CHINESE JOURNAL OF LAW

Vol.31, No.6, November 2009

Abstract: Lay visitor inspection system of detention place, as a kind of torture prevention system outside criminal procedure, invites lay people to be visitors to detention place unannounced and irregularly to check the detention conditions and the legitimacy of related activities enforcing detention law. This system has improved effectively the treatments of detainees. In addition, it can pass good messages to the public that the detention place has done a good job, and can increase public's confidence on the work of detention place. The lay visitor inspection system of detention place can be combined with China's People's Congress institution, which means that members of local congress are selected as lay visitors.

The visitors in Liaoyuan where we conducted the pilot research visited local detention place for 20 times. In each visit, they visited where they would like to see in the detention place and then selected detainees as interview target. They could talk with the selected detainees confidentially and without the intervention from police officers. After the visit, the lay visitors could write down their comments on the conditions and human rights protection situations in the detention place. These comments will be reported to local government and police stations which are in charge of pre-trial detention places in China.

The system can coordinate with other torture prevention institutions, such as interrogation audio or video taping. One of the strong points of it is its economical aspect, which means only small sum of money can be used to support the operation of this system. Certainly the pilot research also found some drawbacks of it. For example, China lacks the culture of volunteer, and without enough NGO and volunteers, the system can not operate for a long time. In addition, the system works better to check conditions of detention place than to protect procedural rights of detainees.

The above conclusions are got through one pilot empirical research in one pilot detention place, in which the researchers compared the data before and after the pilot including various indicators on detention conditions and protection of human rights of detainees. The empirical

research used multi-methods including individual interview, group interview, collecting administrative data, observation and survey, which ensure the effects of the empirical research.

Key Words: inspection of detention, pilot, detention place, empirical research

Abstract: The position of objective imputation is concerned with the nature of constitutive requirements. This article discusses this problem in the context of the substantialization of constitutive requirements. Objective imputation and causation are two totally different concepts. Causation is committed to the issue of attribution, while objective imputation is concerned with blamefulness. Thus objective imputation is parallel to causation and should be coped with by substantially examining the constitutive requirements after solving the issue of causation.

Moreover, the thinking methods of causation and objective imputation are different. The issue of causation only focuses on the relationship between act and consequence, so before determining whether causation exists or not, we should first examine whether the act and the consequence exist or not. This kind of sepration can not examine the constitutive requirements substantially in some instances. In this aspect, objective imputation carries out a substantializing exanimation of act and consequence, thus goes beyond the bounds of causation and comes into the scope of blamefulness.

There is no hierarchy in the "Four Elements" theory in Chinese criminal law. Although the "Four Elements" theory contains a substantial examination criterion, i.e., the theory of harmfulness to society, this criterion has not been included into the analytic scheme of crime as a constitutive element, and is kept away from even overtops the analytic scheme of crime. There exist three theoretical obstacles to introduce objective imputation into Chinese criminal law under contemporary circumstances, that is, the insurmountable contradiction between objective imputation and harmfulness to society, the insuperable conflict between objective imputation and causation, and the unavoidable inconsistency between objective imputation and the "Four Elements" theory. Only by abandoning the "Four Elements" theory and introducing the "Tripartite Scheme" theory as the analytic scheme of crime can objective imputation theory survive in Chinese criminal law.

Key Words: criminal law, objective imputation, causation, constitutive requirements

Abstract: Risk criminal law results from the coming of risk society. The risk society not only offers a new visual angle for understanding and mastering modern criminal law, but also provides an important theoretical tool for re-thinking traditional criminal law. Risk criminal law tries to establish a new model of criminal law to prevent and solve risks beyond traditional criminal law.

The normalization and functionalism of criminal law become the theoretical basis of risk criminal law. The former emphasizes to model people's activities through norms in order to keep people loyal to laws and norms. The latter emphasizes that criminal law plays a more active role in preventing risks in order to maintain the safety and order of society. Risk criminal law is substantially different from traditional criminal law. It establishes a new paradigm of criminal law, adjusts its functions, changes the principle of liability imputation, re-constructs the constitutions of risk crimes and prepositionally uses punishments.

Risk criminal law transforms the value systems of traditional criminal law, thus brings about some risks and dangers. Firstly, it launches challenge to the basic principles of traditional criminal law. It has conflicts with the principle of legality, the principle of criminal responsibility and the principle of proportionality. Secondly, it splits the system of values of traditional criminal law. Its boundary of punishment is quite indefinite because it takes the necessity of preventing risks rather than the infringement of legal interests as the basis of punishment. Thirdly, it changes the principle of liability imputation, so it may excessively expand the scope of criminal responsibility.

