外黨團內部有健全的分工，強化議員的專業知識與權威，並且促成職業政治家（Berufspolitiker）的抬頭，執政多數與反對黨經常在委員會內即能對有爭議性的法案達成協商成果，就此反對黨黨團某種程度亦獲得共同決策的機會。

註　釋

註 1：一九七六年第八屆聯邦眾院開議前，若干基社黨議員曾經自行於Kreuth一地做成決議，有意脫離基民黨，另組黨團擴大政治影響力，幸好在聯邦眾院開議前及時由基民黨與基社黨一起通知議長將依照議事規則共同成立黨團，才解除所謂的Kreuth決議文的效力。見Helmut Schnellknecht (hrsg.)，Wegweiser Parlament, Bonn 1986, S. 273.

註 2：Bundesverfassungsgesetz 20, 56, 104f.

註 3：可能有無黨籍的選區候選人當選聯邦眾院議員，或黨籍議員不參加黨團，甚至黨籍議員離開黨團的情形，但是這算是例外，且其影響力低，像第十屆聯邦眾院無黨團歸屬的議員才三名。

註 4：二個聯邦眾院黨團均有黨團幹事，其中基民／基社黨黨團工作綱領祇

規定主席建議黨團幹事人選供選舉參考；社民黨黨團議事規則規定黨團理事會負責分配任務，像與其他政黨協調推動議事工作，安排與聯邦眾院以外人士接觸的管道等；自民黨黨團議事規則並沒有提及黨團幹事的任務。其實，各黨團的黨團幹事均有各自對主席與黨團理事會負責的工作項目，不過依照 F. Schäfer的看法，當前黨團幹事最重要的工作是，(一)代表黨團內部工作的形像、(二) 檢視黨團提出的草案與提案的合憲性、(三)在聯邦眾院資深委員會代表黨團、以及(四)與邦眾院保持接觸。Friedrich Schafer, Der Bundestag-eine Darstellung seiner Aufgaben und seiner Arbeitsweise, Opladen 1982, S. 144.

註 5：此即包括所有基社黨議員團体，其通常於星期日晚上開會，主要目的在協調並強化基社黨在基民／基社黨黨團內一致運作的力量。見 Gerald Kretschmer, Fraktionen-Parteien in Parlament, Heidelberg 1984, S. 101.

註 6：大質詢需有符合黨團最低人數的連署方得提出，通常針對聯邦政府整體的行爲、計劃、或疏忽加以質詢，而小質詢亦復如此，祇不過它通常針對聯邦政府各別的具體行爲、計劃、或疏忽加以質詢。見前揭書。

註 7：第十二屆聯邦眾院內，有新進的民社黨（PDS)八名議員與聯盟九十／綠黨（Bündnis 90／Grünen）十七名議員，亦分別參與各委員會。

註 8：通常委員會主席與副主席不屬於同一黨團，又財政委員會主席由反對黨黨團指定人選，最大的黨團提出資深委員會（Ältestenrat）主席人選。見 Gerald Kretschmer, Fraktionen, in: Eckart Busch/ Ekkehard Handschuh/Gerald Kretschmer/ Wolfgang Zeh (hrsg.), Wegweiser Parlament, Bonn 1990, S. 241-246.

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國會議員的政治立場與其立法參與
—以兩岸條例爲例

施正鋒

Legislator's Political Stand and His Participation in Law-making

by
Cheng-Feng Shih*

摘 要

我們以兩岸條例的立法過程來作個案研究，探討國會議員本身的政治立場，是否會影響其在委員會及院會上的出席及發言。

我們發現，當議員對於「台灣主體」有強烈好惡者，傾向熱衷參與委員會上的審查。

Key words：legislator、law-making、congress-watch、political stand.
關鍵詞：國會議員、立法、監督國會、政治立場。

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* 淡江大學公共行政學系副教授兼系主任

壹、緒　論

「國會監督」與「監督國會」是截然不同的東西。前者指的是國會對於行政部門在政策實行過程加以監督，看其是否稱職，所以這是國會的諸多職責之一。後者指的是國會外面的行爲者對於國會的考核，看它對於選民對託付的各種職責是否盡力了，比如立法、監督行政、代表民意、以及服務選區等等。

監督國會的努力可以說始於美國。在1960、70年代之間，出現了一種特殊的利益團體叫作「公共利益團體」，比如Common Cause與Nader's Raider（Mcfarland, 1984），它們扮演的是近似於消費者的看門犬角色，對於政府在政策制定與執行的表現加以監督與評估。它們具體的作法是收集相關資料並公開給一般大眾，以期擴大選民對該公共議題的注目。

