CHINESE JOURNAL OF LAW

Vol.31, No.4, July 2009

Abstract: This article focuses on the criticism of the concept of judicial acceptability whose central issue is that judges can use public opinions to displace the legal standards in legal reasoning. This concept has two factors. Firstly, the public opinions, like legal standards, are justifying reasons, so that they could be the ground of judicial decision-making. Secondly, to pursue the value of judicial democracy, public opinions must be reflected in the judicial process. However, through careful re-examination of those factors, both are implausible.

Due to the following two aspects, judicial acceptability is a concept without foundations. On the one hand, public opinions could not be converted to justifying reasons. In legal reasoning, judges must give arguments to support the decisions that they render. Those arguments are reasons for the decisions. Judges could give two kinds of reasons: justifying reasons and explanatory reasons. The former aims to justify the decisions, and the latter aims to explain why those decisions occurred. Therefore, the explanatory reasons have no ability to justify the decisions. Undoubtedly, because the nature of public opinions is not necessary "(moral) good" and they are indeterminate, public opinions are the explanatory reasons of decisions, not justifying ones. So judges could not take those opinions as justification for the decisions in legal reasoning.

On the other hand, democracy is the fundamental political principle in modern society, so the judicial democracy becomes the fundamental principle of legal reasoning. There are two kinds of judicial democracy: directly judicial democracy and indirectly judicial democracy. The supporters of the concept of judicial acceptability think that using public opinions in legal reasoning will match the requirement of judicial democracy. But in fact, judicial acceptability only matches the directly judicial democracy. More over, the indirectly judicial democracy could correspond with the core of modern political democracy, Majority Votes, and judicial duty of

judges better. Therefore, judicial democracy cannot become the foundation of judicial acceptability either.

Key Words: judicial acceptability, public opinion, justifying reason, judicial democracy

2、A Structural Analysis of Basic Forms of Legal Reasoning…… *Lei Lei*(18)

Abstract: The core of theoretical problem about legal reasoning lies in its structure, on which the present studies on basic forms of legal reasoning concentrate. Legal Reasoning describes a process, during which men apply legal reasons discursively und inter-subjectively aiming at a rational conclusion. Taken those presuppositions, the basic forms of legal reasoning should have three characteristics, viz. formality, necessity, and specificity. The "Four-divided Model" by Arthur Kaufmann and "Three-divided Model" by Robert Alexy provide both good starts for this research. Comparatively, the latter model is sounder, but there remain some demerits with it. On the one hand, only subsumption (deduction), balance and analogy share above three fundamental characteristics of legal reasoning. Thus understood, on the other hand, they have hitherto not yet been inserted into a dynamic procedure of legal argumentation.

As normative argumentation, basic forms of legal reasoning are bound to reflect the nature of discursive rationality. Thus we have to establish some new analytical prerequisites, that is, the structure distinction between legal rules and legal principles, the judgment of the existence of rule holes and its relation with rules, and the different corresponding relations between the stages and premises of legal reasoning and the basic forms of it.

Subsumption is apt to the first ("construction of arguments") and third ("reconstruction of arguments") stages, in the meanwhile men should remember well that the structures of these two stages are different. Balance applies to the second stage ("cross attacks of arguments"), and analogy, when thought as the chief mean and method to fulfill rule hole, just strides across two stages, viz. construction of arguments and reconstruction of arguments. Subsumption stands at the beginning and the end of balance process, while it is yet connected to the upshot of analogy course. Analogy, when major premises with "relevant similarity" have been found, can be transformed into subsumption. Through partial reducibility thesis, analogy can also be transformed into balance. Subsupmtion, balance and analogy constitute an integral part of a normative legal reasoning model.

Key Words: subsumption, balance, analogy, stage of argumentation, discursive

Abstract: Although they can both make bona fide third party become the owner of a thing to the detriment of the real owner, it is necessary to note that the public trust of estate register and bona fide acquisition are very distinct mechanisms to protect reasonable reliance in property transaction.

It is very vital for bone fide acquisition to balance the benefits of real owner and bone fide third party, because to a great extent the actual possession of chattel does not always mean that the possessor of the chattel is the real owner. Compared with the actual possession of chattel, the estate register is almost endowed with absolute credibility given that it can display adequately the type and nature of real rights. That is to say, with the scientific system of registration, the estate register can be regarded as the real appearance of real property.

Additionally, there are also many differences in legal effects between public trust of estate register and bona fide acquisition. The legal effect of bone fide acquisition is no more than making bone fide third party to acquire the ownership of chattel. On the other hand, the legal effect of public trust of estate register is rather complicated. It protects both positive reliance and negative reliance, now that various kinds of real rights can coexist on the same land. Furthermore, its positive reliance protection is also different from bone fide acquisition, because it includes the following effects: acquiring real right from the real owner, receiving performance from a debtor, obtaining the priority of registering in register, etc.

