CHINESE JOURNAL OF LAW

(Bimonthly)

Vol.34, No.3, May 2012

CONTENTS

Abstracts: A rather confusing situation has been witnessed in the Chinese ideology of the rule of law in these years. In all the relevant social aspects, different ideas have been put forward in connection with the proper form of the Chinese style rule of law and the comprehension of the ideal visions of such form. With regard to the question as to what the rule of law is, people are more inclined to cognize and accept the Western influences of the liberal doctrines of the rule of law institution, and the rule of law pattern based upon such doctrines, together with the features as depicted by such doctrines, have become, to a certain degree, the profound memories about what rule of law simply means, which have become the criteria whereby the Chinese rule of law in reality is perceived and judged.

Therefore, upon a sound analysis and profound perception of the flaws of the liberal doctrines of the Western style rule of law, efforts need to be made to enhance the autonomous construction of the Chinese style ideology of rule of law, i.e., to construct the Chinese style rule of law on the basis of the socialist legal ideology. In this process, attention needs to be paid to achieve the harmony among the socialist legal ideology, traditional jurisprudences and knowledge system. Efforts also need to be made to transform the socialist legal ideology into concrete legal thoughts, legal theories, legal doctrines, legal culture, legal knowledge and the pattern of legal thinking in order that the prestigious status of the Chinese style rule of law may be established upon the socialist legal ideology. Meanwhile, more theoretical and knowledge support is to be given to the socialist legal ideology. Probing researches have been made in this thesis upon the main aspects of the construction of the Chinese discourse system of rule of law and the contributions still need to be made by the Chinese legal academy in this process.

Key Words: legal ideology, socialist legal ideology on the rule of law, discourse system of rule of law, legal theory

Abstract: China and the world need a kind of new humanism which absorbs the essence of Chinese and West humanism and merges cognitive rationality and moral rationality together so that modern politics and society can be founded on morality and rationality at the same time. It is desired and possible for China to move towards the humanistic way to moral and democratic rule of law and realize the moral and political ideal combining “inner saintliness” with “external

kingliness" again.

There are three historical and theoretical types of the rule of law, that is, the rule of law as legalism, Confucian rule of law and the rule of law as constitutionalism. Generally and historically, the rule of law as legalism is a kind of utilitarian and administrative rule of law, Confucian rule of law is a kind of moral and administrative rule of law, and the rule of law as constitutionalism is a kind of political and utilitarian rule of law. The kind of moral and democratic rule of law is absent in the history until now. Relatively, although the West constitutionalism attached importance to the rational humanism, liberal democracy and human rights, the moral dimension was ignored to some degree. Although Confucian rule of law valued the moral humanism, the dimension of democracy and natural rights wasn't developed sufficiently. On the whole, connecting democracy to morality, combining natural rights and morality, and harmonizing rational humanism with moral humanism are the hard but necessary task to complete in our present time.

It is appropriate for modern China to make the two systems of "inner saintliness" and new "external kingliness" develop in parallel. On the one hand, the construction of "inner saintliness" should be based on human moral nature and moral rationality. On the other hand, the construction of new "external kingliness" should be based on human physical nature and cognitive rationality. Meanwhile, the way to moral perception which is different from experiential perception should be always open so that human moral spirit and moral humanity can enter into and play an important and innermost role in the modern system of new "external kingliness".

Key Words: rule of law, humanism, constitutionalism, cognitive rationality, moral rationality

Abstract: In China, beginning in the late 1970s, the decentralization of powers has played a significant role in the transformation of state structure, and the traditional centralized fiscal system has changed into a decentralized revenues-sharing system. In the decentralized central-local framework, the fiscal capacities of local governments were gradually strengthened. After the reform of "the tax sharing system" in 1994, although the fiscal authority centralized once again after the reform, the local governments had been given some discretion as a part of fiscal autonomy, which covered a variety of issues, such as budget, revenue, and expenditure. Meanwhile, local governments indirectly and legally got independent decision-making powers on the debt financing and the expenditure of public investment by means of the local state-owned enterprise. Local governments also got independent financial powers from the rules behind the convention of the constitution law. However, the role of law as a determinant of economic development has been less often explored. Thus the powerful local political factions were able to adopt financial policies instead of laws, and get under-regulated sources to finance local expenditure needs. In this way, the so-called de facto financial autonomy outside the legal framework is just one of the features of the local autonomy of contemporary China.