除此外，一般利益團體也重視相關政策的制定，以便適切地對行政或立法部門施加壓力，比如「美國勞工聯盟暨工業組織會議」（American Federation of Labor and Congress of Industrial Orgnizations ，簡稱AFL-CIO）對於美國經濟政策與貿易政策的高度關切。而民主、共和兩黨的智庫，「布魯金斯研究所」（Brookings Institute） 與「美國企業研究所」（American Enterprise Institute）對於政策規則、制定、執行、與評估也相當關注，以期提供建言。

我們所謂的監督國會，指的是對於立法院的監督。「新時代基金會」曾經對於增額立委的問政表現加以評估，出版了《立法院擂台》一書。澄社與國會觀察基金會也在1992年二屆立委選舉之前，大量公佈立委的問政行爲。他們的目標是相當的清楚（註1），希望透過大眾傳播媒體對於這些評估的報導，影響選民的投票抉擇；也有主持者因此被當事人告訴。

所謂「向選民負責」（accountability），是指國會議員能反應選民的意願，而最簡便的衡量方式是看他是否能獲得連任；在這裏有一個前提必須成立，即選民有充分的資訊作判斷，但是，這是選民最欠缺的。提供資訊給選民，公開委員的政策態度與問政表現，使選民有能力節制委員，是防止委員出現選前與選後言行不一的不二法門。

在下面的章節裏，我們將先要考察文獻，檢討各種研究國會的可能概念

架構（conceptual framework），找出比較適切的一種，以引導我們的評估與研究的安排。我們先要描述評估委員參與法案審查的熱心程度，著重點將在其出席與發言的情況。其次我們將檢視是什麼因素決定其前述行爲：我們要探討的是政治立場（或意識型態），也就是對兩岸關係的定位；資料來自我們對委員發言所作的內容分析。

貳、文獻回顧

在美國，政治學者對於國會的研究是在二次戰後的事。由於他們只針對特定議題作深入探討，比如國會選舉與議員的點名投票行爲（roll-call）,因此難免見樹不見林，所獲的頂多匯集成「中程理論」（middle-range theory）而已。對於議員的行爲動機、委員會的行爲與動機、以及政黨的影響等等諸多現象，則有待加強研究。這種發展的原因在國會內部的非正式溝通無法觀察，也未見形諸文字、或載於記錄，而傳聞又不能當證據。在此種資訊不利的情況下，學者無從得之到底誰對誰說了那些話，又造成了什麼樣的影響，因此無法成就所謂的「總括理論」（grand theory）（Rieselbach, 1983）。

在英國，議會的研究被視爲荒瘠的科目，只停留在對國會的組織結構與過程的描述，也就是採取傳統的法律制度（legal-institutional） 研究方式，缺乏對國會議員的行爲作描述、分析比較與解釋，更談不上作假設檢定與理論構築（Norton, 1986）。

台灣的國會研究還處於發芽的階段，除了選舉的研究外，對於國會本身的研究很少（註2），連起碼的法律制度與過程的描述都缺乏，更不用說對於議員行爲的記錄與歸納。比如委員的人口統計資料爲何（註3）？他們在委員會或院會上的投票行爲爲何？由於基本資料的描述沒有，也就談不上進一步的解釋，更不用說理論的構築與知識的累積與進步。在過去，由於增額委員只佔極少數，大多數委員不用改選卻又支配著「萬年國會」，因此學者對於國會的忽視是可以理解的。但自從老立委全部退職以及二屆立委在1992年底選出，國會的角色丕變。由於當前的憲政體制未確定，我們不敢斷言國會將是政治體系中的核心，但至少將與行政部門以及政黨相互倚重，因此值得我們加以關照。而我們希望能把本研究作爲一個墊階石（building block）。

Clem（1989: pp. 247-52）認爲在評估國會時，可從五個方向著手：（一）國會議員的行爲與素質；（二）憲法賦予國會的權力；（三）內部結構，比如單或雙院制、黨團或者常設委員會；（四）立法過程是否民主、有效率、快速以及周全；（五）政策的實質內容是否合乎國家或政府的目標。這其中，他以爲四、五項最重要，也就是要透過立法的數目與內容來判斷國會的決策過程是否有效果（effectiveness）。

他所提供的這份清單，大致把國會的重要層面都條列出來了，問題是這些層面的相對關係如何並不清楚。此外，他似乎暗示立法是國會最重要的功能（或職責），然而，事實並不盡然如此。一般來說，學者認爲國會的初級功能不外代表民意、立法、監督行政、教育大眾、以及服務選民（Vogler, 1984: pp. 10-19 ; Rouder, 1977: pp. 186-200; Clem, 1989: pp. 251-52）。當然，也有學者進一步把這些功能加以歸納或衍伸，因此有合法化、建立共識、政策澄清、調解衝突等級層較高的主要功能（Loewenberg and Patterson, 1979; Davidson et al., 1982），此外，國會亦有領袖甄拔、任命官員、或修憲等次要功能。

