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IS THERE FOURTH TYPE OF CAPITAL SYSTEM: RETHINKING THE CLASSIFICATION OF CORPORATE CAPITAL SYSTEMS[1]

Abstract. *In 2013, China modified its Company Law, and this modification created a new capital system, which is not exactly the same as legal capital system in the Germany or the authorized capital system in the Anglo-American countries. Jurists in China debate on the classification of the new capital in the traditional category among the three capital systems, which are legal, authorized and compromise capital systems. Some argue that the Chinese new capital is still legal capital, and some claim it is to be a compromise capital. However, that endeavor is useless and they take a wrong logic approach. They always change the traditional definition of each capital system in order to make the new capital of China fit for the one they argued. The new capital in China Company Law is a new one, and it does not belong to any type of existed capital system all over the world. Because the category of the capital system is inductive consequence, which is just a description of the typical modern developed countries legislation and is not a deductive one based on a closed logical loop. There is no logical reason why we must classify the new Chinese capital into one of them. A more important academic dilemma is that such controversy has no theoretical and practical meaning. The category of the capital system is on the end branch of the corporate theory, and no theory or institution is bases on it. It is only a theoretical analyzing conclusion, without any reasoning or inference following. Furthermore, this controversy has no contribution to the legal practice. The running, registering of a company, even resolving a company dispute has never and will never consider the category of a capital system offered by the Company Law. Recognition of the legislation innovation is pragmatic and struggling on the theoretical problem is helpless.*

Keywords: *Chinese Company Law, new capital system, controversy, legal capital, authorized capital, compromise capital, formal logic, induction, deduction, theoretical function of category.*

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Capital system always plays an important role in the business company law in the Civil Law countries. In the Chinese company law' academic language, there are three types of capital system all over the world and the old Chinese Company Law is one of them. However, in the year of 2013, China modified its Company Law and offered a new capital system, which lead to a controversy about the category of the new capital system. Some argued that the new system belonged to the legal capital and some argued compromise capital system. Until now, there is no common sense on the category. But is it necessary or reasonable to classify the new system into one of the three? Can't we be the forth one? This essay will discuss the Chinese capital system in Company Law and try

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to resolve the problem of category. The part I will introduce the modification of Chinese Company Law in 2013, making the reader to understand the background of controversy. The part II will illuminate the three types of capital system under the Chinese company law academic language. The part III will show the controversy of Chinese capital classification and demonstrate the error of their arguments. The part IV will rethink the classification of corporate capital systems and argue that the classification of corporate capital systems is unreasonable and the Chinese new one does not belong to any of the existed three capital system. And the last part is the conclusion.

I. MODIFICATION OF CHINESE COMPANY LAW IN 2013

In the end of 2013, NPC of China modified Company Law on the system of capital. Basically, the modification happened in four aspects:

Firstly, it cancelled the minimum proportion of initial contribution and prolonged the period of the contribution. The last edition of Chinese Company Law was promulgated in 2005, and the Article 26 of 2005 Company Law required: the registered capital of a limited liability company shall be the total amount of capital contributions subscribed to by all the shareholders registered in the company registration authority. The amount of the initial capital contributions made by all shareholders shall not be less than 20 % of the registered capital, nor less than the statutory minimum amount of registered capital, the margin shall be paid off by the shareholders within 2 years from the day when the company is established; for an investment company, it may be paid off within 5 years. This kind of capital system belonged to the legal capital system, which had the example of Germany. Although this article allowed the investors paid off all their capital in 2 or 5 years, there also are many restrictions on it, such as the initial capital contributions proportion and the limitation of time.

But the Article 26 of 2013 Company Law says that: The registered capital of a limited liability company shall be the amount of capital contributions subscribed for by all its shareholders as registered with the company registration authority.

The modification cancelled the requirement of period of real contribution of capital, which means that theoretically shareholders can promise their contribution in an infinitely period. Nowadays, in the electronic registration system of Administration for Industry & Commerce, the maximum of years for the margin payment are 99 years.

