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Abstract: Through 30 years' practice, Chinese path to the rule of law is undergoing a transition. The transition may be summarized as from the previous focus on the learning of and borrowing from western legal thoughts and systems to the present focus on the researches on and considerations of Chinese specific circumstances to settle our own problems on a self-reliance basis. This transition is mainly caused by the consensus that western style of rule of law is not suitable to China, and that Chinese path to rule of law needs institutional renovations in light of our own circumstances.

Theoretically speaking, this transition has also changed the ideas concerning to the ideal pattern of rule of law, and some of the essential issues presented in the western jurisprudence have also to be reviewed. Such review has indicated that, people's ideas about the ideal legal systems are strongly influenced by the classical western jurists who have depicted a nice picture for an ideal pattern of rule of law. This depiction does not really tally with the objective rules of legal construction and the reality of the western states. Therefore, misunderstandings of and undue reliance on western legal thoughts should be eliminated in the construction of Chinese legal system.

Based upon the above analysis, this thesis puts forward some proposals about the Chinese path to the rule of law. The judiciary role in the Chinese political framework has to be properly determined. The diversity and applicability of law have to be carefully considered in China with a large population and different economic developments. The responsibility and function of judiciary should be determined and exerted properly in the background of the plurality of social governance resources and the insufficiency of judicial resources. The claims of different classes and interest groups have to be equally considered and balanced, and the social influence and effects of judicial acts should be paid attention to. The professionalization, technicalization and due process of law should be realized step by step because our economics and culture are relatively backward. The judicial power has to be properly distributed and an internal check and balance mechanism has to be put in place. Finally, a quick and appropriate response mechanism to international calls has to be established in today's international context.

Key Words: path of rule of law, autonomous rule of law, imitative rule of law, theory of rule of law

Abstract: Scientific inquiry and legal advocacy are two different epistemic models. Science aims at analyzing phenomenon and constituting systematic knowledge, while law aims at making decisions about the issues of truth within a limited period. In the process of constructing factual truth based on scientific evidence, however, inquiry is twining with advocacy. Due to its complexity, a crucial problem in applying scientific evidence is its admissibility. The admissibility of scientific evidence means the standards or conditions to admit an item of scientific evidence as the premise to prove truth.

No matter what was generally accepted of Frye, or what Daubert had provided for judges to carry out their responsibility as a gatekeeper, they were all subject to wide criticism. The main reason lies in that the current logical relationship among the validity, reliability and admissibility set for scientific evidence is with much confusion. The confused epistemological presumption of the standard of admissibility for scientific evidence makes it difficult to be a rule in reality, resulting in the failure of U. S. Federal Rule of Evidence to make a clear stipulation for the admissibility of scientific evidence.

By a historical introduction and epistemological rethinking to the standards of admissibility for scientific evidence, this paper examines the structure of admissibility from both internal and external properties according to the functions of scientific evidence in truth-seeking. The internal properties of scientific evidence are embodied in three aspects, that is, the validity, the reliability and the relevance. This is a process of naturalized cognitive way. The scientific validity depends on both scientific principles and methods, and the reliability of scientific evidence is influenced by scientific uncertainty, reproducibility, causality, error rates, and the like. The external properties are embodied in the process of proving fact by using scientific evidence and the assessment of the credibility of scientific experts themselves who proffer the scientific evidence. Those assessments show a social dimension of scientific evidence, and reflect its external mechanism. According to the structure and properties of the admissibility of scientific evidence, we can epistemologically and systemically construct a system of the standards for the admissibility of scientific evidence.

Key Words: scientific evidence, standard of admissibility, legal reasoning

Abstract: Administrative self-restraint is an autonomous activity by the administrative system or administrative bodies to bind their actions and make administrative power exercised in lawful and reasonable scope and track. It is a way of self-control of illegal or improper administrative actions with a series of internal mechanisms， such as self-prevention, self-discovery, self-containment and self-correcting.

