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# 政策規劃新方法之探析

鄭興弟

#### 摘要

一九九六年台灣舉行第一次總統直接民選,中共對我沿海發射飛彈,李登輝總統告訴國人,政府已準備好『十八套劇本』,因應中共飛彈射擊所引發的衝擊。今年(一九九九)七月,李總統對外宣稱台灣與大陸爲『特殊的國與國關係』又引起中共强烈反擊,我國防部將九六年十八套『劇本』縮編爲十三套『劇本』。如何規劃處理危機的『劇本』?本文探討了西方學界與實務界流行的『劇本式規劃法』(Scenario-Planning),分析在決策者面臨危機時,該方法如何提供『判斷架構』,協助他(她)研擬『前瞻』與『獨創』的決策方案。本文檢視1973年第一次石油危機發生,荷蘭皇家石油公司成功因應危機的『行動方案』,就是『劇本式規劃法』的具體應用。

抑有進者,人類即將邁入二十一世紀,如何建構新世紀的遠景?本文探討『未來遠景建構法』(Future State Visioning Technique),加拿大『國家橡膠公司』應用該方法提昇公司的安全措施,在兩年內使公司的嚴重傷害案件減少十倍。本文亦做了『個案分析』。

本文還分析『策略規劃法』(Strategic Planning),重點在探討如何經由『策略規劃』排除決策者在決策時所遭遇的『不確定狀況』,進而闡述如何運用『腦力激盪』,尋找『解決問題』的『最適』政策方案。

關鍵詞:『劇本式規劃法』、『未來遠景建構法』、以及『策略規劃』。

國立政治大學公共行政學系教授

## 壹、緒言

人類即將邁入廿一世紀。面對未來不確定的時代,不確定的環境以及伴隨而來的新的價值觀念,我們如何根據廿世紀已知的經濟、政治、社會、科技等資訊,透過「想像」、「覺察」(perception)和「洞視」去描繪、構築未來遠景,創作一部新世紀的「劇本」(scenario)?晚近西方企業已經與政策科學學術專家倡導了新的規劃方法,引導吾人掌握新時代的環境、勾勒新世紀的遠景,並提出解決新世代問題的政策方案。本文嘗試探討並分析「劇本式規劃法」(Scenario Planning)、「未來遠景建構法」(The Future State Visioning Technique)以及「策略規劃法」(Strategic Planning)等三種政策規劃新方法之內涵及其用途。

## 貳、劇本式規劃法

大家可能還記得,三年前中共爲阻撓我們第一屆民選總統選舉,曾對台灣海峽發射飛彈,當時李登輝總統就告訴全國人民,我們已準備好"十八套劇本"因應中共飛彈發射所帶來的衝擊。今年(民國八十八年)七月李總統提出「兩國論」(宣稱中華民國與中華人民共和國爲「特殊的國與國關係」),引起中共當局强烈反擊,發動「文攻武嚇」,我國防部宣布已將三年前「十八套劇本」縮編爲「十三套劇本」。這些劇本就是應用「劇本式規劃法」所研擬的因應策略。

「劇本式規劃法」雖然在一些企業機構曾經被使用過,但在學術

界從事系統性研究與探討者,當推哈佛大學企管學院資深講師瓦克 (Pierre Wack)。此一規劃法能夠使決策者在複雜而不穩定的環境下, 把一切相關的資訊有效加以整合,而提出前瞻性、獨創性的政策方 案。「劇本式規劃法」的應用,美國民間智庫可說扮演了催生的角色。

吾人皆知,第二次世界大戰時,很多學界人士被徵調到政府機關 以及研究機構服務。最明顯的例如不少著名物理學學者奉召加入美國 芝加哥大學的「曼哈坦計畫」(Manhattan project),最後製造了原子彈 迫使日本投降。其他如核能、雷達和電腦的研究也都有突破性的進 展。

戰爭結束之後,這批知識分子將「決策分析」(Decision analysis)以及「賽局理論」(Game theory)技術應用到民間企業的「研究與發展」領域,在「公司的規劃」(Corporate planning)方法上獲得了顯著的成果。

當時在「藍德公司」(RAND Corporation)服務的柯恩(Herman Kahn) 首先應用「未來思維」(Future thinking)方法加上「想像」(imagination) 描寫未來的社會與世界可能發生的情境<sup>註1</sup>。

爲了對「未來情境」找到更恰當的名詞,作家羅思廷(Leo Rosten) 建議以好萊塢電影「劇本」(scenario)一詞代替「未來情境」,柯恩 認爲「劇本」突顯了「未來情境」的「迷思」(myth),也就採用了此 一名詞。

柯恩本人在1960年代中期在紐約創立「漢森研究所」(The Hudson

註1 : Kahn, Herman & Anthony J. Weiner, *The Year 2000 : A Framework for Speculation on the Next Thirty Years* (N.Y.: Macmillan Publishing, 1967).

Institute),更應用「劇本式規劃法」(Scenario planning)預測未來世界經濟發展<sup>註2</sup>。

無獨有偶,美國西海岸的智庫-史坦福大學所設立的「史坦福研究中心」(Stanford Research Institute ,SRI)也應用「作業研究」(Operations research),經濟學以及公司規劃技術爲大企業公司提供長期策略規劃(Strategic planning)。

1968年,越戰造成美國社會嚴重對立,校園暴力事件層出不窮,「史坦福研究中心」的「未來研究團體」(Future group)還接受美國教育委員會委託,探討美國未來將是什麼樣的社會,在教育制度方面是否需要調整以適應新世代學生的需求。

到了 1970 年代初期,很多大公司紛紛成立研發部門,自己利用電腦從事策略規劃。奇異公司(General Electric,GE)開風氣之先。該公司人員在規劃過程中應用「劇本式規劃法」(Scenario planning) 先思考未來社會環境有那些因素會影響公司營運。研究過程中還涉及「德菲預測法」(Delphi technique)。該法原先是由藍德公司高級研究員海默(Olaf Helmen)以及達爾期(Norman Dalkey)所倡導,後來廣爲政府和民間應用在策略規劃上面註3。

經由德菲預測法,奇異公司邀請專家學者提出未來可能影響企業 營運環境的關鍵變數和指標,然後再應用「趨勢-影響分析」(Trend-

註2: Kahn, World Economic Development: Projections for 1978 to the Year 2000 (Boulder, Colo.: Westview Press, Inc., 1978).

註3: Dunn, William N., Public Policy Analysis: An Introduction (N.Y.: Prentice-Hall, Inc., 1981), pp.196-202.

impact analysis)以及「交互影響分析」(Cross-impact analysis)來衡量關鍵變數與指標之間的交互作用。根據「變數與指標」的交互作用,亦即掌握環境因素之後,再來規劃公司可能採取的策略性因應「劇本」

註4。

到了 1970 年代末期,「財星雜誌」(Fortune)列爲前 1000 家大企業當中,很多都已採用「劇本式規劃法」。根據統計,四分之三的公司都已應用此一策略規劃法。尤其在 1973 年第一次石油危機發生後,爲了因應未來世界變動不居的市場,很多公司甚至運用各種不同的分析方法,建構「多元劇本」(Multiple scenarios),提供公司高層管理人員作爲營運決策的依據註5。

然而對「劇本式規劃法」從觀念假設、理論闡述到模式建立,最 先從事系統性分析探討,被公認爲此一領域「無可爭論的知識領導者」 (Undisputed intellectual leader)當推曾任荷蘭皇家石油公司企劃部主 任,本身亦爲經濟學者的瓦克(Pierre Wack)<sup>註6</sup>。他曾在 1983 年到 1984 年在哈佛大學企管學院擔任資深講師,講授「劇本式規劃法」。 I、「劇本式規劃法」為決策者提供「判斷架構」

瓦克指出,今日企業管理高層主管經常要思索的—個問題就是: 面對社會環境的變遷,如何調整經營策略、創新管理方法以及推出創

註4 : Georgantzas, Nicholas C. & William Acar, Scenario-driven Planning (Westport, Ct.: Greenwood publishing Group, Inc., 1995).

註5 : Dyson, R. G. (ed.), Strategic Planning: Models & Techniques (New York, N.Y.: John Wiley & Sons, Inc., 1990).

註6 : Schoemaker, PJH. & Cornelius Van der Heijden, "Integrating Scenario into Strategic Planning at Royal Dutch/Shell," *Planning Review*,20,3, May-June, 1992.

意產品?他認爲在快速變遷的時代,企業經理人常遭遇到「認知的危機」(Crisis of perception),也就是無法認清一個已發生的新興的現實,還是根據舊有的管理方法作出決策。此種情形很容易導致經營策略的失敗。這也就是企管學大師杜拉克(Peter Drucker)所說:「變遷的時代最大的危險不是變遷的本身;而是以昨日的邏輯去制訂行動方案」
<sup>註</sup>

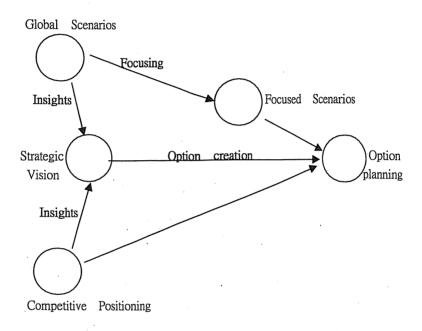
很多探討「決策者特質」的文獻顯示,在正常穩定時期,決策者較易掌握現實狀況,只要在策略上做一些調適,就可作出成功的決策。然而在迅速變遷的時期,決策者的思維模式變成猶豫而不確定。他可能擁有資訊,但因對突發的現實狀況存有幻覺或憧憬,也未必能根據資訊作出正確的決策。在這種情況下,「劇本式規劃」途徑可以引導他從另一透視觀點去認清新的現實狀況。這是因爲「劇本式規劃法」一方面要依靠「事實」(facts 或資訊),另一方面還要靠「認知」(perceptions),才能作出前瞻性的決策。換句話說,決策者根據事實,研判資訊,然後將具有策略顯著性的資訊在他的腦海裡轉換成「新的認知」(fresh perceptions),據此制定決策。

職是之故,「劇本式規劃法」可以突破決策者傳統思維窠臼,使他有能力「重新認知」現實(to re-perceive the reality)。瓦克就認爲,此種規劃法可以把各種表面上看起來不相關的經濟、科技、政治、社會和策略競爭的資訊有效地組合起來,而轉換成一個「判斷架構」(A framework for judgment)。它對決策者的貢獻,絕非一般「模式」(model)

註7 : Pierre Wack, "Shooting the Rapids," Harvard Business Review, Nov- Dec., 1985, p.150.

所能企及註8。

也就因爲它具有上述功能,所以「劇本式規劃法」能使決策者在變遷、複雜與不穩定的環境下,重新發現「前瞻」與「獨創」的決策能力。如何應用「劇本式規劃法」?瓦克構築了下述流程圖與具體運作步驟<sup>註9</sup>:



他以 1973 年第一次石油危機發生時,他任職的荷蘭皇家石油公司因應危機的經過,闡述「劇本式規劃法」的應用。

#### Ⅱ、應用「劇本式規劃法」處理石油危機個案

石油危機發生,這是「全球性劇本」(Global scenario 或稱爲 Macro-scenario)。要應付全球石油危機,皇家公司必須根據公司策略

註8: *Ibid.*, p.146.

註<sup>9</sup>: *Ibid.*, p.150.

提出「焦點劇本」(Focused scenarios)。這些「焦點劇本」包括:評估 石油價格上漲後市場上對石油的需求量以及消費者過度反應的油品 上漲以及預期漲價心理導致通貨膨脹。通貨膨脹對汽車工業帶來衝擊,汽車工業遭受打擊自然影響世界經濟。

各國政府在石油危機發生後,紛紛採取能源管制政策,尋找替代能源,連帶推動系列反制通貨膨脹措施。在節省能源、反通貨膨脹政策實施一年後,到 1974 年全世界對石油需求量明顯降低。石油輸出國家(OPEC, Organization of Petroleum Exporting Countries)的財政也受到波及。這些因石油危機而引起的後續發展,就是瓦克所謂「策略性遠見」(Strategic vision)。因此在擬訂公司或「國家劇本」(Country scenario)時,上述「策略性遠見」必須考慮在內。「策略性遠見」要使公司領導人或企劃部門主管洞燭機先,深入了解問題,才能經由「洞識」(insight),掌握石油危機所引發的連鎖問題。

1974 年全世界的石油需求量雖因石油危機的發生而減少,但皇家公司企劃主管階層認爲需求量的減少主要是受世界經濟景氣低迷的影響,並不代表消費者的消費行爲已經有了基本改變。他們堅信「企業週期」(Business cycle)的原理,經濟會再復甦,但會緩慢復甦,而且世界經濟會出現階段性的低成長局面。於是他們設計了世界經濟復甦的「劇本」一稱之爲「有節制的成長劇本」(The constrained growth scenario)。

另一方面,他們相信已開發國家所規劃的「替代能源計畫」徒託空言,祇是「紙老虎」,尤其是美國總統福特提出的「減低依賴進口

石油,尋求替代能源」的「獨立計畫」(Project independence)更不可能實現。多數 OECD (Organization of Economic Cooperation and Development,世界富國俱樂部)國家的核能發電廠和煤的產量皆未達到預期目標。易言之,替代性能源不可能減輕石油輸入國家對中東石油的繼續依賴。

皇家公司領導人乃預測世界經濟會在 1976 年漸漸復甦。主要是 因爲當年美、日、德三大工業國家面臨全國大選。經濟問題最能影響 選民投票取向。所以當年三個國家執政的政府都把施政重心放在經濟 問題上面,特別是致力於經濟的復甦。

既然經濟會再復甦,皇家公司也要提早研擬計畫,準備好如何在景氣復甦時與其他同業在新的石油市場上競爭,這就是在具備「策略性的遠見」之後,必須隨即提出配套的「競爭性定位」(Competitive positioning) 並 10 方案。

掌握了上述「全球劇本」、「焦點劇本」、「策略性的遠見」以及「競爭性的定位」等要件,再透過「深謀遠慮」與「洞識」(insights),我們所規劃的「備選方案」(option) 就可以順利產生。這就是整個「劇本式規劃法」的步驟與過程。

註 10: Ringland, Gill, *Scenario Planning: Managing for the Future* (New York, N.Y.: John Wiley & Sons Inc., 1998), p.305.

註11: *Ibid.*, p.306.

## 多、未來遠景建構法

#### I、「未來遠景建構法」之內涵及其用途

「未來遠景建構法」則是由美國著名的 Dupont 公司總裁兼加拿大多倫多管理學院教授史都華(J.M.Stewart)所發明<sup>註12</sup>。此一方法可以讓一個公司或一個機關首長率領領導幹部,經由 Workshop(講習會)方式,從遠景的建構,目標的定位,發展出實施策略與行動方案<sup>註13</sup>。

顧名思義,「未來遠景建構法」的目的,是爲企業組織或政府機關在策略規劃與管理方法上做長期的改變,以建構組織或機關未來的遠景。

一般規劃模式大致可分爲「回應性修正」(Reactive modification) 與「前瞻性規劃」(Anticipatory planning)兩種。所謂「回應性修正」, 是指在沒有整合性的規劃架構下,從事即時而片面調整、修正管理與 策略方面問題,是一種頭痛醫頭、腳痛醫腳的治標方法;「前瞻性規 劃」則是一種整合性的規劃方式,這種規劃重視所有與環境有關的社 會經濟問題,並將彼此的因果與相關性,整合到長程的企業環境政策 內。更重要的是,它著重預防與引導功能,可以隨時作必要的政策調

註 12: Stewart, J. M., "Future State Visioning Technique at National Reb-ber Company," *Planning Review*, Vol.22, #2, Mar-Apr., 1994, pp.20-27.

Also see, Lucas, James R., "Anatomy of A Visionary State," *Mana-gement Reviews*, Vol.87, Feb., 1998, pp.22-26.; Winslow, CharlesD., *Future Work: Putting Knowledge to Work in the Knowledge Economy* (New York, N.Y.: Free press, 1994); Schultz, Wendy L., *Future Fluency: Explorations in Leadership, Vision & Creativity* (Ann Arhor, Mich.: University of Michigan Press, 1995).

註 13: Stewart, *op. cit.*, p.22.

<sup>-</sup>Also see, Sheiffer, Steven E., "Workshop: A Planned Approach to Effective Council-Management Relations," *Public Management*, #95, June 1993, p.20.

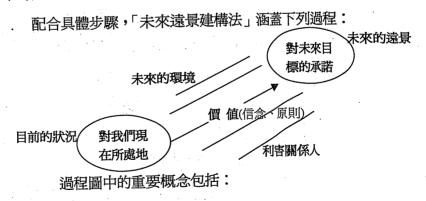
整,預防企業經營或機關決策傾向惡化發展的可能 註 4 。

「未來遠景建構法」是屬於前瞻性規劃的一種方法,它强調:

- (一)認定並同時表達出所有「利害關係人」(stakeholders)的價值觀;
- (二)將每一組利害關係人的基本動機與信念加以檢視,並整合成一共 同分享的遠景;
- (三)管理菁英要提出策略以保證遠景能付諸實現。

「未來遠景建構法」的具體步驟如下註15:

- (一)將利害關係人列出來,並從他們的眼中去看未來;
- (二)將未來的環境描述清楚;
- (三)廣泛地建構出組織或機關未來所能達成的遠景;
- (四)把未來的遠景與現況加以區別;
- (五)將組織的價值觀(包括目標、原則和標準)標明清楚;
- (六)要把未來的遠景轉化成可以用行動來付諸實現的概念上;
- (七)開始規劃策略及行動。



註 14: Wheelwright, Steven & Spyros Makridakis, Forecasting Methods for Management, 3rd ed.(New York, N.Y.: John Wiley & Sons, Inc., 1980), pp.4-12.

註 15: Stewart, op. cit., pp.21-22.

- (一)未來環境(The future environment)—未來環境的輪廓、潛藏的機會 與挑戰;
- (二)未來遠景(Future state vision)-組織或機關在未來會成爲什麼樣子?
- (三)目前狀況(The present state)—評估組織或機關目前的狀況;
- (四)價值(Values)一作為遠景基礎的目標、信念與原則;
- (五)利害關係人(Stakeholders)-將爲未來組織或機關的策略所影響的一群人。

掌握過程圖後,可以設計「講習會」發展未來遠景:

當環境急遽變化,競爭情勢日益複雜,顧客與民意需求日趨多樣化,愈來愈多的企業領袖與政府首長深感發展遠景模糊、對外在環境缺乏靈活應變的能力時,「講習會」可能是協助企業組織或政府機關發展策略、建構遠景的最佳利器<sup>註 16</sup>。其具體步驟可分爲:

- (一)公司總裁召集領導幹部來講解公司未來遠景;
- (二)領導幹部又將講習會分爲兩種:
  - (i) 第一個講習會:探討公司未來的遠景、現在的狀況以及現在與未來環境的比較與對照;
  - (ii)第二個講習會:研擬公司價值(目標、標準、原則)以及具體的發展策略與行動方案。
- 第一個講習會的任務如下:

它不是急於尋求組織的目標或策略,而是要先釐清組織目前所處

註 16: *Ibid.*, pp.22-23.

的情勢。只有對目前的環境作出實事求是又符合本身條件的分析,對未來環境的預測與因應才有相對的精確性。

美國當代著名管理大師波特(Michael Porter)的成名著作《競爭策略》(Competitive Strategy)一中便提到:策略的訂定必須考慮企業所處的環境,才能讓規劃出來的策略,導引企業在大環境中求生存、發展,或是擊敗對手<sup>註17</sup>。釐清了組織目前所處的局勢之後,「未來遠景建構法」更著重「創新性的思考」(Innovative thinking)。所以,第一個講習會要完成下列任務:

- (一)講習會參與者要去思考公司或機關未來三至四年的發展遠景:
- (二)提供研討的架構(framework),討論的主題必須區分為許多分題 (sub-topics);
- (三)每一個主題與分題必須從「利害關係人」的觀點來探討;
- (四)參與講習會的人員要以「創新的思考」去發掘問題。必須決心突破現狀瓶頸,激發各種能改善流程、產品與服務效率,使企業或機關與未來環境需求相結合,開創輝煌的遠景。

#### 第二個講習會的內容如下:

認清了組織目前的情勢後,接下來便是對組織的價值取得共識並 訂出可行性的行動策略,而這些策略必須以「逐波推進、環環相扣」 爲原則。以下是此一講習會的內容:

(一)在此一講習會中,領導幹部必須對公司的價值(目標、標準與原則)達成共識(consensus);此一共識必須與公司或組織未來遠

註 17:蘇拾忠,*策略規劃指南*(台北:遠流出版社,民國八十三年),頁 57。

景相互連結(linkage);

(二)以「策略規劃法」(Strategic planning)規劃具體策略與方案,使公司或組織遠景與價值得以執行和實現。

必須强調的是,企業或組織不但要有特定的目標,而且要將這些 目標依輕重緩急優先順序排列出來。

在辦完第二個講習會後,必須要讓所有參與者體認到「目標既是 策略規劃的起點,也是策略規劃的終點」的觀念。因為有了目標以後 才能接著分析外在環境與內部資源如何配合、考慮可行策略、選擇及 執行策略,這些步驟若能落實,目標自然達成。

如上所述,「未來遠景建構法」强調「創新性思考」,《創意革命》一書開宗明義便提到:企業或組織完全是創造力的表現,因爲企業人或組織人掌握的資金、人才、市場、觀念及服務都是變數,各有不規律的生命週期,唯有「創意人」才能掌握變數、開創新機<sup>註 18</sup>。在未來遠景的建構過程中,創意是不可或缺。除此之外,以「設身處地」的「同理心」(empathy)將所有的「利害關係人」的需求涵蓋在內,傾聽他們的心聲,這更是「未來遠景建構法」有別於其他未來策略規劃方法之處。

註 18: 韓應寧譯, Ray, M. & Myers, R 著, *創意革命*(台北:天下文化出版社,民國七十九年), 頁 1。

#### Ⅱ、「未來遠景建構法」在國家橡膠公司之應用

前面提到,「未來遠景建構法」是由史都華所倡導。早在他擔任 杜邦公司加拿大分公司資深副總裁時,便已開始應用該項方法。此種 方法應用於國家橡膠公司(National Rubber Company)後,更是使得工 廠安全有了明顯的改善一在短短兩年之內使工廠重大傷害降了十倍<sup>註</sup>

國家橡膠公司是北美洲最大的橡膠再利用(recycled rubber) 一將一些工廠廢棄的輪胎轉化生產爲多樣的產品一的公司之一。在 1990年時該公司位居龍頭老大的地位,不過就在此時,公司在安全紀錄方面急速地惡化,工作意外發生數量不斷上升,遠高於平均值,因此承受了來自公司股東、員工及政府機構如「工人補償委員會」一WCB(Workers' Compensation Board)的層層壓力,逼使公司尋求改善註20。

在1991年底,Ted Pattenden 就任國家橡膠公司的新任總裁後,他迫切地想要在安全方面做出一番成績,由於 Pattenden 曾經在杜邦公司的加拿大分公司工作過,因此便以「未來遠景建構法」作爲改善安全的管理技術。他採取下列具體步驟<sup>註 21</sup>:

第一步:改變高級主管人員的思維與心態。他召集領導群要求他們提出未來遠景。這些主管人員包括 Pattenden 自己、副總裁、及其他十多位高層主管。領導群決定要研擬經營目標與行動方案。他們所

註 19: Stewart, op. cit., p.21.

胜 20: Ibid.

註 21: *Ibid.*, p.22.

預期的產出(output)爲:(一)關於安全的未來遠景;(二)對現在狀況的描述;(三)一套核心的(core)信念與原則;(四)建立安全政策;以及(五)1992年的目標與行動計畫。

第二步:從利害關係人的觀點規劃未來遠景。利害關係人的名單 包括:

- (一)直接相關者(Directly Involved):(i)主管人員;(ii)員工;(iii) 顧客;(iv)股東;(v)政府;以及(vi)員工家屬。
- (二)間接相關者(Indirectly Involved):(i)供應商;(ii)當地社區;(iii) 競爭者;(iv)金融社區(Financial Community);以及(v)媒體。

利害關係人不只侷限於組織的內部成員,而且涵蓋外界利害關係 人的參與,以確保組織的遠景、策略與行動方案,能與外在環境緊密 地結合。

第三步:舉辦講習會

(一)第一個講習會-現在狀況與未來遠景探討<sup>註22</sup>

在評量現階段狀況之前先探討未來的遠景。如果一開始考量現狀,很容易將過程侷限在今日之議題(issues)與障礙(barriers),最後陷入沒有結果的(unproductive)與分歧的(divisive)討論上。而一旦我們認爲自己有更好的未來,我們將會變得較爲積極,也勇於承認過去的錯誤。參與講習會的成員們必須以國家橡膠公司未來三至四年的發展爲思考的著眼點。爲了提供一個討論的架構,把主題又細分爲許多分題(sub-topics)。這些分題爲:

註 22: *Ibid.*, pp.22-23.

- (i)公司的安全表現(以「工人補償委員會」的統計、評鑑爲準);
- (ii)管理方式的特徵(態度、行爲以及以「安全」爲工廠管理的優先工作);
- (iii)員工的特徵(熊度、行為、訓練);
- (iv)生產設備(保護設備與設計);
- (v)安全計畫與系統(其特性與效能);
- (vi)下班後(Off-the-job)的安全(效能與員工態度);
- (vii)顧客、股東及社區的觀點(他們對公司安全的看法)。

這裡的每一項分題都必須由利害關係人的觀點來檢視,而每位參與者必須用創新的思考(Innovative thinking)去想像公司未來的遠景。例如:如果我們是顧客,我們對於國家橡膠公司有何期許?很明顯地,安全處理與安全輸送、安全使用與安全廢棄產品同樣受到顧客重視。因此,好的安全績效表示該公司注意顧客需求,也是一種「負責管理」的表現。

領導群瞭解公司需要進行大幅度改革。很幸運地,很多參與者新 到公司不久,他們不會感受到變革的威脅。他們深信自己能比過去的 管理團隊做的更好,因此很快地就描繪出公司未來的藍圖。

#### 【管理方面】

- 管理上必須以預防一切傷害爲原則。
- 管理上必須要關心員工福利、並重視員工的訓練與發展。
- ·管理上必須對員工的建議作出回應,並建立「安全不能妥協」的觀念。如此便可創造出一個員工能自由批評的環境,並且是一個「安

全第一」(Safety is second to none)的環境。

#### 【員工方面】

- · 員工必須隨時警覺工作環境是否安全,並懂得關心工作伙伴,必 要時要用同儕壓力以確保環境安全。
- ·安全訓練非常重要,而且要持續進行。訓練是終身的,焦點放在改變工作需求及技能的持續改進。

#### 【生產設備與過程】

生產過程必須讓員工易於使用,要在員工身體能力所能負荷的範圍內從事安全的工作。對於安全有威脅的設計應予以排除,預防的設備必須使員工能易於使用,所有的設備都必須保持乾淨清潔。
 【公司安全績效】

- · 國家橡膠公司將會顯著減少傷害案件,進而達到零傷害的目標。
- ·國家橡膠公司將在「工人補償委員會」的安全檢查紀錄上成爲具有 高績效的公司;它的安全記錄將使它與同業中具領導地位的公司並 駕齊驅。

#### (二)第二個講習會-支持遠景的價值觀念<sup>註23</sup>

雖然第一個講習會已經爲公司描繪了未來的遠景,但是如果遠景 與公司的價值觀念(values)相衝突,遠景還是不能成眞。除非公司 的成員能夠分享相同的價值觀念,否則不可能在公司的策略或行動承 諾上達成共識。因此唯有「未來遠景」與「價值觀念」相結合,未來

註 23: *Ibid.*, pp.23-24.

遠景才能實現。爲了結合「價值觀念」與「未來遠景」,國家橡膠公司採取下列措施:

- 信念:鼓勵員工有效學習,俾建立信念。
- •原則:所有員工要參加有意義的安全活動。
- · 未來遠景:員工意識到安全問題並尋求改進。經由參與安全活動, 提昇員工安全方面的知識與承諾。
- ·目前狀況:員工對安全活動並沒有積極涉入。他們似乎認為意外是工廠作業正常的一部份;安全是人事管理部門的工作,與員工無關。

公司決定使用「傷害」(injuries)這個字眼,正代表公司重視價值 觀念的一個顯著例子。事實上,擁有最好安全紀錄的公司都認為所有 的傷害能事先預防。他們避免使用使用「意外」(accidents)這個字 眼,因為它有「無法預防其發生」的意涵。

也許有人會問:「既然信念與原則這麼重要,那我們爲何不用它們作爲創造未來遠景的架構?而要先建構未來遠景?」但經驗顯示, 一旦未來遠景與現今狀況被描繪和區隔後,信念與原則很容易說明。 這也是第二個講習會所要達成的任務。國家橡膠公司採取下列行動以 落實新的「公司哲學」——信念與原則:

#### 安全信念:

- 所有的傷害可以預防。
- 管理者必須深信並强調良好的安全績效可以達成。
- 傷害與意外的調查研究非常重要,如此才能學習預防未來傷害再

次發生。

- ·讓員工參與安全活動,將有助於改進員工對安全的瞭解與態度。
- 沒有人願意受到傷害。他們願意冒險,因爲他們相信自己將不會 受到傷害。
- •安全的卓越目標可以達成,正如同其它領域也可達成卓越目標。
- 良好的安全記錄有助於改善社區與工業的關係,同時對顧客也有正面的影響。

#### 安全原則:

- 安全是每一種工作不可分的一部份。每一個人都要為自己以及同事的安全負責。
- 管理部門要致力於創造安全的工作環境,同時要對造成的傷害負直接的責任。
- 必須遵守安全法規。
- 必須使所有設備與操作過程一直保持安全的狀態。
- 必須對所有的傷害和意外透過調查,並根據調查結果持續提昇安全等級。
- 必須使員工參與安全活動,以提昇他們的瞭解與承諾。
- 必須透過教育與訓練以增強工作時間外的安全。釐清了公司的遠景與原則之後,接著就要擬訂具體的目標。以下

### 是國家橡膠公司採用的方法註24:

• 將安全政策傳達給員工,並確定員工能完全瞭解。

- 規劃員工能參與安全活動的一套完整體系。
- 執行全盤性的訓練方案,使員工充分瞭解設備與安全過程的操作。
- ·建立一套安全組織與體系,包括中央安全委員會(Central Safety Com-mittee)、安全性策略人員、參與性的檢查體系以及針對所有員工所召開的安全會議。
- 擬訂一套傷害狀況的調查體系,並運用調查發現改進安全狀況。
- 將重要安全法規及程序編入安全指導手冊。

以上「個案研究」說明了國家橡膠公司如何利用「未來遠景建構法」改善安全績效。實施後的嚴重傷害統計數字,由 1991 年的 35 件,1992 年的 20 件至 1993 年底的 4 件,在短短兩年內減少了約十倍。安全績效的提昇使國家橡膠公司在受評估的工業團體中,獨占鰲頭。如公司副總裁克拉克(Rose Clark)所說:「『未來遠景建構法』對國家橡膠公司特別有益,因爲過去員工很少對自己工作提供建言,更遑論在公司實施未來策略」
註 25 。

## 肆、策略規劃法

#### I、策略規劃之意義

「策略規劃」(Strategic Planning)自從1970年代由英國一批「地

註 <sup>24</sup> : *Ibid.*, p.24. 註 <sup>25</sup> : *Ibid.*, p.27. 區規劃」與「都市設計」人士開始應用以來,已受到政策規劃與企業 規劃學界與實務界廣泛重視,咸認爲是規劃領域方面一項重大的突 破。

此一新興規劃領域後來由英國傳至荷蘭。應用範圍也由都市與區域規劃擴大到國家政策上,例如環保、社會安全與能源政策等。東、 西德統一前之西德聯邦政府亦將此一規劃方法應用在政府政策領域。

當初提出此一新興規劃途徑的佛蘭德(John Friend)與奚科林(Allen Hickling)强調:「策略規劃」可以協助規劃者,在面臨複雜的決策問題時,如何在不穩定的環境、有限時間、有限資源以及不同利益團體的需求和壓力下,從事策略性規劃和抉擇。他們認爲,在策略規劃下,「規劃」的本身就是一種「策略抉擇」(Strategic choice)的過程<sup>註 26</sup>。

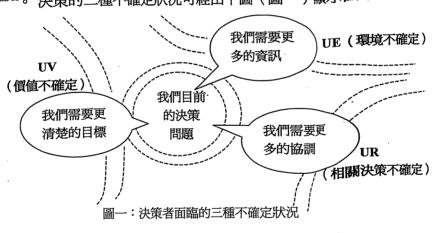
#### Ⅱ、策略規劃與不確定的決策因素

佛蘭德與奚科林比喻說:當我們面對一個決策問題(Decision problem)時,我們好像面對一片雲。由於雲層籠罩,我們無法把問題看清楚。我們這時面臨一些壓力,必須作出決定。但又不清楚應該選擇什麼行動方案(Courses of action)。換句話說,決策者面對一種

註 26: Friend, John & Allen Hickling, *Planning Under Pressure: The Stra-tegic Choice Apporach*(New York, N.Y.: Pergamon press, 1987). Also see, Morrisey, George L., *A Guide to Strategic Thinking: Building Your Planning Foundation* (San Francisco, Cal.: Jossey- Bass Inc., Publishers, 1996); Courtney, Hush, Jane Kirkland, and Patrick Vigueruie, "Strategy Under Uncertainty," *Harvard Busi-ness Review*, Vol.75, Nov-Dec., 1997, pp.67-79.

不確定狀況 (State of uncertainty),不知如何處理當前決策情勢<sup>註 27</sup>? 佛蘭德與奚科林指出,決策者因雲層籠罩而看不清楚決策問題, 這時圍繞在雲層四週的有三種不確定狀況:

- (一)工作環境不確定(Uncertainties about the working environment,簡稱 UE);
- (二)指導價値不確定(Uncertainties about the guiding values,簡稱 UV);
- (三)相關決策不確定(Uncertainties about related decisions, 簡稱 UR)
  <sup>註 28</sup>。決策的三種不確定狀況可經由下圖(圖一)顯示出來。



既然決策者面臨三種不確定狀況,他(她)在決策之前,自然必 須先排除這三種不確定狀況。如何能解決這三種不確定狀況?「策略

註 27: *Ibid.*, pp.9-10.