Secondly, it cancelled the minimum of registered capital of both kinds of companies. In China, there are two types of companies, which are the limited liability company and the joint stock limited company. Here a significant legal diversity must be showed. The Chinese limited liability company is deferent from the LLCs in USA. According to Article 3 of Company Law, in the case of a limited liability company in China, a shareholder is liable to the company to the extent of amount of the shareholders' capital contribution. A limited liability company is liable for the debts of the company with all its assets. This is not an exact definition of a limited liability company. But it is more close to the closed corporation or closely held corporation in America. And the limited liability company («LLC») is a hybrid form of business entity that combines the liability shield of a corporation with the federal tax classification of a partnership. A creature of state law, each LLC is organized under an LLC statute that creates the company, gives it a legal existence separate from its owner or owners (called «members»), shields those members from partner-like vicarious liability for the entity's obligations, and governs the company's structure, management, and operations (subject in most respects to the members' «operating agreement»). The essence of an LLC is the coexistence of partnership tax status with corporate-like limited liability.[2] In the 2005 Company Law, the minimum of registered capital of the limited liability company was 30,000 RMB, and the minimum of the joint stock limited company was 5 million RMB. The solo company[3] required minimum of 100,000 RMB as its registered capital. The modification cancelled all these requirements, which means that shareholders can register a company by only one RMB, even without money. The background was that the Chinese government was practicing its policy of entrepreneurship of all citizens, trying to encourage the economy. Originally, difference between two classifications of companies is not very clear.

[2] *Kleinberger D. S.* Agency, Partnerships, and LLCs. Third Edition. Aspen Publishers, Wolters Kluwer, 2008. Pp. 455—456.

[3] The solo company means the company has only one shareholder.

Some joint stock limited companies, especially the unlisted companies, is not much different from the limited liability companies. So a part of Chinese scholars called them closely held companies as in Anglo-American countries. After the modification, both the requirement of registered capital disappeared, which results that the difference became vaguer between the two types of companies.

Thirdly, it simplified the registered items and documents. The old company law required that all the capital must be verified by the legal verification institutions and the shareholders must submit the verification certificate when applying the company registration in the Article 29 of 2005 Company Law. But the new Company Law does not require the shareholders paid-in the capital when registering the company instead of subscription, and the license of company will not show the paid-in capital. The 2013 Company Law cancelled the verification certificate, which simplifies the procedure and requirement of documents.

Fourthly, it cancelled the minimum proportion of monetary contribution. The 2005 Company Law required the 30 % minimum proportion of monetary contribution, which means that the contribution in kind cannot be more than 70 % of all the capital. Article 27 of 2005 Company Law state that: A shareholder may make capital contribution in currency, in kind or intellectual property right, land use right or other non-monetary properties that may be assessed on the basis of currency and may be transferred according to law, excluding the properties that shall not be treated as capital contributions according to any law or administrative regulation. The value of non-monetary properties as capital contribution shall be assessed and verified, which shall not be overvalued or under-valued. If any law or administrative regulation prescribes the value assessment, such law or administrative regulation should be followed. The amount of the capital contributions in currency paid by all the shareholders should be not less that 30 % of the registered capital of the limited liability company. This was restriction on company finance and would obstruct the establishment of company, especially the high tech company. The 2013 Company Law cancelled this requirement. Nowadays, even a company registered by totally un-monetary contribution is lawful.

Scholars had different appraisal on the modification. Some argued that the modification had not been consulted and was radical. And the reformation caused the worries of safety of transaction and creditor protection. The first was that when the minimum of capital is canceled, whether the one-dollar company will appear and the company tends to make fraud. The second is that whether the false contribution will be easy.[4] Scholars answered these questions. «There was no evidence showing that the one-dollar company tends to make fraud.» Whether a company does fraud transaction is decided by the comprehensive circumstance, including the cost of fraud, credit system of the society, insolvency law, etc. It is not effective for us to solve the fraud problem by registered capital. And the false contribution is not necessary in the new capital system. Supporters argued that the new capital system was more effective than the old one in the extent of creditor protection.[5] Although most criticism focused on the radicalness of 2013 modification, the professor from Peking University pointed its conservation: In some sense, the purpose of 2013 modification of Company Law was to encourage the entrepreneurship and stimulate the market, which caused the deviation of reformation of capital system. The modification payed more attention on the relief of regulation, and ignored the fact that the corporate autonomy and business rationality also need growing process. As a result, the Company Law does not guide the paid of capital, does not offer the rules of calling up of capital and liability for breaching of contract, even confuses the capital publicity and administration.[6]