Administrative self-restraint is a new tool to control administrative power, and its premises lie in the universal phenomena of administrative self-restraint, functional defects of legislative and judicial power, and the spring of internal administrative law. As one of the new approaches to develop the rule of administrative law, administrative self-restraint has close relationship with constitutionalism and external administrative law, and is also a necessary result of administrative self-organization. According to the theory of constitutionalism, administrative power should not only has external restriction, but also pursue self-restraint autonomously so as to realize the aim of constitutionalism. Furthermore, external administrative law has provided external press and conduit for administrative self-restraint through delegated legislation and judicial review, thus become the necessary frame of administrative self-restraint. Finally, administrative subjects can realize self-restriction, self-regulation and positive administration by administrative organizational structure, internal administrative rules and moral standards.

The phenomena of administrative self-restraint have reflected some functional defects of legislative and judicial organs in promoting the rule of administrative law in China. Nowadays, the expansion of the power of the administrative state has made the advance control by legislative organ and the ex-post control of judicial review incapable to provide effective supervision. Therefore, in addition to speed up the construction of constitutionalism and external administrative law, it is necessary to perfect internal administrative law and make up for the functional defect of external administrative law by the theory and system of administrative self-restraint, thus promote the rule of administrative law in China.

Key Words: the rule of administrative law, administrative self-restraint, internal administrative law, external administrative law

Abstract: In the sense of norm, the factual act is one of the constitutive requirements of law, leading to legal effects according to its actual consequences. Whatever specific act meeting the above-mentioned requirements is the factual act, a kind of legal facts. Obviously, as a kind of action of human being, the factual act is different from natural facts and pure facts about human flesh, because there is no position of human action in the latter two constitutive requirements. Moreover, in the field of the legitimate acts, the factual act is not the expressive act and includes the actual consequences, so it has essential differences with the legal act and the quasi-legal act, both of which are expressive acts and actual consequences are not necessary to them. Furthermore, because of its legitimate quality, the factual act is also different from the tort, which belongs to the category of illegitimate acts.

As one of the constitutive requirements, sometimes the factual act needs no intention, such as the discovery of an object buried underground and processing. Sometimes it includes an intention, which can further be divided into the factual act with dependent intention, such as acquisition and loss of possession, and the factual act with independent intention, such as management of affairs without mandate. The fact that the factual acts are classified according to the position of intention in the constitutive requirements shows that the factual acts are systematic. Therefore, as far as the meaning of the factual act is concerned, not only its attribute as one of the constitutive requirements but also its different demands for intention should be paid attention to.

The factual act and the legal act are theoretically contradictory and mutually exclusive. They have different normative means with the former having no function of self-government. However, they are interdependent to perform some functions. For example, the conduct of spontaneous agency can be a legal act, and the cause of delivery can be a sale contract. Meanwhile, they are also mutually restraint. For instance, in a real act, the delivery determines the establishment or effectiveness of the legal act. It is in the interleaving of different act norms that the systematization nature of Civil Law emerges and the practice could be interpreted rationally and regulated wholly.

Key Words: the factual act, the legal fact, constitutive requirement, the legal act, systematization

Abstract: The floating charge has been stipulated by § 181 of Chinese Property Law. The outstanding characteristic of floating charge is the instability of floating charge assets. Accommodating to this characteristic, the immunity of "buyers in the ordinary course of business", that is, the "outflow" floating charge assets are immune to the former floating charge rights, has also been stipulated by § 189(2) of Chinese Property Law. This system is provided at large in the foreign personal property security interest law. Compared to the foreign law, our buyer's immunity system is made simply and crudely, even with some mistakes, which should be perfected and clarified by extracting experiences from abroad and combining the interrelated provisions of our Property Law.

Owing to the instability of the floating charge property, the specific thing which flows into the floating charge property will automatically become the floating charge property, and thus the floating charge mortgagee will also have mortgage interests on it without any other additional formalities. But as to whether the former floating charge rights can be priority to the later hypothec attached on the thing named as "purchase money security interests (PMSI)" in foreign law automatically, there is no answer to this key problem in our property law. To resolve this problem, we should definite its concept, differentiate its type, and establish the efficacy of the purchase money security interests, basing also on the experiences from foreign law, to respond to the urgent need in legal practice.