大體而言，學者都會同意，國會的傳統功能是立法，但是由於政策的內容往往決定於內閣、政黨、或官僚體系，所以就形式來說，國會最基本的功能是政策的合法化。在實質上，我們毋寧說國會是一個論壇或競技場，用來表達不同的政治立場。此時，國會起碼可以充當政治安全活門，給于異議份子發洩的機會；從積極面來看，這樣的國會起碼可用來調解不同政黨、利益、價值觀、或意識型態之間的衝突，甚至進而建立共識。

至於那一個功能比較重要，Davidson等人（1982）提出三套理論來說明美國國會應該扮演的角色。（一）相互制衡理論——強調憲政上的三權分立對國會與行政部門的安排，主張國會限制行政部門的立法。（二）行政力量理論——由行政部門提出法案並加以執行，國會只不過稍作修飾並加以核准。（三）黨政政府理論——行政部門透過政黨來支配立法部門。在不同的模式下，國會的功能便有所不同。在相互制衡模式裏，國會的功能有立法、代表、建立共識、以及監督行政；在行政力量模式裏，國會的主要功能是合法化、監督行政、及代表；而在政黨政府模式下，國會的主要功能只剩政策澄清與代表。Riesebach（1982） 加了第四種，即國會至上模型，視國會爲國務的

主要推動者。也就是說，在不同的模式下，國會應該扮演的角色不同。

在這個研究裏，我們只著重立法院的立法功能，但並非因爲因爲相互制衡理論或麥迪遜模式在規範上的優越性，而是在國會的諸多初級功能裏，代表民意、監督行政、教育大眾、或服務選民等較難有普遍性的標準，而且觀察困難，爭議性也較多；相對於立法過程的觀察，較無上述困難或爭議，而且也合乎一般人對「立法委員」名正言順的期待。此外，就分析的切入級層來看，立法的功能比其他功能（監督行政以外），更能表現出個人與政治體系之間的互動，如此一來，才能避免光重視立委個人的目標與認知、或不可透視的國會整體，所可能產生的疏失與缺憾。

當然，這種選擇必定對某些立委造成不公，比如花絕大部份時間與心血在服務選民者，或者竭盡心力在挖糞方式進行監督行政者（尤其是葉菊蘭委員）。甚至有立委根本不以「兩岸條例」爲然，比如陳定南委員，他的出發點是「台、中關係」爲兩國關係，不值得特別立法，因此他自始就不願參加審察（註4）。對於他們，我們並無規範上的臧否，因爲這是選民的權利與責任，而我們只提供資訊而已。

參、法案審查的參與程度

首先，我們來觀察委員們參與聯席委員會的程度，亦即我們的應變數，這可以分爲出席與發言兩部分來看。在出席方面，我們的評估方式是這樣子的：任何委員只要出席或列席了聯席會一次（註5），不管他是否爲內政、司法、或法制委員會的成員（註6），我們就給予一分；相反的，如果該委員是這三個委員會之一的當然成員，他就有義務出席聯席委員會的審查，所以凡是缺席一次即扣一分。由於兩岸條例前後經歷了18次聯席委員會會議，委員可以獲得的最高分數是18分，最低分是負18分。

值得提出來討論的是在得分方面，我們並未刻意區分出席與列席。從正面來看，我們或許可說，一個非聯席委員會成員能抽空列席，誠屬難能可貴，因此，應該可以獲得較高分數的鼓勵。然而，如此一來，反倒是會鼓勵委員列席所不屬的委員會議，荒廢自己應該專注的所屬委員會；此外，依此方式，假若聯席會的當然委員與列席委員都是全程參加，則後者得分勢必較高，則

對專心審查的當然委員必然不公。即使這兩個問題都可被合理解決而不引起爭議，我們對於權數到底要多少也難有定論，所以我們決定給予相等的分數。

一、委員會的出席

根據表1 ，我們可以看到出（列）席委員會的前19名（21人）（以下的討論只含增額立委）。出席記錄最好的有三人，陳水扁、李友吉與黃主文，各得16分；其中陳水扁不屬聯席委員會，卻特地出席了16次，顯示他的高度關心；李友吉與黃主文皆爲當然委員，雖然出席了17次，但因各缺席1次，被扣1 分，因此得分與陳水扁相同。

表1 ：委員會出席記錄（前19名）

姓名	總分	名次	姓名	總分	名次
陳水扁	16	1	李慶雄	12	11
李友吉	16	1	葛雨琴	12	11
黃主文	16	1	周　荃	11	14
黃興邦	15	4	林正杰	11	14
蔡奮鬥	15	4	曾芙美	11	14
朱鳳芝	14	6	丁守中	11	14
李勝峰	14	6	王令麟	11	14
林鈺祥	14	6	吳　梓	10	19
陳癸淼	14	6	黃正一	10	19
劉興善	13	10	羅傳進	10	19
李宗仁	12	11			