Scholars also pointed out that the modification might cause some new problems in the context of Company Law. The more challenging question is the capital deficiency's influence on piecing the corporate veil and liability of shareholders' contribution. In the theory of piecing the corporate veil, capital deficiency is an important reason of piecing. If piecing the corporate veil is easy to apply, the cancelling of minimum capital will give more risk to shareholders who abuse the corporate per-

[4] *Shi Tiantao*. Explanation and Analysis of Company Capital System // Tsinghua University Law Journal. 2014 (5). P. 137.

[5] *Huang Hui*. Legitimacy of Reformation of Capital: Economic Analysis on the Basis of Creditor Protection // China Legal Science. 2015 (6).

[6] *Liu Yan*. Logic and Path of Reformation of Corporate Capital: On the Approach of Business Practice // Chinese Journal of Law. 2014 (5). P. 51.

sonality and limited liability of bearing the liability of corporate jointly instead of escaping the liability.[7] Piercing the corporate veil (PCV), also called disregarding the corporate personality, was regulated in the Article 20 of Company Law: If a shareholder of the company abuses the independent status of the company legal person and the limited liability of shareholders to evade debts and seriously harms the interests of the creditors of the company, it shall bear joint and several liabilities for the debts of the company. PCV is a case law rule in the Anglo-American law system countries, but it became statute law in China in 2005. The capital deficiency is one of the reasons of piercing the corporate veil. But the court seldom pierces the corporate veil only on the fact of capital deficiency, so the worry above will not really happen in the future.

The politics mechanism decides that the legislation will never change only because of the criticism of scholars in China, especially on the occasion of one or two years after the latest modification. So the scholars' more important staff is to interpret the new rules and to prevent the bad influence of the modification instead of criticizing it.

II. THREE TYPES OF CAPITAL SYSTEM

No matter what scholars appraised the modification, it became legal rules in China. The modification changed the capital system in China, but the question is that the new capital system is what kind of. Theoretically, scholars classify the capital system all over the world into three types, which are legal, authorized, and compromise capital system.

A. Legal Capital

The legal capital system, also named identified capital or paid-in capital, means that when the company is formed, all the promoters need to pay or promise to pay all the capital, which is popular in the civil law countries. The essence of legal capital system is to maintain a fixed amount of capital as the basis for determination of company and the protection of creditors.[8] It imposes minimum amounts of capital for the formation of companies, excludes certain assets like future services from being used as shareholder contribution, requires cumbersome procedures for contribution in-kind and severely restricts the distribution of dividends and corporate stock repurchase. This burdens not only the formation of companies, but also the raising of capital through the issuance of new shares with significant costs.[9] Typical legal capital system exists in Germany. Before the company registers in the business registration bureau, promoters must pay their consideration of stock. If it is money, they need to pay a minimum of quarter par value of stocks; if it is premium of issue, they need to pay all premiums.[10] All of the other European Union Member States adhere to the legal capital doctrine. In part, the European Union has imposed this doctrine by adopting the Second Council Directive of December 13, 1976(Second Directive). The Second Directive imposes limits on minimum capital, contributions, distributions to shareholders, and increase or reductions in capital. However, many Member States go beyond the Second Directive's legal capital rules, providing for a stricter regime intended to better protect creditors.[11]

Under the legal capital, the law always requires the confirmation, maintenance and invariability of capital, named three principles of capital.