註 28: *Ibid.*, p.11.

#### 規劃」的兩位倡導人提出下列解決方法:

#### (一) 要解決「環境不確定」狀況:

必須透過「調查」(survey)、「研究」(research)、「分析」
(analysis)以及「預測」(forecasting)。易言之,經過調查、
研究、分析及預測後,不確定的環境因素或變數可以獲得釐
清,甚至排除。

#### (二) 要解決「價值的不確定」狀況:

必須先確認「政策指導」(Policy guidance)原則,澄清「政策目標」(Policy objectives),同時設定「政策優先次序」(Policy priorities)。

瞭解政策指導原則,掌握政策目標和政策執行的優先次序後, 指導價值的不確定問題必然迎刃而解。

### (三) 要解決「相關決策不確定」狀況:

必須加强協調(negotiation)、溝通(communication)、聯繫(liaison),同時瞭解那些部門涉及在「更廣泛的政策議程」(Broader policy agenda)之內<sup>註 29</sup>。

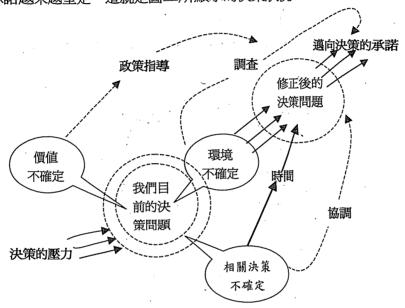
透過與政策議程有關的機關溝通、協調、聯繫,也熟悉它們在政策議程中扮演的角色,相關決策的不確定狀況應該不復存在。

經過這些努力,上面提到的工作環境、指導價值以及相關決策不

註 29: *Ibid.*, pp.11-13.

確定狀況會相對減少,逐漸降低或消弭於無形。

經過時間的推移,決策者把不確定狀況加以控制,它原先面臨的 那一片雲,也逐漸變小。撥開雲霧,看見青天之後,決策者對政策的 承諾越來越堅定。這就是圖二所顯示的決策狀況。



圖二:經過時間推移,控制不確定決策狀況

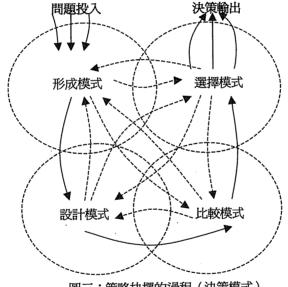
#### Ⅲ、決策模式 (Modes of decision-making)

前面提到,「策略規劃」將規劃視為策略抉擇的一個過程。在傳統決策過程中,吾人先界定「政策問題輸入」(Problem inputs)以及預期中的「決策輸出」(Decision outputs)。在輸入與輸出中間,有四種不同決策活動或模式(modes)不斷轉換,相互回饋(feedback)。策略規劃就是這種模式不斷轉換、相輔相成的一種過程。

這四種決策活動或模式爲:(一)問題形成模式(Shaping mode):

亦即政策問題的行程;(二)設計模式 (Designing mode):設計行動方案 (Courses of action);(三)比較模式 (Comparing mode):比較各項行動方案未來執行的後果;(四)選擇模式 (Choosing mode):此一模式包括:(i):決策者選擇自己偏好的行動方案;以及(ii)他對該行動方案的「決策承諾」(Policy commit-ment)程度<sup>註 30</sup>。

我們從下圖三可以更清楚看出這四種決策活動或模式不**断轉**換,交替回饋的過程。



圖三:策略抉擇的過程(決策模式)

# Ⅳ、決策進程(Phases of decision-making):備選方案研擬的具體 步驟

決策模式展示了決策活動的一般過程,我們還需要進一步闡析涉 及技術層面的決策制訂階段或備選方案研擬的具體步驟。

註 30: *Ibid.*, pp.19-20.

## 此一技術層面的進程涵蓋三個步驟:

- (一) 問題界定與目標闡述 (Problem-definition and goal articulation):即先界定政策問題並闡述政策目標。
- (二) 「解決問題」的過程與發展政策備選方案(Problem-solving process and development of alternatives): 政策問題既已界定,就應進入「解決問題」的過程。但如何解決問題?這就要針對問題,發展、研擬政策備選方案。
- (三)政策備選方案的評估(Evaluation of policy alternatives):政策備 選方案(如甲、乙、丙或 A、B、C等案)提出後,每一方案的 可行性(fea-sibility)如何?必須加以評估註31。

這三個技術性步驟實際上是上述四個決策模式的延伸。「問題界定與目標闡述」就是決策模式中「問題形成模式」;「解決問題的過程與發展備選方案」就是「設計模式」;而「政策備選方案的評估」則包括了「比較模式」和「選擇模式」。由此可見,決策模式和決策的技術進程可說是「相互發明」,環環相扣。

在上述決策的三階段進程中,有一個觀念扮演異常重要的角色,此即「封隔」(closure 或 cloture)。「封隔」此一名詞原來用在議會議事運作上。在議事廳內,某一政黨議員提出一個方案(草案),反對黨議員如想加以封殺,可藉「冗長辯論」(filibuster)拖延表決時間。這時主持議事的主席如認爲已給予充分辯論時間,他(她)可以宣布辯論終止,把方案付諸表決。在「辯論終止」與「付諸表決」之間的

註 31: Alexander, Ernest R., "The Design of Alternatives in Organization Contexts: A Pilot Study," *Administrative Science Quarterly*, Vol. 24, Sept., 1979, pp.382-404.

「封隔」(interval) 就叫 cloture。

在做決策的階段,「策略規劃」採用了美國威斯康辛大學都市計劃學系亞歷山大(Ernest Alexander)教授的論述,强調在第一階段(目標闡述)與第二階段(發展政策備選方案)之間的「封隔」程度要低(low cloture);相反的,第二階段與第三階段(政策備選方案的評估)之間的「封隔」程度則要高(high cloture) 註32。理由是:當我們界定政策問題,闡明了政策目標之後,我們接著要研擬政策備選方案以解決政策問題。因此在發展政策方案時,幕僚人員要時時想到政策目標是什麼?如此研擬出來的政策方案才不致違離政策目標。換言之,兩個階段要維持低「封隔」度。彼此能夠「靈犀相通」,中間不能築起「高牆」加以封隔。

另一方面,第二階段政策方案發展,要等到所有的方案都已研擬完畢,才進行方案的評估。不要在提出甲案(或 A 案)後,就開始評估,如此可能造成「方案過早被排除」(Preemption of policy alternatives)。要等到幕僚把所有方案(甲、乙、丙甚至丁案)都提出來,我們再一一加以評估。這時各方案並列評比,才有「比較的基礎」,才能從「比較」的過程中,選擇「最適」的方案;「決策模式」中,「比較模式」和「選擇模式」的意義在此。所以第二階段和第三階段的「封隔」度要高,亦即在所有方案未完全提出之前,不必急於對先提出的個別方案進行評估。

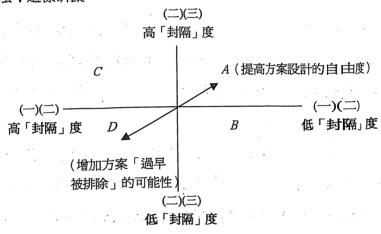
亞歷山大以下述圖表(圖四)說明了「封隔」觀念在決策三階段

註 32: *Ibid.*, p.386.

進程中的關係<sup>註33</sup>。

在圖四中,「橫軸」(Horizontal axis)代表決策進程中(一)與(二)兩階段之間的「封隔」關係;「縱軸」(Vertical axis)則代表(二)與(三)兩階段之間的「封隔」關係。

以 A「象限」爲例,在此一象限中,決策進程第一與第二階段維持低「封隔」度,亦即在研擬決策備選方案時,隨時要想到政策目標是什麼?這樣研擬



圖四:「封隔」(cloture)觀念與決策階段之關係

出來的政策方案才能與政策目標相互扣合。而第二與第三階段則維持高「封隔度」,也就是要等全部政策備選方案都已提出,才對各個方案進行評估,以選擇最有可行性的方案。此一象限的優點是,方案設計的自由度最高。亞歷山大列爲最理想、最理性的方案規劃類型。

在 B「象限」內,(一)與(二)兩階段之間雖保持低「封隔」

註 33: Ibid.

註 34 : Lindblom, Charles E., "The Science of Muddling Through," *Public Administration Review*, Vol.19, No.2 (Spring, 1959), pp.79-88.

度,不必憂慮備選方案與政策目標可能產生「南轅北轍」問題,但(二) 與(三)兩階段「藩籬」盡撤,中間沒有「緩衝區」,設計出一個方 案,就來評估一個方案,最後可能連一個方案都無法成立。

在 C「象限」內,(二)與(三)之間雖然保持高封隔度,不致 於產生「方案過早被排除」的現象,但(一)與(二)之間也因高封 隔度的關係,研擬方案時沒想到政策目標,如此提出來的決策方案可 能違離政策目標的旨趣。

在 D「象限」內,(一)與(二)亦維持高封隔度,政策方案與政策目標「各行其道」;而(二)與(三)之間封隔度低,毫無設防,方案一出爐就搶著評估,方案有「過早被排除」的弊病。亞歷山大列 爲最差的方案規劃類型。

亞氏備選方案研擬步驟的第一步驟中「政策目標」也就是公共政策學者林伯隆(Charles E. Lindblom)教授所稱的「目的」(ends);第二步驟中「備選方案的發展」也就是林氏所說的「手段」(means)。換句話說,要設計最適的政策「手段」來達到決策者所想要達成的政策「目的」<sup>註34</sup>。

林伯隆提出兩種政策制訂的方法:一種叫「根的方法」(Root method);另一種叫「枝的方法」(Branch method)。「根的方法」是目標與手段分開;「枝的方法」是目標與手段不分<sup>註 35</sup>。上述方案規劃的四個「象限」,亦即四種類型當中,在 A「象限」內,第一階段與第二階段維持低「封隔」度,也就是「政策方案」(手段)與「政策目

註 35: *Thid.*, pp.80-83.

標」(目的)要建立「連鎖關係」(linkage)。用林伯隆的話,這就是「枝的方法」。在 C「象限」內,(一)與(二)兩階段間爲高「封隔」度所堵住,政策方案(手段)與政策目標(目的)互不相涉,用林伯隆的話,這就是「根的方法」。

林伯隆認爲政策制訂宜採「枝的方法」,手段與目的不能分開。例如,一項計劃要在三年內完成(目的),設計方案(手段)時,就應該考慮組織或機關資源(預算、人力)如何分配與配合,俾有利於計劃的執行(implementation)以及計劃的追蹤和評估(evaluation);所以「目的」和「手段」不能截然分離<sup>註 36</sup>。由此可知,林伯隆政策制訂的觀點可說與亞歷山大不謀而合。

#### V、策略抉擇的途徑

本文剛開始時,提到決策者在面臨決策問題時,遭遇到三種不確定的狀況:一爲工作環境不確定(UE);一爲指導原則不確定(UV); 另一爲相關決策不確定(UR)。

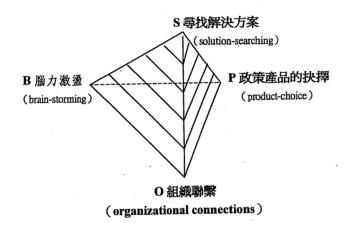
策略規劃的核心問題,是要引導決策者去尋找「最適」的政策方案。我們討論了亞歷山大所倡導的政策備選方案研擬步驟,然而如何協助決策者突破三種不確定決策狀況,找到「最適」的政策方案?

佛蘭德和奚科林兩人提出了「策略抉擇的多層面途徑」(A multi-dimensional approach for strategic choice),簡稱爲BOSP途徑。B 代表「腦力激盪」(Brain-storming),O 代表「組織聯繫」(Organizational con-nections),S 代表「尋找解決方案」(Solution-

註 36: *Ibid.*, pp.81-82.

searching),P代表「政策產品的抉擇」(Product choice)。佛、奚兩氏以一個四邊三角形(tetrahedron)圖案(請參見圖五)涵蓋了 BOSP的四個層面<sup>註 37</sup>。

首先讓我們來探討如何經由 B 途徑,亦即「腦力激盪」途徑,來 尋找最適的政策備選方案?

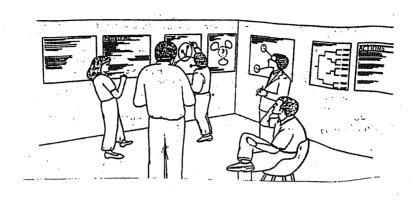


圖五:策略抉擇多層面途徑

佛、奚兩氏推薦了一種稱爲「互動場景」(Interactive setting)的 腦力激盪方式。這個場景包括:(一)研討室:研討室內放置數塊黑 板,如圖六所示;(二)紙張和有色筆;(三)磁釘<sup>註38</sup>。

註 37: Friend & Hickling, op. cit., pp.84-85.

註 38: *Ibid.*, pp.90-91.



圖六:「腦力激盪」互動場景

參加方案研擬「腦力激盪」的幕僚群以三至五人爲宜,通常稱爲「決策研討會」(Decision-seminar)。幕僚群開始腦力激盪時,先界定政策問題,然後分析決策面臨的 UE、UV 以及 UR 三種不確定狀況。排除這三種不確定狀況後,即著手研擬「行動方案」(Courses of action)。研擬行動方案時,幕僚群把構思好的方案寫在紙上,以磁釘釘在黑板上。如果有人覺得已提出的方案不夠問延,他(她)可以把原方案拿下,將自己認爲較理想的方案再釘上去。幕僚群透過腦力不斷激盪,「最適」的方案最後必能「脫穎而出」。

腦力激盪的方式很多,B途徑所介紹的是英國式方式。美國公司的高層主管甚至有人採取「創意的祈禱」(Creative prayer)方式從事腦力激盪。有一家總公司董事長統領四家分公司,這個企業集團有一次遇到一項經營上的難題。爲了解決經營難題,董事長與四家分公司總經理約好一個早晨在一處清靜的地方集會。這個清靜的房間沒有電

話,不會受到外界干擾。五個人到齊後,選擇了下列方式做一次別出 心裁的腦力激盪:

(一)開始時先靜坐沉思,讓心緒定下來;(二)由董事長帶領,進行祈禱;(三)五個人分別把如何解決營運難題的點子(方案)寫在卡片上;(四)彼此交換卡片;(五)在交換過程中,發現最好的點子 <sup>註 39</sup>。

最好的點子或最適的方案找到後,有助於協助決策者解決「工作 環境不確定」以及「指導原則不確定」的問題。

其次,我們要探索 O 途徑—亦即「組織聯繫」途徑與「最適方案的尋找」之間的關係。我們知道,「組織聯繫」顧名思義,其目的是要促進與決策議題有關機關的「互動參與」(Interactive participation);重點在「橫的聯繫」。

如何經由「組織聯繫」調適「多元政策利害關係人」(Multiple policy stakeholders)的權益?最常見的方式是强化協調與溝通,或成立「諮詢委員會」(Advisory Commission)凝聚相關機關或利益團體的觀點,使各有關機關以及利益團體的立場與利益獲得調和與折衷<sup>註</sup>

在協調與溝通方面,我們在此引述一個頗具參考價值的例子。過去美國國務院、國家安全顧問與國防部之間因缺乏制度化協調溝通機

註 39: Cited in Peale, Norman V., *The Power of Positive Thinking* (Engle-wood Cliffs, N. J.: Prentice-Hall, Inc., 1956), pp.60-61.

註 40: Friend & Hickling, op. cit., p.93 & p.95.

註 41 : 引自 中國時報,民國八十七年,六月一日,三版。

制,常發生三位內閣閣員在外交與國防政策問題上意見相左,甚至彼此相互掣肘的現象。1997年初,柏格出任柯林頓總統的國家安全顧問後,第一件事就是與國務卿歐布萊德以及國防部長柯恩「約法四章」,加强三方面的溝通與協調。輿論界取三位閣員姓氏的第一個字母(Albright, Berger與 Cohen) 匿稱之爲「ABC協議」。

### ABC 四點協議如下:

(一)不公開彼此批評;(二)不落井下石;(三)假設對方無辜,在 自己懷疑同僚掣肘之前,先打電話問清楚;(四)政策制定之前,先 取得彼此認可,然後經由記者會向外宣布<sup>胜41</sup>。

爲了加强聯繫,柏格每週一還在他的辦公室與歐布萊德和柯恩共 進午餐。此種制度化的協調與溝通機制可說是「組織聯繫」最佳的範 例,更有助於團隊精神的建立<sup>註 42</sup>。

另一方面,現代化多元社會,意見多元,利益也多元。西方國家政府經常成立「諮詢委員會」,邀請各利益團體代表出任諮詢委員,共同參與探討公共政策問題,以凝聚各利益團體的共識,作爲決策的基礎。公共行政先驅學者賽蒙(Herbert A. Simon)曾經說過:當代國家的政府決策是「團體諮商」(Group consultation)的產物<sup>胜43</sup>。

兩年多以前,英國科學家首次「複製」了一頭綿羊。既然動物可以「複製」,有一天人類也可以「複製」。此一問題震撼了美國生物、 醫學與科技界。醫界有人宣稱要著手複製人類。美國政府爲了解決此

註 42 : Thid

Simon, Herbert A., Administrative Behavior: A Study of Decision-making Processes in Administrative Organization, 2nd ed. (New York, N.Y.: The Free Press, 1957), pp.105-107.

一人類有史以來最棘手的生物科技與生命倫理問題,由柯林頓總統敦請醫學、科技與生物界名流成立「國家生物倫理諮詢委員會」 (National Bioethics Advisory Commission),由普林斯敦大學校長謝畢洛 (Harold Shapiro)擔任主席,在四個月內 (1997 年六月)提出研究報告,建議政府禁止「複製人類」(Human cloning)。這就是運用「諮詢委員會」協助政府研擬政策備選方案最典型的例子。

由此可知,經由協調溝通或成立「諮詢委員會」落實「組織聯繫」, 可以協助決策者克服「相關決策不確定」(UR)的問題。

經由「決策研討會」(Decision-seminar) 腦力激盪出來的備選方案,透過「組織聯繫」,提交決策相關單位進一步諮商,這時就進入「BOSP」途徑的第三層面-「尋找解決方案」(Solution-searching) 階段。在此一階段,米特羅夫(Ian I. Mitroff) 教授所倡導的「假設分析法」(Assumptional analysis)廣為策略規劃學者所引用<sup>註 4</sup>。

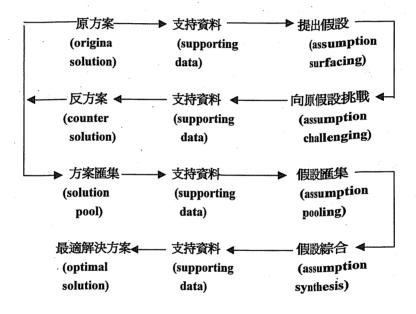
「假設分析法」的步驟如下:

- (一) 認明「利害關係人」(Stakeholder identification)。
- (二) 提出假設 (Assumption surfacing):提出政策問題的「建議解決方案」(Recommended solution)以及支持解決方案的資料。
- (三) 向原方案提出挑戰 (Assumption challenging):參與會議的相關機關代表有人認為「建議解決方案」不夠問延,或對其可行性提出質疑。在挑戰後提出另一建議方案。

註 44: Mitroff, Ian I. and Richard O. Mason, Challenging Strategic Planning Assumptions: Theory, Cases, and Techniques (New York, N.Y.: John Wiley & Sons, Inc., 1981).

Also see, Mitroff, James R. Emshoff, and Ralph H.Kilmann, "Assumtional Analysis: A Methodology for Strategic Problem-solving," Management Science, 25(1979), pp.583-593.

- (四)「假設匯集」(Assumption pooling):在此一階段,參與會議 人員要把第二步驟提出的「原方案」或「正方案」以及第三步 驟提出的挑戰性「反方案」加以匯集整合。
- (五)「假設綜合」(Assumption synthesis):在匯集整合上述的正、 反兩方案後,制訂一套「綜合性」解決問題方案<sup>註 45</sup>。 上述步驟可用圖表(圖七)顯示如下:



圖七:「假設分析」的過程

從「假設分析法」的步驟可以看出,米特羅夫「假設分析」的邏輯源自「辯證法」(dialectics);將「辯證法」三階段: Thesis(正)、Antithesis(反)以及Synthesis(合)應用到「解決方案的尋找」上。「Assumption-surfacing」提出正方案,此即 Thesis(正)的階段;

註 45: Mitroff, Emshoff & Kilmann, op. cit.

「Assumption-challenging」向原方案挑戰,此即 Antithesis (反)的階段;而「Assumption pooling」和「Ass-umption synthesis」則爲(合)的階段。

從「假設綜合」找到「最適」解決方案後,必有助於協助決策者 在從事決策時,突破他(她)所面臨的「工作環境」與「指導原則」 不確定的問題。

解決問題的「最適方案」已經找到,「BOSP」途徑的最後一個層面就是「政策成果抉擇」(Product choice)。在此一階段,參與決策者突破政策制訂過程中政策指導原則、工作環境、相關機關決策不確定狀況,克服時間壓力與資源限制,整個決策團隊已經累積並建立了信心,對解決問題的「最適方案」有了堅定承諾。幕僚人員對於這套最適政策方案還要提供系統性文獻(Systematic documentation)與支持性資料,闡析釋疑,使政策方案更具說服力。最後並以「整套政策」(Policy package)方式,呈現出來,如此「策略性規劃」才算克盡全功、圓滿成功<sup>此46</sup>。

### 伍、結論

以上我們探討了政策規劃三種新的規劃方法-「劇本式規劃

註 46: Friend & Hickling, op. cit., pp.101-103.

Also see, Christensen, Clayton M., "Making Strategy: Learning By Doing," *Harvard Business Review*, Vol.75, Nov-Dec., 1997, p.154 & p.156.

法」、「未來遠景建構法」以及「策略規劃法」。這三種方法具有不少 共通之處。

### 第一、外在環境的不確定因素:

由於企業組織和政府機關面臨不確定的外在環境因素,企業管理和政策規劃學者與專家才提出這三種規劃方法試圖突破這些不確定因素。「劇本式規劃法」之目的是要協助決策者在變遷、複雜與「不穩定的環境下」,重新發現「前瞻」與「獨創」的決策能力。「未來遠景建構法」過程圖的第一個步驟就是要掌握「未來環境」潛藏的機會與挑戰。「策略規劃」的規劃者在面臨政策問題時,首先要排除的就是「工作環境的不確定」問題。

### 第二、 遠見、遠景 (vision) 與「未來」取向:

「劇本式規劃法」强調「策略性遠見」(Strategic vision);「未來遠景建構法」過程圖中第二個步驟就是要描繪「未來遠景」(Future state vision)。「策略規劃」雖然沒有明顯提到「遠景」兩字,但在規劃過程中,首先要確定「政策指導的價值」(Guiding value),而要確定「政策指導價值」,需要揭橥清晰的「政策目標」(Policy objectives)。遠見、遠景與目標都强調未來取向。

### 第三、 創意與腦力激盪:

「劇本式規劃法」一方面要靠「事實」(facts),另一方面還要靠「認知」(perceptions)。它的具體運作程序當中有兩個地方都需要憑藉「洞識」(insights)。憑藉「洞識」才能「創造備選方案」(Option creation)。「未來遠景建構法」要透過「講習會」(Workshop),由公

司或機關領導幹部彼此腦力激盪,先建構未來遠景,然後研擬發展策略或行動方案,使公司或機關的遠景得以實現。「策略規劃」的「BOSP」多層面途徑,第一個層面"B"就是應用「腦力激盪」(Brain-storming)來研擬政策備選方案。

這些共通之處對於我們迎接與因應二十一世紀的來臨具有深遠 的啓示意義。二十一世紀顯然是一個外在環境不確定的世紀,我們熟 悉這三種政策規劃新方法才能掌握、控制未來世界的不確定因素。

要迎接二十一世紀,我們一方面要勾勒二十一世紀的遠景,也要構築二十一世紀的願景。如何描繪遠景,克服外在環境的衝擊,有待我們發揮創意(in-novation)與洞識力,提出「前瞻」、「獨創」的政策方案,如此我們才能從二十世紀的門檻,跨進二十一世紀的殿堂,實現我們共同構築的願景。

# An Analysis of New Policy-Planning Methods Hsing-Ti Cheng Abstract

This research paper attempts to examine and analyze three new-developed and widely-used policy-planning methods. Namely: "Scenario-Planning", "Future State Visioning Technique" and "Strategic Planning".

"Scenario-Planning" can effectively organize a variety of seemingly unrelated economic, technological, political, societal information and translate it into a framework for judgment for policy markers.

This paper also illustrates how did the Royal Dutch/Shell. Company successfully cope with the first world oil crisis during 1973 by using scenario-planning method.

Now, as we approach the year 2000, and as mankind enters into the new millennium, how are we going to build our vision for the next century? This paper introduces the "Future State Visioning Technique". It also exemplifies the remarkable improvement in safety performance at National Rubber Company in Canada by applying this technique.

As for "Strategic Planning", this paper tries to accomplish two purposes: (1) How do policy-makers manage the state of uncertainties when they are confronted with a decision problem? And (2) How do policy-makers utilize "brain-storming" approach to search for the "optimal" problem-solving policy alternatives? Our analysis provides innovative ideas and pragmatic proposals.

Key words: Scenario-Planning, Future state visioning Technique,
Strategic

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# 政策分析應用之探討: 以環保政策議題為例

陳恆鈞\*

#### 摘要

制定政策的理由眾多,其中之一爲產生滿足社會期望的結果。由於政策分析本質爲應用科學,因此對於公共政策所隱含的因果關係特別關注。換言之,政策分析爲一具有工具性質的學科。本文首先依據(1)知識產出,(2)手段,(3)方法論以及(4)專業角度等四個趨勢來界定政策分析的概念及定義。其次,從政治期刊及公共政策期刊選擇數篇關於環保政策的文章,來比較其範圍方法論及內容。最後提出四點試驗性的結論:雖然兩種期刊同樣是研究環保政策(1)公共政策的期刊較偏向於使用評估研究途徑,而政治期刊則較傾向於使用實證的方法;(2)公共政策期刊所使用的方法論一般而言較政治期刊所使用的方法論含有較多的變數;(3)公共政策期刊的研究結論大多累積成應用知識來影響決策,而政治期刊則將政策研究結果傳達給決策者供作參考;(4)公共政策期刊所產生的備選方案適用範圍較大可運用於其他地區。

關鍵詞:政策分析,環保政策議題,趨勢,期刊。

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### I. Introduction

Although governments do their best to uncover and select goals that are in the public interest, to design and choose alternatives to achieve those goals, to monitor the selected alternatives and ensure that they are implemented properly, there are constant complaints about ineffective programs, wasted money, and unsolved problems. Citizens receive the benefits and pay the costs of public policy. However, the costs often outweigh the benefits for they include not only the direct burden of taxation, but also the disappointments, and frustrations resulting from the failure of policies. After all, dissatisfaction with the results of the government decision-making process is apparent. But, at the same time, the government is also facing pressures. One pressure is the growing load on the environment; another is the withdrawal of tacit acceptance of authority, which is the source of its legitimacy and most of its power. Even if government does act, the policy outcome usually does not match intent. Frequently, government is incapable of dealing with new and threatening situations. G. C. Edwards and Ira Sharkansky described these phenomena as policy predicament (1978).

Today, with many new and complex problems facing the

government, there is no automatic mechanism to constantly monitor what goes on in government as the market does for business in areas where competition is relatively free (Schultze, 1970:16-21). Under that situation, the emergent job for government is to find another tool for shaping the policy-making process. Actually, this is policy analysis.

There are two aims in this paper. First, it attempts to discuss the different definitions of policy analysis given by various scholars. For succinct and easy contrast, the method used involves classifying the different definitions in accordance with four trends. They are (a) knowledge, (b) means, (c) methods, and (d) profession. Second, this paper chooses several articles from the political science and public policy journals about environment policies and compares them in terms of scope, methods, and content.

## II. Different concepts and definitions of policy analysis

Inevitably, policy analysis has different definitions depending on various authors' use of different methods. Sometimes they are

interchangeable, while sometimes they are applied in a particular meaning on a special case. In a broad sense, policy analysis can be defined as nature, cause, and effects of alternative public policies that address specific social problems. However, a more succinct way is to classify the term by the definitions and concepts. Here, this paper proposes four different kinds of classification in discussing the definition of policy analysis that include the following:

#### (a) Trends that relate to knowledge

Policy analysis is an important process of problem solving to invent new alternatives and to engage in creative as well as imaginative thinking. This includes much attention to problems of political feasibility, recruitment of support, accommodations of contradicting goals, and recognition of diversity of values. Especially important is construction of models, which can full justify the special characteristics of policies. In general, the goal is to explain variations in policy output. In order to achieve this function, sufficient knowledge is indispensable. As Susan B. Hansen argues "the failures of policy are not necessarily those of policy analysis, but both reflect to some degree our limited knowledge" (1983: 228). There are also many scholars who stress the importance of

knowledge, such as, Thomas Dye. He defines policy analysis as finding out what governments do, why they do it, and what difference it makes, - it involves the systematic identification of the causes and consequences of public policy, the use of scientific standards of inference, and the search for reliability and generality of knowledge (1976:1-3). H. D. Lasswell defines policy analysis as a kind of knowledge of and in the decision processes of the public and civic order (1971:1). Y. Dror explains the functions of policy analysis are to combine present methods of systems analysis with qualitative methods and a full awareness of the special characteristics of political phenomena, so as to provide a more advanced form of knowledge (1968:1-3). Furthermore, Susan B. Hansen refers policy analysis as an explicit, focused, systematic analysis of the outputs of governments and their effects on society (1983:218).

### (b) Trends that relate to means

Policy analysis is an action of a goal, objective, or purpose (Friedrich, 1963:70). Therefore, political scientists are gradually shifting their attention from the institutions and strictures of government to content of public policy - to the description and explanation of the causes and consequences of government activity

(Dye, 1976:2). How to make an effective method for policy-makers is the aim. As the political scientist, Alexander Mood suggests policy analysis as a procedure for carefully balancing the pros and cons of making a specified change in the tasks or procedures or rules of an organization (1983:2). In the same vein, Stuart S. Nagel thinks that policy analysis can be defined as evaluation of alternative governmental policies or decisions in order to arrive at the best policy or decision in light of given goals, constraints and conditions (1984:1-2).Others, such as D. MacRae and J. A. Wilde, define policy as the use of reason and evidence to choose the best policy among alternatives (1979:5). Mead maintains that policy analysis is a form of systems analysis. He explains that policy analysis has two major functions: "one evaluates options for resolving an issue on the merits as an economists do"; and then "goes on to address the political constraints as political scientists have usually done" (1985:223).

### (c) Trends that relate to methods

As we can see policy analysis is becoming increasingly interdisciplinary in its methods (Hedge and Mok, 1987), especially, with political science (the elite model, the group model, the system

theory) and economics (cost-benefit analysis, cost-effectiveness analysis). The main reason is it would be unrealistic for most political scientists not to be reluctant to define the public interest apart from the outcome of the pluralist political process (Mead, 1985:320). Hence, policy analysis gradually displaces traditional political criteria for programs with effectiveness and efficiency norms from economics. However, policy analysis is only one of the bridges of these disciplines, it does not intend to transform their basic characteristics. As B. R. Ripley suggests, policy analysis is trying to blend a solid grounding in the best of the discipline with a commitment to deal with specific policy issues (1985:26). Here, how to make the best (or good) choices for the use of scarce resources is an "applied discipline which uses multiple methods of inquiry and argument to produce and transform policy-relevant information that may be utilized in political settings to resolve public problems" (Dunn, 1981:60). R. A. Heineman also holds this definition. He regards policy analysis as developing techniques and models that may give it a more specific identity and expertise (1990:6).

### (d) Trends that relate to the public policy profession

There is a substantial growth in policy analysis training programs, project tams, and so forth. As David Webber argues, the major advantage of these kinds of "policy task forces over standard operating procedures, is the potential for the generation of new ideas and inputs from policy specialists who might not otherwise be involved" (1991:187). Generally, how to apply the accumulated knowledge for policy-making is the focus. As Gochenour explains, analyses for public decisions are formal studies of the sort a government agency might contract to have carried out by a university, research institute or management consulting firm (1982:2). Moreover, Formun defines policy analysis as an application both to the activity and to the product of this activity (1968:3). Thanks to their active participation, government can be more effective and efficient in analyzing alternative public policies.

In summary, the first three approaches have one thing in common: they try to answer how policy is made by concentrating on the effects of various political, economical and social variables so have on a wide range of outcomes (Mead, 1985; Wagner, 1985). On the surface, it seems that if we understand the policy process and

the factors that explain outputs, we can improve the way it works. To me, this is not necessarily seen as leading to advice. In fact, a successful policy analysis is an ongoing problem-solving process. To achieve that sufficient knowledge utilization; research is the precondition (Webber, 1983; Hansen, 1983). Therefore, how to integrate the knowledge utilization and the analysis of policy change which will lead to a conceptual framework is the new trend for public policy analysis (Webber, 1987).

# III. Different viewpoints about the development of environmental policies

One of the methods of social science is comparison. The more complex the elements of comparison, however, we will find the more profound the challenges to attaining conceptual consistency in analysis. The main reason is that the political environments, in which public policy exist are complex. In this section, this paper attempts to explore different articles relating to environmental policies. The sample is chosen from the political science journals and policy journals.

- (i) C. O. Jones' paper (1974, Journal of politics) treats an issue-area in which science and technology have a major impact on both cause and cure. He suggests that traditional "majority-building incrementalist" model may adequately explain federal air pollution policy development before 1970. However, this model cannot be used in 1970s, he develops and alternative "public satisfying-speculative augmentation" model of policy development to explain the particular case.
- (ii) Hanf's paper (1982, European Journal of Political Research), applying regulatory structure approach, was developed for research in the area of human services delivery as an alternative to the traditional top-down model of implementation. On the basis of fieldwork, he tested the general applicability of this perspective to other policy types and instruments. Which describes the design and assumptions of an international comparison of the implementation of regulatory programs in the area of air quality control.
- (iii) B. D. Wood in his article (1988, APSR) tries to discover the importance of democratic hierarchies in shaping public bureaucratic outputs. In order to examine the effect of the Reagan presidency on EPA outputs for clean air, he applied the Box-Tiao models (mathematical formulas) to explain shifts in the vigor of air pollution enforcement

between 1977 and 1985.