在這21人當中，有8 人是列席者，分別是陳水扁、蔡奮鬥、陳癸淼、周荃、丁守中、王令麟、黃正一與羅傳進，表示他們對兩岸條例的重視。在這些人裏頭，只有2 位民進黨黨員，即陳水扁與李慶雄，無黨籍有林正杰、蔡奮鬥與王令麟3 人，其餘都是國民黨；在在國民黨16人當中，集思會成員就佔了7 名，新國民黨連線4 名。相較起來，民進黨籍立委就顯得沒有那

麼熱衷出席。

根據表2 ，我們可以看到出席聯席委員會排行倒數9 名，這些委員所得總分皆爲負數，原因在他們在四個會期當中，至少有一次爲聯席會的當然成員，因此缺席次數越多，被扣分數越多。田在庭在四次會期內爲聯席會當然成員，卻從未出席過會議，因此被扣了18分；魏耀乾、楊敏盛與謝深山亦是當然成員，但只出席2 次到4 次，因此分別居排行倒數2 與4 名；戴振耀、趙少康、王天競與葉菊蘭於兩個會期爲當然委員，但是出席情況不佳而被扣多分，抵銷他們出席所得分數；洪玉欽與莊金生在一個會期爲當然委員，只出席一二次。令人吃驚的是在這9 人當中，民進黨竟佔了4 名（44%），超過該黨在增額立委中所佔的比例（14%）。

表2 ：委員會出席排行（後 9名）

姓名	總分	名次	姓名	總分	名次
田再庭	-18	1	趙少康	-4	6
楊敏盛	-14	2	王天競	-4	6
魏耀乾	-14	2	洪玉欽	-3	8
謝深山	-10	4	莊金生	-2	9
戴振耀	-8	5	葉菊蘭	-2	9

爲了更清楚看出委員所屬政黨不同，是否會在聯席會議的出席率有所差別，我們把委員所得出席分數依據政黨來分別加總，除以各黨委員人數，再除以18（聯席委員會所開會議次數），其結果整理在表3 。我們發現無黨籍與國民黨籍委員的出席情況（分別是28%與26%），稍比總平均高（24%）；而民進黨委員的出席率（8 %）卻遠低於總平均。在這裡，出席率數字普遍較低，主因是我們使用各黨委員的數目當商數，而非使用各黨在聯席委員會當然成員數目，我們的主要假設是每個委員都有機會去參與聯席會的審查，即使他並非當然成員。

表3 ：各政黨於委員會出席情況

	民進黨	無黨籍	社民黨	青年黨	國民黨	總數
所得分數	25	66	0	5	437	533
黨員人數	17	13	1	1	93	125
平均數	1.5	5.1	0	5	4.7	4.26
出席率	8%	28%	0	28%	26%	24%

二、委員會上的發言

其次，我們要觀察委員在聯席委員會的發言情況。根據表4 ，我們可以看到發言次數的前20名，其中民進黨委員佔了6名，無黨籍3 名，國民黨11名。

表4 ：委員會發言排行（前20名）

姓名	次數	名次	姓名	次數	名次
*劉興善	539	1	李勝峰	105	11
李慶雄	483	2	吳　梓	89	12
陳水扁	426	3	王志雄	79	13
*李宗仁	305	4	彭百顯	54	14
*張俊雄	263	5	蔡璧煌	50	15
*黃主文	176	6	謝長廷	40	16
林鈺祥	171	7	蔡勝邦	30	17
林正杰	167	8	周　荃	28	18
盧修一	133	9	黃明和	23	19
丁守中	109	10	林國龍	21	20

註：有*者爲主席

我們若將此表與表1 相較，可發現發言與出席情況並無絕對相關，比如

民進黨委員在出席前19名當中只佔了兩名，在發言前20名中卻佔有6 名，亦即除了李慶雄與陳水扁在出席與發言都出線外，張俊雄、盧修一、彭百顯與謝長廷的發言較頻。又如在無黨籍方面，除了林正杰無論出席與發言都排上名，蔡奮鬥雖列席多次，卻只發言11次，而王令麟雖也多次列席，但從不發言；相反的，蔡勝邦與黃明和雖然分別只列席了5 次與8 次，卻發言踴躍。

在國民黨方面，我們發現出現在表1 的委員也大致出現在表4 ，換句話說，會去出席或列席聯席會議者，其發言的傾向也較大。當然，國民黨委員發言次數偏高，其中有一個原因是在其中4 個會期裏，有3 次是由國民黨籍委員當主席：86會期黃主文，87會期李宗仁，89會期劉興善（88會期由民進黨籍張俊雄當主席）。