The confirmation of capital means that when the company is established, the registered capital must be fixed and demonstrated. And the fixed registered capital will show the property ability of the company to public. But nowadays Chinese Company Law allows installment payment of contribution, so we cannot find a perfect provisional example for this principle.

Maintenance of capital should be understood in the sense of protecting the corporate asset in the scope of initial capital from the shareholders' infringement.[12] In the specific rules, the Article 166 of Company Law says:

«When companies distribute their after-tax profits for a given year, they shall allocate 10 % of profits to their statutory common reserve.

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7 *Zhao Xudong*. Capital Legal Liability under the Reformation of Capital System: Rational Interpretation of Modification of Company Law // Chinese Journal of Law. 2014 (5). P. 20.

8 *Deng Feng*. Common Corporate Law // Renmin University of China Press. 2009. P. 316.

9 *Kübler F.* A Shifting Paradigm of European Company Law? // 11 Colum. J. Eur. L. 219 (2005).

10 *Raiser T., Veil R.* Recht der Kapital-gesellschaften / Translated by Gao Xujun. Law Press China, 2005. P. 91.

11 *Enriques L., Macey J. R.* Creditors versus Capital Formation: the Case Against the European Legal Capital Rules // 86 Cornell L. Rev. 1165 (2001).

Companies shall no longer be required to make allocations to their statutory common reserve once the aggregate amount of such reserve exceeds 50 % of their registered capital.

If a company's statutory common reserve is insufficient to make up its losses of the previous years, such losses shall be made up from the profit for the current year prior to making allocations to the statutory common reserve pursuant to the preceding paragraph.

Companies may, if so resolved by the board of shareholders or the general meeting, make allocations to the discretionary common reserve from their after-tax profits after making allocations to the statutory common reserve from the after-tax profits.

A company's after-tax profits remaining after it has made up its losses and made allocations to its common reserve shall be distributed, in the case of a limited liability company, according to Article 35 hereof and, in the case of a company limited by shares, in proportion to the shareholdings of its shareholders, unless the articles of association of the company limited by shares stipulate that the profits shall not be distributed in proportion to the shareholdings.

If the board of shareholders, general meeting or board of directors violates the preceding paragraph by distributing profits to shareholders before the company has made up its losses and made allocations to the statutory common reserve, the profit distributed in violation of regulations shall be returned to the company by the shareholders.

Companies that hold the shares of their own company shall not be entitled to profit distribution.»

The illegal distribution is prohibited and if it happened, the shareholders must return the allocations as unjust enrichment. However, the right to claim the return belongs to the company, so we can image that nobody will execute the claim except for the creditors. Under the Chinese Company Law, there is no such provision to offer the creditors' right to claim. Maybe the rule of Piercing the Corporate Veil(PCV) can offer an approach to creditors. Here the creditors can argue that the illegal allocation is a kind of abuse and the shareholders should bear the joint and several liabilities with the company. In 2011, the Supreme Peoples' Court promulgated the Provisions on Certain Issues Concerning the Application of the Company Law(III), which regulated that if the shareholders withdraw his/her contribution by any other means without going through statutory procedures, it is a conduct of withdrawing contribution and creditors have the right to require the shareholders who withdraw his/her contribution be additionally liable, to the extent of the principle and interests of the contribution withdrawn.

The invariability of capital means that without going through the statutory procedure, the company cannot change its registered capital, especially reduce it. The Chapter 9 of Company Law regulates the change of registered capital. The Article 177 says:

When a company needs to reduce its registered capital, it shall prepare a balance sheet and a schedule of property.

The company shall notify its creditors within a period of 10 days commencing from the date on which the resolution to reduce the registered capital is passed and, within 30 days, make newspaper announcement of the reduction. Such creditors shall, within a period of 30 days commencing from the date of receipt of the written notification, or within a period of 45 days commencing from the date of the announcement for those who do not receive the written notification, have the right to claim full repayment or require the provision of a corresponding guarantee from the company.