Considering the above-mentioned differences, it is inadvisable to remove the borderline between the public trust of estate register and bone fide acquisition. In other words, it is no exaggeration to say that it will acquire rather limited effect to protect the transaction security of estate only through the pattern of bone fide acquisition. Unfortunately, The Property Law of PRC finally adopts the legal thought which treats equally the reliance protection in the transaction of chattel and estate. This article therefore suggests that §106 of the Property Law be interpreted narrowly in order to fulfill its function effectively, namely it only be applied to the transaction of chattel, and the reliance protection of real property be carried out by §16 of the Property Law.

Key Words: subjective right, reliance protection, bona fide acquisition, public trust of estate register

Abstract: §6 of the judicial interpretation of supreme people's court on compensation for personal injury has brought the theory of duty of care derived from German cases into Chinese Law. Such importation is of some significance for our judicial practice to resolve the difficulty it faces concerning liability for omissions and indirect infringement.

Although this theory can crystallize §106(2) of General Principles of the Civil Law on the problem of duty of act, such problem is not the urgent difficulty faced by our judicial practice. Firstly, §106(2) of General Principles of the Civil Law has not excluded the liability for omissions or indirect infringement. Secondly, the origins of duties of act are not limited to the special provisions of legislation according to our theory. Thirdly, in the typical cases as the background of such importation, courts have not ruled such cases on the absence of duty.

In fact, it is the structural feature of omission and indirect infringement that troubles our courts. That is to say, there are often intervening acts of third parties or victims before the occurrence of the damage, and such intervening acts are the direct causes of the damage. This feature has produced the difficulty on the problem of causation.

The duty of care can in some extent resolve the hard problem of causation. If the duty is to protect the person within its protective scope from infringed by a third party, or to prevent a third party within its controlling scope from infringing others, then once such duty is breached, the requisite of causation is also satisfied. On the other hand, if the duty has nothing to do with the act of a third party, then whether the causation between the conduct breaching the duty and the damage is interrupted or not, cannot be judged by whether such duty is breached or not.

§14 of the Draft of Tort Liability Law (proposed for the second discussion) has not taken into account and prepared for the various circumstances of intervening acts of third parties, has denied in general the existing space of liability for indirect infringement, and will bring about serious negative influence.

Key Words: duty of care, liability for omission, indirect infringement, duty of act, causation

Abstracts: The current system of liability for medical damage, which has developed along with the on-going of the reform and opening-up of China, has undergone three phases, including the phase of limiting the patients' claim for damages, the phase of increasing the burden of proof of the medical institutions which leads to the defense medical treatments, and the phase of re-thinking and reflection. The current system consists of three double-track systems in the cause of action, the compensation standard for medical damage and the identification of liability, and has a dual structure by differentiating the liability for medical accidents from the liability for medical faults. Such structure reflects the reality of the chaos in the application of law.

The draft of the tort liability law provides an opportunity for reforming such system. The basic direction of reform is to insist on the equality of personality and unify the system of liability for medical damage. The basic requirement of reform is to balance the interests of the victims, the medical institutions and all the patients, and the fault liability principle is the best balancer to adjust them. The principle of equality in litigation weapon should be insisted on to balance the opportunities and interests of litigants.

Based on these principles, a single-track and unified system of liability for medical damage will be constructed. To realize this construction, firstly, the concept of liability for medical damage should be unified by abandoning the concepts of liability for medical accident and liability for medical fault. Secondly, the liability for medical damage should be divided into three categories, that is, the liability for medical technical damage, the liability for medical ethical damage and the liability for medical product damage, and different imputation principles should be applied in different categories. Thirdly, the general standard of medical fault is the current medical level. Fourthly, the burden of proof in the medical disputes should be scientifically allocated and the compensation standard for personal injury should be unified and limited. Lastly, the nature of liability identification for medical damage should be judicial identification.

Key Words: medical damage, liability for compensation, relationship of interest, system reform

Abstract: The legal protection of "ideas" is a basic and critical issue that many countries' creative industry has to face during its recent development. As one kind of burgeoning intellectual product, "ideas" has close relationship with works, trademarks and other traditional intellectual products.

But "ideas" has its independent contents and value. In general, "ideas" should possess some novelty and concreteness, although the judgment criteria are different in different countries.

In the U.S.A., which has the most abundant experiences about the legal protection of "ideas", a variety of legal theories concerning its jurisprudence foundation have been developed during the long-term evolution, such as the property theory, the contract theory, the unjust enrichment theory and the confidence relationship theory, etc. These theories and the corresponding legal protection approaches have important value for many other countries to learn from them.