在這20人當中，集思會佔了8 名，新國民黨連線只有2 名。與發言情況相較，新國民黨連線委員李勝峰與周荃在兩方面都入榜，朱鳳芝與葛雨琴因爲是當然委員而勤於出席，但是發言並不多。集思會委員則有4 名同時在出席與發言方面上榜。

我們若把各委員的發言次數根據政黨相加總，再除以各黨發言平均數，，其結果報告於表5 。我們可以發現民進黨的平均發言次數（79），遠大於總平均數（23），而無黨籍（18）與國民黨籍（14）則低於平均數。可見民進黨籍委員在席委員會的發言情況優於出席或列席情形。

表5：各政黨於委員會發言情況

	民進黨	無黨籍	社民黨	青年黨	國民黨	總數
發言次數	1348	232	1	0	1291	2872
黨員人數	17	13	1	1	93	125
平均數	79	78	1	0	14	23

由委員會發言的情形來看，集思會與民進黨作了相當的主導。在18次會議中，集思會主持8 次（黃主文主持86會期6 次會議中的5 次，其中一次由李宗仁代替），民進黨主持4 次，佔的三分之二。由表4 也可看出發言

前20名當中，集思會與民進黨委員共有14人上榜，佔了70%。假若我們剃除擔任主席者，只取發言排行的前十名（見表6 ），兩股勢力仍佔了70%。

表6 ：委員會發言記錄（前 10 名，不含主席）

姓名	次數	名次	姓名	次數	名次
李慶雄	483	1	丁守中	109	6
陳水扁	426	2	李勝峰	105	7
林鈺祥	171	3	吳　梓	89	8
林正杰	167	4	王志雄	79	9
盧修一	133	5	彭百顯	54	10

三、院會的出席

再來，我們要觀察委員在院會的出席情況。在這4 個會期裏，總共有6次院會是在審查兩岸條例（86會期與89會期各3 次），我們的評分方式是每次出席均可得一分，缺席或請假者扣一分，所以最高可獲得6 分，最低者負6 分。根據表7 ，我們可以看出增額立委裏，出席排行的倒數10名。

表7 ：院會出席排行（最後10名）

姓名	總分	名次	姓名	總分	名次
張立明	-6	1	薛國樑	-2	5
陳湧源	-6	1	王世雄	0	10
林　空	-3	3	林國龍	0	10
陳耀南	-3	3	林錫山	0	10
馬國祥	-2	5	莫翔興	0	10
高資敏	-2	5	黃天生	0	10
許禎祥	-2	5	蔡文曲	0	10
陳定南	-2	5	蔡奮鬥	0	10

在這些人當中，張立明與陳湧源是沒有參加過院會，故得負6 分；林空與陳耀南只參加過1 次，各得負4 分；馬國祥等5 人只參加2 次，得到負2 分；王世雄等6 人出席與缺席各半，故得0 分。

我們注意到在這16人當中，僑選委員竟佔了10名之多，達63％。若依據委員所屬黨籍來看，國民黨8 名，無黨籍6 人，民進黨則有2 人（陳定南與黃天生）。蔡奮鬥在院會的出席情況不佳，但是卻熱衷參與委員會審查。

我們進一步把委員的出席分數依據黨籍來加總，除以各黨委員人數，再除以院會次數（6） ，可算出各黨的出席率，這些結果報告於表8 ，其中民進黨與國民黨的出席率稍高於總平均（67％），分別是76％與72％，無黨籍的3 ％則遠低於總平均。

表8 ：各政黨於院會出席情況

	民進黨	無黨籍	社民黨	青年黨	國民黨	總數
所得分數	78	10	4	6	402	500
黨員人數	17	13	1	1	93	125
平均數	4.6	0.8	4	6	4.3	4
出席率	76%	3%	67%	100%	72%	67%

我們如果把表8 與表3 互相對照來看，國民黨偏離總平均的情況（或是趨近於平均的情形），在委員會與院會之間的變化並不大；相對的，民進黨與無黨籍委員出席委員會與院會的變化相當大。明顯的是民進黨委員比一般委員稍重視院會，卻是相對的比較不重視委員會。無黨籍委員則比一般委員稍重視委員會，卻大大不重視院會的出席。

四、院會的發言

最後，我們要觀察委員在院會的發言情況。根據表9 ，我們可以看到發言次數最多的前10名。在11名委員之中，民進黨委員有7 人，集思會3 人，佔了91％，這個模式與委員會發言情況相仿，都是由兩者作主導。而新國民黨連線委員無一人上榜，發言的次數相對上不如委員會時，無黨籍亦然。