In short, equality, freedom and rights advocated and pursued by traditional criminal law are still regarded as the basic values. Therefore, risk criminal law can not completely replace traditional criminal law, and it should be a supplement to make up for the weaknesses and loopholes of traditional criminal law. In other words, traditional criminal law and risk criminal law should co-exist. They support each other to realize the goals of maintaining the order and safety of society.

Key Words: risk, risk society, risk criminal law, traditional criminal law

Abstract: This thesis analyzes the long-discussed issue of "difficulty in filing a lawsuit" in the area of civil procedure. This issue does not refer to the situation that the court cannot accept and hear a case due to its inconformity with relevant laws. It mainly refers to the situation that the court, considering some external factors, refuses to accept some cases which conform to the required conditions stipulated in laws, regulations and judicial interpretations. This thesis points out that one main reason of this issue is the judicial policy of our country which overcomes law.

The judicial policy represents itself in civil jurisdiction as restriction and negativity. It means that judicial policy always restricts the acceptance of cases which are in line with the suing conditions. The court will restrict the acceptance of some cases, such as cases of illegal fund raising, infringement due to false information disclosed by listed company, bankruptcy disputes, tainted milk tort disputes, indemnification due to natural disaster such as earthquake, as well as cases that involve sensitive social, political and economic issues.

The reasons for the restriction include the specialty of rule of law in our real society, the limited judicial system and judicial capacity under the specified power structure, the limited regulating scope and function of existing law, and pragmatism, relativism and particularism in consciousness and methodology. In the reality of China, such adjustment by judicial policy is relatively reasonable, for some controversies which concern legal disputes actually involve political and other social factors, which cannot be independently handled and solved by judicial departments. In our country, the influence of adjustment and regulation by law is very limited, and numerous social relations are regulated by administrative and policy-based rules. The status of judicial departments decides that they lack the capability of judging independently.

However, the adjustment by judicial policy which overcomes law also bears high cost. It will obviously jeopardize the authority of law, and even sacrifice public's faith and dependence on rule of law. The author believes that in the background of social transformation including the transformation of rule of law, the judicial policy restriction on filing a lawsuit would be limited gradually and finally terminated.

Key Words: civil procedure, filing a lawsuit, acceptance, judicial policy

Abstract: The theory of recklessness in traditional civil law system is simple and crude in content and fragmented in system. Lacking of explanatory power inherently, it can not provide clear criterion and methods for judicial adjudication and is unable to explain why recklessness amounts to intention. The theory of fault in criminal law has always been influential to civil law, so that the recklessness theory in civil law can well absorb the essence of related theory in criminal law.

Firstly, recklessness should be a kind of conscious negligence, that is, the actor has knowledge about the high probability of the damage occurred and the non-legitimacy of his act. Secondly, the actor should de facto create a huge risk, that is, the probability that the damage would occure is very high and the damage occurred is huge after the realization of risk. Such fault is a subjective fault which can be avoided to a great extent by the actor and a kind of fault under strong moral condemnation. It falls into an independent type of fault between intention and ordinary negligence and is much closer to intention. The judgment of "knowledge" should stick to the classification of "knowing" and "having reason to know", and judicial inference should be effectively applied in typical situations and legal presumption applied where law expressly provides. The determination of the seriousness of risk refers to the comprehend judgment of the probability and extent of damage, and the cost of prevention should also be taken into account.

The legal effect of recklessness is in principle the same as that of intentional tort with also some exceptions. The legal effect of recklessness mainly includes its influence on the establishment of liability for damage, on the application of the rule of contributory negligence, on the presence or absence of the right of recourse when somebody is held accountable for other person's behavior, on the liability for damage of depository without charge or donors, on the amount of compensation for mental losses, and so on. Additionally, recklessness is the manifestation of maliciousness and thus constitutes a typical circumstance where the punitive damages are awarded.

Key Words: recklessness, type of fault, conscious negligence

Abstract: Due to the coexistence of human beings and the universality of causal connections, damage is comprehensive and complex in real society. Nevertheless, only limited damage can be

redressed in civil law after they are filtered by some legal skill tools. The scope of damages is determined to a great extend by the legal policy.