- (iv) R. W. Hahn (1990, Public Choice) in his paper attempts to construct a more complete theory of environmental regulation. His method is to apply game theory to provide more satisfactory explanations for a number of observed patterns of environmental policy. This paper suggests that the outputs of environmental policy emerge from a struggle between key interest groups.
- (v) G. Hoberg (1990, Policy Science) plans to evaluate Reagan's regulatory reforms through one case study, the regulation of pesticides. The analysis reveals that while the Reagan administration has produced important changes in both policy style and substance, in comparison to the changes in both policy style and substance, in comparison to the changes that occurred around 1970, they have been relatively modest.
- (vi) J. D. Montgomery's paper (1990, Policy Science), based on field research, indicates that the major source of environmental deterioration chlorofluorcarbons and carbon dioxide had been resolved, but deforestation and land degradation still require changes in mass behavior, especially in the third world countries.
- (vii) B. Bozeman and M. Crow's paper (1990, Policy Science), based on survey data, tries to trace the roots of why environmental policies

cannot successfully develop their function. They indicate the structure of R&D laboratory system, its environmental influence pattern, and the design of an effective technical enterprise are closely related. Unfortunately, the US R&D had neglected this key point. It is because the traditional sector-based classification of laboratories tells us little about their structure and behavior.

(viii) R. E. Kohn (1991, Policy Science) stresses the importance of transaction cost in environmental policies implementation. In his paper, the author uses the method of cost-benefit to compare five alternative instruments for pollution control. Most of the data are focusing on the St. Louis airshed. A major conclusion is that taxes are a superior instrument for pollution control when the increase of public revenues is a desired objective.

### IV. Comparison of the different conceptions

Using the main trends of policy analysis to explore the different author's viewpoints is a difficult undertaking. One reason concerns linkage problem - author's methods, perspective, academic background, and the target and so on. All of these factors are difficult to unify. Other reason is the nature of the problem keeps changing.

This paper is restricted to a sample of 9 articles about environmental policy. Certainly, this sample does not reflect the larger universe of policy research. Nonetheless, we still can compare the difference between policy journal and political science journal. There are four tentative conclusions as following:

- (i) Policy journals tend to focus on problem orientation. From these articles, we find that the authors of policy journals use evaluative (how particular programs work) and explanatory approach (how the problems have evolved), but the authors of political science journals use the demonstrative (to test new approach to particular problems), and some of them also apply explanatory approach. Here, policy journals seek to establish the determents of the pattern of policy outputs. While the function of political science journals may help to inform policy-makers, their aims are to present not to influence, through the analysis in some cases.
  - (ii) In my sample, it shows both policy and political science journals are multidiscipline. However the former more or less lends to

use political economy, the latter lend to use formal theories of organization. Furthermore, the methods used in policy science often involve complex statistical analysis with a number of variables relating to economic, social, and political characteristics of local authority.

- (iii) There will some disagreement about the extent to which knowledge ought to be available. The content of policy journals is more an attempt to apply knowledge to influence policy decisions. However, the contents of political science are attempt to present knowledge to policy-makers. Here, the author accept H. D. Lasswell's depiction of the policy sciences as being legitimately concerned with both "knowledge of the policy process" and knowledge in the policy process" (1970). The argument for evaluative and explanatory research, apart from their intrinsic (Mead, 1985), is that they help the decision-makers to appreciate the complexity of, and constraints on policy.
- (iv) In paper's sample, policy journals' scope is narrower than political science journals. The alternatives presented by policy journals can be applied in America, but political science journals are broader.

### IV. Conclusion

Briefly, this paper attempted to discuss what policy analysis is by different scholars' definition. In general, these different definitions can be categorized into four trends. They are (1) outputs, (2) means, (3) methods, and (4) public policy profession. In the second section, the author chose several articles from policy and political science iournals and explored their contents, scope, and methods. In the final section, the author used these articles as a sample to compare the different features between policy and political science journals. There are four tentative conclusions from the comparison: (1) policy journals tend to use an evaluative approach, however political science journals tend to apply demonstrative research; (2) the methods used in policy journals often involve more complex variables than political science journals; (3) the content of policy journals is more inclined to apply knowledge to influence decision-makers; political science journals tend to present knowledge to decision-makers; (4) the alternatives presented by policy journals can be used in America; political science journals can be applied to a broader area.

There has been considerable growth in policy analysis research during

1980s. Such trends are desirable, however, owing to our limited knowledge, it leads to the failure of policy. As H. Ingram and H. E. Mann note (1980) policy failure is evidence of a political system that responds knowledge that may be limited and appropriate policy tools are unavailable. My concern in this paper is the contribution of policy analysis to the policy-making and believes that the much wider and more intelligent use of policy analysis can make a great contribution to better policy decisions.

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### The Application of Policy Analysis:

### The Case of Environmental Policy Issue

#### Hen-Chin Chen\*

### **Abstract**

Policies are made for a variety of reasons, one of them is to produce socially desirable outcomes. As an applied science, policy analysis is concerned with predicting cause-effect relationships implicit in policies. In other words, policy analysis is an instrument. In this paper, we first try to define the concepts and definitions of policy analysis, in terms of four trends: (i) knowledge, (ii) means, (iii) methods, and (iv) profession. Second, we choose several articles from the political science and public policy journals about environment policies and compares them in terms of scope, methods, and content. In the end, we make four tentative conclusions. Although both journals deal with the same policy, there are four differences: (i) policy journals tend to use an evaluative approach, however political science journals tend to apply demonstrative research; (ii) the methods used in policy journals often involve more complex variables than political science journals; (iii) the content of policy journals is more inclined to apply knowledge to influence decisionmakers; political science journals tend to present knowledge to decision-makers; (iv) the alternatives presented by policy journals can be used in America; political science journals can be applied to a broader area.

Key Words: Policy Analysis, Environmental Policy Issue, Trends, Journal.

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### 「接續性獨占」,共謀理論,與「最高 轉售價格維持」約定

陳志民\*

摘要

於美國反托拉斯法下,上游廠商就下游廠商之最高轉售價格所作之約定,一直爲美國聯邦最高法院認定爲當然違反修曼法之限制交易類型。此項看法在1997年的 State Oil v. Kahn 一案中被正式推翻,法院改以「合理原則」作爲審理相關案件之標準。State Oil 一案展現美國最高司法機構逐漸擺脫以形式化的法律原則作爲判決之基礎,轉而强調最高轉售價格限制的功能性分析之趨勢。也即,最高轉售價格之違法性,並不能單單植基於價格決定自由不容被剝奪的理論上,而是需透過對該交易限制之市場效果爲經濟評估方能求得一妥適之答案。此等改變,非但對美國司法實務將產生重大影響;從反托拉斯法學之角度來看,該案也可視爲是針對管制者長期以來就市場價格限制約定所抱持之戒慎恐懼態度的再省思。

本文擬對美國反托拉斯法對最高轉售價格維持之司法演變,從經濟與法律之觀點,爲一詳細之介紹與分析。就經濟理論部分,本文將著重在最高轉售價格維持所具有的解決市場「接續性獨占」功能及法院以往所賴以制裁最高轉售價格的共謀理論等之介紹。就法律部分,本文將就確立最高轉售價格維持應適用當然違法原則之 Albrecht 案,以及下級法院如何透過反托拉斯法律原則之運用以因應對 Albrecht 案不斷升高的批評聲浪,終致最高法院廢棄該項原則爲一歷史性之敘述與分析。文末以美國法之經驗對我國公平法之解釋與政策制定所引含之啓示作結。

關鍵詞: 最高轉售價格維持、接續性獨占(successive monopoly)、共謀、掠奪性罰價、修曼法(Sherman Act)、當然違法、合理原則

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### 前言

1997年11月4日,美國聯邦最高法院於 State Oil Company v. Khan <sup>註1</sup>一案中,以一致之判決推翻了其維持將近三十年之名案--Albrecht v. Herald Co.. 註2 數十年來,Albrecht 一案所確立的業者 間之「最高轉售價格維持 (maximum resale price maintenance; "Max. RPM")與「最低轉售價格維持」(minimum resale price maintenance; "Min. RPM") <sup>註3</sup>約定同爲美國反托拉斯法下「當然違法」(per se illegal) 行爲之見解,一直爲是下級法院於審理相關案件所需遵守 與適用之法律原則。 於此原則下,一旦業者有固定下游廠商轉售 價格之協議存在,該協議即當然違反相關之反托拉斯法規,法院無 需就業者所主張之該約定可能具有促進市場競爭效果爲進一步考 量。 雖然最高法院於 Albrecht 中所持之理由,幾乎從判決之初, 即受到廣泛的探討與批評,而各級法院也在其後的類似判決中嚐試 運用不同的法律原則以減輕該案所可能產生之不合理現象: 但聯 邦最高法院捍衛 Albrecht 之決心,似乎並未因批評聲浪的增高而有 所動搖。 也正因爲如此,State Oil 一案格外引人注目。

依我國公平交易法第十八條之規定:「事業對其與交易相對人,

註1: 118 S. Ct. 275 (1997).

<sup>&</sup>lt;sup>註2</sup> 390 U.S. 145 (1968).

註3: Min. RPM 自 1911 年 Dr. Miles 一案後,即被美國聯邦最高法院裁定爲當然違法。 Dr. Miles Medical Co. v. John D. Park & Sons. 220 U.S. 373 (1911)。

就供給之商品轉售與第三人或第三人再轉售時,應容許其自由決定 同美國法一般區分「最高」及「最低」轉售價格維持,並適用不同 的法律原則, 並不清楚。 惟從條文文義及我國公平法之立法曰的 觀之,立法者所關切者,乃業者決定轉售價格的自由,乃維持市場 競爭之基礎,不容被任意剝奪。 在此考量下,似無區分「最高」 或「最低」轉售價格維持約定,並於法律之適用上厚此而薄彼之心 要。惟與 min. RPM 不同者,乃 max. RPM 具有降低產品最終售價 之市場效果,消費者可因此以較低之價格享受其所欲購買的產品。 因此,將 max. RPM 約定認定爲當然無效的結果,很可能將泊使消 費者以支付非競爭價格的方式來滿足所需。 此引發一值得吾人淮 一步深思的議題:何以業者自由決定轉售價格的權利比同被列爲公 平法立法目的之一的「消費者利益」(公平交易法第一條)來得重 要? 論者或可主張,禁止 max. RPM 於短期內也許對消費者有害: 然保障與維持市場價格競爭活絡,可促使交易秩序更趨公平與合 理,避免獨占或聯合行爲產生,長期而言,消費者實將因此而受利。 此項論點或許言之成理。 然令人不解的是,max. RPM 約定通常並 未限制加入約定之業者從事更低轉售價格的競爭;禁止 max. RPM

註4: 此規定爲公平法於今年(民國八十八年)修正後之條文內容。 舊法第十八條將經公平 會公告之一般消費者之日常用品排除於本條之適用範圍外。 公平法立法說明中載明, 之所以有此排除規定,乃因一般性消費用品之「市場競爭性較強」,因此「同種類商 品在市場上可爲自由競爭,不易受到轉售價格限制之不良影響」。 參閱「公平交易 法立法目的與條文說明」,頁十五。(行政院公平交易委員會編印,八十五年一月)。 換言之,由於競爭之激烈,任何不願受 RPM 限制之業者,較易尋得其他供應爾與之 交易。 爾等決定價格之自由亦將因此而獲得較大之保障

反而讓業者有機會抬高其最終價格。 消費者如何可因此而受利? 換言之,除抽象的「價格決定自由」外,禁止 max. RPM 與强化市 場競爭二者間因果關係之建立過程爲何?國內相關文獻鮮少論 及。 而美國司法判決於這方面之演變,不論在法條解釋或政策制 定上皆深具參考價值。

本文第 I 節首先介紹上游廠商(製造商)對下游廠商(經銷商)採行 max. RPM 之可能的正當理由。 其中,以 max. RPM 可被利用作爲降低製造商因「接續性獨佔」(successive monopoly)而導致市場對其產品之最終需求減少之問題,最受到反托拉斯法學者和美國聯邦最高法院之重視。 另 max. RPM 亦常與其他類型的垂直交易限制搭配,作爲製造商行銷策略之最適組合,其最終目的仍在避免「接續性獨佔」問題。 節第 II 節探討 max. RPM 之可能反市場競爭效果。 包括共謀理論與其他理論。本節將以介紹Albrecht 案爲行文的重心。 第 III 節分析 Albrecht 所引發之問題,以及美國聯邦法院如何在爾後的類似案件中修正 Albrecht 之見解以調合(或規避?)其與學理所可能產生之齟齬。 State Oil Company一案亦將於本節詳述之。第 IV 節思考美國法的經驗對我國執行與解釋公平法第十八條之啓示與未來修法之建議。 第 V 節總結本文。

E5: 另外,美國聯邦第七上訴巡迴法院法官 Easterbrook 認為,max. RPM 尚具有降低消費者之搜尋成本與交易成本,以及創新產品形象等功能。詳請參閱 Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 891-900 (1984).

### I. Max. RPM 與「接續性獨佔」 (successive monopoly) 理論

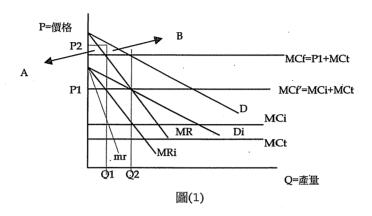
### A. 基本理論模型介紹

於垂直銷售體系下,製造商所最關心者,乃產品的最終銷售 量。 換言之,一旦下游市場之銷售量增加,經銷商對該產品之「衍 生需求」(derived demand)也跟著增加。 越 連帶地,製造商也可 因此而提高其銷售利潤。 然而,當上、下游市場分別由二廠商所 獨佔時,由於個別追求「利潤極大化」(profit-maximizing)之定 價行爲,「接續性獨佔」問題於焉產生。 其推理過程如下。 當上 游獨占者依「獨占定價」(monopoly pricing)模式,也即邊際成本 (marginal cost)等於邊際收益 (marginal revenue)之方式,決定 其對經銷商之售價後,該價格內化爲下游獨占者邊際成本之一部 分。 根據該成本與相同之定價模式,經銷商進一步求出其最適價 格與產出。「接續性獨占」對製造商而言之所以成爲一項問題,乃 和由其以本身之邊際成本來決定產品之最終售價並直接售予最終 消費者相較,製造商之獨占利潤受到經銷商獨占定價行爲之另一層 剝削,而導致產品之最終價格與產出偏離其最適水平;間接地,下 游廠商對該產品之「衍生需求」也因而減少。 註7 此項結論,可由

註6:於經濟學上,「衍生需求」泛指對某物之需求乃導因於利用該物以生產他物之考量。詳見 MICHAEL PARKIN, ECONOMICS 384 (1990).

註7:對此,美國現任聯邦最高法院大法官 Steven Breyer 於其擔任聯邦巡迴法院法官時之一項判決中,曾有如下生動的描述。 假設鋁原料市場由某一廠商所獨占,而其生產成本為 \$40。 進一步假設對該獨占廠商而言,鋁片(aluminum sheet)之利」潤極大化價格為 \$100。

### 圖(1)來加以說明。註8



假設最終產品 F 與中間原料 I 分別由二不同廠商所獨占。 D 及 MR 乃下游獨占者所面對之需求及邊際收益曲線。 相對地,Di 及 MCi 則分別爲原料市場獨占者所面對之衍生需求和邊際成本曲線。 進一步 假設下游廠商之生產技術 爲固定比例(fixed proportions);換言之,一單位的 I 將被用於生產一單位的 F,而 目只能生產一單位的 F。 學 另下游廠商將 I 轉換爲 F 所需之成本亦

倘使鍊鋁市場處於完全競爭狀態,而將鋁原料提鍊爲鋁片之轉換成本爲 \$35,獨占廠商將以 \$65之價格賣出其原料,以維持鋁片之產出於最適水平。相對地,假使鍊鋁市場也由一家廠商所獨占,則 \$65之價格將誘使其將鋁片價格提高超過 \$35,因爲該廠商也同樣要"極大化"其利潤。 然如此一來,鋁片價格將因此而升高;市場對鋁片及鋁原料之需求則相對的減少。Town of Concord v. Boston Edison Company, 915 F.2d. 17, 24 (1st Cir. 1990); cert. denied 499 U.S. 931 (1991).

注8: 有關「接續性獨占」之模型與分析,多數產業經濟學教科書及專論均有詳細之介紹。 請參閱 CARLTON & PERLOFF, *INDUSTRIAL ORGANIZATION 523* (2<sup>nd</sup> ed. 1994);
WILLIAM F. HUGHART II, *THE ORGANIZATION OF INDUSTRY* 318 (1990); JEAN TIROL, *THE THEORY OF INDUSTRIAL ORGANIZATION* 174 (1988); ROGER BLAIR & DAVID KASERMAN, *LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL* 31 (1983).

註9:較淺顯的例子乃電視機經銷商於向製造商購得電視機一台後,不論其投入在行銷之成本為何,其最終之銷售量仍爲電視機一台。See. BLAIR & KASERMAN, id, at 28. 此項假設對「接

以圖中之 MCt 曲線來代表。

欲了解下游廠商對 I 之需求量,吾人首先需決定 F 之最終產量爲何。 依獨占定價模式,下游廠商之最適產量發生於當其邊際成本等於其邊際收益時。 換言之,於某一特定要素價格 P 下,下游廠商將生產 F 直到 MR= P + MCt,或 P= MR- MCt。 此一方程式可視爲下游獨占者對 I 之實際需求或「有效需求」(effective demand)。 <sup>註10</sup> 而從上游廠商之角度來看,該曲線實際上等於其邊際收益曲線,MRi。 <sup>註11</sup> 相對於該有效需求曲線,假設圖(1)中之 mr 乃上游獨占者之實際邊際收益曲線。 於此等成本架構下,下游獨占廠商依 MCi=mr 決定 I 的最適產出與價格,Q1 和 P1。 P1 隨之成爲下游廠商成本的一部份,使其生產 F 之邊際成本成爲 MCf= P1 + MCt。 依同樣的定價模式,MCf= MR,F的最終產量及售價則分別爲 Q1 與 P2。

#### B. Max. RPM 作為一項矯正「接續性獨占」問題之約定

「接續性獨占」之福利效果爲何,可由以下之比較說明得知。

續性獨占」模型的分析極爲重要。 倘使生產技術爲可變動比率(variable-proportions), 經濟分析所關心之重點將有所不同。舉例言之,假設 3 單位的勞工與 4 單位的資本,或 4 單位的勞工與 3 單位的資本,都可生產一台個人電腦。 倘使勞工市場爲工會所獨占,經濟學家所關心者,乃獨占價格與生產要素間的可替代性,將使生產偏離最適之要素給且合。 換言之,廠商將使用過少的勞工及過多的資本。 相關之分析,請參閱 John M. Verrion & Daniel A.Graham, Profitability of Monopolization by Vertical Integration, 79 J. Pol. Econ. 924 (1971) 以及BLAIR & KASERMAN, id., at 48-50.

註10: SHUGHART, supra note 8, at 320.

註11: 下游廠商之總收益爲  $P_X$  Q。 依定義,邊際收益乃總收益之一次微分。 因此,  $MRi = d(P_X) / dQ = d[(MR-MCt) \times Q]/dQ = MR-MCt$ 。

首先考慮上游或下游廠商透過垂直整合(vertical integration 游廠商購併下游廠商)之方式,整合兩不同階段市場,而後再以 I 之邊際成本,而非獨占價格,作爲企業整合後內部的移轉價格。 此一安排,使下游部門生產 F 之邊際成本變爲 MCf=MCi+MCt。 再依MCf=MR 之定價模式,F 之最終產量及 I 之衍生需求將變爲 Q2;而 F 之最終售價將爲 MCf。 從圖(1)吾人可以得知,不僅 F 的產出增加(Q2>Q1),消費者所需支付的價格也因此而降低(P2>MCf);「消費者剩餘」將因此而增加。 註12 而在「接續性獨占」的情形下,上、下游廠商之總獨占利潤π。爲(P2-MCf)×Q1。 註13 垂直整合後,企業之總獨占利潤π。 變爲(MCf-MCf)×Q2。 從圖(1)中,吾人可清楚看出,π<sub>i</sub>-π<sub>s</sub>>0。 註14 換言之,「接續性獨占」下之整體福利效果將因垂直整合而獲得改善。

除透過類似購併或結合等垂直整合方式改變產銷市場結構外,上游廠商亦可藉由契約約定解決「接續性獨占」問題。例如上游廠商可向下游廠商先收取等於 $\pi_i$ 之加盟權利金(franchise fee),而後再以邊際價格將 I 售予下游廠商。於該約定下,上游廠商所可獲取之獨占利潤與垂直整合相同,同為 $\pi_i$ ;而 I 之衍生需

註12: 依經濟學用語,「消費者剩餘」(consumer surplus)乃指消費者對某物所願意支付的最高價格與其實際所支付的價格二者之差,而前者可由消費者之需求曲線來代表。 PARKIN, *supra* note 6, at 168. 依圖(1),垂直整合後,消費者剩餘增加的幅度等於 A+B.

註13
 : 上游與下游廠商之利潤分別爲 (P1-MCi) × Q1 與 (P2-MCf) × Q1。 二者相加, (P1-MCi)

 × Q1+ (P2-MCf) × Q1= (P1-MCi+P2-P1-MCt) × Q1=[P2-(MCi+MCt)] × Q1=

 (P2-MCf) × Q1。

註14:詳細之證明,請參閱 Blair & Kaserman, supra note 8, at 34.

求亦可維持在 Q2 的水平。註15 另一項可能的安排便是 max. RPM。 <sup>註16</sup> 以圖(1)爲例,上游廠商仍可以 P1 之獨占價格移轉 I 給下游 廠商;而後於經銷契約中約定每單位 F 的售價不得超過 P1+MCt。 此安排之最終效果與垂直整合或加盟權利金約定相同--F 及 I 之需 求將維持在最適水平 O2。 註17 不同的是,於加盟權利金的情形,獨 占利潤之實現發生在下游市場;而於 max. RPM 則發生於上游市 場。 此外,「接續性獨占」市場的發生,除係各別廠商獨立商業 行爲下之產物外,也可能是上游廠商有意的契約安排。 例如,爲 避免經銷商間互搭對方售前或售後服務的便車,產品製造商常於契 約中加入「地域限制」(territorial restriction)條款,劃分下游經銷 商個別專屬之產品銷售區域。 此一安排,使各下游廠商於其銷售 區域內取得形同獨占者的地位,「接續性獨占」問題於焉產生。 從 這個角度來看,max. RPM 搭配「地域限制」條款,可視爲製造商 於賦予其經銷商市場力量以鼓勵不同品牌間競爭(interbrand competition)之同時,控制最終產出與衍生需求於理想水平之一項最

註15: Walter Y. Oi, A Disneyland Dilemma:: Two-Part Tariffs for a Mickey Mouse Monopoly, 85 Q. J. ECON. 77 (1971); TIROLE, supra note 8, at 176. 從經濟學的角度來看,π, 乃固定成本(fixed cost),並不會影響下游廠商之價格決定。一旦 I 以邊際成本賣出,下游廠商之邊際成本仍爲 MCi+MCt 。 對於固定成本是否會影響廠商或個人之理性決策,哈佛大學教授 Robert Nozick 哲學的角度有深入的探討。ROBERT NOZICK, THE NATURE OF RATIONALITY 21 (1993).

註16:除此之外,製造商亦可於契約中訂定產品之最低銷售量,或同時以垂直整合及經銷契約「雙重行銷」(dual distribution)的方式,避免經銷商抬高其價格。 請參閱 Carlton & Perloff, supra note 8, at 526; Blair & Kaserman, The Albrecht Rule and Consumer Welfare: An Economic Analysis, 33U. Fl. L. Rev. 461, 478 (1981); Blair & Fesmire, Maximum Price Fixing and the Goals of Antitrust, 37 Syracuse L. Rev. 43, 59-67 (1986).

註17: TIROLE, supra note 8., at 177; CARLTON & PERLOFF, id.

適契約組合。<sup>註18</sup>

綜言之,從「接續性獨占」之經濟模型分析顯示,max. RPM 約定降低產品最終價格並提昇整體產出水平。 下游廠商之利潤或 將因此安排而減少, 但其減少部份乃移轉至上游廠商,再加上「消 費者剩餘」的增加,就社會整體而言,max. RPM 實有促進其福利 效果之正面功能。

# II. Max. RPM 之反競爭效果 — 共謀 (Collusion) 理論與其他

相較於「接續性獨占」解釋,美國聯邦最高法院長期以來對 max. RPM 安排一直持否定的態度。 此項立場之起源,可追溯至早 期該法院之兩件水平聯合訂價案。

於 U.S. v. Socony-Vacuum Oil Co. 世 9 一案中,被告乃位於美國中西部之主要石油生產公司。 爲因應 20 及 30 年代石油生產過剩 導致下游零售價格慘跌之窘狀,被告彼此同意選擇一家或數家煉油廠商做爲其商業「舞伴」(dancing partner),並由其負責收購爾

註18 · 有關利用各類垂直限制約定以作爲解決「接續性獨占」問題之最適契約組合,請參閱 Frank G. Mathewson & Ralph A. Winter, *An Economic Theory of Vertical Restraints*, 15 RAND J. ECON. 27 (1984).

註19 : 310 U.S. 150 (1940).

等生產過剩之石油藉以穩定市場價格。並20 由於此項安排,石油之上游批發價與下游零售價格皆因此得維持在一定水平之上.儘管被告極力主張,該購買協議可使市場石油價格趨於合理,避免業者從事「毀滅式競爭」(ruinous competition)行爲,並21 美國聯邦最高法院於判決中之一段文字,重申其對市場價格不容被任何形式的人爲約定所扞預之立場:"於休曼法下,基於提高(raising)、降低(depressing)、固定(fixing)、維持(pegging)或穩定(stabilizing) 跨州或與外國間貿易商品價格之目的,所形成之具有同等效力的聯合行爲,皆屬當然違法(illegal per se)。並22

於其後之 Kiefer-Stewart v. Joseph E. Seagram & Sons 註23 一案,聯邦最高法院進一步將 Socony-Vacuum 之精神具體落實於水平聯合訂定最高轉售價格之合法性分析中。 本案原告(Kiefer-Stewart) 乃位於美國印地安那州之酒品批發商。 於對被告所提起的訴訟中,原告主張被告彼此間對限制酒品之最高轉售價格存有默契,而對違反該限制之批發商,則以拒絕繼續與其從事交易的方式來達到制裁的目的。註24 此協議或默契已對原告商機造成傷害。 原告據此請求法院判決該行為已構成休曼法第一條所禁止之聯合行為,註

註20:此項安排,僅爲石油公司間之「君子協議」(gentlemen's agreement),並無契約之拘束力。

Id., at 179.

註21: *Id.*, at 220.

註22: *Id.*, at 223.

註23: 340 U.S. 211 (1951).

註24: Id., at 212.

25 並於地方法院獲得勝訴。 該案於上訴後,遭聯邦第七巡迴上訴法院改判。 除無確實證據證明被告間有限制轉售價格之協議或默契外,法院指出,限制最高轉售價格實具促進市場競爭之功能。 <sup>註 26</sup> 然而,聯邦最高法院認為本案證據已足夠讓陪審團認定被告間已具有聯合行為之合意。 更重要者,乃依據 Socony 之精神,max. RPM與 min. RPM相同,皆是對經銷商依其判斷決定價格自由之限制,應屬反托拉斯法中之當然違法行為。 <sup>註 27</sup> 惟嚴格來講, Socony與 Kiefer-Stewart 兩案仍屬水平交易限制之範疇;真正表明美國聯邦最高法院制裁 max. RPM 決心者首推 1968 年的 Albrecht v. Herald Co.一案。 <sup>註 28</sup>

本案爭議肇始於從事報紙批發之原告 Albrecht 與報社 Herald Co.間之一項經銷契約。 依該契約約定,Herald Co. 賦予 Albrecht 於一定區域內獨家銷售其報紙之權利。 然而,Herald Co.亦要求所有經銷商遵循其所建議之最高轉售價格。 倘若經銷商違反該最高轉售價格之限制,Herald 得選擇終止與該經銷商之契約,或以垂直整合的方式,直接進入該經銷商之獨家銷售區域與其從事報紙批發或零售業務之競爭。 註29 於發現 Albrecht 自行調高該報之零售價後,Herald Co.首先選擇後者作爲懲罰 Albrecht 之方式,並僱用他

註25: 15 U.S.C. § 1. 該條文禁止業者以契約、托辣斯、或共謀等方式,限制州與州或與外國間貿易之聯合行爲。 違反者,係屬刑法上之重罪(felony),可處罰金或最高三年之有期徒刑。

註26: 340 U.S. 212.

註27: *Id.*, at 213.

註28: 390 U.S. 145 (1968).

註29: *Id.*, at 147.

人說服 Albrecht 之客戶終止爾等與 Albrecht 之報紙遞送契約。 Herald Co.進一步將與 Albrecht 解約之客戶分配予其他經銷商。 縱使如此,Albrecht 仍繼續以超過 Herald 所建議之價格銷售其報紙,並具狀向法院提起告訴,主張 Herald 之行爲已違反修曼法第一條之規定。 隨後,Herald Co.終止 Albrecht 之經銷權。 註30

該案上訴至聯邦最高法院後,多數大法官認為 Albrecht 應勝 訴。 其所持之理由自此成為美國司法界與學界探討 max. RPM 反 競爭效果之最重要依據與思考之始點。 歸納而言,可分以下四點 說明之。

#### A. Max. RPM 與共謀(collusion)理論

於運用修曼法第一條認定被告行爲違法時,最重要之前題要件乃當事人間有共謀不爲價格競爭之合意存在。至於共謀存在之認定標準,最高法院再度重申其於 United States v. Parke, Davis & Co. 註31中之立場,認爲除了廠商明白宣示其銷售策略並拒絕與違反該策略之經銷商從事交易外,廠商利用其它手段强迫經銷商不得違反其所建議之最高轉售價格,亦可作爲聯合定價合意存在之證據。註 以本案爲例,Herald Co.乃基於强迫 Albrecht 降價之目的始僱用第三人說服 Albrecht 之客戶解約;而該第三人於受僱時亦了解

註30 : *Id.*, at 147-48.

註31 : 362 U.S. 29 (1960).

註32: 該案涉及 Parke, Davis & Co.於經銷契約中限制其經銷商之批發價與零售價,並要求批發商不得與違約之零售商從事交易。 Id., at 44, 45. 由於零售商受制於解約之威脅,不得不接受轉售價格約定之限制;而藉由拒絕與違約之零售商交易,批發商則協助 Parke Davis 落實聯合訂價之計劃。 據此,最高法院認爲三者間已具有共謀之合意。390 U.S. 149.

Herald Co.之此項目的。再者,當其他經銷商接收 Herald 所分配之解約客戶時,爾等亦當然了解不遵循 max. RPM 之後果;實質上,亦相當於協助 Herald Co. 落實聯合訂價之計劃。 據此,最高法院認為 Herald Co.與其經銷商間實存有聯合訂價之合意。 註33

#### B.Max. RPM 與便利共謀(facilitating collusion)理論

與共謀理論息息相關者,乃美國最高法院認為,假使 Herald Co. 所設定之最高轉售價格接近或等於經銷商之實際銷售成本,則市場上之實際轉售價格亦將趨近或等於該最高轉售價格。長期而言,max. RPM 將產生與 min. RPM 相同之反競爭效果。 <sup>註34</sup> 然而,最高法院並未近一步說明二者之關聯性係透過何種論理過程所建立。歸納言之,除價格決定自由受到限制外,學理上認為 min. RPM 之最主要反競爭效果乃其提供製造商或經銷商一項便利或鞏固彼此共謀協議之機制。 <sup>註55</sup>

首先就下游市場之共謀來看。此理論認為,一旦下游廠商是一 群具市場力量之買方,爾等可集體行使其「獨買力量」(monoposony

註33: 390 U.S. 149-50.

註34 : *Id.*, at 153.

注35:除此之外,min RPM 可防止「套利」(arbitrage)行為產生,故可協助廠商實行差別取價(price discrimination)。為避免位於需求彈性較高地區之消費者,將售價較低之產品轉賣至彈性較低之經銷區,製造商可以高彈性區之售價作為最低之產品轉售價格,使轉售之誘因消失。另外,學者亦主張,對製造商而言,min RPM 於產品行銷初期或許有其必要。然而一旦廠商習慣於轉售價格維持制度,其隨市場情況改變而調整銷售策略之機動性也將隨之降低。從而出現學者所謂的「行銷遲鈍」(marketing inertia)現象。相關理論之介紹與檢討,請參閱 HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 11.2 (1994); THOMAS R. OVERSTREET, JR., RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 25-31 (1983); Robert C. Steiner, The Nature of Vertical Restraints, 30 ANTITRUST BULL. 143, 177(1985).

power)要求上游廠商採行最低轉售價格制度。 題 經銷商可藉此察 覺任何企圖違反聯合定價協議之廠商。 另透過拒絕交易條款,下游廠商可利用上游廠商作爲處罰之工具。 共謀協議亦可因此而更加穩固。 題 次就上游市場之共謀而言。 在缺乏任何控制機制下,當零售價格下降時,製造商將很難得知該價格變動究竟是因爲經銷商之競爭,抑或係部份製造商已違反價格協議所致。 而一旦廠商採行 min. RPM 使得下游零售價格均相同,由於經銷商無法將因此所節省之購貨成本反應於售價以增加其最終銷售量,間接地,其對秘密降價製造商之衍生需求也不會因此而增加。 如此一來,製造商秘密降價之誘因也將大幅降低。 從這個角度來看, min. RPM 實可大幅降低製造商間之監督成本,並提高聯合行爲成功的機率。 單 38

從判決中,吾人僅能揣測美國聯邦最高法院似乎是透過將 max. RPM 與 min. RPM 的經濟效果等質化後,再直覺的認為所有 min RPM 可能產生之反競爭效果,皆可以 max. RPM 之交易安排來達成。 因此,於法律原則之適用上,應等同視之。 惟此項見解是否

註36 : HOVENKAMP, id., at § 11.2b; BLAIR & KASERMAN, ANTITRUST ECONOMICS 354 (1985); G. FRANK MATHEWSON & RALPH A. WINTER, COMPETITION POLICY AND VERTICAL EXCHANGE 14 (1985). 部份學者認為,「便利經銷商共謀」乃各類反競爭解釋中,最具可信度者。OVERSTREET, id., at 13; Robert Pitofsky, In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing, 71 Geo. L. J. 1487, 1490 (1983).