There are also other systems concerning to floating charge which should be taken seriously. Firstly, floating charge is applied mainly to chattels security interest, so the uniform registration system of personal property security interest and the scientific classification system of collateral should be established. Secondly, floating charge and its related systems focus on the order of satisfaction of different security interests on chattels, while our Property Law has significant defect in this aspect, in short of unified and clarified rules concerning to such order. Lastly, floating charge involves also legal implantation. Our legislation on property law and its perfection should learn from and extract abroad legal systems on personal property security interest.

Key Words: floating charge, buyer's immunity to former

Abstract: With contract termination no longer needing the elements of imputation cause such as obligor's fault, the institution of termination becomes one of the systems that release parties from the contract duty. On the other hand, the rule of risk-assuming in the traditional Civil Law can also release obligee from counter-performance. Hence, an interlacing between contract termination and risk-assuming is inevitable. Whether the risk-assuming rules should be brought into the system of termination or not is becoming a problem. The Draft of the Act on the Reform of the Law of Obligations in Germany and the Draft Proposals about the Japanese Civil Code (Law of Obligations) Reform supported the former and deleted the provisions concerning risk-assuming. But the Act on the Reform of the Law of Obligations in Germany supported for the latter in the end. In China, we face the same problem. The Contract Law of PRC has also provided both rules, resulting in the confusion in the judicial practice.

The monism of termination rules and the coexistence of both are the two representative models to resolve the problem. In the fields of implication, effect, procedure, application scope and the limitation of period, both similarities and differences exist between risk-assuming rule and contract termination, and each has its strong points. A conclusion is that，if we adopt the monism model, the system arrangement should fill up the blank with the abolishment of the risk-assuming rules, and if not, the application relationship between them should be clarified.

As to the interpretation of the Contract Law of PRC, when the risk is taken by obligor, obligee may select risk-assuming rule or contract termination, with the limitation of termination, the limitation in liquidation and the counterplea be dealt in particular. When the risk is taken by obligee, the termination cannot be selected. In the situation of defective performance, §§ 148 and 149 should be applied, with the rationality of § 148 needing further consideration. When otherwise agreed by the parties about risk-assuming, the agreed has priority. The rules of lease contract or partial termination can be applied by analogy in long-term contracts, and § 148 could also be applied by analogy in the risk allocation in liquidation.

Key Words: contract law, risk-assuming, termination

Abstract: Hypothetical causation does not work on causation but on damage: to limit the scope of damages according to hypothetical course. Whether hypothetical causes can work on the calculation and determination of damages caused by former injurious act or not depends on the

time-standard of damage calculating, nature of hypothetical cause and whether the damage is direct or not. The first issue determines the time scope of hypothetical causes which can amend damages. The second issue excludes such hypothetical causes which can be attributable to a third person. Whether damage is direct or not determines the scope and degree of amendment on damages by hypothetical causes.

The theoretical foundation of the amendment on damages by hypothetical causes lies on the idea of the damage and the risk distribution mechanism. The idea of damage concerns to the definition of damage, and determines the quality and quantity of certain elements which will affect the evaluation and calculation of damages. The risk distribution mechanism determines whether the burden of the risk should be taken by the victim or the others. It approves to the practice of many countries in making distinction according to different natures of hypothetical causes.

As to the relationship between hypothetical causation and compensation for damage, our country has no sufficient discussion and unified standpoint both in theory and practice. In legislation, the time-standard of damage calculating is set to the time when the damage happens, which limits the amendment effect of hypothetical causation theory. Therefore, we should define the intension and extension of the damage properly. It is suggested that the time calculating damages be taken as fundamental normal formulas. It is also suggested to distinguish the hypothetical causes of the act of a third party from others. If the damage could have been caused by a third party, such hypothetical cause does not affect the scope of the damages caused by the former injurious act. When the damage could have been caused by the other later causes, the liability of the preceding injuring person should be limited accordingly. Ultimately, the theory of hypothetical causation should be in general applied to indirect damage, but not to direct damage.

Key Words: hypothetical causation, compensation for damage, direct damage, indirect damage

Abstract: Discretion on allocating burdens of proof by judges is provided by § 7 of Supreme People's Court's Rules for Civil Evidences. This provision is far beyond the support from our legislation, jurisdiction and concept, which should not be practiced now. Firstly, scientific general rule of allocating burdens of proof has not been established in current China. Demands for the discretion in judicial practice reflect the lack of substantive rules and the excessive dependence on

the conversion of burden of proof. So on one hand, § 7 puts too much emphasis on the less important part, on the other hand, it overestimates the normal demands for the discretion on the conversion of burden of proof.