If the company does not follow the rule, the consequence will be void or voidable of reducing capital, which means that the shareholder who has the company repurchasing his or her shares will return the contribution in the extent of reduction.

B. The Authorized Capital

The authorized capital system is used by the common law countries in modern time. It means that the company law does not require the minimum of registered capital, and the article or the assembly of shareholders can authorize the board of directors of issuing equities anytime. There is no limitation on the board's power of issuing equities by the article or the assembly, except for the concept of authorized capital which is just the maximum of issuance. This kind of capital typically exists in the England and USA. In most American states, the capital is not heavily considered in the process of incorporation, and only the authorized stock should be written in the article, which

[12] *Hueck/Windbichler*. oHG, München / Chinese translated by Yinsheng. Law Press China, 2010. P. 366.

specify the total number of shares of stock the corporation can issue. If the corporation will be able to issue different types (classes) of stock, the articles specify the rights of each class. In many jurisdictions, the articles also specify something called «par value» for the stock.[13] And the capital system is not as important as it is in the legal capital. It is interesting that it was also legal capital before the authorized capital was adopted in the America when the U.S. Model Business Corporation Act abolished the concept of legal capital as a useless device. So the difference between legal and authorized capital is not an evidence of diversity of Civil Law and Common Law.

C. The Compromise Capital

The compromise capital system is that the articles of incorporation or the assembly authorizes the board of issuing stocks, but the amount, proportion, time, term, procedure and extent of stocks are limited especially. Under the compromise capital, the assembly of shareholders can decide the total amount of the stock issue, even authorize the pre-emptive right of issuing new stocks. And the board of directors can only decide the issue in the extent of authorization. Most Chinese scholars argue that this capital system exists in Japan.

We can compare the function of three types of capital by three approaches. The first approach is the interest of shareholders. On the approach of interest of shareholders, the standards of judging the capital system are cost of formation of company, regulation of return on investment and channel of quit. On the aspect of cost of formation, legal capital, compromise capital and authorized capital are in a line of decreasing progressively. On the aspect of regulation of return on investment, legal, compromise and authorized capital are looser and looser one by one. On the aspect of channel of quit, legal, compromise and authorized capital are wider progressively. The second approach is the interest of company, and the standard is autonomy for which the legislation leaves the company business judgment. The legal capital is the strictest, and the compromise is freer, and the authorized capital system is the freest one. The third approach is creditor protection. The standard is which one gives the creditor most powerful protection. In different institutional regulation, the authorized capital system can realize the function of protecting the creditor best.[14] And scholars pointed early that the legal capital doctrine was a costly and inefficient way to protect creditors. First, the legal capital doctrine unjustifiably burdens companies (and hence investors and the efficient functioning of the entire equity market) by making their financial structures inflexible, burdening them with cumbersome procedures, and forcing them to pay for useless expert reports and legal advice. It also burdens society with the out-of-pocket expenses and opportunity costs of having judges enforce this complex set of rules. In addition, the legal capital laws (of Europe) do not significantly benefit creditors, and in certain cases, may even harm certain creditors. Creditors have more efficient means of protecting their interests. Voluntary creditors, however weak they may be, can contract to protect themselves against asset diversion. Furthermore, society and find more efficient and less costly ways to protect involuntary creditors—such as piercing the veil of misbehaving close corporations.[15] So the Chinese reformation maybe considered as a kind of alleviation of legal capital.

III. THE CONTROVERSY OF CHINESE CAPITAL CLASSIFICATION

The modification happened in 2013 and was valid in 2014. The NPC modification of Company Law in 2013 was so suddenly that scholars did not participant the demonstration, and was dominated by central government, which was very different from the legal modification before. So the modification did not bind by company law scholars' existed viewpoints, and chose a new capital system, instead of restricted by the three types of capitals. Then, a controversy appeared in the Chinese academic circle. Typically, there are four viewpoints on the category of Chinese new capital system.

A. It is still the legal capital system. The new Company Law and Regulations of Governing the Registration of Companies still keep the legal concept of «registered capital», which should be registered in the registration authority and published in

[13] *Gevurtz F. A.* Corporation Law. Thompson Reuters, 2010. P. 55.

