

# ENFORCING SOCIAL RIGHTS BY PRIVATE MEANS: A CASE IN CHINA

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**SUMMARY:** I Introduction. II The Legal Grounds for the Use of Private Means. A. Rights Clause. B State Positive Duties Clause. C. Society and the Principle of Subsidiarity. III An Example: Different Types of Private Means in Old-age Security. IV Legal Problems Caused by Private Means' Use. A. Accountability Deficit. B. Rights Infringement or Deficiency. C. Efficiency. V Conclusions.

**ABSTRACT:** This Article proceeds in four distinct parts. For Part I, Article 45 of Chinese Constitutional law has stipulated that citizens of the People's Republic of China have the right to material assistance from the State and the society when they are old, ill or disabled. In Part II, I will argue the various private means in China. Particularly, I will base on the specific content of social rights, wherein these types will be depicted by the unique Relationships between *Public and Private*. For Part III, because of the

enforcement of these private means, public law's scholars should discuss such questions: *Accountability, Rights and Efficiency*. Part IV will end with the conclusions.

**KEYWORDS:** SOCIAL RIGHTS, CHINA AND EFFICIENCY

**RESUMO:** Este artigo divide-se em quatro partes distintas. na Parte I, o Artigo 45 da Lei Constitucional Chinesa estipulou que os cidadãos da República Popular da China têm o direito a assistência material do Estado e da sociedade quando estiverem velhos, doentes ou incapacitados. Na parte II, vou discutir os vários meios privados na China. Particularmente, vou me basear no conteúdo específico dos direitos sociais, em que esses tipos serão descritos pelas relações exclusivas entre público e privado. Na Parte III, por causa da aplicação desses meios privados, os estudiosos da lei pública devem discutir tais questões: Responsabilidade, Direitos e Eficiência. A parte IV terminará com as conclusões.

**PALAVRAS-CHAVE:** Direito sociais, China e eficiência.

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## 1. INTRODUCTION

Social rights refer to the rights by which citizens shall receive such services as food, health care, housing and social security. Whether social rights can be left by the courts' judgment is a controversial issue in the modern constitutional theory<sup>1</sup>.

For example, American Constitution does not include any type of these rights; most American scholars have taken the position against their inclusion accordingly.<sup>2</sup> In essence, the opposite attitude for the judgment of social rights by courts mainly depends on the separation of powers, democratic considerations, public policy considerations, in addition to the indeterminacy of social rights.<sup>3</sup> But many post-developing countries specify these rights. Even in South Africa, the courts' revolved jurisprudence on socio-economic rights is reviewed by three leading cases: *Soobramoney*,<sup>4</sup> *Grootboom*,<sup>5</sup> and *Minister of Health v TAC*.<sup>6</sup> The recent literature in English has tremendously focused on the South African Constitutional Court and has been typically vital of its perceived deferential approach, which is largely based on the traditional administrative law model of reasonableness review.<sup>7</sup> Many Chinese scholars also

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<sup>1</sup> Many scholars have discussed this question. See Mark Tushnet, *Weak Courts, And Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton University Press (2009); Charles A. Reich, *The New Property*, 73 Yale L. J. 733 (1964); Cass Sunstein, *Designing Democracy: What Constitutions Do?* 221 (2001); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 962 (1973); Amy L. Wax, *The Constitution under Clinton: A Critical Assessment: Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, And The Political Economy Of Welfare Reform*, 63 Law & Contemp. Prob. 257 (2000); Archibald Cox, *The Supreme Court, and 1965 Term - Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91 (1966) Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 Cornell L. Rev (2000); Helen Hershkoff, *Positive Rights And State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131(1980) Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L. J. 1245, 1255 (1965)

<sup>2</sup> Cass Sunstein, *Designing Democracy: What Constitutions Do?* 221 (2001)

<sup>3</sup> Cass Sunstein, *Social and Economic Rights? Lessons from South Africa*, Chicago Public Law and Legal Theory Working Paper No.12 William E. Forbath, *Not So Simple Justice: Frank Michelman on Social Rights, 1969-Present*, 39 Tusal.L.Rev. (2004), pp 597, 598 & nn.5-6.

<sup>4</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) (hereafter *Soobramoney*).