註37 Barbara Ann White, Black and White Thinking in the Gray Areas of Antitrust: The Dismantling of Vertical Restraints Regulation, 60 Geo. WASH. L. Rev. 1, 42 (1991).

世38 OVERSTREET, supra note 35, at 20; Pauline M. Ippolito & Overstreet, An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works, 39 J. L. & ECON. 285, 293-94 (1996). See also, Lester Telser, Why Should Manufacturers Want Fair Trade, 3 J. L. & ECON. 86, 99-105 (1960).

妥適,將於下節深入探討之。

#### C.Max. RPM 與市場集中度之增加

聯邦最高法院認為 max. RPM 當然違法的另一項理由則是製造商企圖以本身之判斷取代市場機能,從而剝奪經銷商競爭與生存之能力。 最高法院特別關切製造商所定之最高價格可能過低,而無法補償經銷商提供消費者所需之服務或便利等非價格競爭(non-price competition)之成本。 其結果將導致下游經銷市場由少數財力雄厚且規模較大之經銷商所掌控,而市場集中度也將越來越高。 註 39

#### D. Max. RPM 與「接續性獨占」理論

最值重視者,乃聯邦最高法院於判決中拒絕接受聯邦巡迴上訴法院以「接續性獨占」理論作爲合法化被告採行max. RPM 之理由。上訴法院認爲,由於 Albrecht 受有獨家經銷條款之保護,於該經銷區內,形同獨占。 限制其轉售價格可防止 Albrecht 濫用其市場力量,抬高產品之最終售價。 就本案而言,max. RPM 可視爲輔助獨家經銷條款以保障消費者福利之必要契約限制。 註40 然而,最高法院於其判決中反對上訴法院此項論點,認爲當事人不得以矯正因一項垂直交易安排所生之反競爭效果作爲使用他項非法契約限制之正當理由;縱使 max. RPM 爲唯一可矯正市場力量濫用之機制時亦同。 註41

註39: 390 U.S. 152-53.

註40: *Id.*, at 153.

註41 : *Id.*, at 154.

## III. Albrecht 案之再檢討

#### A.學理之批評

綜言之, 姑且不論美國聯邦最高法院對共謀協議存在之證據 推論是否妥適,<sup>註42</sup> Albrecht 案於學理上仍有以下幾點值得斟酌之 處。

其一,從上述理由 D 觀之,美國聯邦最高法院似乎犯了循環論證之謬誤。本案之核心爭議在於決定 max. RPM 是否具有類似 min. RPM 之反競爭效果,進而可一視同仁地適用「當然違法」原則。 誠如 Harlan 大法官於其反對意見書所言,本案問題所在並非 max. RPM 可不可能違法,而是 max. RPM 是不是必然違法(alwaysillegal)。 <sup>註43</sup> 因此,當被告提出 max. RPM 與獨家銷售區域安排乃解決「接續性獨占」問題之最適契約銀合時,該主張已挑戰「必然違法」此項命題之正確性。 此時,法院審理之重心應是該理論之經濟效果評估,而非先行將 max. RPM 認爲是非法,而後再以不得以一項「不法」矯正另一項「不法」爲由,加重其可責性。 於正常情況下,由於報紙之利潤來自於廠商之廣告贊助,Herald 應樂見其批發商或零售商能於相關市場內從事激烈之價格或服務競爭以增加其讀者群。 <sup>註44</sup> 然而,基於報紙發行及經銷之特殊市場結

註42: 如 Harlan 大法官於其執筆之不同意見書中即表示,受僱於 Herald 之第三人僅限於提供其勞務,對於 Herald 是否限制最高轉售價格並無利害關係存在. 法院將單純之勞務契約視爲共謀協議似有欠妥適. See id., at 160-61.

註43: Id at 165

註44: Jacqueline Dowd, Note, Application of the Antitrust Laws to Newspaper Distribution System:: The

構,<sup>註45</sup> 獨家經銷似乎是 Herald 所必需接受之經濟現實。<sup>註46</sup> 由此觀之, max. RPM 搭配獨家銷售安排以解決「接續性獨占」問題之論點, 為更見其說服力。

其二,從經濟效果之評估來看,最高法院將 max. RPM 之市場效果與 min. RPM 等同視之,其論理似嫌粗糙,法院並未針對 max. RPM 提供一獨立之分析架構以呈現其與 min.RPM 二者之等質關係。 誠如 Harlan 大法官所言,斷然將 min. RPM 與 max. RPM 劃上等號,進而拒絕考量後者之任何可能之促進競爭效果,實無異以"盲目替代分析"(substitute blindness for analysis)。 <sup>胜47</sup> 事實上,最高與最低轉售價格維持有相當不同之市場效果。 首先,縱使如最高法院所言,當最高轉售價格長期等於廠商之實際銷售成本時,其與廠產實施最低轉售價格無異,然相較於 min RPM, max. RPM 並未對消費者造成任何不利之經濟效果,因爲爾等所可能支付之最高價格將不會超過廠商之成本。 <sup>胜48</sup> 此與完全競爭市場下之結果無異。 再者,max. RPM 僅限制經銷商之「最高」而非「最低」轉售價格,其如何作爲一項監督機制以防堵業者祕密降價競爭,進而便

Sherman Act Turned on Its Head, 38 U. FL. L. REV. 479, 483 (1986).

註45 Harlan 法官認為,基於對報紙遞送路線儘可能「精簡」(compactness)的要求,以及每條路線只能容納少數甚至一家零售商之特質, 寡占及價格領導乃每一經銷市場之必然趨勢。 390 U.S. 166.由於報紙遞送之成本主要爲固定成本(如購買送報所需之卡車),其邊際成本很低,使得每一條遞送路線往往展現相當的規模經濟。連帶地,也使得「自然獨占」(natural monopoly)成爲市場上極爲普遍之現象。 再者,於美國,報業間之競爭,有一大部份來自對地方新聞的報導。此特質,也大幅限制了市場潛在競爭者之人數。有關報業與其他產業之不同,see, Dowd, id., at 483-86.

註46 <sup>:</sup>390 U.S. 166-67.

註47 Id., at 157.

註48 : Dowd. *supra* note 44, at 492.

#### 利廠商實施共謀協議?實令人費解!

其三,最高法院基於關心最高轉售價格渦低,無法保護小型經 銷商從事非價格競爭,進而禁止廠商採行 max. RPM,從價格理論 來看,該理由亦值商確。市場經濟之一項基本特性乃產品價格可透 過市場需求與供給變動作不斷的調整,而逐漸趨向「均衡」 (equilibrium)。而於調整過程中,治費者之需求改變,扮演著重要 之訊息指標與制裁機制。 因此,倘使製造商所設定之最高轉售價 格過低而無法補償經銷商之成本,其後果乃降低爾等成爲該製造商 經銷商之意願,消費者對該製造商產品之需求也將隨之減少。 點 爲增加其產品之銷售密度,此結果將迫使製造商重新調整其訂價策 略或放棄最高轉售價格制度。由此項角度觀之,法院與其關心 max. RPM 如何剝奪經銷商之價格決定自由及競爭能力,毋寧將焦點置 於 max. RPM 是否爲製造商所濫用,以作爲妨害市場發揮其自我矯 正功能之工具。學理上最常討論者,乃製造商是否將最高轉售價 格設定在經銷商之邊際成本之下,意圖透過「掠奪性訂價」(predatory pricing)的方式,排除既有或潛在之市場競爭。 註50 類此之考量,

Easterbrook, supra note 5, at 889.

註50: 廠商運用掠奪性定價以擴大其市場力量之可行性,已遭受芝加哥學派(Chicago School)學者之質疑。如 Easterbrook 即認為,一旦掠奪者企圖於排除市場競爭後提高價格,用以彌補其於掠奪期間所受之損失時, 高額的利潤,將吸引競爭者再度加入市場競爭,而掠奪者勢必得再行降價以排除潛在競爭。 惡性循環的結果乃廠產長期處於虧損,掠奪性定價也因此成為一非理性(irrational)之競爭策略。 Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U.CHI. L. REV. 263, 269 (1981). 近來,拜「賽局理論」(game theory)之賜,部份經濟學家認為掠奪性定價並非全如芝加哥學派所言,無反市場競爭之虞。特別是當市場資訊不對稱(asymmetric)時,廠商可藉實行掠奪性定價,以散佈及建立其掠奪市場之決心與聲譽,進而降低其他競爭者進入市場之意願。 相關理論之發展與簡介,請參閱 AlvinK. Klevorick, *The Current State of the Law and Economics of Predatory Pricing*, 83 AM. ECON. REV.162 (1993)(Papers and Proceedings).

大多涉及水平市場要素,如進入市場之難易或競爭廠商人數之多寡的評估,與 max. RPM 本身並無直接之關係。 而從「當然違法」原則之出現乃基於實現司法經濟考量下的產物觀之,從事該評估所需調查之事證與結果是否當然對市場競爭有害之不可預知性,似將進一步把 max. RPM 推離該原則之適用範圍外。

#### B. Albrecht 案於美國下級法院之實踐

縱使 Albrecht 在學理上引發諸多爭議,美國各級法院於後 Albrecht 之反托拉斯法案件中,仍遵循「當然違法」原則。 但另一方面則透過對原告舉證責任之加重,特別是引進「反托拉斯損害」 (antitrust injury)之概念,以平衡因 Albrecht 案所可能產生之不公平 現象。

於美國法上,「反托拉斯損害」乃提起反托辣斯法私人訴訟中當事人適格要件之一,且係由美國聯邦最高法院於 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.一案中所確立之法律原則。 註51 該案涉及一保齡球瓶製造商(Brunswick)因垂直購併多家保齡球館,導致原告之營業利潤減少。原告聲稱,若非被告收購這些面臨倒閉之業者,原告於競爭者不堪虧損退出市場後,其利潤將可大幅增加。 於判決中,最高法院確立了反托拉斯法私人訴訟之當事人,除需證明其受有財產上之損害外,該損害尚需爲反托拉斯法所欲避免之損害之

除掠奪性定價外,當市場處於寡占競爭時,max. RPM 於學理上亦可能被利用爲廠商實行「限制定價」(limit pricing) 之手段以排除市場之潛在競爭。L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, 211 (1977). 簡言之,於「限制定價」下,雖然最高轉售價格在邊際成本之上,然廠產所訂定之價格水平,將使任何潛在競爭者無利可圖。 倘潛在競爭者預見此結果,其進入市場之意願也將隨之降低。

註51: 429 U.S. 477, 489 (1977).

當事人適格原則。舉例而言,假設透過合法之價格競爭,A廠產 迫使B廠商退出市場競爭。就B而言,其所受之損害(商業利益之 損失);而該損害乃肇端於A之行爲(價格競爭),實無需置疑。然 而B卻不得提起反托拉斯法上之私人訴訟,因反托辣法之立法目的 乃在保護競爭(competition)而非競爭者(competitor)。

就聯邦上訴巡迴法院而言,「反托拉斯損害」原則之被運用於max. RPM 案件,以第七巡迴法院以下之二項判決,最具代表性。

於 Jack Walters & Sons Corp. v. Morton Building, Inc. , <sup>EDQ</sup> 被告 Morton 爲組合式(prefabricated)農舍之製造商,而原告 Walters 乃加 盟該項產品行銷行列之經銷商。 Walters 並於特定區域內享有對 Morton 產品之獨家經銷權。 <sup>EDQ</sup> 被告每年均舉辦有數次之產品促銷活動;消費者可經由 Morton 之廣告得知促銷價格與舉辦(促銷活動 之經銷商。 此外,爲達促銷之目的,Morton以折扣價將其產品售 予經銷商。 爲求此折扣利潤確實反應於最終售價,Morton 更要求經銷商之零售價不得超過其所廣告之促銷價格。 違反者,將被終止經銷權或面臨來自 Morton 以較低的廣告價格直接銷售與消費者之競爭。 <sup>EDQ</sup> 另外,被告亦經常檢查經銷商是否確實遵行該價格政策。 Walters 主張,Morton 之行爲已構成最高轉售價格之維持,當然違背修曼法第一條之規定。

本案經原告上訴至巡迴法院後,就最高轉售價格維持部份,美

註52 : 737 F.2d 698 (7th, Cir. 1984).

註53: *Id.*, at 701. 註54: *Id.*, at 706.

國著名反托拉斯法學者 Posner 法官基於以下三點理由判決原告敗訴。

其一,由於事涉 Morton 之商譽,被告有充分之理由採行合理 之措施以確保消費者能如廣告所言,以較低之價格購得 Morton 之 產品。 依 Posner 法官之見解,所謂合理之措施,包括說服經銷商 遵循促銷價格與檢查下游經銷商是否確實執行。 原告所列之理 由,並未證明被告與其他經銷商有聯合訂定最高轉售價格之協議存 在。<sup>註55</sup>

其二,如前所言,於 Albrecht 一案中,法院認定 max. RPM 當然違法的原因之一,即當事人不得以矯正他項不法爲由而將其合法化。 Posner 法官認爲,此項觀點之說服力,於 1977 年最高法院之名案 Continental TV., Inc. v. GTE Sylvania, Inc. 题56—案後,已顯得相當薄弱。 由於在 Sylvania 一案中,最高法院接受了銷售區域限制約定具有限制「同種品牌競爭」(intrabrand competition)以促進「異種品牌競爭」功能之理論,從而推翻了獨家銷售區域限制乃「當然違法」之傳統見解,而改爲應受「合理原則」審查的交易類型之列,該判決大幅提昇了該交易限制合法之可能性。 引申而言,max. RPM 作爲與獨家區域限制搭配之最適契約組合,以防止下游經銷商濫用其獨占力之抗辯,其可信度也將大幅增加。 题57 Posner 强調,由於 Morton 的獨家銷售區域安排並非本案之爭訟點,這項見

註55: *Id.*, at 708.

註56: 433 U.S. 36 (1977).

註57 : 737 F.2d 706.

解並非主張 Morton 的最高轉售價格約定一定是合法。然而,其的確突顯了「當然違法」原則下,將 max. RPM 視爲必定具有反競爭效果之不妥當處。<sup>註58</sup>

其三,縱使 Morton 限制經銷商轉售價格之行爲違法,Walters 所受之損失主要來自其他經銷商之合法價格競爭。 Posner 法官强調,雖然市場競爭之增强,乃經銷商價格決定自由遭受限制下之產物;然而從另一角度來看,因產品價格降低,Walters 之損失卻是消費者利益之增加。 由於本案並無事實顯示被告有實行「掠奪性定價」之意圖,該損失並非反托拉斯法所欲保護之損害,Walters 不得具此提起私人訴訟。註59

Jack Walters 所仰賴之原則爲隨後之 Indiana Grocery, Inc. v. Super Value Stores, Inc. 註60所遵循。該案原告爲位於美國印第安那州,印第安那波里斯(Indianapolis)地區之超市連鎖店。其於訴訟中主張被告與其加盟店間存有轉售價格不得高於其他競爭廠商價格之協議。註61 雖然 Indiana Grocery 承認被告之價格並不具掠奪性,但其主張由於 max. RPM 已屬「當然違法」,由此可推論出當事人因最高轉售價格維持約定所受之損害當然是反托拉斯法所欲保護之損害. 再者,倘法院以「反托拉斯損害」爲由禁止當事人提起訴

註58 : *Id.*, at 707.

註59: 737 F.2d 709.

註60: 864 F.2d 1409 (7th Cir. 1989).

註61 : *Id.*, at 1416.

訟,此將與 Albrecht 制裁 max. RPM 之精神相背離。 註62

然而,此項論點並不爲第七上訴巡迴法院所接受。 法官强調,無論是「當然違法」或「合理原則」,其適用之最終基礎,仍在於競爭效果之評估。 註63 換言之,前者乃適用於在多數情形下,反競爭效果大於促進競爭效果之交易限制類型。 而適用之目的,乃基於司法經濟之考量,與當事人是否受有損害甚或「反托拉斯損害」無必然之因果關係。 由於本案之價格限制並未達掠奪訂價之水平,原告乃合法價格競爭下之犧牲者,並未有反托拉斯損害發生。 註64 另外,因 Albrecht 比確立「反托拉斯損害」原則之 Brunswick一案早發生,法院認爲 Albrecht 並未排除新法律要件之適用。 註65 C.美國聯邦最高法院對 Albrecht 案之修正

美國上訴巡迴法院將「反托拉斯損害」原則運用於審理 max. RPM 之態度,於其後之 Atlantic Richfield Co. v. USA Petroleum Co. <sup>註</sup> <sup>66</sup> ("ARCO") 一案中,獲得聯邦最高法院的肯定。 本案被告兼上訴人 ARCO 乃營業地位於美國西岸之石油公司。 除本身自營之加油站外,加盟(franchise)乃 ARCO 銷售其產品之另一主要管道。 原告及被上訴人 USA 石油公司,則爲獨立之石油經銷商。 <sup>註67</sup> 爲因應經銷商間之折扣戰,ARCO 改變其行銷策略,以透過各種買賣優惠

i±02 · Id., at 1418.

註63: Id., at 1419.

註64 : *Id.*, at 1419-20.

註65 : *Id.*, at 1420.

註66 : 495 U.S. 328 (1990).

註67: *Id.*, at 331.

條件的方式,鼓勵其旗下加盟站降低零售價至與其他獨立經銷商相同之水平。<sup>註68</sup> USA 主張,ARCO之行為應被視爲是與其他經銷商間就石油最高轉售價格所爲之一項協議。而由於該聯合行爲,加盟站彼此間之競爭將大幅降低,爲數眾多之獨立經銷商也將因不堪長期虧損而退出市場。<sup>註69</sup>

雖然聯邦最高法院再度重申 Albrecht 案仍具判例之拘束力,但基於「反托拉斯損害」之考量,仍判決 USA 公司敗訴。法院認為,在缺乏「掠奪性定價」的證據下,縱使如 USA 所言,max. RPM 將 迫使 ARCO 的經銷商無力負擔價格或非價格競爭,而導致石油零售市場之集中度增加;但該結果應爲 USA 所樂見。 身爲 ARCO之競爭者,USA 可趁此機會提供所需要之服務,進而吸引因 max. RPM 之實行而對 ARCO 過度集中之經銷體系或服務不滿意之客戶,以提高自已的利潤。註70 再者,即便如 Albrecht 所言,max. RPM 終究會產生與 min. RPM 相同之反競爭效果,USA 實可搭轉售價格協議之便車,以避免其與 ARCO 間所可能引發之價格大戰,甚或共享獨占利潤。 不論如何,USA 皆不可能因 ARCO 之限制最高轉售價格而受有反托拉斯損害。註71

另一方面,如同 Indiana Grocery 一案中之原告,USA 亦主張因 max. RPM 乃「當然違法」,其於法律上即當然視爲受有損害,

註68: *Id.*, at 332.

註69 : Id.

註70: Id., at 336-37.

註71: Id., at 337.

而無舉證之必要。對此主張,最高法院採取與第七巡迴法院同樣的立場,認爲「當然違法」原則與「反托拉斯損害」乃二項不同之概念。前者乃商業確定性與訴訟效率下之產物。 法院之所以可以在未經詳細之競爭效果評估前,即將某特定之市場交易類型認爲違法,其理由乃從過去司法實踐之經驗觀之,該交易類型具有促進市場競爭效果之機率可說是微乎其微! 註72 此與當事人是否因該違法行爲而受有反托拉斯法所欲保護之損害,不可混爲一談。

#### D. Albrecht 案之推翻

儘管美國聯邦法院延續其將 max. RPM 視爲當然違法之立場,但「反托拉斯損害」概念之運用實已大幅動搖該原則之妥適性。由於最高轉售價格對消費者有利,在「反托拉斯損害」原則之限制下,原告可否提起訴訟的關鍵,端視其可否證明被告正利用 max. RPM 從事掠奪性定價,以排除市場競爭。 而法院也勢必要調查諸如被告之市場力量、生產成本、從事反競爭行爲之意圖、以及成功之機率爲何等證據。 註73 其所需之時間與人力,恐將大幅增加法院之執法成本,而與「當然違法」原則之精神背道而馳。 此外,誠如 Posner 法官於 Jack Walters 一案所揭櫫的,「當然違法」原則完全排除了法院考量 max. RPM 經濟效果之機會,尤其是利用 max. RPM 以解決「接續性獨占」問題。 於 Sylvania 一案後,嚴格遵循該原則,也勢將提高法院誤判之機率。

註72: Id., at 342

註73:有關美國法上審理「掠奪性定價」之原則,請參閱 Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

1997 年 11 月 4 日,美國聯邦最高法院正式以 State Oil 推翻 Albrecht。 本案原告 Khan 承租 State Oil 之加油站與便利商店,且 於契約中允諾,將以 State Oil 所建議之轉售價格扣除每加侖美金 3.25 分之零售利潤向 State Oil 購買所需之汽油。 原告可以高於 State Oil 所建議之價格出售其產品,但多餘之利潤需回扣予 State Oil.。註74 於營運一年後,原告因獲利不佳無法依約按時支付租金,而遭 State Oil 解約及要求返還租賃物。 Khan 則另狀控告 State Oil 限制最高轉售價格,剝奪其依汽油等級採行不同售價之自由。註75 地方法院以原告並未受有反托拉斯損害爲由,判決其敗訴。 法官 認爲,原告並未證明倘無最高轉售價格限制,其汽油之銷售量將大幅增加。註76 同時,並無證據顯示 State Oil 於特定市場內具有相當 之市場力量,而足以從事諸如掠奪性定價等妨礙市場競爭之行爲。註77

本案上訴至巡迴法院,再度由 Posner 法官審理。 雖然其重申 max. RPM 具有解决「接續性獨占」問題之功能,但亦强調於 Albrecht 案被推翻前,max. RPM 仍屬當然違法,下級法院需受其拘束。 註78 而就反托拉斯損害而言,Posner 推測最高法院將對本案採取較寬之認定標準。此可由以下二點推知。首先,Sylvania 案雖然將「合理

註74: 118 S.Ct. 278.

註75:<sub>Id.</sub>

註76: *Id.*, at 279.

註77:74

註78: Kahn v. State Oil Co., 93 F.3d 1358, 1363 (7th Cir. 1996).

原則」擴張至垂直非價格交易限制;但於判決之一項註腳中,最高法院大法官再度重申垂直價格限制乃「當然違法」之立場。 <sup>註79</sup> 相對於最高法院所一再强調之獨家銷售區域限制具有促進「異種品牌競爭」之功能,Posner 認爲,該註腳宣示了最高法院認爲同品牌內之價格競爭仍屬反托拉斯法所欲保護之利益之一。 <sup>註80</sup> 也因此,僅管 max. RPM 具有增進消費者福利之效果,任何型態之垂直價格限制,將被視爲是一項反托拉斯損害。於判決中,Posner 强調,此種解釋很明顯的與經濟理論相悖;但任何修正,應來自於最高法院,而非上訴法院。 <sup>註81</sup> 再者,於 ARCO中,最高法院以 USA 乃ARCO之競爭者與受益者爲由,區別 ARCO與 Albrecht 二案之不同。其反面解釋乃一旦涉案之當事人爲類似 Khan 之下游經銷商時,由於爾等未能如 USA 般以非價格競爭與 ARCO 相抗衡,進而從中獲利,其預期最高法院將會將此項損失視爲是反托拉斯損害。

然而聯邦最高法院藉由本案,以下列理由推翻了 Albrecht 一案 所確立之原則。 大法官們首先强調,修曼法之精神乃在於保護不 同品牌間之競爭; 而不論其決定過程爲何,只需轉售價格在掠奪 水平之上,較低之價格實對消費者有利,且並無削弱市場不同品牌

註79: 433 U.S. 51 n. 18.

註80: 93 F.3d 1364.

註81 : *Id.* 註82 : *Id.*  競爭之虞。註83 於此等情形下,執法機構强行運用反托斯法制裁具有降低市場價格之交易安排,將可能迫使社會整體付出高昂的代價,因爲削價求售正是競爭之最主要本質。註84 基於此項信念,最高法院認爲,max. RPM並不具有需以「當然違法」原則始能防堵之對消費者或市場的傷害。此外,大法官亦再度肯定 max. RPM解決「接續性獨占」問題之價值,認爲廠商之所以禁止其經銷商抬高價格,往往係爲避免下游獨占力遭濫用導致銷售量降低之商業利益考量,而非出於妨礙市場競爭之惡意。註85

再者,最高法院指出,禁止 max. RPM 並不當然可以維持經銷商獨立決定其產品售價之自由。 事實上,Albrecht 一案迫使許多報社改以垂直整合方式,自行遞送報紙, 導致獨立之批發商與零售商人數減少。 換言之,法律所欲保護之價格決定自由,並未因Albrecht 一案而得以實現。雖然 而如果 max. RPM 真如 Albrecht 一案所言,將導致經銷商無法提供必要之服務,受害者除消費者外,尚包括經銷商與製造商本身。 就正常商業判斷而言,製造商實不可能採行 max. RPM。 同理,何以製造商願以 max. RPM 讓下游市場集中於少數大規模經銷商手中? 縱使其目的乃在於透過掠奪性定價以獨占市場,其可行性爲何,於學理上仍有爭議。 更何況因 max. RPM 而無力提供服務之經銷商,很可能亦是較無效率之廠商,爾

註83:<sub>118</sub> S.Ct. 282.

註84:<sub>Id.</sub>

註85: Id.

註86: Id. 有關運用垂直整合方式以解決「接續性獨占」問題,請參閱本文第 I 節 B 項之說明。

等之退出市場,對消費者及競爭而言,不盡然有害。註87 類此之爭議,皆有待法院於個案事實中,運用「合理原則」來詳加分析判斷。最後,大法官認爲,max. RPM 是否實質上等同於 min. RPM,也需依「合理原則」考量諸如上游市場競爭者人數之多寡及參與共謀協議成員之個別市場占有率等因素,以決定聯合固定最高轉售價格協議是否真的具有原告所指控之不利市場競爭之效果存在。註88 綜言之,不僅 max. RPM 欠缺如 Albrecht 所預期般的反競爭效果,「當然違法」原則的使用,很可能將使「接續性獨占」問題更加惡化,而對消費者不利。註89

## IV. 啟示與建議

相較於美國判例法對市場競爭結構分析之强調,公平會歷年來 對轉售價格維持案件所爲之處分或解釋,展現出相當不同之風貌。 歸納言之,其決定過程之基本原則乃公平法第 18 條之適用不應因 限制類型爲最高或最低轉售價格維持而有所不同。此項結論可由公 平會本身對最低轉售價格限制之幾項解釋與決定得知。如於(81)公

註87: *Id.*, at 283.

註88: Id. 當上游競爭者人數眾多時,達成共謀協議與監督協議執行之成本也將增高。 共謀成功之可能性也相對較低。 而當共謀協議成員之市場占有率很小時,由於其無足夠之市場力量以影響市場價格,共謀理論也將因此而較不可採。有關運用「合理原則」所需考量之因素,請參閱 Easterbrook, *supra* note 5, at 901-04.

註89: 118 S.Ct. 283.

參字第 02148 號解釋中,公平會就經銷契約約定產品建議價是否違 反公平法時表示,契約"如對下游經銷商未要求約定應以該上下限 價格出售或不得打折",則不得認爲已違反第18條之規定。註90 早 於解釋廠商對經銷條件設限是否違法時,公平會認爲供應商如要求 經銷商須提供與供應商相同(包含較高及較低)之折扣時,將有違背 第 18 條之慮。<sup>註91</sup> 於「中央文物供應社於空大出版社之教科書約 定轉售價格」一案,公平會認爲該經銷契約第五條規定:「售價以 定價爲準,並不得加(減)價售出(.)」,已違反第十八條第一項,須 予以糾正。<sup>註92</sup> 而最近之「南一書局股份有限公司因從事不公平行 爲及足以影響交易秩序之欺罔及顯失公平行爲」一案,註93 公平會 於討論該案關於「限制轉售價格」約定部分時,明白表示了「限制 轉售價格」(未區分最高或最低)政策"無形中即剝奪配銷階段廠商 自由決定價格之能力,經銷商將無法依據其各所面臨之競爭狀況以 及成本結構來訂定售價,其結果將使同一品牌內不同經銷商間之價 格競爭爲之減弱。"於4 很明顯的,公平會對公平法第十八條之執法 態度,仍較傾向於保護價格之決定自由。 至於售價自由之限制空 係透過業者之何者交易限制協議,則非所問。

公平會對 max. RPM 最明白之政策宣示,當屬「豐禾實業股份

註90:本案乃下載自公平會電腦網站(http://www.ftc.gov.tw)中之「國內案例資料庫」。粗體字及底線乃等考所加。

註91: (82)公貳字第 04384 號解釋。 資料來源同上註。

註92: (81)公處字第 040 號。資料來源同註 90。

<sup>&</sup>lt;sup>註93:</sup>(87)公處字第 087 號。資料來源同註 90。

註94: 同上註。

有限公司爲限制轉售價格及足以影響交易秩序之顯失公平行爲」一案。註95 該案涉及豐禾實業限制其經銷商與零售商出售其「優沛蕾」產品之轉售價格,並要求末端零售價格不得高於其所訂定之促銷價格。對不配合促銷活動之廠商,豐禾實業則以停止供貨及終止合作關係作爲處罰。公平會以下列二點理由,認定該行爲已觸犯公平法第 18 條之規定。註96 公平會首先指出,豐禾之全省經銷商都是以賺取進貨、銷貨之價差爲主,受其委託經營賺取佣金者,實屬少數。爾等之關係,該當第 18 條「交易相對人」之構成要件。再者,雖然豐禾一再辯稱,其所定之價格僅係建議價格,但公平會認爲,被處分人對未配合促銷之經銷商會予以糾正,並以此作爲是否續約之參考。 而經銷商在面臨可能被解約之壓力下,顯少有不配合促銷降價活動者。豐禾所稱之建議價格,實質上已具有價格限制之拘束力。

與同將 max. RPM 視爲當然違法之 Albrecht 相較,「豐禾實業」一案之處分理由似稍嫌簡略。公平會「確定當事人法律關係」(經銷或代銷?)→「定性」(建議售價或約定價格?)→「結論」(合法或非法?)之三段式論理邏輯,與 State Oil 著重 max. RPM 對市場正面與負面影響之功能性分析,更形成相當明顯的對比。註97 筆者個人

註95: (85)公處字第 013 號。 資料來源同註 90。

註96: 同上註。

註97:類似的論理方式,也曾為美國聯邦最高法院所採。如於 Dr. Miles 一案,該法院將當事人之交易類型區分為"寄售"(consignment)與零售二類。前者由於被告仍控制及擁有貨物之所有權,故無轉售或轉售價格維持之問題存在。220 U.S. 398. 然而,最高法院於後來的判決中,開始對這種過度強調形式區分之判決理由產生質疑。如於 Sylvania 一案中,Powell大法官即指出,當法院將某種垂直交易限制歸類爲當然違法之列時,其所持之理由需建構

淺見認為,公平會如能於處分書中,就本文之二大主題「接續性獨占」與「共謀理論」,以個案事實為基礎提出分析說明,將可使其決定更具說服力。 而其中最主要之考量因素乃豐禾之市場地位為何? 此關係到豐禾所謂之建議價格是否真對下游經銷商具有與價格約定相同之拘束力,以及豐禾是否能以最高轉售價格限制遂行掠奪性訂價或穩定其與經銷商間之共謀協議。 另外,豐禾是否給予其經銷商類似獨家銷售區域之保護,使得强制促銷活動,成爲避免經銷商濫用其競爭優勢而傷害消費者利益之必要附加限制? 註98 類此問題,皆是反托拉斯法學理上檢討 max. RPM 競爭效果理應關心之焦點。

惟在此需强調者,以上所提並非在非議公平會決定之正確性。由於法律上無效之概念乃自始、確定、與當然地不生效力,<sup>註99</sup>加上公平法施行細則並未賦予公平會於適用第 18 條時,得考量當事人之意圖、目的、市場地位、所屬市場結構等因素之權限,<sup>註100</sup>公平會之裁量空間已受到大幅的限制。因此,筆者所提之建議,似乎

於"可論證的經濟效果" (demonstrable economic effect)之上,而非仰賴"形式的界線劃分" (formalistic line drawing)。433 U.S. 58-59. Scalia 大法官於稍後之 Business Electronics Corp. v. Sharp Electronics Corp.一案中,重申此項立場,並強調在 Sylvania 之原則下,法院將很難單純以交易契約中有無限制"價格"二字來判斷. 因爲所有之垂直非價格限制,都具有影響下游轉售價格之潛在經濟效果。485 U.S. 717, 728 (1988).