Secondly, the regularity and predictability of allocating burdens of proof is of vital importance. Nowadays, it is acceptable to acquiesce in the discretion on allocating burden of proof by judges and check the discretion with the appealing and retrial process or by reporting to the Supreme People's Court. This can release the tension between the statute and the development of the society and respect the jurisdiction mood of "rule—application". As the concept of burden of proof has not been accepted by people, the rule of discretion could make people replace the rules of allocating burdens of proof with the abstract and fuzzy idea of fair and justice, which will corrupt the regularity of allocating burdens of proof.

Finally, the facts that it has not formed a routine to use burden of proof to decide on cases in judicial practice, that the capacity of judges to use burden of proof precisely is still to be improved in current China, and that the discretion of judges in allocating burdens of proof needs to be regulated make the rule of the discretion too advanced. Because of the orientation of individual case and social effects of Chinese judges, even there is the case which demands discretion on the conversion of burden of proof while there is no such rule, the judge will still look for discretion. So we should not worry that the judges will stop pursuing justice without § 7, on the contrary, we should worry about whether § 7 will encourage the judges to go too far to be controlled.

Key Words: civil procedure, allocating burdens of proof, discretion, the statute

Abstract: The issue of non-governmentalization of arbitration institutes has reached a conclusion in legislation and theory. The reason why this issue is discussed again in the contemporary ethos is the tendency of administration in practice. The nature of arbitration institutes in China has to be affected by the "situation" of China. Arbitration institutes have faced the crisis of the administrative alienation because of the social tradition of administrative promotion, which is shown in several aspects. In the view of personnel appointment, most of persons in arbitration institutes are executive staff. As to the case of finance, the income and

expenditure of arbitration institutes are characterized as public finance. In the operation of arbitration, the arbitration institutes are built up according to the administrative divisions, and the management of cases has administrative attributes.

The administrative alienation of arbitration institutes has been formed historically, so it also should be resolved in a historical way. In primary stage of the administrative alienation, arbitration institutes benefit a lot from the tendency of administration. Arbitration institutes not only profit from the high efficiency of administrative system in the arbitration efficiency, but also advance the social acceptance of arbitral awards with the help of the authority of administrative organizations. What's more, the tendency of administration can also bring various administrative welfares to the staff of arbitration institutes. However, the arbitration institutes which have been aliened administratively appear to breach the arbitration principle of self-determination by parties, and to execute judiciary authority beyond the administrative power, which run counter to the obligation of the WTO agreements China bears.

The first step to reform is to replace the tradition of "administrative guardianship" by "judicial supervision", so as to cut off the relationships between the government and arbitration institutes. The second is to transfer the "administrative supervision" into "association supervision"， so that the arbitration association will safeguard the arbitration institutes. At the same time, the administrative management of arbitration should be internalized to promote the efficiency of arbitration. Besides, the intensity, dimension, and progress of reform should be properly held in the practice of the non-governmentalization of arbitration institutes.

Key Words: arbitration institute, non-governmentalization, administrative guardianship, judicial supervision, arbitration association

Abstract: The primary subject of the sentencing procedural reform is to establish an appropriate sentencing procedural model to coordinate the relationship between conviction and sentencing proceedings reasonably. Although the newly established reform program by the Supreme People's Court can be feasibly implemented in the guilty plea cases, it would meet some difficulties in both summary cases and general procedures and even face some theoretical disputes and real risks.

Through the experimental exploration of the grassroots courts, a model named “centralized sentencing model”, basing on the mass-appearance of prosecutors, has gradually taken shape in summary proceedings. In this model, after the indictment which confirms the defendant has constituted a crime, the court hears a number of cases prosecuted by prosecutors in a continuous sentencing hearing and gives their sentencing decisions respectively.