<sup>5</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)

<sup>6</sup> *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) (hereafter the *TAC* case). These three cases deal primarily with the socio-economic rights protected in ss 26, 27 and 28(1) (c) of the Constitution.

<sup>7</sup> Sandra Liebenberg, *Adjudicating Social Rights under a Transformative Constitution, in Social Rights jurisprudence: Emerging trend in international and comparative law, supra note 2, at pp 75, 90.*

use the South African, American or German laws as example to justify social rights.

However, I hold the opinion that social rights are not mere unspoken rights. *Courts, Legislators, Agencies* can choose appropriate means to implement them. In other words, if the topic of justifiability focuses more on the role of courts, then my article will be inclined on the reality of social rights. My article will especially discuss their enforcement by private means. This is due to the fact that any right would have cost, which definitely includes the social rights. Any country that desires to achieve these rights must have the financial support. However, many countries still face a lot of financial risks because of the limitation of financial budget. The governments also need private sources to accomplish the goals of co-operation and collative governance in *New Public Management Theory's* time<sup>8</sup>. Therefore, governments and agencies have used private means such as *Contracting-out; Franchise* or *PPP (Partnerships between Private and Public)* to enforce social rights.

This Article proceeds in four distinct parts. For Part I, Article 45 of Chinese Constitutional law has stipulated that citizens of the People's Republic of China have the right to material assistance from the State and the society when they are old, ill or disabled. The State develops social insurance, social relief as well as medical and health services required for citizens to enjoy this basic right. This provision includes many meanings, which will be analyzed herein.

In Part II, I will argue the various private means in China. Particularly, I will base on the specific content of social rights, wherein these types will be depicted by the unique Relationships between *Public and Private*. For Part III, because of the enforcement of these private means, public law's scholars should discuss such questions: *Accountability, Rights and Efficiency*. I shall talk about the experience in *Elderly Support System* of China to explore these controversies. Part IV will end with the conclusions.

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<sup>8</sup> The first practices of New Public Management emerged in the United Kingdom under the leadership of Prime Minister Margaret Thatcher. Thatcher played the functional role of "policy entrepreneur" and the official role of prime minister. Thatcher drove changes in public management policy in such areas as organizational methods, civil service, labor relations, expenditure planning, financial management, audit, evaluation, and procurement. Gernod Gruening, *Origin and Theoretical Basis of New Public Management*, *International Public Management Journal* 4 (2001), p1-25.

## 2. THE LEGAL GROUNDS FOR THE USE OF PRIVATE MEANS

Some scholars believe that now we are in the stage of *Contracting State*. *Contracting State* means that these forms of regulatory contractual relationships reflect on some jumble of private law and public law's understandings. They structure the relationships between the government, regulated entities, and putative beneficiaries of these apparent schizophrenic regulatory programs.<sup>9</sup> For instance, in Brazil, the Federal Constitution also demands that government contracts for public tasks, services and public procurement be made through a bidding process at the federal, or state and municipal levels.<sup>10</sup> Accordingly, it is necessary to outline what the legal basis is. As far as *Constitution of the People's Republic of China is concerned*, it includes three types of norms related to the use of Private Means.

### A. Rights clauses

According to the Article 45 of the *Constitution of the People's Republic of China*, "Citizens of the People's Republic of China have the right to material assistance from the state and society when they are old, ill or disabled." Based on the original meaning of this Article, the citizens have the right to seek for material assistance. *The Right to Material Assistance* (物质帮助, *Wu Zhan Bang Zhu*) was derived from the 1954 version of the Constitution. At that time, the government of China protected the basic demands including the provisions of adequate food, water, clothing, and shelter. Elderly, ill or disabled people were the holders of social assistance rights. I'm inclined to agree with this opinion, which is *the Right to Material Assistance* is a conditional right, and is right for *particular* citizens. Other social rights such as right to education, health care and housing need to be clarified by upcoming articles with more programmatic or obligatory features.

Currently, the government is aware that it ought to safeguard the citizens' basic rights and ensured social assistance in the spirit of citizenship. The change in the conception of social assistance enhances political status of social assistance system, while increasing government's

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<sup>9</sup> Jody Freeman, *The Contracting State*, 28 Fla. St.U.L.Rev. 155(2000).