註98:對於禁止 max. RPM 是否有損消費者利益,公平會在「豐禾實業」一案並未說明。 但於(81)公參字第 021480 琥解釋中,公平會認為,經銷商未將供應商之"建議售價"四個字印於產品上,是否會造成經銷商剝削消費者權益,應依具體個案判斷。 見前註 90. 推敲其意,公平會似乎是關心消費者可能因此而誤以爲該價格乃統一價格,而喪失比價之意願,進而被剝奪享受較低價格之機會。 果真如此,該項見解將如何與公平法第 18 條之普遍適用於 min. 及 max. RPM 的原則相協調? 此問題有賴公平會於未來相關案例中釐清。

註99: 劉得寬著,民法總則,頁 320 (中華民國 71 年 9 月修訂初版)。

<sup>&</sup>lt;sup>註100:</sup>請參考公平交易法施行細則第 24 條之規定。

僅能透過修法之方式爲之。 換言之, 立法者似有必要將 max. RPM 約定排除於「無效」交易類型之外,而將第18條所規範之內容限 制在 min. RPM 約定。對具反競爭潛在危險之最高轉售價格維持約 定,筆者認爲有下列二項配合措施可資採行。其一,於公平法施行 細則第24條第1項中增列「最高轉售價維持」約定爲公平法第19 條第6款所稱之限制之一,使執法機關得依施行細則第24條第2 項之規定,以類似美國法上之「合理原則」考量諸如「接續性獨占」 ·及「共謀理論」等促進競爭與反競爭因素。其二,將 max. RPM 排 除於公平法第三章「不公平競爭」之外,而以第二章關於企業獨占 與聯合行爲之相關規定規範之。 如上所述, max. RPM 之最主要反 競爭效果,乃在於其可能被利用作爲「掠奪性定價」之工具。如果 係獨占者(公平法第5條第1項)所爲,公平會實可依公平法第10 條第2款有關獨占者濫用市場地位之規定處罰之。 如係企業彼此 間共謀妨礙市場參進下之產物,公平法第 14 條禁止廠商爲聯合行 爲之規定,實足以防節之。 另就公平法第 10 條而言,公平會可利 用對獨占事業之認定過程,詳細審核企業之市場占有率、市場參進 之難易度、以及企業有無影響特定市場價格之能力等因素(公平法 施行細則第3、4條),進而篩選出眞正有能力濫用 max. RPM 從事 「掠奪性定價」之廠商。 而第 14 條所列之聯合行爲例外允許規 定,則給予公平會從整體經濟與公共利益之角度衡量 max. RPM 合 法性之機會。 如公平會可具此調查 max. RPM 是否係業者爲尋求 國外銷售量的增加,以「確保或促進輸出」而專就外國市場所爲之

約定 (公平法第14條第4款)等。

#### V. 結論

本文以美國反托拉斯法對「最高轉售價格維持」約定之判例演變爲例,檢討我國公平法第 18 條規定之相關問題。 就美國法部份,本文特別著重對經濟學上「接續性獨占」理論與共謀理論於美國司法實踐之介紹。 而從 Albrecht 一案的全盤否認,歷經聯邦上訴巡迴法院及 ARCO 一案之透過「反托拉斯損害」概念以不衡「當然違法」原則所產生之弊端,發展至最近的 State Oil 一案以「合理原則」取代「當然違法」原則,吾人可清楚地看出,美國聯邦最高法院對 max. RPM 之審理態度,已由早期的以保護獨立廠商之價格決定自由爲主要標準,轉化爲對整體市場競爭有利與不利了效果之評估。 而除非市場結構容許且有證據顯示廠商正利用 max. RPM 從事諸如「掠奪性訂價」等行爲或企圖以不當之低價構築競爭者之參進障礙,共謀理論將最高轉售價格限制的經濟效果及其對消費者利益之影響與最低轉售價格限制同質化的看法,也將在嚴謹之學理分析下,逐漸失去其光環。

受囿於我國公平法原則上將最高與最低轉售價格限制皆視爲當然無效,公平會之相關決定與解釋仍建立在探討當事人間之法律

關係是否已構成「轉售」,以及經銷商之價格決定自由是否已受到 限制。類似美國法之功能性分析方式,則較少見。由於最低與最 高轉售價格限制對市場競爭之影響有相當程度之不同,爲求我國公 平法之決定能更週延,筆者個人認爲,美國之執法經驗實值得我國 參考借鏡。 就最高轉售價格約定而言,可考慮於將來修法時,將 其與最低轉售價格限制相區別。 至於因此所產生之法律適用問 題,則可依下列二種方式配合。如果立法者認爲 max. RPM 仍應 歸類爲「不公平競爭」,則可將其排除於公平法第 18 條之適用範 圍外,而另以第19條第6項來規範之。其次,立法者或可考慮將 分析 max. RPM 所可能產生之反競爭效果「水平化」。 畢竟,類 似 max. RPM 是否會淪爲廠商掠奪市場之工具而得以成功地排除潛 在競爭,終竟需探究實施 max. RPM 之廠產相對於其他競爭者而 言,其市場地位爲何。從這個角度來看,max. RPM 非不得視爲係 獨占者濫用市場力量或聯合行為的一種類型,而分別依公平法相關 規定分析處罰之。

# Successive Monopoly, Collusion, and Maximum Resale Price Maintenance

#### Andy C. M. Chen

#### **Abstract**

It had been held for decades by the U.S. Supreme Court that agreements between manufacturers and distributors fixing the maximum resale price levels were per se illegal under the Sherman Act. The Court relinquished such a view in State Oil v. Kahn of 1997 and declared in that case that maximum resale price maintenance would be reviewed under the rule-of-reason standard. State Oil reveals a trend under which the Court gradually departs itself from basing antitrust decisions primarily on the mechanical application of established legal doctrines such as the freedom to determine one's own prices. Instead, functional analysis in the sense that the legality of maximum resale price maintenance be determined by an evaluation of its potential market impacts would now be relied upon more favorably by the Court Not only will this change of reviewing standard be meaningful for antitrust practitioners, it also represents a reconsideration from the Court regarding antitrust regulators' quite

critical view on any price agreement among market participants.

This article intends to present a detailed introduction and analysis of this issue from both economic and legal points of view. With respect to economic theories, I focus on how procompetitively maximum resale price maintenance could be used to resolve the "successive monopoly" problem and how, according to the Supreme Court, it could be abused to facilitate collusion. In light of legal theories, I will first offer a historical account of how the per se rule was applied to cases concerning maximum resale price maintenance, in particular the *Albrecht* rule, followed by a analysis of the lower courts' modification of the reasoning in Albrecht developed to accommodate the rising criticisms of that case. In addition, the Court's holdings in *State Oil* will be introduced in this part.

I conclude this article with a discussion on how American experience could shed light on the enforcement of Article 18 of the Fair Trade Law in Taiwan.

Key Words: Maximum Resale Price Maintenance; Successive Monopoly,

Collusion, Predatory Pricing, Sherman Act, Per Se Illegal, Rule

of Reason

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## 法國省制之研究

呂育誠\*

摘 要

在法國地方制度中,省不僅是重要的地方政府層級,更是法國傳統中央 集權觀念與地方自治結合的具體表現。本文即在於從法制的觀點,探討法國 省制的組織架構及其功能,同時比較在一九八二年地方分權法施行對於省制 的影響,以及法國省制對於當前地方政府研究與實務運作所呈顯的意涵。

關鍵字:省、法國、比較制度、地方政府。

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## 壹、 前言

自法國大革命以後,省(department)便一直成爲法國重要的地方制度之一。在法國至今二百餘年的發展歷程中,除了少數特殊情形外,各省所轄區域基本上並無重大改變。此外,由於法國係採行中央政府集權的單一國家體制,故省政事務主要由中央政府派駐於省的代表所主導,至於省民自行選舉產生的議會,則僅是具有諮詢功能的象徵性機關。

近年來,上述長期穩定的省級政府組織型式雖然持續存在,然 而其間的權責關係與運作型態卻有相當大的轉變,特別是自一九八 0年代地方分權的呼聲日益高漲的情形下,省制的內涵與功能亦隨 之產生重大變革。

本文主要是從法制與功能兩個層面,探討法國省制的內涵與發展歷程,並嘗試從其間特質的分析中,推論出影響省制建構的重要考量因素,以及法制架構與功能運作在變革過程中之轉變內涵及其關係。筆者希望藉由本文之探討,不僅可以更深入地瞭解法國省制內涵,且亦能提供吾人在地方政府研究的過程中,對於制度建構及其功能的轉變能產生新的解讀與啓發。

### 貳、 法國省制沿革

法國省制的起源與規模可追溯至一七九0年代。由於在歷經大

革命後,法國人民一方面爲了確保公民權益的平等,一方面也基於地方風土民情的差異,故根據地理位置分佈將全國劃分爲 90 個省。此一劃分的原則與結果歷經二百多年的發展,除了 1966 年巴黎市週邊因爲人口數量增加而增設 5 個省,以及 1975 年科西嘉(Corsica)省劃分爲 2 個省,使得省的總數增加爲 100 個之外,各省的規模與轄區範圍並未有重大的改變(France Diplomatie,1999)。而這種發展歷程,一方面固然使法國的省制因具有悠久傳統而成爲重要的地方層級,但是另一方面過度以區域爲劃分標準的方式,亦使今日各省在人口分布、區域發展上常面臨不均衡的負面效果。(Stevens, 1997: 163)。

除了歷史的發展淵源,省在法國政府法制上亦具有極爲明確的 定位。吾人從法國第五共和憲法(Constitution of 4 October 1958)第十 二章第七十二條的規定便可瞭解(France Diplomatie, 1999):

- 1.共和國的地方單位(territorial units)應爲縣(commune),省,以及海外領地;所有其他地方單位的設立均依國家依法律規定行之。
- 2.各地方單位均應經由民選議會(councils),並依國家法律規定施行 自治。
- 3.在各省及海外領地,政府的代表(delegate of the Government)應維 護國家利益,管理並監督國家法律的確實施行。

除了憲法的規定,1982年法國政府通過了「一九八二年三月二日法案」(The Law of 2 March 1982,或稱之爲地方分權法),增設「行區」(region)一級,從而使法國地方政府的層級由原先的二級制發

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展成爲行區、省、縣三級。而儘管地方政府層級增多,但是省仍然 是法國地方制度中的重要環節,甚至因爲地方分權法的制定而更增 加其功能與權力。此也是本文探討的重點所在,筆者將於後文中再 敘述。

最後,就政治地位而言,由於法國傳統以來屬於單一制的國家體制,故法國省的地位與其他地方層級一樣,較强調其行政層面上的功能,甚至於常被稱之爲「地方行政」(local administration)而非地方政府。在此一政治觀點下,省的職能主要分爲二部分,其一是執行國家或中央政府的各項行政決策;其二是所轄區域各項法定權利的擁有者。換言之,省的地位是雙重的,在與中央政府的關係上,省是一個接受中央政府權力授予或委託的「分權區域單位」(decentralized territorial unit);而在本身法定權限上,省又是一個擁有特定名稱、預算、區域等因素的法人團體(France diplomatie, 1999)。

基於這種雙重地位觀念,使得傳統上法國中央政府在面對各項 地方事務時,具有較大的影響力,同時其亦可經由層節制的組織架 構,要求地方政府充分履行各項施政目標。

## 參、 二元組織架構

由前所述,省雖然具有法人地位,同時也有明確的地理轄區,但是相對於代表國家的中央政府而言,其功能與地位卻顯得極爲有

限。此一情形反映在制度設計上,即是二元的組織架構:一方面由 人民選舉議員組成省議會(Conseil Ge'ne'ral),以作爲省公法人身份 的代表;另方面中央政府又設置「省級行政官(以下簡稱省行政官)」 (prefect)及相關機構與人員,來確保中央政令的落實。以下茲分別 說明其內涵。

#### 一、省議會

省議會是由省轄區(Canton)內居民選出之議員所組成的機關。 議員選舉方式採「二輪投票制」(Two-ballot "first past the post")的方式,即第一輪選舉以得票率超過絕對多數,且得票數占登記選民 25%以上者當選。若無人當選,則第一輪選舉中得票數超過登記選 民 25%以上者將再進行第二輪投票,由得票較多者當選。議員任期 六年,每三年改選二分之一,連選得連任。議長則是省議會的名義 首長,由省議員互選產生,選舉方式亦採前述「二輪投票」的方式。

在一九八二年地方分權法施行之前,省議會因爲既不具獨立的財政資源,也無實際立法或執行的權力,因此其最主要的功能係作爲各省轄區代表(議員)定期集會或是意見交流的機制或諮詢機關而已。由此可知,省議會雖然有「議會」之名,卻不具備議會之實質功能(潘小娟,1997: 88-93)。

#### 二、省行政官

行政官係由法國中央政府部長會議(Council of Ministers)提名、總統任命後派駐於各省的代表。此外,其更是一省各項中央事務的

實質推動者與監督者。由此可見,省行政官的身份是雙重的:在中央與省的關係上,其代表中央政府行使各種對省的權力;而在省本身範圍中,其又是各有關事務的推動者。

在一九八二年地方分權法施行前,省行政官可說即是一省的最高首長,其所擁有的職權約包含下列層面(Stevens, 1997: 172; AdmiNet-France,1999):

- (一)監督轄區內各項事務之推動,並有權視需要採行有關行動以確保中央各項法令的落實執行。
- (二)執行中央對地方政府的徵稅權。
- (三)緊急事故或危機處理權。
- (四)對中央政府派駐地方各機關行使監督權。
- (五)針對地方事務需求,主動推行各項工作。
- (六)設置有關機關,並配置以適當人力以推動各項業務。

由上述職權內容可知,省行政官的權力範圍不僅涵蓋層面廣泛,其在中央政府的授權下,更可對省屬各項事務發揮實際的影響力。除此之外,爲配合各省轄區在不同社會與自然條件下所形成的特色,並確保中央政令的落實,中央政府更將各省劃分爲若干「連絡區」(arrondissements),每一連絡區均設有「副行政官」(sub-prefect)派駐於區內的主要都市中,以承省行政官之命處理各項事務。這種一條鞭式的指揮命令方式,使得各省在行政官的領導下,形成了一個「行政官體系」(prefecture),而此一體系便是該省各項事務的主要推行機關。

值得注意的是,對於省政事務而言,省行政官雖然具有巨大的 影響權力,但是由於其並無固定的任期,且任免權力又操之於中 央,故中央政府每年常會透過各省行政官間的檢討輪調,以一方面 防止省行政官與某省產生過度密切的關係,另方面也藉以貫徹中央 政府的主導權威。

綜上所述,筆者認爲一九八二年地方分權法施行前法國省議會 與省行政官的制度設計,除了凸顯中央政府對省事務的强力介入, 以及行政權的獨大之外,更值得重視的是在於地方政府與中央政府 體制的配套設計之上。如本文「壹」所述,法國憲法在規範中央與 地方關係時,是基於以行政爲主導的原則,並用概括方式賦予政府 代表權力,亦即在中央與地方的權力劃分上,法國憲法顯然是採行 中央集權原則的。因此,在此種權力架構下,省級政府的設計重心 自然是以行政權(中央行政權)的發揮爲主要考量,並輔以完整的指 揮命令體系(省行政官體系)來達成是項目標。相對地,省議會不論 在功能上或實際運作上,均必須加以抑制,並排除其對行政權力發 揮的可能障礙。

## 肆、一九八二年地方分權法的變革

#### 一、改革的背景

自第二次世界大戰結束後,法國社會亦與世界其他主要國家一樣,不斷歷經快速的成長與變遷,而此一現象表現在地方政府層面

- 上,則形成了下列問題(Safran, 1995: 257):
- 1.人口高度流動,並形成在各地方政府間分佈的不均衡。
- 2. 傳統地方行政功能已無法滿足現代社會民眾的各項生活需求。
- 3.地方政府運作常出現重複浪費與無效率的問題。
- 4.中央政府的決策偏重於部分資源較豐富、較占優勢的區域。相對 地,資源較貧乏的弱勢區域,其意見常受忽略。
- 5.地方自主的草根勢力,要求對地方事務有更多的影響權力。

從上述問題的內容可知,時代變遷對於地方政府而言,不僅產 生不同地理區域及相關社會條件上的失衡,在地方民眾自主意識提 升與實際生活需求的壓力下,其更將造成對中央政府集權運作模式 的挑戰。

- 另外,傳統法國地方政府採取行政官體系的制度設計,以期貫 徹中央行政功能的策略,在實際施行上亦形成了許多困境。Stevens 認爲對省而言,其產生的問題有下(Stevens, 1997: 172-174):
- 1.行政官在地位上雖然是中央政府派駐於地方的代表,但是另一方面由於其也具有一省首長的身份,故爲了爭得省內各地方勢力的配合與支持,使行政官常須代表省方向中央爭取各項權利,從而造成其角色的衝突。
- 2.行政官的功能雖在於監督地方以貫徹中央政府指令,然而隨著地方事務的快速增加與高度複雜化,個人能力並不足以承擔不同專業的決策責任,故行政官僅能發揮居間協調的功能,而難以在實質上主導決策。

- 3.配合資訊科技的高度進步,不論政黨或中央政治力量均可更有組織性地、有效地直接影響地方,此時傳統行政官派駐地方、監督地方的重要性便相對降低。
- 4.行政官並無固定任期,且由中央政府每年檢討調整,故影響其對 地方事務的投入意願與掌控能力。

對於地方政府所形成的問題,法國政府自一九六0年代開始即採取許多的改革措施,無奈因爲受制於各項政治力量的抵制,使大部分的努力最後均回到現狀,一直到密特朗總統(Mitterrand)所領導的社會黨政府在八0年代開始執政後,才有較爲具體的成果(Schmidt, 1990: 70-132)。而社會黨政府在一系列對中央與地方關係的改革中,一九八二年地方分權法的制定無疑是最具影響力的,因爲本法不僅重新建立了地方政府的架構(由二級制改爲三級制),更大幅改變了傳統中央集權的運作原則。而此一變動反映在省的體制上,則是省議會與行政官權力間的消長。

#### 二、省議會的變革

由地方分權法第一條第一項規定:「行區、省、縣市由民選議會自治」。可見其對省議會體制變革的方向,主要是從中央主導與强調行政功能爲主的原則,趨於更重視地方的自主運作。以下茲根據地方分權法相關規定將變革內容分別予以說明。

#### (一)地位與職權

省議會在地方分權法肯定地方自治的前提下,便由昔日以提供 諮詢爲主的地位,轉變爲省事務的實際決策機關,而省議會議長也 取代了省行政官,成爲代表省之行政首長。除此之外,省之地位與職權尙有下列改變(內政部,1995):

- 1.省議會議長爲該省首長,故職責爲領導並監督省屬各部門之運作 並進行必要決策,以履行省議會之各項決議(第二十四條、第二 十六條)。
- 2.省議會基於法令規定,有權課徵地方稅,並據以制定省預算(第二十五條、第五十條)。
- 3.在有關中央與地方,或地方政府間權限劃分之法律公布前,省議 會議長可依需要支配運用中央政府各部會直屬機關(第二十七條)
- 4.省議會基於轄區經濟發展、保護省民經濟及社會利益,以及中央 行政法院之核准,有權參與社會及經濟事務(第四十八條)。
- 5.僅有清償應付債款以及依法確立之支出,爲省之必要支出(第五十 二條)。

#### (二)組織

地方分權法並未改變傳統省議會議員與議長的選舉方式與任期,故其在組織層面上的變革重點,主要是著重在分工單位的設置 與功能的强化之上,茲歸納如下(內政部,1995):

- 1.省議會得設置祕書處,由省長、四至十位由議員互選產生之副省 長及其他成員組成,負責省議會之召集與各項縣政執行工作(第 二十四條)。
- 2.省議會常會每季召開一次。基於下列要求,亦可召開臨時會:(1) 省議會祕書處的要求;(2)三分之一以上省議員之提請;(3)省議

長之提請(第三十七條)。

- 3.在省議會議長及省行政官的同意下,後者應至省議會進行報告。 此外,在總理要求下,省行政官亦應至省議會報告(第三十六條)。
- 4.每年省議會議長及省行政官應向省議會提出一份書面報告,以說 明本身業務執行情形。
- 5.省議員因故不能出席會議,可委託另一位省議員在該次會議中代 表投票。唯每位省議員僅能接受一個委託投票權(第四十四條)。

雖然省議會由於組織權的放寬而具有更實質的影響力,然而地 方分權法仍然保留中央政府的監督權。例如第四十三條即規定當省 議會出現無法運作之情事,中央政府得依部長會議之決議,以行政 命令予以解散,唯該項決議應於最短時間內告知國會。省議會遭解 散後,該省行政事務仍由原省議會議長負責處理,但各項決定須經 省行政官同意後始能執行,且省議會議長應於二個月內進行省議會 改選。

### (三)功能

配合自治地位的確立與組織權限的增加,地方分權法亦賦予省 議會相當的功能,如表一所示:

表一:一九八二年以後法國省議會之功能

	功能	內容
No.	社會服務	提供社會服務與醫療照護措施;疾
		病預防;兒童、家庭、殘障、老

<i></i>	T
	人福利工作。
保健工作	兒童與家庭衛生;防疫工作;癌症、
	腫瘤、性病、麻瘋病防治。
住 宅	住宅區救護站規劃;設立住宅區管
	理委員會
教 育	負責高級中學之設立(含地點選
,	定、籌措財源、興建、採購設備、
	維護);掌理課外活動;轄區藝
	術、舞蹈、音樂學校及劇院之設
	立、組織。對行區之職業教育業
	務提供諮詢
文化	省屬博物館之組織及財源籌措;省
	屬古蹟維護
計畫	對行區計畫提供建議;協助農村開
	發工作
都市生活	對都市範圍及有關開發工矩提供建
	議
運輸	對行區運輸體系提供建議;規劃省
	級運輸計畫;核准非都市運輸計
	畫;省道維護;學校運輸系統的
	規劃與財源籌措
港口與水道	商港與漁港管理;協辦各港口有關

環境與資產維護	文化保存工作 規劃、修訂並維護省屬巡迴遊覽路
	線計畫
經濟事務	協助行區辦理各項直接或間接促進
	經濟活動(如貸款、租稅減免、土
	地或建物出售);對經營困難企業
	提供協助

\*資料來源: 1.Schmidt, V.A. (1990), Democratizing France: The Political and Administrative History of Decentralization, Cambridge: Cambridge Univ. Press, pp.122-125; 2. Safran W.(1995), The French Polity, 4<sup>th</sup>ed, New York: Longman Press, Ltd.; p.261.

由表一內容可知,地方分權法對於省議會功能的規定,係採列舉方式,同時每一項目均儘量予以明確的界定,並明示其中的權責關係與財源籌措。如此不僅能使省議會在推動各項事務時,能確知本身的角色與權限,更有助於中央與地方,以及各級地方政府間關係與責任的釐清。

綜上說明,筆者認爲一九八二年法國地方分權法訂定後,省制 變革呈顯出下列特點:

1.基於自治與分權原則,賦予省更大的自主權限

不論從職權、組織,乃至於功能層面觀之,地方分權法確實已大幅度拓展了省的自主空間。特別是在租稅預算權以及組織設立兩方面的鬆綁下,更使省議會取得對省事務的自主權利。

2.在既有的體制基礎上尋求功能的變革

藉由法律訂定,省雖然變更了地位與職權,然而其轄區範圍並未 進行調整,且原有省行政官與省議會併立的制度架構也沒有改 變,換言之,整個變革工作主要集中於功能與職權的調整上。

#### 3.將中央與地方行政體系明確劃分

如前項所述,地方分權法仍然維持省行政官與省議會併立的法制 架構,此一設計呈現出法國對中央與省行政體系的刻意區隔,亦 即省議會的職責明確定位於基於中央法令的授權,推動轄區內各 項省屬業務,並負其全責;至於全國性的政策則仍由省行政官代表中央政府執行。

#### 4.行政與議事功能之合併

從前述省的功能內容可知,省所負責之業務多爲基於中央法律或 上級的指導,執行或辦理某項工作。換言之,中央或上級政府已 先行確立該項事務的範圍與目標,省僅負責推動或維持而已。在 此情形下,將議事功能與行政功能集中於議會統一執行,或較能 符合精簡與效率的要求,並使權責更能相稱。

#### 5.省屬業務的具體規範

由於賦予地方特定業務職掌,不僅關係地方推動該項業務的權 責,更可能牽動中央與地方,乃至於地方各級政府間的互動關係 與權限劃分,故地方分權法詳細列舉省屬業務範圍,並明確規範 其細目的作法,將有助於釐清省的功能與權力範圍。

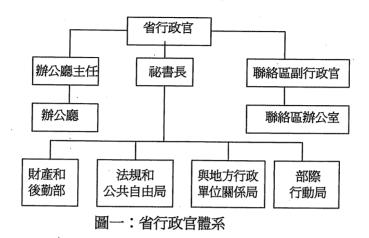
### 三、省行政官的變革

相同於省議會,一九八二年地方分權法亦未改變省行政官與行

政官體系的產生方式,且其定位同樣是作爲國家與中央政府派駐於省的代表,而有權與以國家身份與省訂立契約。雖然行政官名稱曾一度改爲「共和國專員」(Commissaire de Re'publique),但是至一九八七年後則又回復行政官的名稱。基於此,省行政官制度的變革方向,主要係在配合省議會自治權限的擴大,而相對縮減其原先對省政事務的主導角色。具體而言,其變革後的職權如下(Allum, 1995: 426-427:潘小絹,1997:67-70):

- 1.執行法律和中央政府的決定。
- 2.向中央政府提供必要的資訊,如興情反映,政治、經濟、社會等 各方面問題的報告等。
- 3.維護治安權,即採取必要手段以維護地方治安及公共衛生,同時 指揮中央派駐於省之警察機構。
- 4.負責準備與執行非軍事性國防任務,如徵兵、維護軍事設施等。
- 5.在發生重大自然災害或危難時實施緊急處分權。
- 6.作爲中央政府與省間之協調單位。
- 7.經濟權。包括上級政府補助款的支用、編列中央政府對省補助之 預算、對中央在省之經濟發展計畫提供諮詢與建議。
- 8.指揮並監督省轄區內之國家機關。
- 9.監督省級選舉。
- 10.將省議會違法越權行爲移送行政法院審理。

而配合上述職責的變革,省行政官體系則如圖——所示(朱國斌, 1998: 18):



\*註:爲求一致起見,圖中部分譯名已配合本文內容加以修改。

\*資料來源:朱國斌(1998)。"中央集權與地方分權的平衡——對法國一九八

二年地方分權法理論與實踐的考察",地方自治之監督學術研討

會發表論文。中華民國行政法學會主辦。

綜合上述職權與行政官體系的內容可知,一九八二年地方分權 法施行後,省行政官的功能與地位更能符合「中央政府派駐於省代 表」之字面意義,亦即省行政官主要負責指揮監督省轄區內的中央 政府機關,並推動中央政府的政策,同時並作爲中央或上級政府與 省議會的中介機關。換言之,省行政官從原來主導省屬事務的積極 角色,轉變爲以中央政府事務爲主,並居於被動地位監督省政的消 極角色。

## 伍、法國省制架構與制度變革的省思

從組織的型式而言,相對於中央政府的整體性與龐大規模,地 方政府雖然顯得較爲局部並偏重基層事務,但是吾人並不能因此而 忽略其對整體國家政治體系的重要地位與影響能力。Gallagher 等 人在歸納歐洲地方政府制度的特性時即指出,從基層至中央,各級 政府的數曰雖然呈現出遞減的共同特性,但是吾人不可因此就認爲 各級政府間的關係是屬於「層級節制」的關係。事實上,根據不同 憲法或法律的授權型式可知,各級政府間的關係實代表某種政府權 力間的「分工關係」,故彼此間的差異主要是因爲事權分配方式不 同,從而導致不同的影響力,而非因爲層級的不同而有地位高低的 分別(Gallagher, et.al., 1995: 142-143)。基於此一觀點,筆者認爲地 方政府的研究意義,除了從管轄範圍的立場,探討其本身組織架 構、相對的功能,乃至於與地方民眾的互動關係之外,更重要的應 在於從國家整體的觀點,瞭解其在整個政府體制中的地位與分工, 如此不僅有助於釐清特定地方政府組織設立的根本目的,也能較明 確的定位其功能。以下本文即從此兩層面分別探討法國省制的組織 架構及其變革所呈現的意涵。

### 一、中央集權理念下的制度設計

法國第五共和憲法雖然肯定其地方單位是施行「自治」(self-government)的,然而吾人不論從歷史淵源,或是相關法令規的內容觀之,法國均是採行中央集權制的國家,而地方政府則是中央政府

「權力下放」(de'concentration)的單位。換言之,中央政府僅是把 行政管理權的一部分授予地方,同時此一權力可以隨時收回(許崇 德,1993:81-82)。由此可見,前述所謂自治的觀念,對於法國地 方政府而言,應解釋爲「基於中央政府的授權範圍來自行治理」。

乍看之下,上述法國地方自治的概念內涵,似乎與一般較常被接受的「國家特定區域內的人民,基於國家授權或依據國家法令,在國家監督之下,自主法人團體,以地方之人及地方之財,自行處理各該區域內公共事務的一種政治制度」(薄慶玖,1997:5)界定不符,不僅地方政府的權限沒有受到嚴密的保障,中央政府更是擁有相當彈性而廣泛的主導權力。然而筆者認為此種現象反而可以協助吾人釐清一個觀念,那就是不論地方政府的制度,乃至於地方自治的意涵,都可隨一國的國情、文化傳統、政府體制等因素之不同,而有不同的表現方式,吾人不應,也沒有必要執著於追求或塑造出某種「放諸四海而皆準」的理想制度。進一步言之,地方政府體制並無「好/壞」或「對/錯」的差異,而僅有「適當與否」的評價,正如吾人不會因為法國中央政府的權限凌駕於地方政府,便作出法國地方制度是失敗的推論,吾人自然也不應單純地認為中央集權式的權力運作方式便必然不利於地方自治工作的推動。

基上所述,探討法國省制最重要的意義,便是在於提供吾人思考在一個以中央政府主導的集權理念下,設置地方政府所可能採行的配套措施,亦即如何經由相關的制度配置,使得中央集權理念得以貫徹,並確能對地方事務推動發揮實質的效益。根據前文的討

## 論,筆者認爲其間的重點有下:

## (一)行政官體系與省議會的二元設計

雖然法國中央與地方關係建立在中央集權的的基本架構上,然而在制度設計上,卻刻意地區隔中央與地方政府的運作範圍。 換言之,即便權力是向上集中的,但是卻不是由上下層級間的單一政府所構成的「一條鞭」指揮命令體系來執行,而是另行建構一套專屬或專責的指揮系統。因此,省行政官及其所領導的行政官體系(prefecture),便扮演中央政府代理人的角色,並職司中央各項政令的執行及監督地方各項業務的推動,以落實中央對地方的集權控制;相對地,民選議員所組成的省議會,則是地方意見與利益的代表,其目的在透過合議程序表現地方的需求與個別差異。一九八二年地方分權法施行後雖然造成省議會與省行政官體系職權的消長,甚至於省首長的變動,然而此一制度設計的基本型式卻未改變。

筆者認為此種行政官與省議會併立的二元設計,除可視為是為了調和中央集權與地方自治兩個互斥概念所進行的妥協之外,更值得注意焦點則是:即使概念上可以妥協,但是制度的設計則不能混淆,亦即不能將集權與自治的概念灌注於同一個組織或政府之中。換言之,不論省的實質權力是歸諸於行政官(一九八二年以前),抑或屬於省議會,但是其各自的定位、功能卻是相當明確的。而更重要的是,經由制度上明確區隔,更能釐清各自的權責關係,而社會大眾也更易針對特定事務找出

課責對象。因爲凡是中央法令或政策,則由行政官體系負全 責;反之,則由省議會負全責,如此將有利於減少因爲權責不 明而產生的爭功推諉問題。

#### (二)省議會議事與執行功能的合一

不論是地方分權法施行前僅具有諮詢功能,或是其後取得省屬 事務的主導權,省議會均將議事與執行功能合一。議長不僅是 會議議事過程中的主席,更是會議整體結論的執行者。此種有 別於一般國家在中央政府層次將行政/立法兩者分離的制度 設計,對於地方政府而言或將具有下列意義:

1.由於地方政府所負責的事權範圍,多爲根據國家法律授權 進行管制或提供服務,故性質較傾向於政策的落實或執行,即 基本政策目標與方針已定,變動的僅是執行的方式或地方特殊 環境的考量。基於此種特質,將議事與執行功能由單一機關掌 理,將可避免不同機關間因爲協調或溝通所可能形成的延宕, 或是因爲立場不同而形成衝突。同時在同一首長的指揮運作 下,亦較能發揮效率。

2.承上點所述,地方議會的權責範圍,多爲根據中央或上級政府授權,議決某項政策目標的落實方式,故並不涉及原則性問題或最終目標的取捨。例如針對社會福利政策的照護老人目標,地方議會的權責主要是在於議決採行特定措施讓轄區老人確實得到照護,而不是議決社會福利政策的適當性,或是改變照護老人的目標。由此觀之,將地方政府議事與執行功能合

- 一,不僅不會產生權責模糊之情事,社會大眾反而可由於事權 集中,更明確也更方便的課以責任並進行評價。
- 3.地方政府資源普遍有限,加上屬於中央政府之業務已由省 行政官體系掌理,故地方實無需再設置多重的機關與人員。

#### 二、中央與地方的權限劃分

地方政府的設置,除了是政府組織的建構以及權力、地位的授 與之外,更重要且也爭議最大的,殆爲中央與地方間的權限劃分。 因爲其不僅攸關中央與地方政府對於地方事務的影響範疇,也決定 了對地方事務的主導或影響程度。

由前述本文第「參」部分的討論可知,在地方分權法施行以前, 法國省議會雖爲憲法所定之地方自治單位,但是由於相關法律並未 賦予其明確的職掌,以致在實際運作上省政業務的主導權,乃至於 省首長均由中央政府的代表(即省行政官)所擁有,而省議會則僅有 諮詢功能。由此推知,在單一國家中當中央政府對於地方的授權愈 模糊,或中央與地方權限劃分僅作原則性的規定,則中央政府集權 的可能性也就愈大,因爲法律的彈性空間愈大,中央政府便可輕易 地藉由解釋或訂定行政命令的方式來「補充」法律的不足,並以其 較高的政府位階要求地方政府遵行。反之,若法律訂定愈明確,則 前述情形自然將受到一定程度的限制。因此,一九八二年地方分權 法施行後省議會能轉變成爲省政業務的實質主導機關,中央與地方權限的重新調整實具有相當的影響力。筆者認爲其可分下列三點進

#### 一步加以討論。

#### (一)地方財政權下授

欲求各項業務之順利推動,首要工作即是取得自主的財源。地方分權法第二十五條、第五十條賦予省議會預算編列與課稅的權利,即等於承認省議會有自主支配地方財源的權力,而第四十八條規定省議會可依法參與經濟及社會事務,以及第五十條規定省議會可依法參與經濟及社會事務,以及第五十條規定省毋須負擔中央政府在轄區內推動事務所需之費用,更使省議會的財務調度與運用更爲彈性化。筆者認爲相關財政權的下授,可說是在中央與地方權限劃分過程中,對地方政府所擁有的各項事權是否能發揮實質功能的最佳判定標準。因爲若地方政府不能自主地支配本身資源,並作最適當的運用,則其即使擁有處理某項業務的權力,然卻可能由於財源運用受到限制,而僅能消極的照章行事而已,甚至於可能出現「有責無權」的局面。故省議會取得地方財政權不僅使其能從省行政官體系中取得推動省政事務的主導權,更有助於充實法國憲法對於省地方自治的意涵。

### (二)事權內容明確界定

除了取得財政權,地方分權法對於省屬事權的界定方式,更促 使省議會權力的明確化。由前文「表一」內容可知,省所負責 的業務內容,除大略分爲社會、保健、住宅...等功能外,每一 項目更加以細分並對其內容作明確的界定。自表面觀之,此種 事權劃分方式似乎顯得過於瑣細而繁雜,但相對地卻使省議會 與地方的權責關係更爲具體而清晰。一般社會大眾即使不甚明 瞭省議會與各級政府間的權力互動與分工原則,但是其只要根 據事權項目按圖索驥,便可輕易的找到負責的單位,而不至有 政府間互踢皮球的推諉現象。此外,事權內容具體化亦可釐清 省與各級政府間的權責關係,從而避免有限資源的不當浪費, 或是蒙受上級政府不當的影響或控制。

#### (三)服務功能的加强

根據 Gallagher 等人的歸納發現,不論基於何種政治體制,或 是處於哪一層級,歐洲地方政府所發揮的功能通常集中在「土 地運用與計畫」,以及「環境管制」二項工作上,前者主要包 括對於轄區土地開發,以及生活、交通、安全等設施之提供; 後者則是訂定各項服務的規範並加以執行(Gallagher, et.al., 1995: 143)。而吾人從地方分權法施行後法國省議會的功能(表 一)亦可發現類似性質的業務。此一情形不僅可以解釋爲省議 會與省行政官體系的性質區隔所在,更能據以瞭解省議會對於 轄區事務處理所扮演的角色與特質,即省議會主要是在提供地 方民眾生活所需的服務,同時並配合服務項目進行相對的營運 與管制。筆者認爲此種服務功能的强調,正是今日地方政府設 立與運作最根本的意義所在,因爲唯有强調地方特色,並提升 對地方民眾的服務功能,地方政府方能在整體政府體系中建立 本身的特色與重要性,同時,藉由與地方民眾不斷互動與回應 的過程,亦才能確保地方政府各項措施與地方需求的結合。以 法國如此强調中央集權的政府體制,尚能重視地方政府與地方 事務的結合,故此一問題對於其他民主政府體制的重要性自然 不言可喻。

## 陸、結 語

雖然「橘逾淮爲枳」,適用於某國的制度並不一定能比照套用 於另一國家。然而「他山之可以攻錯」,藉由對特定制度內涵的深 入剖析,卻也有助於吾人釐清該制度建構的背景、基本理念,以及 所欲達成的目標。

本文對於法國省制的探討,正是希望能瞭解在集權的中央與地方關係下,地方政府的建構型式與運作內涵。而從本文對一九八二年地方分權法施行前後,法國省制變動的研究結果則可得知,地方政府的組織、事權內容,以及運作,都是配合整體國家政治環境與法制規範下的產物。換言之,唯有先行確定上游的國家整體法制架構,下游的地方政府體制才能據以配合建立。同理,欲求地方政府法制的變革,也唯有先行更動國家對地方的關係架構及其他配套措施,如此變革的目標方能眞正落實。

法國省制另一個值得吾人注意的特點,在於地方政府制度架構 與功能權力是可以分開處理的。一九八二年地方分權法雖然大幅度 改變省行政官體系與省議會的權責,但是兩者併存的組織架構、法 制地位,乃至於省的區域範圍,卻仍然維持原狀。因此,儘管在組 織型式上,法國中央政府仍保持對省政業務的影響能力,但是在實際運作上,今日的省議會卻才是實質的主導者。

綜上分析可知,相對於國家而言,地方政府有關論題雖然在規模或範圍上均是較小而有限的,但是其可能產生的影響,卻是全面性且牽一髮而動全身的,故惟有從整體角度思考,兼顧制度建構及其運作的特質與需求,方能在特定地方制度的型式與表象下,更深刻地體會其中在所蘊藏的內涵,以及與環境、觀念交互作用過程中的變革與發展。

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Tier

## The Study of Department of France

### Lue Yue - Cherng

### Abstract

In France, Department is not only a hierarchy level of local administration, but also a combination of ideas of centralization and self- governance. This paper will try to find out the characters of Department and how it runs. At the same time, the author will also compare the differences of institutions and functions between the legal change of The Act of March 3, 1982, and study the meanings and influences of Department.