In China, the theories and the judicial practice of the legal protection of "ideas" are in leading strings for the time being. In practice, people whose ideas have been infringed seek relief mainly by the intellectual property law (the copyright law and the anti-unfair-competition law). In some cases, the plaintiffs also seek relief through the contract law or the basic principles of civil law. But the number of the cases sued to the court is small, and there are few plaintiffs who win the case in the end, with the absence of the concrete rules in the present law and the lag of the legal research.

This article finally holds that, in order to guarantee the healthy development of the creative industry, China should construct its legal protection system from three aspects. Firstly, in terms of its attribute, we should define "ideas" as a type of independent intellectual property. Secondly, in terms of its protection scope, the criteria of relative novelty and concreteness of ideas should be adhered to. Thirdly, in terms of its protection patterns, we should establish a systematic protection mechanism with the copyright law in dominance and the other laws in supplement.

Key Words: ideas, legal protection, copyright

Abstract：The discussion of Xu Ting Case has once focused on the question of whether Xu Ting's behavior constitutes theft or not. In the view of criminal legal dogmatic, it is a typical theft of financial institutions, for his behavior is secret and ATM is of course one part of financial institutions. So the first instance condemned Xu Ting to life imprisonment. But to the public opinions, such punishment is too heavy to be accepted, and the second instance of Xu Ting Case is a concession of criminal jurisdiction affronting public opinions.

From the standpoint of criminal legal dogmatic, there is no positive law basis to use the theory of probability of anticipation to mitigate Xu Ting's criminal liability. Other scholars argue that the special commutation system in Chinese Criminal Law can be applied, or argue to differentiate the sentencing situations of "extremely huge amount" in general theft and theft of financial institutions, but such proposals are not very successful. The premise of criminal legal dogmatic is the trust in the justification of criminal law in force, so such proposals are the only solutions it can provide. This article thinks that, the dilemma of criminal legal dogmatic can be resolved only by the intervention of the constitutional legal dogmatic, which means that we should check the constitutionality of the aggravation article of theft in Criminal Code, i.e. § 264.

In modern times, as to the stabilization and prosperity of national economy and society, financial institutions play a more and more important role than other professions. The security of the property of financial institutions, especially of the banks, is the footstone of the stabilization of the national economy. So it can be permitted to give financial institutions special and suitable consideration in criminal law. But from the view of the principle of proportionality and the systematic interpretation, we must conclude that the aggravation article of theft in the Criminal Code, i.e. § 264, which provides only death or life imprisonment as the penalties, goes too far beyond the legislative purpose, and thus is invalid for violating § 33, para. 2 of the Constitution.

Key Words: Xu Ting Case, theft, aggravation article of theft, equality in Constitution, the principle of proportionality

Abstract: Quantity of crime, a subordinate legal terminology that applies to all complex criminal patterns, is different from typical single crime and typical plural crime. The primary task of the research into the theory of quantity of crime is to determinate whether a certain crime is a single crime or a plural one, and to reveal the essential characteristics and constituting elements of all kinds of complicated quantity of crime. The introduction of a systematic theory of quantity of crime is conducive not only to the perfection of criminal judicature, criminal legislation and criminal theory, but also to the prevention of repetitive evaluation of a single crime and the minimization of influx of judges' subjective opinions, thus contribute to the realization of justice in criminal law.

The theory of quantity of crime, which focuses its attention on problemes such as the determination of the number of crime and the application of penalty thereto, should adhere to the dualistic theory that integrate both the crime theory and penalty theory. With respect to the judging criteria of the quantity of crime, a clear distinction should be made between the criteria in a formal sense and the criteria in a legal appraisal sense. The former takes only the constituting elements of a crime into account, while the latter considers such principles as prosecution efficiency, balance between crime and penalty, etc. Generally speaking, according to the principle of balance between crime and penalty, single crime gets single penalty and plural crime get homologous penalties. But to realize substantive balance, plural crime may sometimes get only one penalty. The prosecution efficiency principle requires that, in some situations, the damage caused by the plural crime must be accumulated, and the criminal act will be judged as one crime pursuant to law.

The quantity of crime has two basic features, including its plural and atypical elements in the constitution of a crime and the denial of cumulative punishment thereof. The quantity of crime should be divided into two categories, that is, quantity of crime in statutory pattern, such as combinative offense and aggregated consequential offense, etc., and quantity of crime in rewarding pattern, such as implicated offense and consecutive offense, etc.

Key Words: quantity of crime, judging criterion, statutory pattern, rewarding pattern

Abstract: The duty of procurators to seek objectiveness refers to the duty that procurators go beyond their prosecutorial stand and stick to objectiveness and justice. The duty to seek objectiveness is a basic requirement of the prosecutorial system, because the establishment of prosecutorial system by state is to safeguard legal orders and social justice. However, due to different judicial backgrounds, such duty has taken two different forms respectively represented by Germany and the United States.