<sup>10</sup> Brazil Constituição Federal art.37, XXI.

responsibility, and ensuring governmental supervision of the social assistance system. The acceleration of economic reform in 1990s has repeatedly highlighted the significance of social welfare in maintaining economic growth, social stability and political authority.

## B. State positive duties clause

State positive duties especially include many contents in socialist system, because that traditional socialist constitutional law of China pays more attention to protecting social rights than protecting economic freedom.<sup>11</sup> In this political system, socialist states have more positive duties of providing particular material protection.

Meanwhile, various guarantees of socialist countries place greater emphasis on "*people's participation*", which is derived from the provisions of *Article 2 of the Constitution of the People's Republic of China*: "All power in the People's Republic of China belongs to the people.....People administer state affairs and manage economic, cultural and social affairs through various channels and in various ways in accordance with the law."

According to such stipulations, we can get these factors: (1) Each law can make special provisions for people's involvement; (2) People can take part in state management by many different ways; (3) People can deal with the national affairs, economic and cultural undertakings, as well as social affairs. On the basis of this stipulation, socialist powers belong to *People*, which imply People can engage social affairs by public or private means. Furthermore, governments' positive duties have more detailed content in the specific rules.

By using *Law of the People's Republic of China on the Protection of the Rights and Interests of the Elderly (2015 Amendment)* as example, Article 33 stipulates that the state shall establish, improve the welfare systems for the elderly and increase their social welfare in accordance with the economic and social development level along with their actual needs.

*The state shall encourage local governments to establish an advanced-age allowance system for the low-income elderly at or above the age of 80.*

*The state shall establish and improve the support system for the elderly in the families complying with the family planning policy.*

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<sup>11</sup>Han dayuan, Lin laifan, Zheng Xianjun, *Topics on Constitutional Law*, China Renmin University Press (2004)

*Rural areas may take some of the jointly owned land, forests, water bodies, shoals, among others that are not contracted out as elderly care bases and the earnings therefrom shall be used for supporting the elderly.*

From the initial stage, old-age security programs have some *moral colors*, in which governments mobilize private sources. Governments take positive attitude for supporting private parties through providing subsidy, and making specific rules to promote positive encouragement. For instance, there are more than 180 nursing homes in Guangzhou City, but 160 nursing homes need government's supports. The hospitals in district-level have been supported by the governments.<sup>12</sup>

These duties belong to the governments and agencies. However, there are also many societal sources in the *Constitution of the People's Republic of China*. Article 45 specifies that the state and society guarantee the livelihood of disabled members of the armed forces, provide pensions to the families of martyrs and offer special treatment to the families of military personnel. The state and the society assist in making arrangements for work, livelihood and education for the blind, the deaf-mutes and other handicapped citizens. In history, the *Society* is the common body of protecting social rights.

### C. Society and the principle of subsidiarity

*The Principle of Subsidiarity* means that "citizens should take responsibility for best in achievement of their own development and to encourage social groups to actively organize, unite and create mutual assistance as a way to promote social welfare services". *Subsidiarity is based on a society's view wherein responsibilities are conditioned by the closeness of people's relationships. Involvement at higher levels of the society has to be seen as a subsidiary to the commitments of the smaller social units. As narrowly applied in the context of the community, subsidiarity has been viewed to refer to a functional division of administrative responsibilities, even though the principle is referred back to its wider usage at some times. This implies an emphasis on decentralization and diversity.*

While this principle is the basic principle of European Union and German Law, we can also

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<sup>12</sup> [http://www.dayoo.com/gb/content/2003-03/06/content\\_975749.htm](http://www.dayoo.com/gb/content/2003-03/06/content_975749.htm).

find certain specific contents in Chinese law's context. For instance, Article 13 of *Law of the People's Republic of China on the Protection of the Rights and Interests of the Elderly* stipulates that, "The elderly peoples shall mainly be provided by their families and their family members shall respect, care for and look after them. This provision clearly reveals that *the Principle of Subsidiarity* in elderly support system is that the family has the critical body and state just has supplement responsibility. Chinese family old-age support is profoundly rooted in the *Confucianism* beliefs and has been the focus of social structure. This character has been a definitive factor in the Chinese culture and personality.