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## Exploring the Dynamics of Network Collaboration

韓剑

#### 摘要

隨著網路型組織概念的提出,組織理論有關合作關係的研究,已逐漸將探討焦點從個人、團體、及組織內的層次,擴展至組織間合作的層次。然而,一般研究仍偏重於相關變數間的線性關係分析,卻少有從非線性的角度對組織間合作關係的建立及解體,就其動態過程進行描述與分析。因此,本文採用激變理論所提出的尖形激變(cusp catastrophe)模式,依據實地訪談資料,針對影響組織間合作關係的兩個主要控制變數一利益與信任,解析合作參與者在合作互動過程中參與意願的消長,以闡明組織間合作系統中的非線性行為特質,並對組織研究領域建議另一種新的思考方向。

關鍵字:合作(collaboration),網路(network),利益(interest),信任 (trust),非線性分析(nonlinear analysis),激變理論 (catastrophe theory)。

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#### Introduction

Collaboration is often seen as one of the prominent driving forces which will lead organizations to evolve over time. In general, collaboration is a purposive behavior of involved individuals who intend to solve problems or to create or discover new areas of interest by dealing constructively with differences and by being involved in joint ownership (Schrage, 1995; Gray, 1989). In addition, the outcomes of the collaboration should reflect group consensus rather than power politics (McCaffrey et al., 1995). In the past, collaboration research has focused primarily on the individual, group, or intra-organizational level. The collaborative relationships between or among organizations were relatively ignored. However, since Powell (1990) explicitly raised the importance of networks as a third form of governance structures, recent research has shown increasing attention to exploring the phenomenon of collaboration networks at the interorganizational level (Osborn and Hagedoorn, 1997; Wood and Gray, 1991).

Research on collaborative networks in the field of organizational studies tends to address two major issues. The first issue concerns the effects of collaboration on individual organizations as well as on all of the participant organizations as a whole. That is, what advantages and disadvantages does an interorganizational collaboration tend to lead to?

For example, it is widely recognized that collaboration through networks can help organizations build sufficient resources, access needed information, and propose effective responses that are essential for improving organizational flexibility (Liebeskind et al., 1996). As a result, network collaborations will not only lead to greater organizational learning ability and innovation (Hanssen-Bauer and Snow, 1996; Powell et al., 1996; Macdonald, 1995), but will also generate greater competitive advantages for participant organizations (Dyer, 1996; Lewis, 1995). On the other hand, research has shown that interorganizational collaboration may lead to some disadvantages. For example, D'Aveni (1994) argues that there may exist a Trojan Horse effect when today's partners become tomorrow's competitors. Uzzi's research (1997) also shows that an embeddedness in collaborative networks may result in an extinction effect when there is an unexpected loss of a network's core organization.

Since positive effects of the collaboration can only result from successful collaborative processes, many other scholars tend to focus on a second issue which relates to the process of interorganizational collaboration. Research in this area tends to investigate critical factors associated with collaborative processes. For example, Gray (1985) developed a process model and listed twelve optimum conditions

which tend to facilitate interorganizational collaboration during three successive phases of the process. In a similar vein, Larson (1992) highlighted the importance of reputation, trust, reciprocity, and mutual interdependence in the process of network formation. Other scholars, on the other hand, have tried to explicate the processes of collaboration formation from a more dynamic perspective. For example, Logsdon (1991) described two patterns of evolution in the formation of cross-sectoral collaboration. Gulati's (1995) exploration of how social structure, other than strategic interdependence, affects interfirm alliance formation patterns provides another explanation of how and why firms form collaboration networks.

While previous studies focusing on either the effects or the processes of collaboration are important for accumulating knowledge and providing insights about interorganizational collaboration, none of these studies provides a satisfactory explanation about when collaborators will participate in or drop off from collaboration. Moreover, most research in the literature tends to describe the phenomenon based on a linear-style of thinking. However, as the theory of punctuated equilibrium has shown that organizational transformation processes can be nonlinear and discontinuous (Romanelli and Tushman, 1994; Gersick, 1991), we may also need to question whether the processes of interorganizational collaboration can

also be nonlinear and discontinuous. If so, the questions of when the discontinuity happens and what factors tend to cause the discontinuity may become important for us to understand interorganizational collaboration in more depth. Based on this concern, this research was conducted as an exploratory study for the purpose of delving into the phenomenon of network collaboration. The study attempted to use nonlinear thinking as another lens for examining the issue of interorganizational collaboration.

In this project, the collaborative relationships among a technology center and its partners were examined. The Technology Center (The Center) was created by a north-eastern state government in the early nineties, and is located at a research university in the state capital. According to its mission statement, the Center pursues new ways of applying computing and communication technologies to the practical problems of information management and service delivery in the public sector. The Center not only provides state and local agencies the ability to experiment with innovative technology solutions at low costs and risks, but also devotes efforts to institutionalize learning by accumulating all projects into a more general framework which will benefit other organizations in the public sector. The Center's projects are carried out through strategic partnerships among government

agencies, technology corporations, and university faculty and students. Operating within the framework of a public-private-academic partnership, the Center and its partners form a problem-solving and knowledge-building network. The purpose of this research is to explore two mutually exclusive behaviors in the collaborative process—collaboration and noncollaboration—by examining the variation of relationships between The Center and its partners. A static view concerning the linkages and the reciprocal relationships in this network can be illustrated in Figure 1.

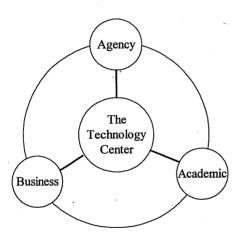


Figure 1 Network Relationships of the Technology Center and Its Partners

To uncover the essence of collaboration, the focus of this research is to examine the following research questions. First, what factors are perceived to be important by potential collaborators in deciding whether they will engage in collaboration or not? Second, what are the effects on collaboration formation and termination of the interactions among these factors? Finally, what constraints may exist that would discourage parties from participating in the collaboration?

In the following sections, the structural and process factors which are found to be important for successfully building collaborative relationships will be discussed based on existing literature. Then, the research methods for conducting this study will be briefly reported. Based on the findings derived from data analyses, possible answers to the above research questions will be proposed. Finally, this paper will suggest important issues that may need to be further studied in the future.

#### **Collaboration and Network**

Many people may associate the concept of collaboration with networks. Nevertheless, they are in effect two different concepts and should be distinguished. Network implies a structure, while collaboration is a process. Individuals, groups, or organizations may

need to collaborate through a network structure; simply presenting the structure may not necessarily lead to collaboration. Therefore, to study collaboration in a network, we may need to pay attention to both the structure which will influence the collaborative behaviors and the processes in which the actual behaviors occur.

## Network as a Structure for Attaining Collaboration

Networks can exist in many forms. For example, Gerlach (1992) depicted three patterns of Japanese keiretsu types of networksfinancial centrality. and industrial alliances, intercorporate interdependence. Perrow (1992) illustrated small-firm networks as consisting of distributors, producers, services and finances, supplies, raw materials, and customers. Burt (1992) presented networks with different structural holes which represent the number of nonredundant relationships between two contacts. Kerwood (1995) described a hub and satellite network arrangement which demonstrates a radiation type of interorganizational links. However, since networks are usually seen as socially constructed (Granovetter, 1992), no matter what the structure is, how the participants perceive the network to be may be a more important issue to address.

#### Weak Ties and Strong Ties

The perception of the participants may be divided into two categories. First, the substance and type of ties between and among individual partners may have significant implications for each of their actions (Nohria, 1992). Weak ties imply that partners do not interact as frequently as those people who are connected with strong ties (Burt, 1992; Krackhardt, 1992). In addition, weak ties may be useful for providing people with access to information, while strong ties are more helpful for dealing with crises and uncertainty (Krackhardt, 1992). In a similar vein, the theory of structural holes argues that the most efficient-effective network should be one which has the least redundant contacts so as to obtain the greatest information and control benefits (Burt, 1992). According to these arguments, the strength of ties will tend to affect the outcomes of collaboration, depending on whether the focus of the proposed collaborative efforts is on information search or on uncertainty reduction.

### The Role of the Central Organization

The second part of the participants' perception that may be of equal or greater importance is the role of the central organization which performs a critical function for initiating and facilitating the collaborative actions (Kerwood, 1995; Waddock and Post, 1995; Rosenkopf and Tushman, 1994; Brown, 1991; Wood and Gray, 1991; Trist, 1983). This organization, using Kerwood's (1995) term, is the hub which is responsible for coordinating the collaborative actions, while other participants are referred to as satellites and can only be linked to the hub; i.e., the links between each participants can only occur through the hub. Identically, Wood and Gray (1991, p. 150) define the central organization as a convener which should have the following five abilities: (1) to be able to "induce stakeholders to participate;" (2) to be perceived by participants as legitimate to have "the authority to organize the domain;" (3) to be able to hold "an unbiased, even-handed approach to the problem domain;" (4) to be able to "appreciate the potential value of collaborating, envision a purpose to organizing the domain, and establish a collaborative process and context;" and (5) to be able to convince all stakeholders that the identified participants "have the right and the capacity to participate in the collaboration."

According to the literature, the two structural factors—the strength of ties and the roles of the hub or the convener may have critical effects on the successful establishment of collaborative actions. However, to make the collaboration analysis useful, we may also need to pay attention to the factors which are considered as necessary for developing a positive collaborative atmosphere in the interactive process among all participants.

# Collaboration as an Interactive Process in the Network

In network analyses, two groups of variables are often seen as important for describing and explaining behaviors in the network. On the one hand, attributes imply "intrinsic characteristics of people, objects, or events" (Knoke and Kuklinski, 1982, p. 10). On the other hand, relationships refer to "actions or qualities that exist only if two or more entities are considered together" (Knoke and Kuklinski, 1982, p. 10). Although attributes tend to significantly affect participants' behaviors in a network, relational measures also contribute greatly to our understanding about network behaviors in the sense that they can

capture emergent properties of the system that cannot be easily uncovered simply by aggregating the attributes of individual participants (Knoke and Kuklinski, 1982). In the literature, both attribute and relational factors have been elaborated for building theories regarding the collaborative process.

#### **Interests and Interdependence**

Among the attribute factors, scholars most often identify interests that can be or might be satisfied from the collaboration and the participants' perceived interdependence with other organizations to be two basic elements which affect participants' willingness to participate. For example, Powell et al. (1996) point out that organizations tend to make their decision to collaborate with other organizations based on calculations involving risk versus return. Gulati (1995) argues that organizations that have the need to obtain resources such as money, specialized skills, access to certain markets, or stronger strategic position with the help of other organizations are more likely to participate in collaborative actions. Therefore, the perception of an organization regarding its strategic interdependence is a key driver of interorganizational collaboration. Gray (1985) also listed relatively

high benefits/costs ratio and degree of recognized interdependence as two of the important conditions for facilitating interorganizational collaboration.

Based on these two major factors (i.e., interests and interdependence), Logsdon (1991) proposed two patterns of evolution in the formation of interorganizational collaborations (see Figure 2). She assumes that when both factors get to a high level, the collaborative potential will also become greater. The first pattern, shown in the figure as Pattern A, moves along the path from low interdependence/low interest to high interdependence/low interest to high interdependence/low interest to low interdependence/high interest to high interdependence/low interest to low interdependence/high interest to high interdependence/ high interest.

# Perceived interdependence Low High Pattern A Low Interest High Collaborative potential

Figure 2 Patterns of Evolution in the Formation of Interorganizational Collaborations (Adapted from Logsdon, 1991, p. 31)

### Trust, Reciprocity, and Asymmetry

Relational factors are those which depict the relationships perceived by the participants. Three relational factors may be worth mentioning in this study. First, trust is a fundamental factor that is seen as having an effect on collaborative behaviors (Smith et al., 1995). For example, Fukuyama (1995, p. 25) argues that "[c]ommunities depend on mutual trust and will not arise spontaneously without it." According to his viewpoint, contracts can help to bring strangers to work together without any basis for trust, but only when trust exists, can the collaborative activities become efficient. By the same token, Nooteboom et al. (1997) argue that besides self-interest and coercion, trust has a complementary effect that will function to strengthen the basis of cooperation. In the investigation of trust in collaborative processes, scholars find that there is a virtuous circle between trust and collaboration. That is, trust in the past leads to successful collaboration, which in turn leads to trust in the future and further

collaboration (Hosmer, 1995; McCaffrey et al., 1995). To illustrate this perspective, Mayer et al. (1995) proposed a model of trust which connects factors of perceived trustworthiness (i.e., ability, benevolence, and integrity), trustor's propensity, trust, perceived risk, risk taking in relationship, and outcomes to form a feedback loop. This model, however, is a little different from the virtuous circle depicted above. That is, whether or not trust in the past leads to trust in the future will depend on whether or not past trust leads to positive or negative outcomes. If the outcomes resulting from trust are negative, a vicious circle instead of a virtuous circle will emerge in the next round of collaboration.

Alternatively, reciprocity and asymmetry are two factors which may result in opposite effects on collaboration. According to Oliver's (1990) arguments, reciprocity emphasizes collaboration on the basis of mutually beneficial interests. Asymmetry, on the other hand, tends to drive an organization to exert power, influence, or control over other participants. As a result, the asymmetrically motivated organization searches for collaboration opportunities in the attempt to achieve its own interests at the expense of others (Logsdon, 1991; Oliver, 1990). However, this driving force of one organization may make other

participants less willing to participate in the collaboration. When asymmetry exists, it is less likely that the collaboration is reciprocal.

Since all factors relating to attributes and relationships are assumed to be crucial for creating effective collaboration, whether all of them have equal effects on interorganizational collaboration or whether some factors have greater weights than the other may need to be further examined. In addition, whether some factors may dominate in the collaborative process over time or whether they tend to shift dominance when they interact in different collaboration stages can be another issue to explore. Some plausible findings for answering these questions are reported below.

### Research Methodology

This research used qualitative methods to investigate the collaborative process of the Technology Center and its partners. In total, 31 interviews were conducted. The interview questions were open-ended. When interviewees used a term whose meaning was not clear or had ambiguous implications, related questions would follow to ask them to clarify what the term meant. The interviewees are

associated with the four groups of stakeholders (i.e., agency, vendors, faculty members, and the staff of the Center) in the collaborative process. Most interviewees were selected because they have participated in the same project. By comparing and examining their answers to the same questions under the same situation, it is possible to cross-check whether what had been described by any individual is the collectively perceived reality or a biased individual response.

Analyses of transcribed interviews are based on the procedures and techniques of the grounded theory approach developed by Strass and Corbin (1990). By coding the participants' descriptions about the collaborative processes, major themes emerged in the initial stage of data analysis. Then, the major themes were connected to demonstrate the behavior patterns of the collaborative processes. Based on these behavior patterns, a conceptual model was formulated to illustrate the possible interactive effects of the critical factors associated with collaboration.

### Relative Interests as Collaborators' Primary Concern

Interests and interdependence are two attributes of the participants that have been identified in the literature as crucial for initiating and sustaining collaboration (Logsdon, 1991). If there were no interests that were perceived to exist, there would be no collaboration. In addition, if the achievement of the interests did not need to depend upon the collective actions of other partners, collaboration could also be unnecessary. Therefore, only if participants perceive their own interests can be achieved in the collaborative process, can the collaboration become possible.

### In Search of Self-interests

In fact, all interviewees who had been working on the Center's projects acknowledged that the possible personal and organizational benefits that might be achieved from the collaboration were their primary concern in making collaboration decisions. For example, as a manager of the Center pointed out, it is important for the Center to get constant financial support from the State government, to obtain

recognition in the research community, and to keep a steady and rapid growth. In the public sector, the people from the participant agencies tend to consider improving the agency's performance and learning from collaborative processes to be two of the most important reasons for them to participate in the collaborative activities.

The decision-making processes of business organizations are more profit-oriented. Before making collaboration decisions, business people would carry out cost-benefit analyses by identifying relative investment, controlling risks, and evaluating the time frame. For corporations which are new to the State market, building initial relationships with potential clients of the State agencies is perceived to be important for them in terms of getting access to the market. Alternatively, companies that have already established good relationships with State agencies tend to be more concerned about whether or not the collaboration will generate a growth of future sales and profits. Since the interests of the businesses tend to vary over time, the same incentive may not be able to result in collaborations at all time.

The reasons for faculty members' decisions to be involved in collaboration also vary among individual faculty members. Some faculty members pointed out that they decided to participate in the

collaboration based on altruistic reasons such as making contributions to government or supporting the needs of their students. However, they also acknowledged that these reasons were not strong bases which would lead to sustaining collaborative relationships. They indicated that nothing could be more important than doing valuable research for academic people. Therefore, most faculty members tend to emphasize that the most attractive factor for them to be involved in continuous collaborative relationships is conducting valuable research which satisfies their research interests. When there are not constant research questions being asked across different stages of collaboration, it will be difficult to get academic people involved in the collaboration in the long run.

Based on the interviewees' opinions discussed above, the self-interests pursued by different participants of the collaborative network can be summarized in Table 1.

Table 1 The Most Important Self-interests Pursued by Individual Participants

# **Exploring the Dynamics of Network Collaboration**

Participant	Self-interests
The Center	Obtaining constant financial support
	Building reputation in the community
	Keeping steady and rapid growth
Agency	• Improving performance
•	• Learning in collaborative processes
Business	<ul> <li>Building initial relationships with potential clients</li> </ul>
	• Increasing short-term and long-term sales
Academics	Conducting valuable research

### Perceived Interdependence

Interdependence is a feeling of individual collaborators that collective actions are necessary for them to realize their respective self-interests. If individual collaborators do not feel that their self-interests are aligned with the collaboration, they will not perceive their success to be dependent upon the success of the collaboration. On the other hand, even though the collaboration does satisfy the interests of the participants to an extent, if the interests are not greater than other interests which can be obtained from other sources, the feeling of

interdependence may not be strong enough to make the collaboration come true.

In the collaborative network examined in this research, it is obvious that the Center has the strongest dependence on the success of collaboration. Without any partners to participate, the Center may not be able to exist since initializing collaboration is its primary function. A manager of the Center pointed out, "We were created to be problem solvers and relationship builders." Apparently, the interests of the Center are embedded in the success of collaborative activities. Both its subsequent funding and growth are determined by its ability to initialize and maintain effective collaborations. Therefore, once the State government does not consider the work of the Center to be worthwhile, the Center's future may not be durable.

State agencies are also supposed to depend on the collaborative activities to a certain extent because they need the other partners to help them solve performance problems, or at least to provide chances for them to learn about new technologies. Nevertheless, if they find that they cannot get anything new from the collaboration, it is also likely that they will tend to defect from further collaboration. For example, the reaction of an unsatisfied agency was described by a manager of the Center:

There was one project that we ended up having to terminate because we just couldn't get the level of agreement with the agency about what we would do in the project, and what the prototype should be. We never went to prototype on that project. We never implemented even a trial system of what they wanted. In part, I think, it was a difference in objectives. They wanted a certain thing. We wanted to do a different thing. We just couldn't agree [with each other].

For corporations, the feeling of interdependence may not be so strong as they are for the Center and the agency, depending on what interests they are pursuing. When a corporation intends to build initial relationships with its clients in the State market, it may care more about exploring sales opportunities than gaining short-term, direct benefits. However, if relationship-building is not a vendor's major concern, a project that will not lead to profitable interests does not make any sense unless its investment can be held to a minimal level. An interviewee who had represented his company to participate in the collaboration explained the possible decisions of his company toward future collaborations:

Today, those reasons [for us to participate] would not be the same. At the time, those were the reasons...[Now], I would not get involved in something that is not one of our core strengths.

It appears that faculty members tend to have the lowest feeling regarding interdependence with other collaborators. Since faculty members have more freedom to choose the research in which they are interested, their embeddedness in the collaboration is minimum. A faculty member who is also a former staff of the Center told of his experience in the collaborative process:

I have a lot more control over the project [that I am working on]. I know where it's going, I can connect it to my teaching and research interests clearly.... It turned out that other opportunities have been as interesting or more interesting than the opportunities that have come up from the Center.

From the discussions stated above, we may find that different levels of embeddedness in the network collaboration tend to determine the participants' perceived interdependence. For the Center and the agency whose success relies more on the success of the collaboration, their perceived interdependence can be fairly high. Corporate and academic partners, on the other hand, often have more alternatives to

satisfy their interests. Table 2 summarizes the perceived interdependence of different collaborators in the network.

Table 2 Perceived Interdependence of Individual Participants

Participant	Perceived Interdependence	•
The Center	High	-
Agency	Moderately high	
Business	Moderately low to Moderate	٠
Academics	Low to Moderate	

For rational collaborators, the calculation of the ratio between collaboration interests and alternative interests is their primary concern which determines whether or not they will be involved in the collaborative activity. Specifically, potential collaborators (e.g., corporate and academic partners) who have a higher degree of freedom in selecting alternative ways to achieve their goals tend to perceive their dependence on the collaboration to be lower. For these potential partners, only if the relative interests (i.e., collaborative interests versus alternative interests) are high, will they possess a higher level of willingness to collaborate. Otherwise, they may choose to do some other work rather than participate in collaboration. Since perceived relative interests are determined by two external variables—interests

provided by collaboration and by other sources, making the interests provided by collaboration always outweigh the interests provided by other sources may be necessary for initiating and reinforcing potential collaborators' willingness to participate in collaboration.

### Trust as a Foundation for Collaboration

Relative interests are preconditions based on which potential collaborators will assess their need to be involved in a collaboration. Alternatively, trust as a relational factor may have greater effects in determining potential collaborators' willingness to participate in a collaboration. People will still collaborate without trusting each other, providing that external control mechanisms exist to punish the trustee's deceitful behavior, or the involvement in collaboration does not have significant adverse impacts on the trustor, or the trustee's interests apparently coincide with the trustor's interests (Mayer et al., 1995). In most cases, if potential collaborators do not believe that their investment will result in expected payback, they will be less willing to collaborate; even though some relative interests can be derived from

the collaboration. In this section, factors which are found to affect trust between collaborators will be discussed.

### **Trust and Risk Taking**

Trust can be seen as an individual collaborator's willingness to take risks (Mayer et al., 1995). Specifically, trust is necessary when the involvement in collaboration may lead to significant risks to the participants. Therefore, whether potential collaborators trust each other before and during the process of collaboration can have significant effects on the success of the collaboration.

In general, research has found that successful interaction in the past, the frequency of interaction, and trustees' professional credentials were assumed to be positively associated with trust (Mayer et al., 1995; McAllister, 1995). In the cases that have been examined, existing relationships between the agency and the businesses, between the agency and faculty members, and between faculty members and the Center's staff did make the initialization of a collaboration become easier. In other cases, frequent interactions between the Center and its

potential partners have also helped to improve mutual understanding, hence making the collaborations become more likely. As to the trustee's professional credentials, since the Center plays a central role in initializing the collaboration, it is more important for the Center than for other partners to possess this property. As a manager of the Center pointed out, the Center had tried very hard to become a professional in its project management so as win trust from all the partners, He said:

Part of it for us project managers is to lay out a project plan and a role for them that makes sense. To a certain extent, if they trust us, they would trust the other partners that we brought into the project. So, I think that having them trust us is the most important piece because then we say, "Well, so and so is gonna do this." If we say it, then it must be okay. So I think the most important piece is having them trust us as the project managers.

Since the individual participants who had been working on the Center's projects might not know each other at the beginning of the collaboration, the only one they could trust would be the Center. Therefore, we may assume that the partners' collaborative experiences with the Center will be the most important foundation for them to determine whether the Center is trustworthy or not. The feeling of

trustworthiness toward the Center will in turn determine how much risk the participants are willing to take in future collaborations.

### **Reciprocity and Asymmetry**

Reciprocity and asymmetry are two opposite outcomes of collaboration perceived by collaborators. Reciprocity implies that all collaborators are able to get their deserved stakes from the collaboration based on a mutually beneficial basis. Asymmetry, on the other hand, implies that the free rider problem exists in the collaboration and some collaborators' interests are neglected (Logsdon, 1991). When a collaborator's trust toward other partners leads to reciprocal outcomes, the trustor-trustee relationship may be further enhanced. However, if a collaborator's trusting behaviors lead to asymmetrical outcomes, existing trust may be eroded (Mayer et al., 1995). Below, we will examine whether different perceptions about reciprocity and asymmetry exist in the collaboration.

In the Center, a manager described their efforts of building reciprocal collaborative relationships:

We work very hard to be sure [that] everyone who is involved is getting benefits that are commensurate with the investment. Our corporate partners come back. Agencies are very happy with what they get...We have five or six faculty members [with whom] we work over and over again.

In the agency, interviewees felt that all partners had received a fair stake from the collaboration. For example, an official described her experiences:

We have learned a lot, beyond what we thought we would....
[The vendors] donated the equipment to use at the Center. On the other hand, they had a lot of ideas to help us. They helped us see what we were trying to reach. They were very helpful. In the University, the students were working side by side with us. They did a lot of programming for us. They were really good. All of them had equal parts. We wouldn't be able to do it without any of them.

Another public manager, on the other hand, claimed that both the vendors and the faculty members had been benefited. She said:

The vendors won a good reputation in the process of codemonstrating the prototype. It worked out to benefit them a lot. The public sector can provide research ideas to the faculty.

While the Center and the agency perceive the collaboration to be reciprocal, business people and faculty members tend to hold different views regarding reciprocity and asymmetry. A representative of a corporate partner said:

We did gain some recognition, but few led to subsequent sales.

However, I do think the project to be worthwhile.

With respect to academic collaborators, although a few faculty members admitted that their participation in the collaboration did help in setting an education agenda, making contributions to the State, and fulfilling the service mission, most of them tended to see the outcomes of the collaboration with the Center to be asymmetrical rather than reciprocal. For example, a faculty member who had worked on several projects expressed his concern regarding the asymmetrical relationship:

I have never been able to get the Center to become interested in any research topics that I find interesting. I feel that I am often asked to work not as a consultant, but as a benefactor. It has never been clear and never worked out under what circumstances the Center is really just asking me to donate my time, and under what circumstances the Center wants to treat me as a consultant.

Another faculty member who also had recent experience with the collaborative processes holds a similar view. He described his feelings toward the collaboration that was not based upon reciprocity but upon asymmetry.

[W]hen you dealt with agencies, we were essentially giving them something for free. They were participating in a project, they were getting information on a project that they were interested in, and they were getting specific technology pilots.... As it turned out, I don't think there really were such a strong set of constant questions being asked across the projects.... There is really not a research question area, it's just a skill for application of those tools [that faculty already know].

Based on the experiences of different participants, their perceptions about reciprocity and asymmetry can be summarized in Table 3.

Table 3 Participants' Perception about Reciprocity and Asymmetry

Participant	Perceived Reciprocity and Asymmetry
The Center	Collaboration benefits all partners
Agency	Collaboration benefits all partners
Business	Moderate benefits for corporate partners
Academics	Few benefits for academic partners

### **Trust among Partners**

After examining different partners' perceptions regarding the collaborative outcomes, we may like to know whether individual participants' perceptions about the level of trust among partners also vary. Two managers in the Center described their feelings about the trust-building achievement. The first manager said:

I think we are seen as neutral, independent, and competent.

Therefore, we have certain level of trust coming in.

On the other hand, the second manager thought that trust between academic partners and the Center may need to be reinforced:

I think that a reputation among faculty members [is] an area where trust hasn't been established as much.

People in the agency and in the companies tend to emphasize the trust that has been built between agencies and vendors. For example, a public manager pointed out:

In the process of doing this project, trust has been developed between State agencies and vendors. Since we demonstrated the results of the project to all VIPs of the State Government, the demonstrations have provided opportunities for vendors to get in touch with the people in the agencies.

A sales manager who has participated in doing the same project expresses a similar feeling:

The relationships gain, the credibility gain, and the good work that was done are fantastic.

Faculty members, in contrast, tend to hold a relatively negative view concerning the asymmetrical collaboration. As a result, some of them appear to be reluctant to retain the same level of trust toward the Center's collaborative efforts. A faculty member described his unpleasant experiences in a series of collaborations:

On an earlier project, I thought there might be a mutual research interest that would start to develop...And when I started working on a more recent project, I thought in fact I had been promised that I'd be paid a lot more money than I was eventually paid. So it's just a matter of learning that these things don't develop as I am told in the meetings.

Another faculty member, on the other hand, seems to be little unhappy with the project management process. He said:

I have been working straight through for a week to meet the deadline which really apparently wasn't the deadline.

As a matter of fact, most faculty members tend to agree that since the projects had already been designed before they became involved, they could have little chance to influence the direction of the research. A faculty member used a passing train metaphor to describe his experiences. According to his description, the overall project is like a passing train, and he jumps on for some period of time, then jumps off again while the train continues in motion. This might be the reason why a significant number of faculty members displayed a relatively lower level of trust toward collaborations initiated by the Center.

In general, we may find that participants who consider the collaboration to be reciprocal tend to perceive a higher level of trust existing among different parties. Conversely, participants who see the collaboration as asymmetrical tend to possess a lower level of trust toward other partners, especially toward the Center. The different levels of trust of individual participants are exhibited in Table 4.

Table 5 Trust of Individual Participants

Participant	The Level of Trust	
The Center	High	
Agency	High	
Business	High	
Academics	Low to moderate	

### Potential Partners' Willingness to Participate

Unless there are an infinite number of potential partners, it may be reasonable to assume that the Center will need to cultivate a positive collaborative relationship between itself and its partners so as to invite the partners to continuously work on subsequent projects. Therefore, whether potential partners are willing to participate in the Center's future projects may be the major issue which is of great interest to explore.

In responding to this question, public officials in the agency displayed the greatest willingness to participate again. A manager in the agency answered:

> I think it (i.e., to participate in collaboration again) depends on how well it will pertain to our work and problems. My answer is "yes, if...."

Business people also expressed a relatively higher willingness to participate. However, they tend to make decisions by emphasizing their business concerns. A vendor explained the difference of the possible decisions between himself and his company:

My decision would be absolutely, if the project makes sense for us.... [For my company,] it depends on how successful your

first project was. If it was widely successful, and you bring the perception to the company that as a result of this involvement, we got x number of dollars in business. If that exists, it's a pretty easy decision. Oh, let do that again.

Due to the fact that faculty members make decisions based on individual experiences and interests, their willingness to participate has displayed a greater level of variety. The responses of three faculty members are used as examples:

Probably not...We just can't seem to work out any sort of mutual research agenda.