In order to restrict the abuse of power, the allocation of financial power among national and sub-national governments, as a matter of the rule of law, should accord with a systematical and practical legal system. Further, the reason for the fiscal autonomy is to strengthen local governments' fiscal responsibility. Under the rule of law, as a self-government model that the local

Abstract: Comparing with the Regulations on Administration of the Housing Demolition and Relocation in Cities, the Regulations for the Expropriation of and Compensation for Housing on State-owned Land (Regulations for Expropriation) has made significant progress. The new regulation's emphasis on public interest, public participation as well as fair compensation sent a positive signal illustrating the progress of rule of law in China. By using the analytical instrument of incentive compatibility and game theory, this paper conducts an analysis of the Regulations for Expropriation and finds that the appraisal agency plays a critical part in the process. However, certain parts of the Regulations for Expropriation are vague and the Measures for Real Estate Appraisal in Expropriation of Houses on State-owned Land (Measures for Appraisal) give the appraisal agency a monopolistic position. These will leave significant room for local governments and appraisal agencies to adopt opportunistic behaviors. This paper conducts an analysis of a few typical cases as well as 64 regulations drafted by local governments in following the Regulations for Expropriation and the Measures for Appraisal, including 49 local regulations for expropriation and 15 local regulations for appraisal agencies. The analysis supports our findings. This paper concludes that establishing an efficient third-party market of appraisal agencies and providing the expropriated persons with a right to choose the appraisal agency is one of the crucial parts for constructing a harmonious government-expropriated person relationship in a society of rule of law.
Key Words: expropriation of houses, fair compensation, third-party market for appraisal, Regulations for Expropriation

Abstract: Chinese scholars of the private law ignore widely the relationship between private autonomy and private law, which provides the existing space and functional background for the former. In fact, due to private autonomy, private law presents characters of formalism as abstract, end-independence, negativeness, procedure, form, autonomy, instrumentality, etc. Concretely, the abstract private rules beyond specific questions provide just a framework in which individuals take actions. These rules just limit but not govern people's decisions. Private law has not its own purpose and treats all individual specific purposes as its own, so that exists as a multi-purpose instrument. Private autonomy is a negative conception. Although negative private rules are mandatory, they would not hurt private autonomy excessively due to their negativeness. The procedural control is of obvious superiority over the end-control for preserving the freedom of juristic act because it is founded on the theory of subjective value. Procedural private law is formal meantime. In private law, formal obligations limit personal freedom in the minimum degree, so the

priority of freedom is highlighted. The value of private autonomy is conflict with the non-legal ideas from politics, ethics, economics, to religion, which means that private law has the character of autonomy. The instrumental rationality embodies not only in all transaction fields by juristic act system, but also in the non-transaction fields, such as family and donation. So all fields of private law are full of the instrumental rationality.

Private autonomy is the foundation of the private law, thus the above characters should dominate private law. Civil legislation should abide by the characters of formalism, and should not make exceptions easily but for sufficient and justifiable reasons. However, there are different defects in current Chinese civil legislation, such as declaring legislative purpose specifically in the first article, taking discrimination imprudently, the phenomenon of the general politics, etc. The characters of formalism should be improved in the future civil legislation of China.