In the development of social welfare administration, especially in the field of old-age security, specific legislations made by central or local government have provided that various items about old-age security initially belonged to the society, family and include personal responsibility as well. The governments of China actively have promoted home-based care as the primary pillar of services for the elderly persons. This position is an agreement with the cultural tradition of filial piety. Many old-age cares are the informal types of care by family members. For those who can afford it, this may be complemented by formal services provided at nursing homes by caregivers.

### 3. AN EXEMPLE: DIFFERENT TYPES OF PRIVATE MEANS IN OLD-AGR SECURITY

Since *the Policy of Reform and Opening-up* in China, many scholars have paid more attention to the relationship between state and society. We might predict if Chinese economy remained in the *Plan Economy* time close to one iron broad, private parties had little chance to participate governance. In this system, the State almost monopolized total resource. *State-owned without private* unprecedentedly prevail.<sup>13</sup> With the origin of *Reform and Opening-Up*, various forms of individuals and organizations begin to have more living space, private as dynamic of which gradually active.

Article 24 in *Law of the People's Republic of China on Population and Family Planning* which provides:

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<sup>13</sup>Jin Zining, *The Reflection of Difference between Public law and Civil law*, Peking University Press (2007),p119



*The localities where there are conditions may, according to the principle of government guidance and peasants' volunteerism, apply multiple forms of safeguards for the elderly in rural areas.*

For a long history, social security was an urban phenomenon in China. Now, it is as large as in many industrialized countries and produces even greater financial problems. *Danwei* will provide housing, medical care and old-age security for the workers. The same services were provided to its pensioners, of whom there were few since China still had a small population. In any competitive system, there is a basic political economy problem when current workers or consumers are expected to finance a debt from the past; but the shock was mainly great given the sudden transition stage in China.

For instance, a lot of social factors have engaged in pension system. In the urban areas, China's urban pension system has been through a series of reforms since its establishment of 1951. In the beginning of these reforms, it was only covered the state and urban collective sectors, but later it had expanded to cover all employees working in the cities and towns, regardless of the enterprise or organization's ownership. In January 1999, the State Council presented the *Tentative Rules on the Payment of Social Security Dues*, which was a government policy directive designed to speed up the inclusion of non-state-owned enterprises and migrant workers in the pension system (State Council 1999). Commonly, this policy is termed as the *Basic Pension Insurance* for urban employees.

Recently, this scheme has been opened to include workers in other rapidly growing urban sectors, mainly foreign-funded enterprises, private enterprises, and the self-employed. In this scheme, the employer and the employee are both able to make contributions and the government acts as pension guarantors. Employers presently contribute 12% or more of the total employee payroll, while the employees contribute 4%–8% of their wages. In the rural areas, for basic pension, this fund might come from government's subsidy. For instance, Provincial governments need to give enough subsidies for *New Rural Social Pension Insurance Program*.<sup>14</sup>

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<sup>14</sup> A major feature of this scheme is that, for the first time in China's long history, the government will make direct contributions to a rural pension scheme. This government involvement will have major implications not only for millions of old people living in rural areas, but also for economic and social development in rural China more

In 1995, a consent had not yet been reached on what exactly ought to form China’s multi-polar system. So, *Document 6 by State Council* had given municipalities with two choices. The first choice emphasized the defined contribution pillar, while the other allowed a greater role for the public defined benefit pillar.

Nearly 60% or 86 million of elderly people in China live in the rural areas. The country is probing the establishment of an old-age security system in this area which says a white paper issued by the information Office of China’s State Council.

The document titled as *The Development of China's Undertakings for the Aged* articulates that the government begins the study of the old-age social security system’s establishment in rural areas for protecting basic livelihoods of the elderly people through highlighting the role of land and family in the process of providing elderly service.

By the end of 2005, the *White Paper* recounted that about 1,900 counties in 31 provinces, autonomous regions and municipalities under the central government had established own old-age social insurance systems. More than 54 million farmers were involved in this system, with the accumulated insurance funds hitting 31 billion Yuan (4.2 billion US dollars). Presently, more than three million farmers receive the pensions.

In recent years, the Chinese government has progressively established a uniform basic old-age insurance system in urban areas. The *White Paper* notes that by the end of 2005, the number of people involved in the basic old-age insurance scheme across China had reached 175 million, 43.67 million of whom were retirees. The aging of China's population sped up in the first years of the new century. By the end of 2005, there were close to 144 million people over the age of 60 in China, which accounted for 11% of its whole population. This has posed a big challenge to the government on how to assure legitimate rights and interests of the elderly people.