The significance of such duty can be seen from the contradictions and difficulties in realizing it. On the one hand, procurators need to implement their function of fighting crimes, so that they must be enthusiastic prosecutors. On the other hand, the duty to seek objectiveness requires them to act as calm and impartial judges. Obviously, these two roles are contradictory,

and this contradiction impedes the performance of the duty to seek objectiveness. It is to prevent and eliminate the unilateralism and abuse of power due to this contradictory position that the law requires specially that procurators should perform their duty objectively. Thus we should notice the limitation of the duty to seek objectiveness and stay alert against its negative effects. Meanwhile, we should guarantee the realization of such duty through external mechanisms.

In our country, due to the political and judicial context, it is extremely necessary to establish the duty of procurators to seek objectiveness, especially under such a background in which the supervisory function of the procuratorial organs is further strengthened. For the realization of such duty, we need to make a series of reform, such as re-examining our internal Performance Appraisal System, balancing unification and independence, etc. We should pay special attention to the maintenance of righteous litigious structure and the respect of litigious laws.

Key Words: prosecutorial system, duty to seek objectiveness, judicial fairness, legal supervision

Abstract: In the instant case between China and Japan in the East China Sea, right or title to continental shelf is the central issue of dispute. The law on continental shelf has evolved, from the natural prolongation principle confirmed in North Sea Continental Shelf Case in 1969, to a rule more favorably considering "distance criterion". Therefore, it is necessary to take the time factor into account.

Time factor can be approached from three perspectives, that is, critical date, inter-temporal law and contemporary law. Critical date is the date when the dispute was given rise to with a concrete issue. Inter-temporal law should be considered when legal relationship had been constructed before the change of the law, and contemporary law applies only when legal relationship was constructed after the change of the law. The mere fact that Sino-Japanese dispute over East China Sea has long before emerged indicates that the time factor in the dispute is not simply a contemporary law question as Japan asserts.

The critical date in this dispute can be dated back to 1974 when China protested the Japanese-South Korean continental shelf agreement. If so, the changes in the law and fact after 1974 would be excluded and the applicable law should be the principle of natural prolongation.

Moreover, if the critical date is deemed to be the year of 1996, when conflicting claims on the legal basis on continental shelf became distinct, inter-temporal law needs to be discussed.

In such a case, if the change in law (incorporating distance criterion) is merely a treaty rule of UNCLOS, non-retroactivity principle in the law of treaties would neatly determine the application of natural prolongation principle established in previous law. In case that the change in law is an alleged customary rule emerged around the year of 1982, were this subsequent law applied, a reasonable long period of time from the previous law would have been required. It is impossible in the present case to draw a conclusion that the evolution of the law on continental shelf over just twelve years (1969-1982) could be reasonably taken as a long period of time. Therefore, even critical date were to be set in the year of 1996, the applicable law is still natural prolongation principle.

Key Words: Sino-Japanese dispute over East China Sea, continental shelf, inter-temporal law, critical date

Abstract: Mian Ning County belongs to Si Chuan Province, where live several national minorities together. Mian Ning has saved a great deal of judicial files of Qing Dynasty, which can re-appear the primitive state of local judicial practice of south west national minorities. These files are of great value for the study of the dispute settlement mechanism in minority areas, the legal awareness and legal ideas of minorities, and the application of state legislations and customs in judicature. This article focuses on the bill of action.

There are several kinds of bills of action in the Mian Ning judical files, which can be divided into three categories according to modern view, that is, bills of complaint, bills of defense and bills of settlement. Some of the bills are formative, and some are not. The usage of bills without fixed format in Mian Ning in the Qing Dynasty shows that, the requirements of format were not very strict in the judicial practice in minority areas. As to bills with fixed format, such format inflicted some limitations on litigations, such as limitations on claims, reasons, number of plaintiffs, status of witnesses, and so on. These limitations had something to do with the customs of local national minorities for dispute settlement.

Because Mian Ning is a compact community of nationalities, the custom law of each minority can only be applied in its inner disputes, and the disputes between persons with different nationalities can only be settled according to formal state legislations. It had been very common that local national minorities selected litigations as means to settle disputes. That is to say, the governance of state on national minority areas had been very strong in Qing Dynasty, and state legislations had already taken hold of an absolute position. To sum up, in Qing Dynasty, state legislations had already penetrated into south west national minority areas, although in the course of disputes settlement, some flexibility also existed in the selection of legal basis.

Key Words: Mian Ning's files of Qing Dynasty, legal history of national minority, legal history of Qing Dynasty