Key Words: private autonomy, characters of private law, formalism, the character of form, the character of autonomy, the character of instrumentality

Abstract: By nature, man has the motivation to pursue the highest possible return out of a transaction. Therefore, when the market situation changes swiftly in an extraordinary scale (e. g. the price doubled in less than 6 months), both the real estate developers and the individual house owners will tend to breach the first, lower-priced sale contract and deliver the subject matter to the second buyer who promises a higher price. Although a majority of the public considers such behavior to be unfair and finds that the first buyer is a victim of the “greedy market economy”, present Chinese law takes a generous or liberal attitude toward the transaction between the seller and the second buyer, only giving the first buyer very limited remedy.

As the speculation of real estate flourished, double-sale practices went rampant in China during the past decades. Consequently, buyers have to face great uncertainty in the transaction and the mutual trust between the market players that is crucial for the smooth operation of the market, reduces significantly. In this context, this paper argues strongly for the introduction of a disgorgement rule to protect the first buyer, which imposes higher obligation on the seller. He should not only pay the compensatory damages, but also disgorge the profits obtained from breach of the contract. Furthermore, even after the newly enacted Property Law has vested the real estate register with ultimate evidential effect for the ownership, it is still important to be aware of the complexity of the registration system and its defects, as well as recognize the ownership acquired during the time when the registration is still imperfect. In the event that the second buyer does not have enough justification to trust the register solely and that his behavior does not fulfill the requirement of good faith, the first buyer should be offered an equity style remedy and be allowed to keep the subject matter he bought. Lastly, tort liability can also be a possible alternative, when taking the historical and present general public opinion into account.

Key Words: double sale, good-faith acquisition, public reliance of register, infringement of the right under contract, specific performance

Abstract: The prevailing view of Chinese civil law scholars regards employer's liability as vicarious liability without fault. However, Article 9 of the Judicial Interpretation for Liability of Personal Injuries provides that the employer should be strictly liable for compensating the loss of the injured whilst the employee, who caused the injury in mere light negligence, should be privileged from not only the indemnity to the employer but also the claim from the injured party. It is in practice usually so construed that the liability of tort by the side of the employee is not a necessary condition for the liability of the employer. In short, the employer may be liable although the employee is not, which is obviously incompatible with the fundamental idea of vicarious liability and severely criticized by the advocators of the vicarious liability theory.

The paper finds that the vicarious liability theory is no longer the development trend of employer's liability and as a matter of fact there exists no pure liability without fault. Even in England and Japan, where employer's liability was traditionally considered as vicarious liability, the courts after taking the duty of the employer into consideration nevertheless tend to exempt the employer from liability only on the ground that the employee was not in execution of his employer's business. The employer's liability is essentially the liability for organizational negligence and derives from the defect of the organization of enterprise. So the employee's liability of tort is not required as a necessary condition for the liability of the employer, otherwise would lead to harmful effects. The light negligence of the employee may only be a by-product of the defect of organization and therefore can be dissolved into the management activities of the employer. Generally speaking, employees in light negligence should be released from the liability of any compensation. In conclusion, Article 9 of the Judicial Interpretation for Liability of Personal Injuries is the one which develops on the basis of the theory of liberation of employee.

Key Words: employer's liability, vicarious liability, liability of organizational negligence, limitation of indemnity, liberation of employee

Abstract: The Chinese criminal law is characteristic in that a great deal of offenses should amount to a certain seriousness demonstrated in certain circumstances prescribed by the penal law or its judicial interpretation in order to be regarded as a crime. How to define the requirement of serious circumstances in the so-called circumstance-delikts within the framework of crime constitution has been one of the theoretical difficulties in Chinese criminal law. Inspired by the quantitative analysis of the unlawfulness in German criminal law theory which allows a gradual variation of unlawfulness, the author finds that the crime constitution is the integrity of quality and quantity. Its

quality is the punishable negative “thing” and varies within a certain limit. Thus an artificial separation of the quantity from its quality in dealing with circumstance-delikts as argued by some Chinese scholars can not be accepted.