Currently, old-age security includes two main concepts: “rural old-age security” and “urban old-age security”.

Rural old-age Security	Urban old-age Security
Family old-age support	Family old-age support

generally.

Five Guarantees Family (五保户 , Wu Bao Hu)		Community old-age support	
Nursing home old-age support	Public nursing homes	Nursing home old-age support	Public nursing homes
	Private nursing homes		Private nursing homes
	Public-Private nursing homes (contract)		Public-Private nursing homes (contract)
Commercial old-age Security		Commercial old-age Security	
Land old-age security		Private help in old-age security	

Cities, government-run institutions and senior care homes are needed to admit elders who qualify as “Three No’s.” In rural areas, government-run homes for the elderly target the “Three No’s” who are qualified for the “Five Guarantees”---that are, food, clothing, housing, medical care, and burial expenses. Certainly, all residents in rural facilities are welfare recipients, as they have always been.<sup>15</sup>

Policy makers also ascertain that the government’s role must shift from being the direct “supplier and provider” to being a “purchaser and regulator” of services. Guided by this strategic shift, a series of national policy directives have been issued to speed up private-sector development of institutional social services for the aged. Multiple strategies are in force, ranging from state-built and privately run facilities to private operated facilities with government support and subsidies for construction and operations.<sup>16</sup> Moreover, *Contracting-out* or *PPP* can be utilized in providing services. We can distinguish these types into three categories.

(1) Private-built and government support: Subsidy or contract

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<sup>15</sup> Wu B, Mao ZF, Zhong R. *Long-term Care Arrangements in Rural China: Review of Recent Developments*. J Am Med Dir Assoc. 2009,10(7),pp 472–477.

<sup>16</sup> China publishes a *White Paper* on its undertakings for the aged. *China.org.cn* [serial on the Internet] 2006 Dec 12; [cited 2012 Nov 5. Available from: <http://www.china.org.cn/english/China/19/1990.htm>.

(2) State-built and Private-run: Contracting out

(3) Private-built and Private-Run: PPP

But in these three types, one may need to see contract as a popular type.

In China, the number of the total nursing home beds covers only 2% of the aging population, and 18% of the disabled aging population. Only 1.3% of the elderly population lives in the government-funded nursing houses. According to the Chinese authorities, there is the demand for an additional 3.4 million hospital and nursing home beds for senior care over the next five years as well as market size expected to grow exponentially. The market of housekeeping for the elderly is expected to expand upon 99 billion to 326 billion at the next 35 years.

#### 4. LEGAL PROBLEMS CAUSED BY PRIVATE MEANS' USE

With the change and revision of government's duties, more private means such as contracts which have different goals are used in each stage of administrative acts of governance. Meanwhile, because the contracts' nature is private, it will initiate many issues. For instance, the contracts maybe transfer the public accountability and infringe citizenship's rights. Consequently, we ought to decide suitable scope and limit. We need to consider different factors including administrative duties, different levels affecting citizen's rights, the cost-benefit analysis and expertise. By considering these factors, the goal of contract governance can be accomplished and the infringement on public value can be prevented.

Three main checkpoints were developed for good governance by using of private means: (1) Accountability Deficit; (2) Rights' Infringement or Deficiency; (3) Efficiency.

##### A. Accountability deficit

When agencies use private means to fulfill public goals, the relationship between private parties and agency will complicatedly be changed. Public lawyers have identified particular legal governance and accountability problems with the development of quasi-markets and contractualization. Professor Mino concludes that greater private involvement in traditional

public sectors is both inevitable and in many respects desirable, but she has also significant concerns about the loss of public accountability.<sup>17</sup>

In this context, the reduction in the role of the state has two aspects: removal of certain functions from direct bureaucratic control, and corresponding dispersal of powers of resource allocation and decision-making beyond clearly demarcated state boundaries. The new contracting forms have brought about doctrinal problems within the private law and the public law. These problems have given rise to the fear that contractual relationships might fail to be regulated adequately by either branch.

Furthermore, public law's accountability is inclined into two sides which are administrative organ (service buyers) and private parties (service provider). Meanwhile, this accountability doesn't not only focus on the liability for breaching contract, but also focuses on the new concept of accountability on the basis of privatization and public-private partnership including regulatory accountability, protective accountability and guarantee accountability.