[14] *Fu Qiong*. Comparing the Three Capital System and Choice of Chinese Capital System // Study on Law and Business. 2004 (1). Pp. 3—5.

[15] *Enriques L., Macey J. R.* Op. cit. 1165.

the license as a way of publicity. In the new capital system, the number of registered capital can be any amount in the articles of association. And after the publicity it becomes the liability of shareholders which cannot be exempted unless under the procedure of capital reduction. Comparing to the authorized capital system, the registered capital is not the maximum of shareholders authorizing the board to issue, but the all registered capital has been issued when the establishment happened.[16] However, the requirement of paid-in before the foundation of company in the legal capital system does not exist, so it does not accord with the traditional legal capital.

B. It is the «partial» authorized capital system, for it does not authorize the board to issue shares.[17]

C. It is compromise authorized capital system in the situation of establishment of limited liability company and sponsorship of joint stock limited company, and it is complete authorized capital system in the situation of one-person limited liability company and establishment of joint stock limited company by public stock offering.[18]No matter the authorized capital or the compromise capital, there must be a key factor that the board of directors has the authorization from the articles of incorporation or assembly of issuing stocks. But in the Chinese new capital system, the board does not have any power of issuance at all. Namely, there is no authorization.

D. It is subscription capital system.[19] This means shareholders or promoters can subscribe the capital regulated in the article of association. If the article requires shareholders' subscription by one-time, shareholders or promoters must subscribe one-time off. If the article requires subscription by installment, they can subscribe by installment.[20] However, Lv Laiming, Professor of Beijing Technology and Business University, argued that the subscription capital system was a kind of legal capital system. Scholar argued that definition of the modification as a change from paid capital to the subscription capital system is not exact. The 2005 Company Law had allowed the subscription of capital, and the registered capital need not to be paid when the company is founded. But the 2005 Company Law restricted the subscription in many aspects, including the initial paid proportion, minimum capital, and the period of subscription. The modification just canceled the restriction, changing the subscription with restriction into a subscription without restriction.[21]

In the academic conference and law reviews, Chinese scholars debate with each other since the modification of law. Until now the debate is keeping. They cannot reach an agreement on the type of Chinese capital system. The supporters of each type do the same thing that adjust the definition of their capital, because they found that it is not easy to put Chinese capital system into any one of the three types. The endeavor trying to do so is not perfect although they have done their best. For example, the supporter of legal capital acclaimed that the paid-in before formation of company is not necessary part of legal capital, and the fix of registered capital is the conclusive part of capital. At the same time, the Chinese capital system does not allow the authorization, so it cannot be authorized capital. However, the latter reasoning is not logical. There is not a logical rule that if one country's capital does not belong to authorized, it must be legal capital.

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[16] *Gan Peizhong*. Company Capital System's Subversive Reformation's Defect of Circumstance and Logic and their Remedial Measure // Journal of Science, Technology and Law. 2014 (3). P. 506.

[17] *Wang Jun, Huang Hai*. Research on the Practice of the Chinese Capital System Reformation // Law and Society. 2014 (7). P. 37.

[18] *Wu Boya*. Research on the Protection of Creditors under the Reformation of Capital System // Legality Vision. 2014 (12). P. 84.

[19] *Du Jun*. Company Capital System's Principle, Evolution and Judicial Challenge // Journal of Law Application. 2014 (11). P. 2 ; *Ding Haihu, Li Xinting*. Judicial Reply of Reformation of Company Capital System // Journal of Law Application. 2014 (11). P. 30 ; *Liu Kaixiang, Zhang Qijian*. The Legislative Changes and Problems Solving of the Corporate Capital System in China // Journal of Henan University of Economics and Law. 2014 (5). P. 28.

[20] *Shi Tiantao*. Op. cit. P. 132.

[21] *Zhao Xudong.* Op. cit. P. 21.