Based on this conclusion, the author constructs a theoretical analyzing tool, namely “the basic quantity range of unlawfulness” due to the basic idea that a certain crime as an unlawfulness type contains always a certain quantity of unlawfulness, to analyze the position of the circumstance requirements in circumstance-delikts. Using this tool, we manage to find that a majority of the circumstance requirements in circumstance-delikts in Chinese criminal law are covered by the basic quantity range of unlawfulness of these delikts and therefore are constitutive elements of them and can be regarded dogmatically as the “general normative evaluating elements”. Consequently, the objective part of the “general normative evaluating elements” should be included in the intention in the case of intentional crimes, which means that the offender should know the factual foundation of serious circumstances in order to establish the crime. However, due to their normative evaluating nature, it is not necessary for the offender to understand the precise legal meaning of circumstance requirements. As to the other circumstance requirements in circumstance-delikts beyond the basic quantity range of unlawfulness of the related crime, it is possible for their orientation in the crime constitution only by specific dogmatic analysis. Some of circumstance requirements are actually aggravated results in the meaning of aggravated crimes, while some other can be treated as the objective prerequisite of punishment. And still others are factors of criminal policy and do not belong to the crime constitution any more.

Key Words: type of unlawfulness, quantity of unlawfulness, basic quantity range of unlawfulness, general normative evaluating element

Abstract: The criminal compulsory measures may be classified into two groups. One are measures that aim at apprehending, stopping and bringing the suspect to judges, which are generally called as arrests, and the other are measures that ensure the appearance of the defendant at the trial, which are usually called as pretrial detentions, residential surveillance and bails. In order to prevent the abuse of the power of depriving citizens’ personal freedom, the West sets many restrictions on compulsory measures. With respect to the measure of apprehending, the law requires probable cause, a writ from judges, and bringing the suspect to a judge without unreasorable delay after an arrest. With respect to pretrial detention, the law requires causes with legality and judge-dominated decision process, and entitles the suspect with the right to appeal to the superior court and the right to a speedy trial.

In China, measures that aim at apprehending and stopping the suspect, and bringing the suspect to law enforcements are called as criminal detentions, stops for further interrogation and seizure and deliver. In addition, measures that ensure the appearance of the defendant at trial are called as arrests, guarantors pending trial, and residential surveillance. Chinese law also sets restrictions on compulsory measures. For example, the law requires a warrant when making a criminal detention. Contrastingly, the criminal detention warrant is not subscribed by a judicial officer, but by a public security organ. Although Chinese law does not entitle the defendant the right to a speedy trial, it

sets time limits for handling cases in different stages for different organs, thus requires law enforcements to handle cases quickly.

Admittedly, China's compulsory measures need to be improved. It is necessary to make the time period of the criminal detention shorter so that it looks more like a provisional measure in exigent conditions. And more procedural safeguards to the suspects and defendants are needs in the process of deciding an arrest. Still, people under the residential surveillance should be more liberal. Unfortunately, the Resolution on Revising the Criminal Procedure Law promulgated on March the fourteenth, 2012 does not make the compulsory measures improved. It leaves more things to do to improve China's compulsory measures.

Key Words: personal freedom, compulsory measure, criminal detention, arrest, residential surveillance

Abstract: When it is difficult to obtain the evidence, such as the evidence would be disappear, fabricated, altered and concealed in criminal cases, the parties, the defenders and the victims all can apply to the special organs to take some preventive measures to get the evidence. We can call this the system of preservation of evidence in criminal cases. However, there is no legal provision about this system not only in both current and revised criminal procedural law but also in its judicial interpretation. And nobody pays attention on the principles and contents about this system in the academic circle, which has caused many deviations from this system.

There exist some reasons to add this system to our criminal procedure law. Firstly, there are essential differences between the preservation of evidence and the applying for collecting evidence. The latter is unlikely to replace the former, and the former can compensate for the inner defects of the latter. Secondly, the preservation of evidence can make up for the deficiency of the obtaining means of evidence of the defender. It can avoid the lost and broken of the evidence, and then reduce the random of collecting evidences by the prosecutors. Thirdly, it can free the defendants who are innocent of all the pain in litigation as soon as possible. And at last, criminal preservation of evidence would make the legal system more systematic, normative and scientific.