For instance, if any nursing homes were subsidized by the government, in this field, we need to observe three relationships of law:

*R1: Citizens and Private Nursing Homes (Service Providers)*

*R2: The Relationship between Citizens and Agencies (Service Supporters)*

*R3: The relationship between Private Nursing Homes and Agencies (Service Supporters)*

In *R1*, this legal relationship's nature is private. Private nursing homes need to offer enough and good service for the citizens. But if any infringement happens, there is the choice to apply for agency's protection. In a typical private contract, the focus is on protecting the property rights of the parties for ensuring the benefits of the bargain and to protect against harm in the event of breach. In other words, there is public accountability.

In *R2*, if some private nursing homes fail to have any subsidy from the governments, this private nursing home might be the body in civil law's context. However, in many areas, private nursing homes need to have some governments' subsidies. We reasonably expect agencies try their best to ensure that public funds can be used for intended goals. Meanwhile, we also can reasonably expect a nonprofit organization to guard against the threat of penalties that could

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<sup>17</sup> Michael J. Triblock and Edward M. Iacobuccin, *Privatization and Accountability*, 116 Harv. L. Rev. 1422 2002-2003, p1422.

damage the organization's reputation and even put it out of business. However, government's officials might develop some better ways to exercise their responsibilities of oversight, even if this may need placing more responsibility and expecting more work for agency officials.

The primary emphasis ought to be on maximizing benefits for the clients. As a result, when agencies use any private mean to accomplish public goals, they always do not want to endure any public accountability for private parties' rights infringement. The application of conventional government contracting processes in the outsourcing of fundamental agencies' responsibilities will lessen the ability of concerned citizens significantly to be aware of the political issues inherent in decisions.

In R3, agencies can use many private means include *contract, subsidy, purchasing service*.....For instance, agencies give some funds for private nursing- homes' operation, but private nursing homes' ownership belongs to private nursing home. As a result, the relationship between agencies and private nursing home belongs to public law's relationship. Agencies need to guide and supervise the use of nursing home for public goals. If agencies use PPP contract to provide public service, the accountability will be differentiated with the subsidy. The former is public law's accountability and the latter is contract's accountability.

But in practice, because private means exist in many special cases, we still need judge it case by case. In *the Pension Organ of Shi Ye Dan Wei at Xiang Cheng v Hotel of Xiangcheng*, the court judge that:<sup>18</sup>

*The court thinks that this case is the scope of civil litigation. The relationship among institution of pension, payment Danwei and private parties' nature is contract nature. That is because those private parties must pay cost for their pension when they can work.*

We can see this reasoning of the court which is "*pension relationship is a contract feature*.....*At this point; right to the pension is derived from the contractual relationship.*" Furthermore, the court held that appellants should be characterized as institutions managed by enterprise's style. In other words, the relevant disputes should be thought as civil disputes on pension. This public institution should have civil legal status rather than administrative legal

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<sup>18</sup> No 585, Henan Province, Zhou Kou City, Medium People Courts Judgement (2009)

status.

### *B. Rights' infringement of deficiency*

Basis on the particularity of welfare administration, private parties can participate in fulfilling the assignment of welfare administration by various forms. These problems are related with procedure law and reveal of information, as well as the relief from this. The administration of elderly security system is a typical field.

As previously discussed, agencies prefer civil accountability other than public accountability. For any citizen, if he/she encounter agency, he/she can protect themselves by procedure law. For instance, in the context of American law, the Supreme Court in *Kelly v. Goldberg*<sup>19</sup> held that due process protections applied to statutory provided welfare benefits. The *Goldberg* Court spoke graciously and generously about the poor, observing that we have come to recognize that forces not within the control of the poor contribute to their poverty and that welfare was not “mere charity,” but rather allowed the poor to “participate meaningfully in the life of the community” by meeting basic subsistence needs.