IV. RETHINKING OF THE CLASSIFICATION OF CORPORATE CAPITAL SYSTEMS

Here, my question is: are there only three types of capital system all over the world? And the Chinese capital system must belong to one of them?

As we know, the three types of capital system are induced from the typical western developed countries. That means, they are not the theorem of capitals. As an independent country, if it wants to copy one of them, it can choose one as its capital requirement, but if it wants to create a totally new capital system, it can ignore the three types. They are just the typical samples of capitals instead of the compulsory choice for every country in the world.

Here we can find a pathetic phenomenon in the Chinese legal academic. Historically, Chinese legal theory was influenced by the Germany deeply, especially the traditional begriffs jurisprudence. Scholars used to induce conception from conception mathematically, ignoring the reality of legal practice. In the beginning of 20th century, China started its legal modernization, while the German law was so popular in the world and influenced the Chinese legislation in a large extent. After the foundation of People's Republic of China, the legislation combined the tradition of Republic of China and laws of the Soviet Union, and the latter one was the shadow of Germany and Swiss civil laws, although they had totally different political goals. Most of company law scholars in China, who have the discourse power, have an academic background of civil law. When they analyze the company law, they regularly use the begriffs jurisprudence approach to reach a conclusion. Categorization is a frequently used tool by Chinese scholars to develop their illustration. Sometimes the categorization is necessary, but it is not omnipotent, especially on the occasion that the subsets cannot cover all the field of the concept. Sometimes, concept is not closed but open. Consequently, the reasoning therein if one is not A, it must be B is wrong. In the context of capital system, the category of legal, authorized and compromised capital is an enumeration of famous capital in the developed countries company law, which is not the total subsets of the concept capital system. There is not a doctrine that any legislation of all more than two hundreds of countries in this planet must choose one of them. So we cannot conclude that if Chinese new capital system is not legal, it must the authorized or compromised capital system.

In fact, the difference between legal capital and authorized is a history choice instead of diversity. In other words, the legal capital existed in American for a long time. Legal restrictions on dividend payments date to the earliest days of American business corporations. In one of the earliest cases, Wood v. Dummer, Justice Story stated that shareholder contributions constituted a «trust fund for the payment of all the debts of the corporation.» As originally conceived, the «trust fund» theory of legal capital simply prevented shareholders from withdrawing the assets they had contributed to the corporation until its creditors had been paid. This was thought to protect creditors by minimizing the risk of business failure and by minimizing creditors' losses if the business failed.

The use of par value greatly complicated the trust fund theory of legal capital. Par value developed into a legal minimum of what a shareholder ought to pay for the stock. This meant that issues regarding shareholder contributions to the corporation rather than corporate distributions to shareholders exerted the primary influence over the development of legal capital doctrines.

Legal scholars have generally praised the trend away from using legal capital to restrict dividends, and they have harshly criticized the use of legal capital notions such as stated capital and earned surplus to restrict payment of cash dividends. One of the leading commentators on legal capital concluded that the real issue is not whether to abandon legal capital as means of restricting dividends, but rather what to replace it with. The critics contend that legal capital is, at best, a meaningless doctrine that fails to benefit any corporate stakeholders while it imposes significant transaction costs on corporate management and shareholders. In the words of one scholar, legal capital «has ceased to perform any real function.»

Modern legal scholarship has generally criticized this concept because legal capital fails to achieve what its critics contend is the concept's only goal, to protect creditors from shareholders. With the advent of de minimis or nominal par values, stated capital no longer represents the collective contributions of the initial shareholders, and par value itself has become an arbitrary number bearing no connection to the value of the assets contributed by shareholders. Legal capital also has little connection to any other assets that will actually be distributed to the shareholders or creditors. Not only does legal capital fail to protect creditors,

it also imposes significant costs on corporations. Critics have also maintained that use of legal capital as a restriction on dividends has spawned enormous legal uncertainty and complexity. Legal capital has also contributed a great deal of complexity and uncertainty to the issue of dividends. All of these criticisms share a common theme, legal capital has no economic consequences because it fails to protect creditors.[22] So the American state company law abandoned the legal capital and adopted the authorized capital in 1980s.