If I were asked to participate in the way that I have participated, I think I would have had a hard time to figure out what that [project] was, and I wouldn't [participate again].

It's possible...if it coincides with my research goals.

To summarize the responses of the partners in the three groups, Table 5 summarizes their willingness to participate in the Center's future collaborative activities.

Table 5 Potential Partners' Willingness to Participate

Participant	Willingness to Participate	
Agency	High	
Business	Moderately high	•
Academics	Low to moderate	

# Interactive Effects of Perceived Relative Interest and Trust

In the discussions stated above, we may find that there exists a discrepancy in perceptions of the collaborative process and outcomes among different parties. How these perceptions of individual participants will affect their willingness to participate may be worth further investigating. Therefore, this section will analyze the collective effect of perceived relative interests and trust on the willingness to participate.

### A Linear Analysis of the Collective Effects

According to traditional linear analysis, the relationship of the three variables may be speculated as: When both values of perceived relative interest and trust are high, potential participants will tend to collaborate. Otherwise, they will tend not to participate in collaboration. This assumption is illustrated in Figure 3. Nevertheless, it is unclear whether collaboration can be formed or not if the corresponding values of these two factors are asymmetric. In fact, this speculation may be much closer to the phenomenon of the real world.

According to the findings from the interviews, people tend to be concerned more about perceived relative interest than trust. This is not to say that trust has only a trivial effect on the formation of collaboration. In contrast, trust did play an important role in the process of forming collaborative relationships. What is worth mentioning is that if there is not perceived relative interest, trust alone will not facilitate collaboration. Although negative trust (i.e., distrust) means the participants may have to take intolerable risks, trust to the greatest level without perceived relative interest still cannot make collaboration happen. Therefore, we may assume that trust is a necessary but not sufficient condition for building collaborative

relationships. The analysis below intends to demonstrate another plausible explanation of the interactive effect of perceived relative interest and trust on collaboration based on a nonlinear dynamic viewpoint.

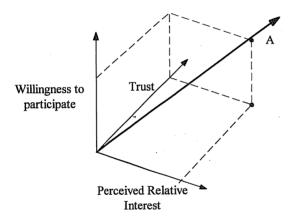


Figure 3 Linear Analysis of Interactive Effect of Perceived Relative Interest and
Trust on Collaboration

### A Nonlinear Analysis of the Collective Effects

To analyze the collective effects of perceived relative interest and trust on collaboration, the discussions below employ a catastrophe perspective (Arnol'd, 1992) that may provide more insightful explanations.

Catastrophe theory, developed in the late 1960s, originates from mathematics. Building on the basis of topology, researchers claim catastrophe theory is able to provide a universal method for studying jump transitions, discontinuities, and sudden qualitative changes in dynamic systems (Arnol'd, 1992). According to catastrophe theory, there are seven elementary catastrophes that can be applied to describe all discontinuous changes of phenomena with a maximum of four control parameters (Guastello, 1995). These seven elementary catastrophes are: the fold, the cusp, the swallowtail, the elliptic umbilic, the hyperbolic umbilic, the butterfly, and the parabolic umbilic (Saunders, 1980).

For illustrating the intertwining relationships among perceived relative interest, trust, and collaboration, the cusp catastrophe appears to be most proper for illuminating the phenomenon under discussion. In general, the cusp catastrophe tend to possess five typical properties:

sudden jumps, hysteresis, divergence, bimodality, and inaccessibility (Saunders, 1980). Two sets of variables are used in the cusp catastrophe. The first set of variables are state variables which exhibit the state of the system. The variables in the second set, called control variables, govern the evolution of the system (Wildgen, 1982; Saunders, 1980). According to these definitions, collaboration in this research is a state variable, while perceived relative interest and trust will be treated as two control variables. The nonlinear relationships among these variables are shown in Figures 4 and 5.

Figures 4 and 5 show the unfolding surfaces projected to the plane under them. In these figures, the trajectories of collaboration development on the unfolding surface are identically demonstrated on the plane. In Figure 4, when both perceived relative interest and trust grow from low values to high values, trajectory A illustrates the linear path of traditional analysis and is similar to that in Figure 3. However, when participants discover that their perceived relative interest is not as high as they had expected, a small decrease of the perceived relative interest beyond point B<sub>1</sub> may result in noncollaboration (i.e., point D), even though the value of trust still remained the same. When the noncollaboration happens, the same value of perceived relative interest may not be sufficient to recover the collaborative relationship. Instead,

a greater relative interest needs to be provided to call the same participant back to collaboration.

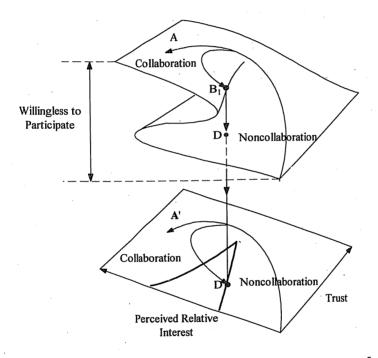


Figure 4 The Dynamics of Collaborative Behaviors: Moderate to High Trust

On the other hand, when the value of trust of a potential participant is relatively low, to build a collaborative relationship may need to provide much higher relative interest to the potential participant (i.e., corresponding to point  $B_2$  in Figure 5). Otherwise, he or she may prefer to stay in a lower willingness to participate state because the risk to collaborate may be too high for him or her to take.

In one of the interviews, a manager of the Center stated that there exists a threshold for convincing people to participate. According to his description, once people can go beyond the point of sitting down and talking with them about the project plan, and the milestones on the activities are defined collectively, they will stay actively participating in the project. In addition, once the collaboration has been established, the collaboration will often sustain until the end of the project. This description is valid as long as collaboration is viewed on a one-shot basis. Nevertheless, the feedback effect of the collaborative process on future collaboration has not been recognized. Moreover, the Center has not realized that there could be another threshold which might cause a sudden fall to noncollaboration as illustrated in Figure 5. In the past, the Center has encountered some instances where a few collaborators suddenly defected from the collaboration. Another more common phenomenon is that many partners are not willing to continue their involvement in future projects, despite the fact that they thought the initial project was successful and they appeared to be happy with the collaborative process.

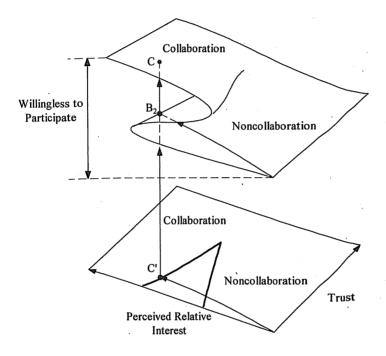


Figure 5 The Dynamics of Collaborative Behaviors: Low Trust

All these puzzles may be explained by the catastrophe model. Since the two states—collaboration and noncollaboration—are assumed to be stable, people will prefer to stay in the current state until they find that the current state has disappeared. In other words, when

people perceive that their relative interest has changed, they may change their decision regarding collaboration or noncollaboration based on their current perceived relative interest. This explanation can be true either in the period of working on a single project or in deciding their involvement in next round of collaboration. In addition, the time lag between actual relative interest and perceived relative interest may be different among different partners. Some partners are more sensitive to relative interest change; others may need more time to recognize the change of actual relative interest. However, in both cases, it is important to realize that past unpleasant collaborative experiences can have feedback effects that make the establishment of future collaboration more difficult. Past pleasant experiences, on the other hand, are not sufficient for leading to future collaborations even though the same incentives are still provided since the perceived relative interest of potential partners may have shifted to another area and they may not care for the same incentives any more.

# Delving into the Problems Hiding Behind Collaboration

Having discussed the interactive effects of perceived relative interests and trust, we may examine why some asymmetrical and

interest mismatch problems exist in the collaborative activities between the Center and its partners. As has been stated, the Center is essentially playing a major role in the formation of collaboration. Therefore, how the Center organizes the collaborative relationship may determine how successful the long-term collaboration can be. This issue will be the focus of discussion in this section.

### The Center as a Convener

A convener needs to perform the role of identifying and bringing "all the legitimate stakeholders to the table" (Gray, 1989, p. 71). Therefore, the Center, holding a central position to connect all the other participants, may need to possess the five abilities of a successful convener.

In the first place, the Center should be able to induce stakeholders to participate. While being asked how the Center encourages people of different organizations to become partners, a manager pointed out that the Center is a gateway for private businesses to get access to the State market. In other words, the Center provides the corporate partners an

opportunity to build the initial relationships and make first contact with potential customers in the government. As a result, the vendors obtained an opportunity to demonstrate their competence and products to a large audience in various agencies. While this benefit is indirect, the corporate partners can be benefited in the long run. For agencies, the Center promised that by bringing their problems and missions into a project, they would receive the benefit that all the partners' efforts can aggregately help the agencies enhance their performance. For academic faculty, their first advantage may be the opportunity to be engaged in applied research. In addition, the faculty members often get paid to work on a target piece of a project when the Center needs their help.

However, how other partners perceive the Center's effort to induce stakeholders to participate may relate to the second and the third abilities of the convener—having the authority to organize the domain and holding an unbiased approach to the problem domain. Individual partners expressed different opinions toward these issues. First, since most of the projects were designed to fit similar needs of different agencies, the generalizable outcomes of the projects may not be able to focus on figuring out solutions for the specific problems encountered by an agency. An official of an agency said that although the general framework of the project could benefit more agencies with similar

functions, she would prefer a project with a smaller scale which was tailored for her agency's specific needs so that the solutions could be implemented immediately. On the other hand, corporate partners said that they would prefer to work on projects with vertical solutions, i.e., which focus on the business discovery need of the corporation, rather than those horizontal technologies which tend to provide generalizable use but do not have too much to do with the core strengths and profitmaking concerns of the corporation. Finally, most faculty members who have been working on the Center's projects indicated that the projects had not been designed to coincide with their research interests. Moreover, no one has ever published any academic paper based on the projects' outcomes. As a result, the unsatisfied partners may be reluctant to participate in future projects if the problem domain defined by the Center can not be tailored to fit their respective needs. The long-term legitimacy of the Center to organize the problem domain may also be questioned by potential partners who may be discouraged and may therefore decrease their willingness to engage in future collaborations.

With respect to the ability to appreciate the potential value of collaborating, envision a purpose to organizing the domain, and establish a collaborative process and context, the Center has devoted consistent efforts to building the foundation for enhancing collaboration. As the director of the Center stated:

I try to have all our staff see that our success depends more than anything else on the relationships we build. Every relationship matters. Bad relationships, even one, is really serious for us. Because we don't have to exist. A lot say we have to exist. No! We only exist because people think we are worthwhile....I really like having people come in with different backgrounds and specialties because each person has a different way of understanding what we are trying to do, and really contributes to us toward a good comprehensive understanding of problems that we have ignored.

In fact, the Center has been very successful in the sense that it has built a national reputation and is becoming a national model in the field of university-based organizations for initiating network collaborations.

After the Center won two national awards, many other universities have followed its lead and established similar organizations.

Finally, concerning the ability to convince all stakeholders that the identified participants are appropriately identified to participate in the collaboration, most of the interviewees held a positive view of their partners. When being asked how important the other partners' role are

in the collaborative process, most people expressed that they felt their partners are very important for making the collaboration succeed. Although some people criticized the project focus and conflicts did exist in the collaborative process, few questioned the appropriateness of the other participants.

According to the examination of the Center's role as a convener, it appears that the major problem presented in the collaboration is the mismatch between the focus of the projects and the interests of respective partners. In order to delve into the origin of the problem, a discussion of the Center's strategic focus and the reason why this strategic focus was so formulated may provide some implications for collaboration management.

#### The Imbalance of Strategic Focus

At first glance, the participants who are involved in the Center's projects would appear to have equal weights in the collaborative process. However, in practice, the process of initiating the collaborative relationships demonstrates that the different partners of

the Center have different weights in the process of proposing projects.

A manager of the Center described this process as follows:

We always start with the public sector, because we want our focus to be on solving practical, contemporary problems of government. So we work closely with government agencies in the State all the time, on committees and work teams that are related to the Governor's office or to the State Forum, and use those experiences and relationships to identify themes.... Once we have got the agencies and their problems defined fairly well, then we look for corporate partners.... [Then], we try to identify particular kinds of academic expertise that we think would be useful for the project and invite faculty members or their students to become part of the project team.

On the surface, the process of initiating collaboration seems reasonable in terms of being consistent with a regular strategic planning process (Bryson, 1988). However, the top-down approach to project planning implicitly implies an imbalance in the relative importance of different stakeholders. In other words, the order of concerns based on the Center's strategic focus is the Center itself, the agency, the corporate partners, and the academics. A faculty who had

been involved in the Center's projects expressed his feeling toward the focus of the Center's strategy:

The Center needs to be very careful about its positioning in State Government vis-à-vis the emerging area of community. It needs to be very careful about how it positions itself vis-à-vis national trends. I think it's doing a very good job at that, first and foremost. And I think its reputation with the agencies is probably second. And then third would be corporate partners. That would be my guesses. The corporate partners are less important stakeholders than the agency. And academics are kind of off the table.

According to these two statements, the ties between the Center and its partners in Figure 1 may need to be revised. As shown in Figure 6, the tie between the Center and agency is the strongest one (i.e., the solid bold line). The second stronger tie is that with the corporate partners (i.e., the solid line). While the tie with the academic people is only a relatively weak one (i.e., the dashed line). Another staff of the Center agrees with this viewpoint, acknowledging that the faculty members "end to be brought in for special purposes rather than being brought in as a real partner." Although weak ties are useful for

exploring and gaining access to information, for a collaborative action to be able to effectively solve problems in uncertain environments, the necessity of increasing the embeddeness of all partners in the network relationship should not be ignored (Uzzi, 1997). However, since faculty members can conduct their own research without being involved in the Center's projects, it seems that faculty members tend to be dependent less on the Center than the Center is on faculty members. Therefore, if the Center really feels that it cannot get to success without the collaboration of faculty members, it may be necessary for the Center to strengthen the tie between itself and faculty members by paying more attention to faculty's research interests.

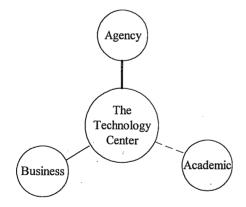


Figure 6 Actual Network Relationships of the Technology Center and Its Partners

## Primary Concern for Creating the Center

As stated above, the strategic focus of the Center tends to determine the actual network relationships and the nature of the projects. With the Center's strategic focus rank-ordered as the State as a whole, the individual agency, the vendors, and the academics, it should be clear why the feelings of asymmetry of the individual partners are inversely rank-ordered. We now may ask why the Center's strategic focus was so formulated. Tracing back to the primary concern for creating the Center may provide insights to the answers to this question.

The Center was created as a result of the constraints of state law. According to state law, business and government agencies can only form business relationships. Public agencies are prohibited from accepting contributions directly from corporations. As a result, the Center was created as a medium to provide a place where government and business could collaborate rather than just buy and sell. A former staff of the Center who had been participating in the process of creating the Center told the story:

Under State guidelines, [agencies] could not accept gifts.

While at the University, we can accept corporate gifts. So in

fact, a very practical issue was that the working rules between corporation and agency are different on University turf than they are on agency turf. So the Center has used those ground rules of the University to accept gifts, to manage and accept gifts and to provide that neutral turf whereby agencies can meet their corporate partners. So I think the University base has been more important for the agency partners and for the corporate partners...than for the fact that there was access to University faculty.

According to the statement above, we may understand that the original reason for creating the Center was not based on the concern of facilitating collaboration among public agencies, businesses, and academics. Instead, the original idea emphasizes more heavily on getting technological help from the businesses and academics. This primary concern hence forms an external constraint that limits the flexibility of forming the Center's strategic focus as well as the collaborative structure. The Center's strategic focus and the collaborative structure, in turn, have had tremendous impacts on the partners' interests and their trust toward the Center. It appears that this would create a dilemma for the Center in organizing the collaborative relationships. If the Center does not pay attention to the demand for

greater mutual interest of its potential partners, the collaboration will inevitably decline in the long run. However, if the Center does respond to the different demands of its potential partners by letting them collectively decide the focus of the projects, it may not be able to meet the priority perceived by the top management of the State government. As a result, the financial support from the State may decrease. Ultimately, there may be no resource and no need to form any collaboration.

#### Discussion

Based on nonlinear analyses, this paper offers another lens for looking at the collaborative processes. In examining the behaviors of a technology center and its partners, two thresholds were found to exist in the collaborative process. When potential partners' trust toward the Center is not great enough, it may be necessary to provide the stakeholders greater relative interest to get them beyond the critical point so that a jump from noncollaboration to collaboration can happen. On the other hand, the process of collaboration, whether

viewed as a period from the time frame of completing a single project or as a long-term, across-projects collaboration, holds the potential for a sudden defection when the partners find their perceived relative interest is not as high as they have expected. When the defection happens, it will be more difficult to rebuild collaborative relationships since the defected partners may expect relatively greater benefits to compensate for the possible risks they need to take, assuming that they still trust other partners at the same level as before. Otherwise, if their trust toward other partners has become lower due to past unpleasant experiences, the resumption of collaborative relationships with these defected partners may become more difficult, if not impossible.

In the collaborative process initiated by the Center, four stakeholders—the Center, the agency, the businesses, and the academic faculty—have been identified. However, it appears that only the Center has achieved its goals of obtaining constant financial support and keeping steady growth in the past. None of its partners have ever been completely satisfied with the outcomes of the collaboration. All the collaborative efforts seem to be directed to satisfy the demand of another latent stakeholder—the top management of the State. Under the constraint of the State law, the Center was created to provide a place for obtaining informal technological assistance to solve statewide performance problems. This concern, therefore, has determined the

strategic focus of the Center and the basic structure of the collaboration, which in turn has led to incomplete collaboration in the sense of getting every partner involved in the design of the collaboration and distributing benefits fairly among partners. The external constraint may be the major barrier to the formation of close collaborative relationships in the long run.

#### Conclusion

Building good theories and successfully applying the theories in organizational settings have long been major objectives pursued by organization scientists. In general, McKelvey (1997, p. 375) raises the criticism that organization scientists have tended to "focus on empirical discovery with very little effort going into the development of idealized analytical or computational models and direct empirical corroboration of them." According to McKelvey(1997), an appropriate approach is one that attempts to (1) theorize based on idealized models; (2) test the models empirically; and (3) produce descriptive, natural theory or case study investigations. To respond to the call for establishing "quasi-

natural organization science" proposed by McKelvey, this research is expected to contribute to the field in terms of employing an alternative perspective—catastrophe theory—to build a grounded theory and an idealized model for further exploring the nature of collaborative processes in network organizations.

Although the catastrophe model employed in this paper has provided some insights concerning the discontinuous behavior change in the collaborative process, one point that needs to be mentioned is that continuity and discontinuity may not be clearly distinguishable (Rosser, 1991). In fact, there may not be a discontinuous change in collaborative behaviors if we only examine the collaborative process on a one-shot basis. That may be the reason why most people would prefer to see that the collaborative efforts as successful, since rarely have defections happened in the process of working on a single project. However, if we trace the long-term collaboration, the explanation of the catastrophe model may be partly true.

In future research, the catastrophe model proposed in this paper will need to be tested by collecting more data within a longer time span. Additional projects will need to be investigated and compared so as to provide more evidence for describing and interpreting the collaborative phenomenon. On the other hand, the catastrophe model proposed in this research may be too simple to illustrate the effects of

interactions of other related control variables on collaboration. In fact. both perceived relative interest and trust can be a function of a number of other variables. In addition, the State has also played a critical, though latent, role by supplying funding to the Center and by demanding that State agencies implement innovation according to policy-makers' policy priority. The concerns of the State top management may inevitably influence the evolution of the Center's strategic focus over time. To illuminate the interwoven relationships among myriad variables dynamically, we may need to build system dynamics model by including the interactions among the State top management, the agency, and the Center. Then, by simulating the model with the input of real world data in a relatively longer time span, we may be able to have better chances to examine whether the findings of this research reflect reality or only a spurious description of a single collaborative relationship.

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## **Exploring the Dynamics of Network Collaboration**

#### Charles C. Han

#### **Abstract**

Since scholars introduced the concept of network organization, collaboration research in the field of organization theory has expanded their focus from the individual, group, and intra-organizational level to the interorganizational level. However, most studies still adopted a linear perspective to analyze related variables. Few people have, if ever, tried to use nonlinear methods to describe the dynamic process of the formation and termination of interorganizational collaboration. This paper employs a catastrophe perspective to illuminate the phenomenon of collaboration and noncollaboration. As a result, the nonlinear behavior of the participants in an interorganizational collaboration system can be identified. In addition, this paper intends to provide more insightful explanations and to suggest a new direction for future research.

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#### 《本期特別企劃》

# 台灣法制政治之回顧與展望以立憲政治為中心\*

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#### 摘要

台灣近百年來受外來政權統治,有關民主法制之建立與運作既非本於台灣自身考量,猶與台灣社會環境脫節,無法獨立自主地實施民主法制政治。 展望台灣未來憲政發展契機,唯有擬定、施行適用於台灣的台灣憲法,植基於台灣當前客觀存在之事實,確立國民主權,以保障人權爲至上原理,建立永久和平中立之憲政體制,確立族群平等、社會福利國家,庶幾台灣成爲獨立自主的民主法治國家。

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### 壹、緒言

一八九五年,大清帝國與日本帝國發生清日甲午戰爭,由於清國戰敗,乃依馬關條約第二條之規定,將台灣及澎湖列島割讓予日本。於是在國際法上,台灣已不是中國領土之一部分,由日本合法地擁有對台灣的主權,並在台行使源諸國家主權的統治權力。直到五十年後的一九四五年,日本因第二次世界大戰戰敗,向聯軍投降而放棄其對台灣主權,結束其對台統治;改由聯軍指派軍事接管台灣的中國國民黨政府,繼續統治台灣,迄今已又過了另一個五十年。儘管在戰後這五十四年漫長歲月中,不論在聯合國舊金山對日和約,抑或對華之日中和約或對中之日中和約,日本始終未明示對台主權欲放棄予那一國家,但是事實上,在這百年歷史裏,台灣在日本帝國殖民統治及中華民國類近獨裁威權統治下,幾乎都同樣處在外來政權的專制獨裁之政治環境;無法獨立自主地實施民主法治政治。

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政治和社會現實的法政思想和制度,以便建立能夠長治久安的法治 秩序的十字路口。

盱衡台灣四百年歷史,尤其使台灣走進近代國民國家(Nation state)之這近一百年來;在前清時代與日治時代,台灣不論是在法律 上(de jure)或事實上(de facto),固然都被認爲是中國或日本所拓殖 的領土,被强調是他們「不可分的領土之一部」----雖則他們都在 敗戰時將台灣割讓或放棄。惟到了現在,不僅在法律上(de jure)中 國早已割讓台灣予日本,兩岸彼此分離已逾一百年;日本也於戰後 放棄對台灣之主權,日台相互離脫五十年以上;從而,台灣與中國 或日本已均非國際法上同一國家,台灣當然也不再是中國或是日本 不可分之一部領土。而且在事實上(de facto),戰後五十年來,台灣 獨立而自主地擁有主權,運作立法、行政與司法等國家權力,不受 中國或日本等任何國家的干涉與侵犯。可是,令人遺憾的,一方面, 中國既無視於國際法規對國家所下的意義,已有明確的定論界說; 也無視於維護國家主權獨立,已成國際社會至上命題;仍然恣肆傲 慢、唯我獨尊地公然表示「台灣是中國不可分領土之一部」;且又 文攻武嚇,顯示不惜以武力征服台灣,統一兼併;尤其經常以中央 政府姿態君臨台灣,視台灣的中央政府爲中國之地方政府;干預台 灣內政,阻止台灣從事國際外交活動。同時另一方面,更令人匪夷 所思的;在台灣,由國名黨長年執政的中華民國政府,竟然與中國 隔海唱和、異口同聲地倡言「一個中國」、「反對台灣獨立」、「台灣 是中國不可分領土之一部」;自我矛盾地,在法律上 (de jure),不

將台灣定位爲一個主權完整、獨立自主的「國家」,反對以「台灣」 名義建立獨立國家;祇願用國際法上殆無前例的「中華民國在台灣」 的名稱,即以涵義曖昧的「政治實體」來界定自己的國家地位;卻 在事實上(de facto),獨立自主地行使國家主權;亦即,對內不受任 何干涉地運作行政、立法、司法等國家統治權;對外則以獨立國家 身份,與三十個左右的國家建立正式邦交,並殫精竭慮地在尋求拓 增與各國建立外交關係,設法加入各種國際計會組織。

無可諱言的,台灣近一百年來,在政治上,始終被定位在國家的殖民地或國家的特定區域,祇是國家領土之一部而非一個「國家」。因此,最能展現國家權力、安定社會秩序的法律制度,特別是位居國家整個法體系根本之憲法,一直是外來的、被迫接受的,憲法與法律之制定,台灣人民固然無法參與;就連憲法與法律之實施,台灣地區也都被視爲是憲政與法治的邊陲,備受輕蔑和差別待遇。換言之,台灣之法制在移植繼受西方近代法制的近百年當中,始終不以台灣本身-----不論是國家或是社會-----之發展或目的,來做運作推展之主軸;反而,由外來統治者經常刻意地逼迫台灣,去屈從、依附他們的社會,使台灣接受日本或中國異質社會之法制,忍受西方近代法制移植東方社會之「雙重排拒」的煎熬。在這種法制史的演展下,台灣法制之歷史與經驗,被迫退居地方法制史地位,在日本或中國之國家法制史之大脈絡掩蓋下,縮瑟壁角、暗然無光;對推展台灣未來法制,難於提供歷史經驗和鑑鏡。

# 貳、日本統治下近代法治政治之移植

一八九五年五月,日本任命海軍大將樺山資紀爲台灣總督,兼接收台灣的全權代表。臨行前,內閣總理伊藤博文並頒予樺山總督以內閣訓令,列陳台灣施政大綱,包括接受清國割讓過程要領七則,以及設立台灣總督府組織綱領與急務十二則。在此一訓令輒已關切到,原屬中國法制施行領域卻又實施得荒腔走板的台灣,如何接受已實施君主立憲的日本近代法制,俾能不至於產生嚴重變形變質或强烈移植排拒。惟一俟日本佔領軍登台,始覺台灣不僅開發未臻成熟,各地仍有土地荒蕪,瘴疫流行,盜匪猖獗、族群械鬥情形;尤其抵抗日本、排拒侵略之烽火,絡繹不絕;加上,當時日本政府連植民主義思想都未形成。植民主義政策也未構思建立,能在甲午戰爭攫取台灣爲植民地也頗出其意料,更違言制定植民地法律在台灣適用之準備。因此,日本當時祇能跟跟蹌蹌地先實施「軍政」,由軍政當局總攬一切行政、司法及軍政,對台灣厲行軍事統治,希輩能銀壓台灣人之繼續抗日、綏靖台灣之社會安寧。

然而,到一八九七年,日本認爲佔領台灣已告完成,廢除對台實施「軍政」改行「民政」之後;日本當局在針對台灣客觀環境,研討建立治台法制時;因著眼現實與理想見解之齟齬對立,產生了「植民地特別法說」與「內地法延長說」之論爭,彼此異其論說,爭議不息。前者認爲:台灣不但有傳統中國法系舊法制及舊習慣,其法政文化水準與環境,與既已移植繼受西方近代法政文化的日本

本十,迥不相侔:從而,應先制定因地制官的植民地特別法,在台 灣先行適用以做爲「過渡」,等待台灣與日本本地之間法政文化水 準接近,再行調整,以達全日本法令統一之目標。相對的,後者則 認爲:台灣既然已歸屬爲日本,或爲日本統治權所及領十之一部 份,日本法制當然適用於台灣:抑目,唯有如此,才能永久保有台 灣的土地與人民,使之與日本本土溶融爲一。儘管如此,由於事實 上,對日本治台而言,此二種論說皆各有所據也各能言之成理;而 二說之間,也非絕對互相矛盾、水火難容;職是之故,經過一番議 論與協調之後,所獲共識底結論,則認爲:鑑於日本治台初年,台 灣抗日烽火遍地燎燒,社會規範浮動不定;實不宜在須臾之間,將 台灣原有之舊法制與舊習慣驟然予以盡廢,使人民無所置手足;盍 如採行兼容並蓄、漸進發展方式,在台灣先行實施「植民地特別法」 法制,以爲適應及調整之過渡期間:一俟依法統治逐漸上軌,台灣 與日本本十之法政文化較爲接近,再修訂調整採用日本本十法規 定,走入「內地法延長」的境界。

盱衡日本治台之法制史底發展,現實上就是循著這種看法在推展。一八九七年,日本以法律第六十三號制頒「有關在台灣施行法令之法律」,亦即在台灣植民地痛遭批評、在日本本土也引起是否違憲爭議,惡名昭彰之所謂「六三法」。依此「六三法」之內容觀之:其第一條規定「台灣總督得在其管轄區內,制定具有法律效力之命令。」同法第五條規定「現行法律或將來應頒布之法律,如其全部或一部有必要在台灣施行者,以敕令定之。」此法賦予台灣總

督過大的律令制定權,被帝國議會議員批評爲「該法嚴重侵犯國會 立法權」,日本政府卻强調,對台灣這一不同民族的植民地,實施 完全相同之日本國內法,並非適當:不僅明白地表示「六三法」就 是「植民地特別法」,而日將這有效僅三年的法律,一再延長到一 九〇七年實施了十一年之久。到了一九〇七年,台灣的抗日事件已 顯著遞減,治安情況也頗改善:同時,在台灣內部以及日本本土, 要求減前台灣總督權力-----尤其律令制定權-----的聲浪日高。因 而,逼使日本不能不於該年重新制頒法律地三十一號「有關在台灣 施行法令之法律,即通稱「三一法」,來對總督權力加以限制。祇 可惜,這「三一法」在本質上一如「六三法」,仍是「殖民地特別」 法」;原來設有「過渡實施年限」的五年,也被一延再延到一九二 一年。綜觀台灣在日治時代的法制,在前半段從一八九五年到一九 二一年的漫長二十六年間,於「六三法」及「三一法」之法治體制 下,仍是採委任立法,由台灣總督制頒律令做爲統治台灣之法律, 實施「殖民地特別法」。

然而,到了一九二一年;一方面,台灣的政治社會秩序已較安定,抗日烽火幾已盡熄,逐漸具備實施「內地法延長」之基礎。同時,另一方面,日本也有借「內地法延長」來推展殖民地同化政策,使台灣人日本人化、皇民化,以遂增强軍力侵略亞洲之意圖。從而,日本就制頒法律第三號「有關在台灣施行法令之法律」,及通稱「法三號」,結束「殖民地特別法」法制,改採「內地法延長」之法制;使日本本土之法律,原則上在台灣可同樣實施。令人遺憾的,台灣

雖在一九二一年有「法三號」之制頒,原則上可因「內地法延長」而使用日本本土之法令,但事實上,到一九四五年日本戰敗放棄對台統治之二十四年間,從「九一八事變」經「七七事變」到世界大戰終止,連日本本土都因戰爭而籠罩在軍國主義的專制獨裁陰霾中,日本本世紀「大正民主時代」、「昭和元禄時代」,較有民主法治氣象的良辰美景,在台灣頂多祇是官方宣傳中之浮光掠影、過眼煙雲。台灣法制之近代化也崎嶇迂迴、舉步艱難。

## **參、日治時代台灣行憲問題之學者見解**

惟在戰前日治時代五十年中,於大日本帝國憲法(即通稱明治 憲法)上,台灣這塊植民地到底應居於何種地位,不僅憲法條文沒 有任何規定,而且連台灣能否適用明治憲法,日本憲法學界與政界 也議論紛紛,莫衷一是。

按照一般公法包括國際公法與憲法的通說,在清國與日本締定 馬關條約,經兩國批准簽署換文時,國際公法上就產生清國割讓台 灣予日本的效力。同時,在日本國內法----憲法-----也產生台灣被 劃歸日本領土之領土變更效力。殊不料,由於台灣是日本制頒明治 憲法後,首次攫得的殖民地,憲法上卻沒有新領土取得之相關規 定;因而,台灣在明治憲法之屬地高權問題上應如何定位,很快就 被視爲重大問題而被提出討論。特別是明治憲法應否在台灣實施及 應如何實施的問題,因爲問題本身涵藏諸多錯綜複雜的因素,又無前例可援引比較;當然就引起更爲激烈的論爭;聚訟盈庭、莫衷一是。

然而,針對這種議論,一般說來,大都認為:明治憲法對領土變更,並未要求必須以明文規定其程序與形式(諸如是否必須經議會同意或認證,是否必須增修憲法明文記載等)。從而,祇要割讓或取得之國際條約締結成立,當然立即產生領土變更之國際法與國內法效果。證諸日本兼併新領土之事例,不單在一八九五年取得台灣澎湖,而且在一九〇五年接受庫頁島的割讓,以及一九一〇年兼併朝鮮;莫不採取此種看法與立場,而未在憲法上就領土變更有所增修與規定。事實上,在台灣,所以會發生明治憲法應否在台灣實施,以及如何在台灣實施的問題;導因於一八九七年日本制頒前述「六三法」時,由於法案中授予台灣總督過大之委任立法之權力,於是引起此舉是否違憲問題,爆發了國會議員與政府官員問之激烈論爭,論戰戰火並延燒到法學界、輿論界乃至社會各方面;議論也經久不息,受到日本本土乃至台灣廣泛而密切的注意。

關於這種議題之挑起如此鉅大波瀾,事出偶然卻又燎燒迅速; 政府原非胸有成竹、備有腹案;無寧是踉蹌踉隨、手忙腳亂。在這種狀況下,日本政府對於台灣在明治憲法之地位問題所持的立場和見解,自然就無法一以貫之;甚至常因國會議員强有力的質詢詰問、公法學界的疑議批評,被迫變更態度而反反覆覆、猶豫躇躊。

本來,當時台灣既然成爲日本新擴張之領土,自然就成爲明治

憲法施行領域。出乎意料的,日本法學界對此想法,相互之間竟然 有南軒北轅、相去天壤之理論,彼此齟齬論爭、訟爭不已;益發使 問題便得錯綜複雜,不易縷析清楚;令人遺憾。其論爭梗概約之: (一)、肯定明治憲法可適用於台灣的學說。重要的有:

> 1.清水滑。清水滑於其名著「帝國公法大意」中,閩論「主 張憲法不適用於台灣領者,認爲『法之存在,既然是爲了 因應計會現實之需要,則在計會之現實洞異時,法也必須 隨之變異。明治憲法之制定,原係基於當時日本社會之現 實而釐定;新領土不但社會現實與文化程度均與日本本土 殊異,而且其住民也無法與在日本出生長大之本土國民, 具有同樣國家感情。因此,不得不謂憲法不能不適用於新 領土。』然而,此種論說見解是毫無根據的荒謬說法。蓋 若新領十之計會現實與本十類似,而其文化程度也與本十 無顯著差別時,根本就談不上可否適用憲法的問題。茍依 否定論之說法,則憲法能否施行於新領土,竟然非取決於 憲法本身,反而須依新領土之社會現實決定;這固然違反 法底本質,而且社會現實的差異,畢竟祇是程度之差而非 本質之異,不易明確比較出來。」又說「論者又謂『憲法 制定之際須以當時領土現實爲基本,未預先設想會獲得新 領土。從而,憲法對預想之外所獲新領土,當然無適用之 餘地。』然而,現代各國爲圖謀國家之發展,彼此競爭奪 取土地,以致各國領土變化不已,殆已成爲當前世界趨

勢。謹因制憲者未就此有所因應規定,輒强言憲法未預見 領土之取得,故不應適用於新領土,不免過於偏頗。

清水教授更指摘「憲法(明治憲法)顯然是參照比利 時及普魯士憲法而來。惟此兩國憲法均明文規定,新領十 非經憲法或法律特別規定,不能適用憲法。憲法(明治憲 法)有意排拒此一條文,不予繼受而列入憲法法典:不待 贅言的,是認爲日本新取得的任何領土,無待增修憲法或 制定特別法律,當然視爲是可以適用憲法的領域。........ 法(明治憲法)無異將其施行領域,局限於制憲時之領土, 其理彰彰明甚。」從憲法法理及憲法史的沿革,力陳憲法 (明治憲法)對日本所有領土,不分新舊,均應有效實施。 2.美濃部達吉。與清水澄相近似的,美濃部達吉教授也認爲 明治憲法對全國領土,均應有效適用:但美濃部氏對植民 地適用憲法,卻懷抱較爲保守殖民主義思想及歧視植民地 態度,採取一個國家主權下有兩種不同憲政統治之類似 「一國兩制」方式。他闉述「憲法對植民地或統治地可否 有效實施,應依憲法各條項之規定而有所區別。憲法並非 以全部條文形成不可分之整體,無寧是包括可分的多數條 項的法典。因此,在這憲法法典中,其性質上必然與國家 統治權息息相關的條項,對國家統治權所能行使之全部領 土,固然可以實施,即令是在領土外之地域,只要是日本 能對之行使統治權,這種憲法條項也能有效實施。因此憲

法(明治憲法)中有關天皇、攝政、國務大臣、樞密顧問及帝國議會之組織權限等規定,其性質上就不受施行區域之限制;換言之;這些憲法條項,不論是在本土或植民地,也不論是在未完全成爲日本領土之地域,經常可以同樣有效地適用。」

美濃部達吉接著說「然而,憲法法典中有關統治方法 及人民權利義務規定,則非必定是全國各地均應共通適 用,應由國家權衡各地現實需要之情況,決定實施或不實 施憲法。因此,祇有在朝鮮、台灣、庫頁島、滿洲及南洋 群島等地區,才會對這些憲法條項產生應否有效實施的問 題。然而,由於憲法(明治憲法)並未明文規定,有關統 治方面及人民權利義務事項,可否在新領土或準新領土施 行,因此,要解決可否實施這些憲法條項的問題,祇有以 法理爲基礎。……

義思想規定,必須以社會文化相當發達與國民對國家忠誠,做爲實施之前提。茍若新領土未具有此種前提時,基於這些主義而規定之憲法條項,就不可在新領土實施。朝鮮、台灣、庫頁島、滿洲及南洋群島等地;……其人民不負服兵役的義務,也未選出民意代表到國會,其非依法律不得逮捕拘禁之人身自由權也未被承認;同時,其行政權與立法權也未臻分立,而可由行政權單獨制定一般法規,司法權獨立之原則也未完全實施。換言之,這些地區到目

前,在法律意義上仍被視之爲植民地,無可置疑。…… 是之故,在朝鮮與台灣,除以敕令之委任立法特別指定, 某些法令和憲法規定事項在性質上當然可於此地施行者 外,本土法令和憲法有關統治方法和人民權利義務事項規 定,應無適用之餘地。」

美濃部達吉教授是戰前日本憲法大師,在所謂「天皇機關說事件」中,表現了學者威武不能屈之人格風範,在推展憲政保障人權上,深受日本民眾與學界之尊敬推崇;卻在對台灣的憲法適用問題上,一方面,肯定憲法有關統治權之規定,可在台灣適用;同時另一方面,則又否定憲法有關統治方式及人民權利義務之規定,可在台灣適用。以此「一國兩制」式的理論架構,使日本憲法(明治憲法)對台灣不保障其地位,可由台灣總統予取予奪、任割任宰;令人感到遺憾。

3.上杉慎吉。在「天皇機關說」論爭上,與美濃部達吉相互 攻計、誓不兩立的上杉慎吉教授,在「植民地之憲法地位」 此一論題上,兩人的思想、理論卻相當一致。上杉論謂「國 家獲得新領土時,憲法原則上雖然可隨著統治權之擴張, 當然在新領土實施;但是這並不妨礙憲法自定其實施之領 域。不論是依憲法明定實施憲法之領域,或是依憲法性質 推定某些領域不能實施,抑或是依某地域現實情形應解爲 不可實施憲法之全部或一部;均應予以肯定。在歐洲,由 於各國所獲新領土往往是文明程度不同的未開發土地,因 而均稱之爲殖民地而實施與本土不同的法律制度,並以此 爲天經地義、理所當然。」

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上杉教授更進一步闡論「殖民地本來就不是憲法應實施之領域。在文明程度及社會實際情形均與本國顯然迥異的殖民地,實施本國制頒之憲法,原就非歐美人士所能想像。然而,卻也不能因而推論爲新領土本質上不可實施憲法;蓋因這種問題本來就是必須依據新領土的實際情形來決定的實際問題。此外,也不可一概地論斷整部憲法可否一概在新領土實施,應權衡新領土的實際情形,來決定究竟是一部或是全部不能實施。至於有關統治權的憲法條項,若無任何特別原因,原則上應可在新領土實施。」這種思想和理論顯示,日本戰前憲法學界保守派和自由派學者,在談論國體、主權和人民權利義務問題,雖然彼此南轅北轍、涇渭分明;但是對殖民地人民之輕蔑歧視,不予憲法保障之心態,則同爲一丘之貉、相差不多。

(二)、否定明治憲法可適用於台灣的學說。就明治憲法適用於台灣,採取明確而全盤否定的學者,不但人數及其學術地位均較採肯定說者爲少爲低,而且其理論也大同小異,幾未脫市村光惠之見解。由於市村教授之否定論說體系最完全,學術地位較高而又最熱心參與此一論戰;本文擬僅紹述其論說梗概,以爲代表見解。按冀其所著「帝國憲法論」中,其所以

#### 否定憲法不應適用於新領土主要理由有:

- 1.明治憲法制頒之天皇文告,揭櫫「增進我八洲民生之福 慶」;於此所指八洲乃指日本本國領土而言,並不包括新 領土,惟若將八洲解釋爲固有領土,不免失之偏狹,似應 解爲制頒憲法時之帝國領國,始稱適當。
- 2.在公佈憲法之天皇敕語中,有謂「朕每顧我臣民,原係我 列祖列宗忠良臣民之子孫」之語。此乃明示此部憲法,僅 制定而畀賜固有日本臣民而已,新附臣民當然無適用憲法 (明治憲法)之餘地。
- 3.所有國家法律並非當然可以適用於新領土,而應審視各個 法律內容,分別判定其可否在新領土實施。新領土之人 民,其風格、習慣、人情、思想及文化程度,顯然與本土 人民不同;因此,爲統治本土人民而制定之法律,原則上 不能適用於新領土人民。有關憲法可否適用於新領土,亦 應同此理論而予否定。以此觀察台灣與朝鮮,其人民與我 日本國民,在各方面多所迥異;從而,顯然地,難以憲法 (明治憲法)所定方式在這些新領土實施。
- 4.組織建立國家之人民,具有兩種性質。其一爲參與國家團體之權力構成之資格,另一則是做爲國家行使統治權之客體的資格。不具備或漠然於參政資格之國民,無法產生國家團體之觀念,當然就無法明確認識國家這種團體,僅能成爲統治權行使對象之人民集團,祇可謂爲統治客體;這

種人民集團即使集結了,也不能組織建立成爲國家這種團體。由此看來,由於台灣人與朝鮮人都沒有參政權,日本對這些人祇能視爲統治的客體,也就是日本的屬地人民,並非日本之國家構成分子;從而,在這些屬地上不能實施明治憲法,其理彰彰明甚。

5.儘管事實上,日本政府雖曾解釋或宣稱明治憲法可於台灣 及朝鮮實施,但單憑這一事實仍不足以證明明治憲法可於 新領土實施。本來,所有憲法實施之大權,均係天皇所執 掌;明治憲法原來既然祇制頒實施於日本領土,茍欲擴張 其實施區域,必然非以天皇敕令明定不可。然而,天皇並 未對台灣及朝鮮發布此種敕令,憲法當然不能在此新領土 實施。

### 肆、日治時代台灣行憲問題之政府態度

一八九七年日本制定所謂「六三法」時,由於該法第一條規定 「台灣總督得在其管轄區內,制定具有法律效力之命令。」與明治 憲法第五條「天皇經帝國議會協替,行使立法權。」之規定,有所 牴觸;因而產生是否違憲之論爭。當時台灣總督府民政長官水野遵 在衆議院答詢時,就謂「六三法與憲法(明治憲法)完全無關。在 台灣憲法並未實施,亦即憲法尚未有實施效力。因此,自可賦予總 督以發布有法律效力之命令底權能。」明言台灣並未實施憲法,並據以釋明「六三法」不會有違憲之問題。不過,兩三年後,包括台灣總督府在內的日本政府,就變更原來的「未曾實施」的見解成爲「部分實施」。而在眾議院中答詢謂「在台灣,憲法(明治憲法)並未全部實施,亦即憲法中有關人民之權利義務部分,實際上並未實施,憲法(明治憲法)因焉祇實施於制憲時之日本本土。至於學者議論之中雖有人主張憲法(明治憲法)亦可適用於制憲後新收領土之台灣乙事;其見解是否適當政府不願置評。惟政府之見解則認爲,像憲法中有關天皇大權之規定,雖依主權之變化而可同時在台灣實施;但像憲法第二章之人民之權利,像服兵役、納稅之義務規定,則未臻乎實施程度。」同時,在貴族院之答爲中也明言「在台灣,憲法並未完全實施。由於有一部分已實施,另一部分則實際上猶未實施;因此政府不擬明言,在台灣完全未實施憲法。」顯然的,日本對台灣是否實施明治憲法,是採「部分實施」得立場。

不過,到了一九〇七年,日本不能不重新制頒「三一法」來取代「六三法」。在國會審議此「三一法」時,也發生台灣是否可以完全實施明治憲法,政府是否已明白確認台灣應完全實施明治憲法之疑議和論辯。當時內政部長原敬在國會答詢謂「本席猶記有關官員既曾表明:台灣已經實施憲法。……若非台灣已實施憲法,必須依據憲法規定來制定本法(三一法),則不會有日前由國會兩院協替審議之情事。本法(三一法)既然已經由國會兩院協替審議,則台灣是否已實施憲法之議論,殆已明日黃花成爲過去的問題。」顯

然的,日本政府已從「部分實施」說推移遞變爲全部實施說。這種 日本政府立場之變更,當然使明制憲所規定「應以法律定之」之事 項,必須另有根據始能以委任立法方式以命令規定。

雖然如此,在當時,不但學術界、輿論界、國會議員和政界人士,認為三一法之規定猶多違憲之處,而且連政府甚到台灣總督府也都承認,從憲法和一般法律之法理言,三一法確不易獲得合憲合法之根據。台灣總督府民政長官後藤新平,且率直表明「三一法原本就是變通之法制,政府自己也瞭解其弱點所在。不過,目前政府也在考慮依據帝國憲法規定,來制頒正則而非變則的態度。」由此可見,日本政府在日本本土和殖民地台灣,實施「憲法的一國兩制」;著時也逢遭諸多困擾而猶豫徘徊。

到了日本治台已逾四分之一世紀之一九二一年,台灣之政治、社會秩序已相定底定;日本政府乃在修廢三一法而提出法律第三號即俗稱「法三號」取代時,明確表示在台灣已完全實施明治憲法的立場。在國會審議法三號時,代表政府答詢的政務委員橫田千之助之如下見解,就是最好的說明。橫田說「依政府取得台灣當初之見解,認爲台灣是所謂殖民地之日本新領土,因而就以在台灣仍未實施憲法,做爲各種論說之基礎。不過,嗣後逐漸轉變這種見解,强調憲法(明治憲法)也可在新領土實施。然而,權衡實際的統治方策與各新領土實施情形;要立即實施日本本土之法律,確實相當困難。因此,認定應讓議會擁有對憲法解釋權能之一大彈性空間,傳議會能制定委任立法之特別立法,是有其一定理由在。」

綜合看來,日本政府經過一八九七年之六三法、一九〇七年之 三一法到一九二一年之法三號,幾次轉移遞變,在行政上大約到一 九二〇年代初年,理論上確立在台灣已實施明治療法之觀點與立 場,其後日本文人內閣也推展「內地法延長」之治台政策。使台灣 在一九二三年元旦開始實施日本民法及民事訴訟法。强化對台灣人 民在憲法上有關權利與義務規定之保障;並且在一九三〇年代以 後,在台實行台灣人「皇民化(即日本人化)運動」,企圖以台灣 爲日本南侵印亞之前瞻基地,乃更積極推展日本憲法及其他 日本本 土法令在一體實施之工作。不過未經幾年,日本遂行侵略戰爭而捲 入世界大戰,並苦嚐戰火及戰敗之苦果;在此段期間,連日本本土 都因戰爭而籠置在厲行軍國主義的軍政府之專制獨裁陰霾中,追言 台灣的實行憲法了。職是之故,在日治時代,台灣實施明治憲法之 事實,若非明確地未予實施,就是「一國兩制」地「部分實施」, 諸多觀前顧後、諸多猶豫,影響所及,法學界對台灣是否實施憲法 及應否實施,也就聚訟盈庭、莫衷一是了。

#### 伍、戰後五十年來之行憲問題

一九四五年日本戰敗放棄對台之主權,中華民國政府接替日本統治台灣,實施了五十年左右與歐美法治形似質異的威權統治;而其憲法內容之荒誕不經以及憲政實施之光怪陸離,則使在日治時代

無法在台灣萌芽茁長之立憲政治,產生類似基因突變而成爲李文斯基(Karl Lewenstein)教授所稱之「語戲憲法」(semantic constitution)狀態;其遞移變化之演變過程之釐清不易、錯綜複化,在比較憲法史上極爲少見。詳言之,戰前治台的日本帝國,其六法體系中居於母法、根本法地位之明治憲法,是採欽定憲法型的君主立憲體制,洵爲同時代歐美比較憲法中最爲保守落伍者;其所採天皇主權體制,視人民之基本人權非出諸天賦而是來自天皇惠賜,以及天皇綜攬國家大權等;與近代西方法制之至上命題——

治,諸多矛盾、干格乖離。相對的,在中華民國的六法體系中,局於母法、根本法地位之中華民國憲法,則採民定憲法型的民主共和憲政體制,在保障基本人權規定,與規範國家權力運作及國家機關組織上,都與民主法治的思想與制度,大體上相當吻合。然而,事實上,日本明治、大正及昭和三位天皇,並未憑恃明治憲法所賦予的天皇至尊地位,厲行專制獨裁政治;反而,相當努力於推展類似英國君主立憲體制下之法治政治;雖然一九三七年起日本發動世界大戰,在軍部政府國家總動員體制下,約有八、九年間民主憲政受到嚴重戕害,但是一般說來,日本社會的法律秩序,在戰前已相當歐美化、法治政治化;台灣這一日本殖民地之法律秩序也隨之提升到相當程度。倒反是戰後五十年來,台灣在中華民國憲法體制下,由於掌握統治權力的國家領導人,未能恪遵憲法採民主共和憲政體制之精神;不僅制頒動員戡亂時期臨時條款,維持四、五十年之國家緊急體制,發布將近四十年之戒嚴令,將憲法封錮而置諸高閣之

迺能遂行人治底威權統治;而且對以六法體系爲基礎之法治政治, 心存輕蔑、隨意踐踏;在動員戡亂時期,政府就制頒及沿用多達一 百五十餘種動員緊急法令,對國家社會之常態法體制,造成極嚴重 之戕害。於是戰後五十年來,台灣的法治政治與立憲政治,因焉無 法有效建立。

事實上,台灣這種法治與憲政之積弱不振、難以發展,除了上 述憲政運作之「以人治取代法治」的原因外,更本質的問題關鍵, 則在於中華民國憲法本身的紊亂無章、錯綜複雜。其主要的弊病在 於:

(一)、民主主義憲法與社會主義憲法之强行合併。在憲法分類上, 民主主義憲法是以保障基本人權目的,國家必須建立權力分 立體制;而社會主義憲法則是以無產階級專政爲目的,必須 實施人民民主集中制。兩者水火不容、不共載天。國民大會 原就是實施人民民主集中制國家特有的機關,由人民選出來 代表人民綜攬行政、立法或司法等全部國家權力。各國稱爲 最高蘇維埃、全國人代會、國民總會或國民大會。現行憲法 既實施五權憲法,卻又設立國民大會;既設立國民大會卻又 不在國民大會選出主席,擔任國家元首,而另行設立總統; 尤其憲法內容又多的是三權分立式內閣制條項,並使國民大 會無形化,卻反將應由立法機關執掌的修憲權,賦予國民大 會;遂使整個憲法充滿自律背反的矛盾與衝突。近年增修憲 法又把總統副總統改爲直接民選,更彰顯此種「一部憲法兩 種意識型態」之病癥,已達末期狀態。

- (二)、三權憲法與五權憲法之混淆不清。三權憲法之權力分立思 想,是建基於西方性惡論或宗教底「原罪」思想;認爲必須 將行政、立法與司法三權、予以分離、分立並使之制衡、避 **孕權力集中,才能保障人民之自由與權利。相對的,孫文仿** 襲西方的三權結構,又加上自創的考試與監察二權,建構成 爲五權憲法:卻不建基於西方的性惡論思想,而以儒家性善 論爲基礎,希冀此五種權力分工合作,造成一個萬能政府, 並未多注意權力分立與制衡,是防範政府專制獨裁俾能保障 人民之基本人權的層面:反而樂觀地認爲人民祇要行使選 舉、罷免、創制、複決四種人權,就能管理監督擁有五種國 家權力之政府。現行憲法之起草人張君勸,雖仿威瑪憲法體 制做了不少三權憲法建構,卻因政治協商會議之結果,不能 不加入總統於五權機關之上,並增置考試、監察兩權:迺使 價值觀、建構功能迥不相侔之思想、制度,雜遝混處、紊亂 不成章法,嚴重妨礙憲法之發展。
- (三)、監察權之創設。在採行議會民主政治國家,爲了對違法或 廢弛職務之行政或司法官員,追究其政治責任;乃賦予立法 機關以彈劾行政或司法官員之權能。這種民意代表機關才有 隻代表人民糾彈官員之彈劾制度,都建於兩院制之國家,俾 能由眾議院(下院)提起彈劾訴追,再由參議院(上院)進 行彈劾裁判。這種彈劾制度由於在內閣制國家之意義和功能

已不顯彰,在總統制國家也已少運作;在憲政體制上已是日 薄崦嵫的思想與制度。唯獨孫文竟使此立法權中不足輕重的 小權獨立於立法權之外,且爲之另立爲與立法權分庭抗禮的 權力,並取走應留諸立法機關之調查權及審計權。可是,這 代表民意執掌彈劾權的監察院,卻祗能也祇應從事彈劾訴 追;同時又別無其他民意機關可以進行彈劾審判;不得不牛 頭馬嘴地在司法權機關設置司法院公務員懲戒委員會,來執 掌彈劾審判事務;造成由無民意基礎之公懲會,來代表民意 追究行政與司法官員之政治責任之荒誕結果。殊不料,近年 來之憲法增修條文,更變本加厲地使過去由省及院轄市議會 間接選出之監察委員,變成由總統提名監察委員之不倫不類 之制度。在此情況下,憲法之實施發展就更崎嶇難行了。

(四)、考試權之創設。在現代國家之行政機關體系中,爲使事務官僚之考試任用及升遷退養,能超然獨立於政治黨派之外,其人事及考試行政機關原就應較其他行政機關超然獨立一些。事實上,當前世界各國也多在行政機關中設立人事與考試機構,讓它有某種程度的超然獨立地位與權能。不過,在整個行政權能龐多複雜的執掌中,人事與考試行政業務這種權職不重的權能,畢竟不是大到非從行政權獨立,另設一考試院而與行政院分庭抗禮不可。行政院下內政外交、經濟財政等部會之執掌,何其重要,行政院中會計營繕、研考總務之事務,何其繁雜;其重要繁難且與人事考試不相伯中,又

豈能使之另設一權、分置一院?因此,孫文援引中國古代輒 有科舉制度,而使考試院獨立於行政院外之五權憲法,是頗 值得商榷的。蓋中國古代政制,執掌人事與科舉之吏部與禮 部,原就隸屬執掌行政的尚書省。既非獨自設立,又不屬中 書省或門下省;而歐美也都於行政機關體下設立人事或考試 機構,使其較具超然獨立之職位與權能而已。事實上,在世 界各國只有台灣才有之考試院,經四、五十年之憲法實施, 已證明了這種思想與制度之窒礙難行。考試院行使考試權, 不但如何開科取士設立考試科種,都無法自行斟酌決定;而 且錄取人員如何分發以考用合一,也無法單獨爲之,必須行 政院代爲分發;實難完全超然獨立行使考試權。過去政府也 承認這種失敗,所以借臨時條款之修訂,成立行政院人事行 政局,任其違反五權憲法之考試人事獨立於行政權原則。其 至臨時條款廢止後,仍再依憲法增修條文使行政院人事行政 局,依然留存下來。考試院與監察院如此諸多破綻,使五權 憲法體制更謬訛百出。

(五)、內閣制與總統制的葛藤。現行憲法大概說來,乃是張君勸 仿襲威瑪憲法的內閣制,調和五權憲法的架構而草擬。憲法 五十三條明定行政院是國家最高行政機關,憲法第四章總統 這一章,則無總統是國家最高行政機關之規定;反而明確在 該章憲法第三十七條規定,總統公佈法律、發布命令,應由 行政院或行政院長及有關部會首長副署。抑且,憲法第五十 五條規定行政院長需經立法院同意任命,同第五十七條也規 定行政院要向立法院負責,特別是憲法第五十八條,明確地 把國家最重要的行政權能賦予行政院。可見,即使有若干副 次或輔助規定,略有不同於一般內閣制,也無損於我國政制 爲內閣制之本質。然而,由於過去兩代蔣總統乃至今日李登 輝總統,都厲行以黨領政的中心領導式統治,遂能使原應「虚 擁其位、無爲而治」的內閣制總統,扮演等同或高於總統制 之角色。甚至爲了使總統在擁有以黨領政的政治實權外,也 具有合乎憲政的法律權能,就荒腔走板地逸脫憲法憲政的基 本原理原則,制定在比較憲法史上少見類似的動員戡亂時期 臨時條款,並一再加以增修以擴大總統的權能,侵蝕行政院 原有的行政權能;形成總統有權無責、行政院長有責無權的 憲政怪象。於是乎,戰後台灣的憲政體制就一直陷在「既非 內閣制又非總統制,既是內閣制又是總統制,不完全是內閣 制也不完全是總統制」的自我錯亂狀態。嗣後,雖因動員戡 亂的戒嚴體制,受到普遍而廣泛的批評和反對,終於廢止了 動員戡亂時期臨時條款,也解除了戒嚴;但卻以變質變形的 「增修憲法條文」方式,史無前例的「一機關數階段」怪異 **過程,修改憲法:不但使臨時條款中擴增之總統權力,借屍** 還魂於憲法增修條文中,而且,透過改變監察院爲不代表民 意之行政督察體系,以及總統直接民選,大幅拓增總統權力 與地位。邇近又悖逆憲法權力分立原理,使副總統兼任行政 院長,導致行政院與立法院間,朝野政爭莫有寧日,憲法與 憲政也呈現逐漸病入膏肓、不可救藥的末期狀態。

#### 陸、對台灣未來憲政之展望

最近幾年來,一方面,由於中國收回香港澳門之日已近在眼 前,就更積極的用文攻武嚇手段侵略台灣,並封堵台灣對外之國際 外交經貿:迺使台灣拂拭不去獨立自主之陰霾,連做爲法治與憲政 基礎之國家定位,都無法正確定位。同時另一方面,過去長年來在 兩代蔣總統遂行少數族群之外來統治時, 獲有物質上既得權益而心 理上卻無法接受民主的多數統治的部分人士,自我汨陷於「寧予外 人不予家奴」的不正常心態中:强力反對台灣自丰獨立,必欲使台 灣成爲中國的一部份。這內外兩股的力量,逼使台灣不僅仍以「中 華民國「即「共和的中國」自稱,而主張統治領域及於全中國乃至 於外蒙古:而且仍以與台灣無什歷史淵源、祇由中國人制定來適用 於中國之中華民國憲法,做爲台灣不可廢止之憲法。因此,憲法在 不適合台灣現實的政治、社會及法律環境下,雖經一再增修,卻愈 修破綻愈多,抑且,統治階級只視憲法爲遂行統治之工具,蹂躪踐 踏、呼來揮去:如今在國家元首及行政首長都曾對國家根本大法之 憲法,强欲以副總統兼任行政院長方式,來排解執政黨之權力接班 卡位鬥爭之風潮下:希冀中高級公職人員乃至一般民眾,恪遵憲法

與一般法令規範,當然極爲難能;台灣民眾也因爲對憲法及一般法令之尊嚴威信,普遍缺乏由衷信賴。馴至整個社會盈溢違法行爲; 貪污及暴力之反法治現象,縱橫交錯於政界、財經界乃至於黑社會 幫派中;甚至狼狽爲奸、沆瀣一氣。除非在台灣的法律人能夠在此 挺身而出,共同戮力於憲法秩序及法治政治之重建;否則台灣難免 因憲法與法治秩序之腐蝕崩壞,逐漸由盛轉衰走入衰亡的境域。

然而,令人遺憾的,展望台灣未來的法治政治——尤其是立憲政治,冷靜而客觀地看來,是相當令人無法樂觀的。儘管從一九八七年以來,前總統蔣經國到現任李登輝總統都一再强調要實行憲政改革,在前年國家發展會議也列入憲政改革議題。但是,執政黨與新黨或則擔心影響政權安泰,或則疑懼助長台灣獨立情勢;借口制憲將消耗社會鉅大成本或動搖當前法政秩序之安定,堅持不肯制憲。而民進黨在當時,因核心人物急於謀求與執政黨組織聯合政權,也放棄了長年來所主張的重新制憲立場。從而,在目前政治勢力構造之現實下,期待擺脫中華民國憲法體制之致命的束縛,走出台灣近百年來外來政權所制頒外來憲法之陰影,來建立新憲法下新台灣之法治政治,原就不很容易。尤其是在台灣民眾對立憲政治普遍缺乏信賴,對法治政治心存懷疑輕蔑之氛團下,恐怕更是困難。看來,除非有新立文章,否則台灣只有繼續浮沉於修憲一再失敗的波濤中,使立憲政治逐漸衰竭敗亡。

事實上,過去十多年來,也有不少人洞燭機先,高瞻遠矚地研究析理台灣的政治、社會、經濟、文化等客觀生態環境,試行草擬

適用於台灣的台灣憲法;其立憲主義思想、憲法體例體制、比較憲法之原理原則、以及保障基本人權與權利分立制衡內涵等;莫不遠比現行中華民國憲法體制,合乎現代憲法學理而理路清晰井然,至涵藏較爲優越之保障人權及權力分立之條項。其中,尤以許世楷、林義雄及張燦洪所草擬之台灣憲法草案,較受注意與好評,民進黨在早期所曾試撰過之此種草案,也有足供參考借鏡者。祇要政府與朝野各政黨有意眞正徹底推展憲政改革,決心重新制定新憲法;則可以先行邀集各政治黨派之代表性人物,高階重要公職人員、憲法或公法方面學者專家以及社會各階層賢達,召開制憲政治協商會議;在博徵眾議、諮諏周臻之前提下,然後,舉辦制憲會議議員選舉,由當選之制憲議員正式召開制憲會議,進行審議此一憲法草案;等審議通過後將此憲法草案提供全國公民投票,公投通過即正式公佈並訂定正式實施之日期,完成制憲大業。

至於對未來台灣憲法之制定,做爲終生以研究憲法,宏揚憲政爲目標之筆者,有如下期待:

- (一)、要面對台灣當前客觀存在之政治事實而制定,在國家定位、 領土之宣示、憲法適用之對象各方面,要明確實在不虛誇膨 脹。
- (二)、在規定國體與政體之條項上,不要再冠上特定之價值意識 或特定人之思想觀點。以符合憲法必須是價值相對主義之原 理原則。庶幾基本人權之言論出版、思想價值自由,能有眞 正保障;以公意政治爲基礎之民主政治,才能眞正實施。

- (三)、確立國民主權主義,使國家主權能確實屬於人民全體。再 國家機關之設立時,應多斟酌考慮議會民主政治之神話性, 以及行政權肥大化之現代國家病理;建立健全的公民投票法 制,使有關國家社會之重大議題或論爭,需經公民投票決定。
- (四)、以保障人權爲憲法之至上原理。憲法之形成,有如國家及 社會之起源,不是爲憲法而憲法或爲國家而國家,兩者都是 爲保障人民自由與人權而形成建立。因此,憲法應以保障人 性尊嚴、天賦人權爲憲法之最高倫理與目的;把國家權力分 立與制衡,最爲保障基本人權之方法與制度來運作。
- (五)、建立永久和平中立之憲政體制。台灣是面積小、人口多、 天然資源有限的國家;卻因地處西太平洋要衝,歷史上常成 爲列强覬覦的對象。台灣未來應仿傚瑞士建立永久和平中立 之國家,不與美、俄、日、中、越和其他國家訂定軍事同盟; 憑以作爲列强衝突之緩衝國。國內祇設立防衛最低需要之軍 隊,以憲法限制國家之武力及宣戰權限。
- (六)、憲政體制應仿傚比較憲法上各國普遍採用之內閣制或總統制,縱使有所增減也必須在不損及其制度本質之範圍內。諸凡已經實行而證明已趨失敗之人民民主集中制,或僅能行諸特殊國或特殊背景之委員制或法國第五共和制,以及像五權憲法之獨創制度;應避免採用。
- (七)、確立族群平等之憲法。台灣係由或大或小之四個族群所構成;惟其歷史恩怨、對抗情結,及因此產生之族群不平等,

有待憲法就族群之眞平等作成更明確而具體之規定; 唯此才 能使台灣內部團結、長治久安。

- (八)、社會福利國家之建立。除了傳統的基本人權之保障外,應 將從一九一九年威瑪憲法所規範社會福利規定以後,七、八 十年來逐步形成而成型的社會福利制度,列入憲法法典;使 基本人權從消極的要求保障自由,進展到積極的請求獲得社 會福利。尤其應該就中華民國憲法所缺如的勞動基本權,明 確的予以規定與保障。
- (九)、新基本人權之增設。現行中華民國憲法制頒於距今半世紀 前,較諸同一時代制定之憲法,人權規定已嫌貧乏;較之現 在各國憲法則更落後許多。因此,像生態環境權、隱私權、 知之權利、媒體接近使用權、勞動權、休息權、教育自由權、 和平生存權等等,都應增列於憲法中。
- (十)、中央與地方政府,應由中央、省直轄市、縣市及鄉鎮縣轄市四級制,改爲中央與直轄市及縣市兩級制,廢除疊床架屋不切實之省級政府,並使鄉鎮縣轄市成爲縣市之下的行政區域,以提高行政效率與行政人員品質。

回顧台灣從一八九五年以來,近百年間,從外來政權間接移植 繼受了西方近代的法制,包括立憲政治和法治政治。由於都不是台 灣眞正獨立自主地在建立和推展,受限於統治政權的刻意制馭運營 或政治文化影響;所以過程崎嶇艱難,成果並不理想。回顧過去百 年法制之史的展開,固然運祚叢艱、業績慘淡;惟展望未來,亦感 陰霾重重、無法樂觀。際此難局,也許正是我們法律人特別須要奮發圖强的時候;而台灣法學會之努力經營運作,也許正是我們法律人應從事的工作。願法律人之有心人,聚集在台灣法學會周邊,爲台灣法治建設、推展憲政,來共同努力奮鬥。

The Review and Prospect of the Politics of Rule of Law in Taiwan :

A Focus on Constitutionalism

#### Hong-hsi Lee

#### **Abstract**

Taiwan was ruled by foreign powers during the past one hundred years, which resulted in the fact that she was unable to realize a polity based on democratic rule of law, that is, the practices of Taiwan's democracy and rule of law were not founded on Taiwan's own merits nor derived from her societal elements. Looking forward the future development of Taiwan's constitutional politics, one must come to the assertion that it is imperative for Taiwan to draft and enforce a Taiwanese Constitution specifically designed for her. This constitution should base on the plain fact of Taiwan's presence, ensure popular sovereignty, protect fundamental human rights, establish a permanent, neutral sovereign state, secure equality among ethnic groups, and realize welfare state, so that Taiwan can become a truly democratic nation.

## 法政學報編輯委員會啓事

本學報爲一年兩期的學術性刊物,創刊多年,頗 受各界好評,第八期因故延至今年出刊,特向讀 者諸君敬致歉意。爲更進一步服務各界讀者,自 本期(第九期)開始,本學報全面改版,以全新 面貌與讀者見面,學報的中文名稱不變,英文刊 名則改爲 Journal of Law and Politics。

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