But when commercial institution or NGO to provide service, whether consumers have due procedural rights or not?<sup>20</sup>

The American Supreme Court had accepted the view that private actions should be viewed as state actions in special circumstance. However, it has applied this view narrowly, considering that most actions are private despite clear traces of government participation. In overall, despite different modes of argument, the cases suggest two central theories for recognizing private activities as state actions: (I) *Public Function Theory*: the private activity is public in nature regarding its functions and purposes, and therefore the state should be responsible for it. (II) *Nexus Theory*: The government involvement with the private activity is so substantial that the separation of the two is inappropriate.<sup>21</sup>

In China, on the basis of *Government Information Disclose Regulation*, one can apply the

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<sup>19</sup> 397 U.S. 254 (1970)

<sup>20</sup> Sappington D E M, Stiglitz J E. *Privatization, Information and Incentive*, Journal of Policy Analysis and Management, 1987, 6(4): 567-585.

<sup>21</sup> Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 Syracuse L. Rev. 1169

governments' information disclose. If this commercial institution or NGO constitutes the *Public Institution* in *Government Information Disclose Regulation*, private parties might use this regulation to protect people's rights, as procedural rights. Different from American law, one does not have other procedural rights such as *hearing*. Of course, you also can't use *State Action* principle. In other words, besides the stipulation of *Government Information Disclose Regulation*, private parties can't find another means to achieve public law's protection.

### C. Efficiency

The failure of the public sector is usually defined as an incapability to offer high quality services efficiently at a reasonable cost, and is attributed to the government's being hamstrung by regulations.<sup>22</sup>With less red tape and bureaucracy, private organizations are thought to provide incentive structures that minimize agency costs compared with the public sector.

In elderly support systems, the public nursing homes coexist with private nursing homes. Hence, private nursing homes always encounter the unfair competition. The private pension institutions always locate in remote and inconvenience areas with old facilities. The existing beds do not accord with the standard of service facilities and social workers are insufficient for public service. Occupancy rate of bed is so high that many elder persons don't have enough beds, even they have, and they still are lack of good service. Besides these factors, private nursing homes will have a *lengthy* license process of because of excessive luxury and high cost or inadequate condition due to the lack of funds and policies. 40% of the private nursing homes have a great *deficit* for many years. Despite rapid growth in the elder-care home industry in China, the market is tilted toward the former government-owned elder care homes that still enjoy institutional and bureaucratic advantages in funding, staffing, and insurance.<sup>23</sup>China has implemented to address its nursing shortage and the challenges that it is currently facing.

Thus, in China, we intend to discuss how to achieve the private parties' independence, especially by focusing on one kind of autonomy separated from agencies. This is first question;

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<sup>22</sup> Robert Melia, *Private Contracting in Human Services* (June 1997), <http://www.pioneerinstitute.org/research/whitepapers/wp03full.cfm>.

<sup>23</sup> Zhan H J, Liu G, Bai H G. *Recent Development in Chinese Elder homes: A Reconciliation of Traditional Culture*. *Ageing International*, 2005, 30(2),pp 167-187.



Efficiency is the subsequent problem. Many Chinese older persons prefer “public” institutions more than “private” institutions.

## 5. CONCLUSIONS

In china, we consider that the civil sphere has close relationship with the public sphere, so even when governments use PPP or other private means to achieve public goals; it is difficult to clear the line of these two spheres. State’s role is bigger than society’s role. Society is an organ or institution of state. In this background, this question maybe is the first diffused question whether private means are better than public means or not. Nowadays, for enlarging the citizen’s participation, lessening the burden of financial burden and enhancing the efficiency of public service, State and Governments also encourage private means to enforce the social rights. Consequently, China governments rely on society including family, community, neighborhood and other voluntary associations instead of traditional institutions to satisfy local needs and individual needs.

In this background, China still faces many transitional problems including the dual social security system, the reform of education and many reformations of social sphere. Social rights have been affirmed and been protected by the Constitution of China. To enforce these rights still faces several problems in this transitional stage. As a result, ideal path is judicial review way. How to use the protected measures in administrative procedure or the process of welfare administration is another practical path.

These private means *aren’t* the old concepts as governments, but apparently private means have a rapid growth in china. Today, the challenge is to achieve a good division of functions and responsibilities between governments and the private sectors in order to take advantages of the strengths of private and public bodies, and to overcome the limit of the other. As we had discussed, to achieve the autonomy of NGO or other civil institutions, this question is the foundation of clearing the line between public spheres with civil sphere. This new relationship will satisfy the wants and needs of citizen. As a result, social rights also can be achieved.