Except the formal logic defect of present controversy, more serious problem is that such controversy has no any real meaning at all, neither theoretically nor practically. The category of the capital system is on the end branch of corporate theory, which means that no theory or institution bases on it. It is only a theoretical analyzing conclusion, without any reasoning or inference following. Furthermore, this controversy has no contribution on legal practice. The running, registering of company, even judging of the company dispute did, does, will never consider the category of capital system offered by the Company Law. Of course, someone may criticize the pragmatic approach of comment above. But any theoretical controversy should have real function, even the metaphysical research asks the ultimate question of the world or our human being. The category of capital system is only functional on the observational method. It should never be a tool or restriction of analyzing the current content of the law. If we cannot put the present institution into any existed category, we should admit that a new category appears, instead of endeavoring to change the definition of exist category and then put the new one in.

V. CONCLUSION

The Chinese new capital system is neither the legal capital nor the authorized capital. It is a unique new capital system. The endeavor of classifying the Chinese capital into any existed type will be failed. If there is any theoretical or practical function of such classification, maybe we can adjust the strict definition of legal capital or authorized capital. However, the classification does not solve any problem at all. The phenomenon reflects the unconfident of Chinese academy. We are proficient to learn the foreign legal institution and theory, but not good at creation of them. In the process of making civil code, the Chinese scholars also face a dilemma of choice of unification or separation of civil law and commercial law. Nobody tries to find third way to define the relationship between civil law and commercial law, exactly the same as company capital system. All of them are trapped in the three capital systems. It is time to give up such kind of academic conversation without any theoretical promotion or practical function.

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СУЩЕСТВУЕТ ЛИ ЧЕТВЕРТЫЙ ТИП КАПИТАЛА: ПЕРЕОСМЫСЛЕНИЕ КЛАССИФИКАЦИИ СИСТЕМ КОРПОРАТИВНОГО КАПИТАЛА

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Аннотация. *В 2013 г. Китай изменил Закон о компаниях, и эти изменения создали новую систему классификации капитала, непохожую на систему уставного капитала в Германии или акционерного капитала в англо-американских странах. Ученые в Китае спорят об отнесении нового типа капитала к одной из трех традиционных систем капитала, а именно к системе уставного капитала, разрешенного к выпуску акционерного капитала и смешанной системе капитала. Некоторые ученые утверждают, что новый китайский капитал по-прежнему является уставным капиталом, а некоторые утверждают, что это смешанный капитал. Однако подобные утверждения бесполезны, вдобавок в них используется неправильный логический подход. Ученые изменяют традиционное определение систем капитала, чтобы подогнать понятие нового китайского капитала к той системе, которая им кажется более подходящей. Понимание капитала в китайском Законе о компаниях действительно является новым, он не принадлежит ни к одному из типов систем капитала. Категория системы капитала — это индуктивное следствие, которое является лишь описанием типового законодательства современных развитых стран, а не дедуктивным, основанным на замкнутом логическом цикле. Таким образом, нет никакой логической причины классифицировать новый китайский капитал как один из известных типов. Более важная научная дилемма заключается в том, что такие споры не имеют теоретического или практического значения. Категория системы капитала находится в самом конце корпоративной теории, и ни одна теория или институт не базируются на ней. Это только вывод из теоретического анализа, без каких-либо рассуждений или дальнейших умозаключений. Кроме того, этот спор не имеет никакого отношения к юридической практике. Управление, регистрация компаний, даже разрешение корпоративных споров, никогда не рассматривались и никогда не будут рассматриваться с позиции категории системы капитала, предлагаемой Законом о компаниях. Признание новации законодательства прагматично, а борьба с этой теоретической проблемой тщетна.*

Ключевые слова: *китайское корпоративное право, новая система капитала, противоречия, уставный капитал, акционерный капитал, смешанный капитал, формальная логика, индукция, дедукция, теоретическая функция категории.*

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