In cases where the defendant pleas not guilty, the viewpoints for the establishment of an “independent sentencing procedure” are came out and supported by some law experts and the judiciary. This model means that the court trial shall be divided into two relatively independent stages, that is, conviction and the sentencing hearing. The court should firstly settle down whether the accused has constituted a crime or not through investigation and court debates. After the declaration of conviction, the court will organize a special sentencing proceeding. By listening to the views of both defense lawyers and prosecutors and reviewing the statutory and discretionary sentencing circumstances, the court then makes the final decisions on the sentencing issue of the accused.

In cases where the defendant voluntarily pleas guilty, the “flexible alternating sentencing model” still leaves some spaces for further improvement. So the sentencing procedural reform is far from maturity. The policy-makers of the reform should not be complacent and conservative. For these self-engendered reform experiences, the reformers should not blindly adopt the attitude of rejection, but instead should face up to the reasonableness of their existence and assess their effectiveness, so as to make them play a greater role in the formation of a new system.

Key Words: sentencing procedural reform, centralized sentencing model, flexible alternating sentencing model, independent sentencing model

Abstract: As one of the basic models of services supplying, the movement of natural persons plays a more and more important role in the international trade in service, and has become an

important issue in the negotiation in the trade in service. The latest legislation and practice show that, the progress of multilateral negotiation moves slowly, the arrangements for movement of natural persons under regional and bilateral trade agreements are flexible and manifold, and the domestic legislation and regulation on movement of natural persons are complicated and fickle.

Although the negotiation on the movement of natural persons under the multilateral trade systems has not finished, the latest result of the negotiation reflects the tendency of the rules on the movement of natural persons under the multilateral trade systems. That is, the types of natural persons in relation to the movement of natural persons have become more extensively, a part of limiting conditions on the movement of natural persons has been abolished, and the rules on the movement of natural persons have become more standard. The arrangements for the movement of natural persons under regional and bilateral trade agreements are different from that under GATS. The latest development shows that, the measures of the Member States are flexible, the market access and national treatment become the universal obligation, and the movement of natural persons among the Member States is becoming liberal. The legislation of different countries on the movement of natural persons shows that, three obstacles in the movement of natural persons have become the adjustor to protect the national market, the ways to import low technical labors of developed countries are more flexible, and the differences among Member States in protecting the rights of different types of labors are more clearly.

The movement of natural persons is the key field of China's trade in service. In order to promote China's fourth model of trade in service, we should take part in the multilateral negotiation on the trade in service actively to establish beneficial rules, join in the regional and bilateral agreements to expand overseas service market with flexible method, and absorb the advanced experiences from developed countries to promote China's rules and regulations on the movement of natural persons.

Key Words: GATS, the movement of natural persons, the agreement of regional trade, latest development

Abstract: To protect traditional knowledge in the TRIPS framework is an important topic for the change and development of international intellectual property system in the post-TRIPS era. Although TRIPS council has not discussed this topic materially, intensive and detailed research on this topic in academics will promote the discussion and provide it with relevant theoretical basis.

The regime of TRIPS regulations is an important systematic resource to protect traditional knowledge. Therein to, provisions concerning to condition and procedure to get intellectual property can be used to avoid claims of intellectual property on traditional knowledge by others besides its holders. And provisions relating to the type of intellectual properties can make the holders of traditional knowledge claim intellectual property on it. However, it should be admitted that the regime of TRIPS regulations is still not sufficient to protect traditional knowledge. It is still a difficult task to explore effective methods and forms to protect traditional knowledge in WTO. Although introducing new obligation to disclose the source of traditional knowledge in the existing TRIPS rules is of some help, it would provide more comprehensive and direct protection for traditional knowledge to construct a special system suitable for its characteristics.

It’s still an uncertain issue whether system arrangement to protect traditional knowledge, especially the system arrangement related to change and innovation of TRIPS, will come true or not in WTO. Therefore, international society should exert to accumulate new developments that can lead to change or correction of TRIPS for traditional knowledge on the basis of correcting mechanism of TRIPS. Such efforts may include expanding domestic legislation on protection of traditional knowledge, concluding a legal document on protection of traditional knowledge in WIPO as soon as possible, and adopting a Ministerial Declaration on protection of traditional knowledge as soft law in the Doha Round of WTO.

Key Words: TRIPS framework, protection of traditional knowledge, system construction