我們若比較表 9 與表 5 ，發現洪奇昌、鄭余鎮與戴振耀三人雖然再委員會上之參與不突出，在院會的發言卻相當頻繁。

表9 ：院會發言排行（前 10 名）

姓名	次數	名次	姓名	次數	名次
李慶雄	29	1	戴振耀	7	6
洪奇昌	16	2	吳　梓	6	8
劉興善	10	3	盧修一	6	8
陳水扁	8	4	李宗仁	5	10
鄭余鎮	8	4	彭百顯	5	10
黃主文	7	6			

爲了要更清楚看出委員所屬政黨不同，是否在院會上發言次數有所差別，我們把委員的發言次數依據黨籍分別加總，再除以各黨委員人數，可得各黨發言平均數，結果如表10所示。民進黨委員的平均發言次數（5.4 ），遠大於總平均數（1.2 ）；國民黨的平均數與無黨籍的平均數（皆爲0.5 ）不及總平均數的一半。我們把表10與表5 相互對照，發現國民黨與無黨籍委員在院會的發言不只比總平均低，且比委員會還低20到30個百分點左右；民進黨委員的院會發言次數不只是比總平均高4.5 倍，並且比委員會時的倍數還要高於100 個百分點。可見民進黨立委不只重視發言甚於出席，而且重視院會甚於委員會發言。

表10：各政黨於院會發言情況

	民進黨	無黨籍	社民黨	青年黨	國民黨	總數
發言次數	91	6	1	0	50	148
黨員人數	17	13	1	1	93	125
平均數	5.4	0.5	1	0	0.5	1.2

在18次聯席委員會裏，民進黨立委的出席率遠低於無黨籍與國民黨立委，但前者的發言率遠高於後者。在6 次院會裏，民進黨與國民黨立委的出席率略高於總平均，且民進黨立委的發言次數遠高於國民黨與無黨籍。可是民進黨立委比較重視院會甚於委員會，重視發言甚於出席，亦即他們一旦有心要發言，即有備而來，集中火力發言。若以發言成員來看，國民黨集思會與一些民進黨立委作了相當的主導。

肆、政治立場

委員對於兩岸關係的定位，是否會影響其參與兩岸條例審查的熱衷程度？要回答這個問題，我們必須先找出其立場爲何。當然，選民對於他們選出的委員所持立場爲何興趣。只不過，我們並不作價值判斷；選民必須自己決定委員的立場是否合乎其意願。

一、內容分析法

我們使用的方法是內容分析(content analysis)，以委員在18次委員會與6次院會中的發言作分析，完全根據《立法院公報》所公佈的內容爲準；至於委員在其他場所作的相關發言，比如報紙或雜誌所作的報導，則不計算在內（註7）。值得一提，我們所觀察的是母體本身(universe)，而非樣本(sample)。

首先，我們必須決定分析單位(unit of analysis)，一般可用的分析單位有字、詞、句子、段落、整篇文章、或語幹(theme) ；在這裏，根據《立法院公報》安排的方式，也可以把每一次發言當作分析單位。我們排除使用段落、文章或每次發言當分析單位，主因在恐怕委員含有過多資訊，進而影響登錄的可信度，比如有複數的類目(category)，因此無法決定其類目的賦予；此外，委員的發言有長有短，若視爲等同，可能會掩蓋對某類目所表現的強度。

我們也考慮到或許句子是個適當的分析單位，然而中文的句子不似英文句子的定義清楚。就英文來說，一個句子是否完整可由文法來判斷；最簡單的方法就是看是否以句點(period)作結尾。但是在中文裏，標準符號在文法上的意義並不太重要，其功能主要在作停頓換氣，因此相同的字詞排列，不

同人可能會有不同的斷句方式；在這裏，斷句則決定於《立法院公報》的記錄者，也會因人而異。

我們最後決定採用關鍵詞(phrase)當分析。我們之所以不採用字(word)，是因爲中文不像英文的字有其獨立意思，往往必須與其他字搭配成詞，才能表現其真正意義。我們除了找出關鍵詞外，還要決定這個詞如何被使用，以免所得的爲假象的頻率計算。要達成這個目標，我們把包含某關鍵詞的句子整個摘錄，把關鍵詞加以標示出來，再來判斷它的用法是肯定的、否定的、或中性的。

我們總共要觀察4 個類目：台灣優先、反對台灣優先、統一與整合、反統一或整合；這4 個類目恰好成爲兩個配對。我們在計算關鍵詞出現的頻率時，只計肯定或否定的用法；比如「條文歧視大陸同胞」關鍵詞用來衡量「反對台灣優先」這個類目，而「並未歧視大陸同胞」則用來衡量「台灣優先」這個類目。一般而言，委員以否定的方式使用關鍵詞的情況較少。當委員使用委婉的方式來陳述某關鍵詞，比如「所謂」或「云云」，或「到底有多少人支持你們基於台灣安全的說法」，我們視之爲否定的用法。