By the legal skill tools like fault, causation, the rule of no redress to non-property damage in general, the theory of direct victims, the theory of violation of absolute rights, the theory of privity of contract, and the foreseeability rule in contractual liability, etc., a great deal of damage is excluded from the scope of damages. By such means, the legal policy in modern compensation law, which are to maintain maximum economic freedom, to maintain maximum general freedom, and to minimize redress to victims, is fulfilled.

However, the modern law of damages focused too much on the freedom of act, thus resulted in a serious defect in the relief of victims. Following the failure of the optimistic rationalism, the emphasis of the relevance among human beings and the pursuit of the substantial justice other than abstract justice in the new legal thoughts, the legal policy determining the scope of damages turns to the emphasis of "limited economic freedom and more fair burden of contractual risk" and "maximum redress to victims under the theory to care for concrete persons". Adapting to the transition of legal policy, many countries' legislations or judgments extend non-fault liability and the scope of damages to non-property damage as their positive responses.

There are obvious deficiencies in the scope of damages in Chinese tort law and contract law, and the draft of the Tort Liability Law of PRC for Third Discussion has also little progress. To amend and perfect Chinese law of damages, the transition of legal policy in other countries and the corresponding developments in the scope of damages should be considered and used for reference. Only then can a more appropriate scope of damages be determined in the near future.

Key Words: the scope of damages, legal policy, freedom of act, relief of victim

Abstract: It has become a problem whether the timed online TV broadcasting satisfies the element stipulated in the definition of the right of communication through network in Copyright Law of PRC, that is, whether the users can access online TV series "from a place and at a time individually chosen by them". This element was transplanted from Article 8 of the WIPO Copyright Treaty (WCT).

Both the WCT and WPPT address the challenges posed by today's digital technologies, for this reason, they have sometimes been referred to as the "Internet Treaties". Article 8 of the WCT intends to clarify that the transmission of works in digital networks should be the object of an exclusive right of the author or other copyright owner. "From a place and at a time individually chosen by them" in Article 8 is used to convey the interactive nature of the transmission in digital networks. The purpose of the right of communication through information network in the Copyright Law of PRC is the same as that of the Article 8 of the WCT. Because the transmission in digital networks is characterized by the interactive nature, and the interactive nature is conveyed by "from a place and at a time individually chosen by them", the transmission in digital networks can naturally satisfy such element.

A lot of real copyright infringement cases indicate that the understanding of the majority of people in relevant industries is correct, so the application of the right of communication through information network should accord with this understanding. Whether digital signals begin to transmit in digital networks to a certain user depends on that user's decision from a place and at a time individually chosen by him, so even literally interpreted, various ways of transmission in digital networks, including online TV broadcasting, are all within the scope of the right of communication through information network.

In fact, "from a place and at a time individually chosen by them" can't describe the interactive nature of digital transmission accurately. To amend the Copyright Law to correct the defects and to establish a right worthy of the name of communication through information network, this essay proposes deleting "from a place and at a time individually chosen by them" from the definition, and merging the right of broadcasting with the right of communication through information network.

Key Words: copyright, the right of communication through information network, WCT, transmission in digital networks

Abstract: The fundamental purpose of security regulation should find its answers in security market. While the functions of security market are known as direct financing and pricing, the legal framework of security regulation should be submitted to decrease transaction costs and improve

market efficiency according to economic analysis of law. However, making "to improve market efficiency" the only purpose couldn't be considered as a comprehensive thinking.

Firstly, it still doesn't reach the level of effective market even in the developed countries' markets. The fact of irrational investment is very widespread among the world's markets, so effective pricing to improve market's efficiency through considering information may not be available. Moreover, the key point of economic analysis is pricing, but there do exist other important functions in the security market, such as the distribution of shares and system risk. These issues couldn't be resolved simply by the means of pricing.

Secondly, whether the purpose of security regulation should only be efficiency, or should include other lists like fairness and justice? In fact, security market is a confidence market where investors' confidence comes from the operation system of the market. The requirements on fairness and justice are what make investors have confidence. If investors lost their confidence, they will choose to leave the market and make the pricing procedure nonsense.

Thirdly, the contents of security law are in accordance with the rationales of natural law. While forbidding insider transaction and requirement on information disclosure are able to interpret what are fairness and justice, the rule of anti-fraud means a good way to reach "common good". And from the point of view of natural law, there isn't fundament contradiction between efficiency and good. The purposes of security regulation should include the protection of investors and improving efficiency within limited ration.