Nowadays, many countries and areas have provided the system of criminal preservation of evidence. Chinese criminal procedure law should add such system not only on the legislative and judicial situations in China but also on the experiences of the other countries and areas. The people's procuratorate should be the approval authority of the application for evidence preservation. The applicant should include the suspect, defendant, defender, victim and his legal representatives. The application should satisfy the basic conditions of relevancy and urgency. The people's procuratorate should examine and dispose without delay after it receives the application. If a decision has been made to reject the application, the applicant may apply for reconsideration. If the procuratorates do not take actions when they should, the court should make inferences against the accusation if the applicants interpose an objection and produce evidences to prove it.

Key Words: preservation of evidence, applying for collecting evidence, right of remedy

Abstract: During the Ming and Qing Dynasties, the state authorities paid special attention to the control over societies in remote country areas. They encouraged the clans to work out regulations in their genealogies to restrict their clan members, and entrusted the clan elders the power to verdict and enforce such regulations. Henceforth, family judicial adjudication came into being and continued to develop. The family laws and regulations in the Ming and Qing Dynasties showed strong continuity of those famous family laws in the Song and Yuan Dynasties, from which many basic institutions and principles in the family judicial adjudication were originated. The family laws and regulations of the Qing Dynasty carried forward the basic spirit of those in the Ming Dynasty, and they were made more specified and their strength of punishment was further intensified.

The family laws and regulations during that period covered all the specifications within the clans about the judicial organization, auxiliary staff members, jurisdiction, lawsuit, hearing and adjudging the case, and the execution. The family laws and regulations at that time were characterized by the fact that the administrative organization within a clan was simultaneously the organization of judicature and the clan elder was the greatest authoritative in awarding and punishing the members of the clan according to all the regulations of the family stipulations and procedure. In family judicial adjudication, the clan elder played a leading role with various powers endowed to him. Local officials acknowledged his judicial effectiveness to various degrees. With striking characteristics, family judicial adjudication had important impact on the judiciary activities at the level of state or county in the ancient time.

Key Words: family laws and regulations, legal history of the Ming and Qing Dynasties, family judicial adjudication

Abstract: The responsibility to protect (R2P) is a new concept or doctrine which appeared at the beginning of the 21st century in the international community. It has not only a close connection with some fundamental principles of international law and international relations, such as state sovereignty, non-intervention in the internal affairs of other states, the prohibition of the use of force and human rights protection etc., but also has involvement in or an impact on the practices on the hot issues in the international community. Therefore, the R2P doctrine initiates immediately concern and discussion in the international community once it was put forward, and the military intervention within the R2P doctrine is the most critical and controversial problem.

By comparing the military intervention under the R2P and the provisions of the use of force in the U. N. Charter, the author points out that, on the one hand, it should be affirmed that the military intervention within R2P, which is different from unilateral humanitarian intervention, is progressive to some extent. R2P advocates that the military intervention should obtain a legitimate

basis through the authorization of the U.N., which is the greatest distinction between the doctrine and humanitarian intervention. On the other hand, R2P attempts to re-interpret the terms relating to the use of force of the U.N. Charter through a flexible expansion of interpretation, to extend the authorization or permission of the use of force from the U.N. and increase possibility for military intervention.

It can be seen from the ten years practices since the birth of the R2P concept that the only application of military intervention under R2P is the response to the situation in Libya. It seems that the international community parties so far do not reach consensus on the sensitive issue of military application of R2P, and still hold cautious position on implementing the R2P by military means. The R2P doctrine has so far not modified the present law of the use of force, but it has some effects on the collective coercive measures of the U.N. collective security system.

Key Words: responsibility to protect (R2P), use of force, Charter of the United Nations, international law