關鍵詞的中性使用並不計算在頻率裏。但是比較引起爭議的是，在何種情況下叫中性使用？基本上，凡是引述條文或是他人的立場，都算是中性；但是若出現在委員自己的建議案或修正條文，則算是肯定或否定性使用。陳述事實或反諷也算是中性，比如「中國從未統一過」。假設句因爲與事實相反，所以我們視之爲中性的。若關鍵詞出現在條件句，則要看關鍵詞出現在前件還是後件；假若它出現在後件，我們視整個句子爲中性的，假如它出現在前件，則要由該委員對此後件是採正面或否定的態度，來決定他對前件的看法是正或是負。比如「若視之爲歧視條款，可能會引起中共的反彈」，我們判斷「歧視」的用法是否定的。最後，若是無法判斷其態度爲何，我們視之爲中性。

我們把4 個類目的相關關鍵詞列在下面：

1. 台灣優先：台灣人民的幸福（爲優先）、台灣兩千萬人民福祉（爲優先）、台灣人民之安全、（保障）台灣人民之權益、台灣人民在繼承時有優先權、台灣的安全、台灣優、對台灣人民不公平。「國家安全」因指涉對象不清而不計。

2. 反台灣優先：對大陸同胞歧視、對自己同胞加以限制、歧視條款、對大陸人民有歧視性、兩岸人民的權利義務必須相等、促進兩岸人民的權益、安全、或和平、精神保守、應秉持平等互惠原則。
3. 統一及整合：國家統一（之前）、未統一（之前）、和平統一（中國）、兩岸統一、和平整合、不談統獨問題。
4. 反統一或整合：主權獨立、台灣國。

我們這裏有一個假設，委員使用該關鍵詞的頻率越多，表示他對該類目越關心。

二、委員的政治立場

關心台灣優先的委員排列如下：謝長廷、黃主文、張俊雄、吳梓、李慶雄、陳水扁、林鈺祥、彭百顯、戴振耀、林正杰、與陳歷健，主要是民進黨與集思會成員。相對的，反台灣優先的委員依其強度排列如下：丁守中、陳癸淼、朱鳳芝、林正杰、朱辛流、葛雨琴、趙少康、蔡璧煌、林志嘉、陳水扁；除了丁守中外，有四成爲新國民黨連線成員（註8）。

關心統一及整合的程度排列如下：林正杰、丁守中、黃明和、黃興邦、謝長廷、吳梓、林鈺祥、洪冬桂、陳水扁、陳癸淼、趙少康。令人意外的是新國民黨連線並未特別關心與中國大陸的統一或整合，而少數集思會與民進黨委員亦稍微表達了對統一的關心，其強度與前者不相上下，比如謝長廷、陳水扁、吳梓與林鈺祥。換句話說，只有丁守中與林正杰表達了較強烈的統一意願。值得一提的是我們並未區隔這是立即或長期的意願，因爲委員往往有意或無意以含混的方式表達其立場。。此外，對統一關心的強度，較台灣優先或反台灣優先的關心爲弱。

最後，有關反統一或整合的發言最少，只有田在庭、陳水扁、林正杰、洪奇昌、張俊雄有提及關鍵詞，且關心的程度不強。這些委員除了林正杰外，都屬於民進黨，可見兩黨立委對「統一」的意涵，並不很清楚。

在我們的設計裏，「台灣優先」與「反台灣優先」這兩個類目是互相排斥的(mutually exclusive)。 也就是說，強烈表達對「台灣優先」類目關心的委員，必定表現很弱或根本不關心「反台灣優先」類目。比如李慶雄、吳梓、林鈺祥、張俊雄、彭百顯、黃主文等委員，一方面表現強烈的台灣優先，

同時也沒有顯現反台灣優先的態度；而陳水扁、謝長廷、戴振耀與陳歷健在表達對台灣優先的關心之際，也稍微表達了反台灣優先的意向。以上委員除了陳歷健是僑選外，不是隸屬集思會就是民進黨。

相反的，一個委員若是表達強烈的反台灣優先意向，應該會顯示很弱或根本沒有對台灣優先的關心，比如丁守中、朱鳳芝與陳癸淼爲是。唯一的特例是林正杰，他顯示了旗鼓相當程度的台灣優先與反台灣優先的意向。

相同的，「統一及整合」與「反統一或整合」這兩個類目的設計是互相排斥的，比如丁守中與林正杰兩人表達出強烈的對統一與整合的關心。但反之並不明顯，主要是因爲沒有一個委員表現出強烈的反統一或整合的關心。