Finally, the insights and solutions offered by natural law reasoning may provide a different regulatory regime. As to the benefit conflict of security analysts, while the economic analysis' resolving plan considers the necessity of relative regulation regime, listing other alternative regulative methods and evaluating the cost and benefit of all methods, the natural law puts emphasis on the mixture of mandatory and non-mandatory methods to improve the social good.

Key Words: security regulation, purpose, route, economic analysis of law, natural law

Abstract: The tradition of public law is a running river. Its historical evolution has undergone two phases, i.e., the period when the notions of public law are its main carrier and the

period when the theories are its main carrier. And it will turn into the third phase, namely, the phase of the general or integrated theory. The general theory of public law means that it has a particular theoretical foundation, constructs an independent and precise system of public law, integrates the traditions containing in the notions and theories of public law, and produces specific knowledge of public law openly. Only the general theory of public law can make all the traditions of public law carried by the notions and theories become "concourse", escape "being broken" and come down incessantly.

The evolution of public law theory embraces two variables, that is, deconstruction and construction. The interplay between them brings about a gradual-and-partial developing pattern. This developing pattern makes the theory of public law depart from the theories of politics and nation, inherit lots of traditions, unearth the inherent mechanism of public law, and form the key minds of public law. However, this pattern has entered into a condition which can not be hold on and needs being broken through now.

To a certain extent, the uniform science of public law plays the dual roles of succeeding the tradition and developing new theories. Of course, every innovation of theory has changed the original tradition, and has been kept in the tradition at the same time. This process brings about the growth of new tradition. Equally, the selective succession and alteration of the tradition by the uniform science of public law reconstruct the system of traditional public law, thus it becomes a new pattern of studying public law.

The generation and developing path of the uniform science of public law have maintained two kinds of trends, i.e., opening and integrating. In conclusion, in the long running river of public law tradition, the development and innovation of modern public law theory should look back upon the past, lay foots on the status quo, and forecast the future. The innovation of modern theory should be the inheritance and development of the tradition, and should be the growth of a new tradition at the same time.

Key Words: the tradition of public law, the theory of public law, uniform science of public law

Abstract: It is an eternal problem about how to deal with the conflict between the principle of due process and administrative efficiency. When dealing with the administrative action violating some procedures but with a correct decision, the very problem emerges. There may be many ways to deal with the trouble. As an eclectic method, making an amendment has been advocated by many scholars recently.

The amendment, as a remedy, has been prescribed in Chongqing Administrative Procedure Interim Regulations (Expert Propositional Draft, 2003), Administrative Procedure Act of the People's Republic of China (Expert Propositional Draft, 2004), and especially Hunan Provincial Administrative Procedure Provisions (implemented on October 1st, 2008). But there are many differences among these three documents. What's more, the amendment is not compatible with other remedies about unlawful administrative actions, such as revocation, correction and voidance. So there are still a lot of problems to be resolved concerning to amendment.

The amendment has been prescribed in the Administrative Procedure Act of Germany, which was put into force in 1976, and the ideas of amendment embodied in the above three documents derived just from Germany. In other countries, such as France, Portugal, Japan, Korea, Britain and America, although the comparable legal system doesn't exist, they take also a lenient policy on administrative actions which only disobey procedure provisions. Therefore, it is feasible to use German amendment for reference, although appropriate alteration is necessary.

The particular circumstances of a nation decide the method selection, such as the economic and politic aim, the citizen's attitude to principle of procedural legality and efficiency, and the citizen's opinion on the procedural independent value and the procedure instrumentalism, etc. According to the situations of China at present, it is necessary to prescribe amendment system in the Administrative Procedure Act of China in the future. And we should choose a stricter policy than Germany. At least, when an administrator does not hold necessary hearing or give sufficient reasons, the decisions made by him should not be legitimated by amendment. What's more, this system should be compatible with other remedies for violation of procedures.

Key Words: administrative action, violation of legal procedure, amendment

Abstract: Natural monopoly industry is the main field of authorized legislation. From the view of efficiency of modern regulation, authorized legislation should control its agent cost, which also becomes the central content of the governance structure of natural monopoly industry of many countries. There are mainly two modes to control agent cost, that is, the single control mode and the structure control mode.

To control the scope of authorization, to make authorizing rules, to maintain the independency of regulation organs and to perfect the procedure of authorized legislation are the four main specific tools used by many countries adopting the single control mode, although different countries have different emphasis. Although the single control mode can decrease the agent cost of authorized legislation, it educes new cost which also should be controlled. To overcome this defect, different control tools should be integrated to support each other, thus the cost control mode shows a transition from the single control mode to the structure one.