上面這4 個類目形成一個連續(continum)或光譜(spectrum)，也就是就統獨而言，「反統一或整合」表現最後的台灣獨立的意願，「台灣優先」次之，然後「反台灣優先」逐漸顯示出統一的意願。就常理而言，一個委員在這四個類目所顯現的頻率，應該呈溫和的單峰分佈，或穩定的丁字型（或反字丁型的分佈）。比如丁守中、朱鳳芝與陳癸淼意向呈現明顯的單峰分佈，而李慶雄、張俊雄與彭百顯的頻率根本就是直柱型分佈。前者屬於新國民黨連線或軍系，後者屬民進黨，可見其立場分明。

意向頻率的分佈最特殊的是林正杰，他除了在4 個類目都有發言外，其分佈呈U 字型（或雙峰），也就是說他個人的意向表現出兩極化。而吳梓、林鈺祥、黃明和、黃興邦與謝長廷也表達了較弱的U 字型意向分佈，其分佈明顯偏向「台灣優先」，卻又同時稍許表達對「統一及整合」的關心。這些人之中，除了黃興邦爲僑選外，以集思會爲主。

三、立場與參與的相關

我們再來嘗試把這4 個類目整合，以構築單一的「台灣主體」指標；凡是發言中提及一次「台灣優先」或「反統一或整合」關鍵詞者可得一分。相反的，凡是提及一次「反台灣優先」或「統一及整合」關鍵詞者得負一分。我們必須指出，得分的正負並無規範上的優劣區分。

根據表11，我們可以看到得分最高與最低的委員，大致也都熱衷參與委員會審查「出席或發言（參考表1 與表4 ）；相反的，熱衷參與委員會審查的委員，其「台灣主體」的得分不一定顯現強烈關心或反對。換句話說，

當一個委員對「台灣主體」有強烈的支持或反對，他會積極參與委員會對兩岸條例的審查；但是熱心參與委員會審查者不一定對「台灣主體」有強烈的好惡，亦即可能有其他因素促使其勤於議事。

表11：「台灣主體」的意向

姓名	得分	姓名	得分
張俊雄	15	彭百顯	7
黃主文	15	林鈺祥	6
謝長廷	14	朱鳳芝	-6
李慶雄	10	林正杰	-8
吳　梓	9	陳癸淼	-8
陳水扁	8	丁守中	-22

然而，上面觀察到的因果關係，並不出現在院會上。其一是在相關的六次院會裏，多數委員都出席了，因此看不出誰比較突出；其二是一些委員在院會的其他發言特別突出，因此把某些對「台灣優先」表現強烈好惡的委員擠掉了。換句話說，具有強烈「台灣優先」好惡傾向的委員，或許也有較傾向參與院會，但並不一定與在委員會時有相同的參與機會。

伍、結　論

在這個研究裏，我們透過「兩岸條例」來考察立委對於法案審查的參與，如果區分委員會與院會，立委們傾向於熱衷出席院會，並且比較踴躍發言。這可以常理來解釋。因爲院會比較能製造知名度，有利立委的連任，落選二屆立委的劉興善、林鈺祥必有深刻的感觸。這情形在民進黨爲甚，原因可能在該黨的資源有限，而且在傳統上一向爲大眾傳播媒體醜化或故意忽略，必須想盡辦法突破此困境。對他們來說發言的重要性甚於出席，亦即不出席則已，一出席就要充分利用機會發言，以求在人數有限之下作最適切的發揮。

在政治立場上，立委並未表達強烈的統獨姿態。更具體說，立委的立場表現在贊成或反對台灣優先，但未並直接對統一而針鋒相對。我們發現當委員對「台灣主體」有強烈好惡時，他會積極參與委員會的審查，以維護其立場；但是熱心參與審查者，卻不一定對「台灣主體」有強烈好惡，因此，必有其好誘因鼓勵其參與。

註　　釋

註1 ：不管其政治立場爲何，我們對於墾荒的精神是予以肯定的。

註2 ：少數的例外是蕭新煌（1984）與黃秀端（1992），而朱志宏（1990）則對國會研究作了詳盡的回顧。

註3 ：見李麟添（1980），但其重點在桃園縣議員。

註4 ：陳定南委員在1992年10月3 日，於台灣教授協會舉辦的「兩岸關係條例之剖析」所發言。淡江大學日本研究所許慶雄教授亦有類似看法。

註5 ：委員在院會與委員會發言記錄，請參考《立法院公報》；請注意其卷期數與院、委會進行的順序不一定相符。委員會出席參見司法委員會第86～89會期所編《歷次會議議事錄》，院會出席見立法院《議事錄》。程序委員會之議事錄過於簡潔，只有決議，並無記錄委員的發言。值得注意的是，我們無法判斷委員是否簽了名即離席，或請同人代爲簽到。

註6 ：立法院秘書處於每個會期印有《立法院各委員會召集委員、委員名冊》。

註7 ：立法院資訊中心可以提供各立委的質詢摘要，但需立委本人同意才能公開於外人，對研究者甚爲不便。

註8 ：詳見施正鋒（1993），表11。

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