The structure control mode has introduced a variety of control tools into itself. It analyzes the relationships between these tools and agent cost, and selects different system tools according to different circumstances. The structure control mode can not only realize the integrity of different functions of different control tools, but also reduce the side effects of different tools and realize their functional complementation. The structure control mode has also revealed that, in different institutional endowments, the systematic tools of different countries to control agent cost can be variable and multiple.

The reality of Chinese regulation reform of natural monopoly industry shows that the decision maker has selected the single control mode and neglected the effect of the structure mode, and such approach selection cannot adapt to the need of reform. The ideal mode to control the agent cost of Chinese natural monopoly industry authorized legislation should make an organic integration of various control tools to construct a structure control mode. And the adjustment of authorization scope should be a priority in the short-time plan.

Key Words: natural monopoly industry, authorized legislation, cost control mode

Abstract: Both the right to self-determination of peoples and territorial integrity of a state are fundamental principles of contemporary international law. On the whole, they are harmonized and inseparably connected to each other and have no contradiction between them.

The right to self-determination of peoples has no effect of altering the existing boundaries between countries. It is clear that international law does not recognize a general right of minority to secede unilaterally from their "parent" state. International law attaches great importance to the territorial integrity of a state and leaves the issue of unilateral secession as a domestic affair to the "parent" state. International society also has the duty not to recognize the unilateral secession. Moreover, international law has neither affirmed nor denied the right to remedial secession of minority. Whether the alleged right to secession in the name of self-determination should be permitted or not should be judged case by case.

In the other hand, international law does not exclude the possibility of secession arrangements reached by free agreements of all parties concerned. It is necessary for a legitimate secession to conform to the self-determination of related people. States established in violation of rights to equality and self-determination should not be recognized as subjects of international law.

International society should realize the concordance and harmony between self-determination of peoples and territorial integrity of a state by various ways, among which to protect the rights of members of minority is a necessary requirement. States should avoid external self-determination or secession through "good governance" or "internal self-determination", i.e., minority should obtain the status of subjects of autonomy or other forms of self-determination. It is the duty of states to promote the right to self-determination of peoples and protect the rights of minority in accordance with the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992.

Peaceful methods and means should be used to settle the conflicts arising in relation to secession. Nevertheless, a state is entitled to use adequate force, including armed force, to defend its sovereignty, territorial integrity and political unity. In any case, universally recognized norms related to human rights should be respected.

Key Words: right to self-determination of peoples, territorial integrity of a state, unilateral secession

Abstract: As a special legal problem, characterization in private international law is deeply embedded in Savigney's theory, harassing scholars of several generations in this field. Actually, characterization focuses on the interpretation of operative facts which are part of a conflict rule, so it relates only to the process of choice-of-law, and has nothing to do with the civil judicial jurisdiction.

Among fact, cause of action, legal relationship and legal rule, which is the object of characterization? To a great extent, the confusion girding this issue gives rise to all the controversies around characterization. The answer should be the substantive legal rules (mainly the foreign substantive rules), based on which the parties state their facts and assert their rights. In fact, characterization reflects a mutual communication between legal rules (especially the foreign rules) and forum's conflicts rules. Consequently, the key issues of characterization are to classify foreign legal rules and to resolve the conflicts of characterization.

When the object of characterization is accepted as legal rules, various theories or approaches on characterization, their strongpoint and weakness as well, will be easily understood. "The lex fori doctrine" prefers the conflict rules, while "the lex cause doctrine" prefers the substantive legal rules, both of which stand at the opposite ends of the spectrum, reflecting one side of the same coin and neglecting the other. However, two other approaches, that is, "the comparative law and analytical law doctrine" and "the new lex fori doctrine", attempt to surpass the mentioned two theories by trying to take both ends of the spectrum into consideration. Comparatively, "the new lex fori doctrine" deeply touches the nature of characterization, while "the comparative law and analytical law doctrine" is too Utopian to be practical.

In conclusion, the way to characterization remains to be a flexible and unsettled process, like swing of the pendulum, oscillating between the two extremes of the conflict rules and the substantive rules, and finally stopping at a certain point based on specific cases. The issue of characterization, naturally, should be resolved by providing the judges with guidance from theories, principles and approaches, rather than enacting legislative rules by parliament.

Key Words: characterization, the lex fori theory, the lex causae theory, the new lex fori theory