CHINESE JOURNAL OF LAW

Vol.33, No.3, May 2011

Abstract: The actual operation of article 135 of the current Constitution of the People's Republic of China, which defines the authority among the people's courts, the people's procuratorates and the public security organs, has a substantial impact on the power and functions of these three organs. Before the promulgation of the Criminal Procedure Law (1979) and the Constitution (1982), the three organs had formed a relationship of functional division, mutual cooperation and mutual constraint. In this relationship, the public security organs had a prior status, and the three organs should accept the leadership of the political-legal department in charge.

The constitutional principle of "dividing their functions, each taking responsibility for its own work, coordinating their efforts and checking each other" should be emphasized as a complete system of logic and norms. "To divide their functions, each taking responsibility for its own work" reflects their independent constitutional status and their limited power. "To coordinate their efforts" shows their convergence in the judicial procedures. "To check each other" is required by the core value of the relationship between the three organs and shows two kinds of subordinate relationship. In terms of the value of the concept, efficiency is subject to fair, and cooperation is subject to constraints. On the other hand, as for the judicial procedures, investigation is subject to prosecution, while prosecution is subject to trial. This constitutional principle is based on the correct recognition of different state power, reflects the attribute of trial power, procuratorial power and investigative power, and ensures the mutual independence of these three kinds of power. The real relationship between the three organs should be adjusted according to constitutional provisions and values.

Key Words: constitutional principle, division of judicial power, judicial reform

Abstract: The Administrative Procedure Law of the People's Republic of China (APL) prescribes at article 54 (2) that, a specific administrative act should be annulled or partially annulled by judgment, if the act has been undertaken

in one of the following five circumstances: a. inadequacy of essential evidence; b. erroneous application of the law or regulations; c. violation of legal procedure; d. exceeding authority; or e. abuse of powers. This closed legislative model has led to great difficulties to judicial interpretation and later legislation. For example, if an act is made without any legal basis or its content violates a law, which one of the five circumstances should the act be classified into? In fact, the statutory circumstance for annulling of a specific administrative act is just a guide to judicial review, not a control.

For this reason, the classification of annulling circumstances should be based on the classification of legal norms, and take an open legislative structure. According to their different functions, administrative legal norms can be roughly classified into evidential norms, procedural norms, substantive norms (including organizational norms and conduct norms), interpretative norms and applicative ones. Violating different kinds of norms means different modes of lawbreaking, which constitutes the basic requirements of annulling a specific administrative act. In future, when amends APL or makes the Administrative Procedure Act of the People's Republic of China (APA), another three circumstances should be added into the circumstances for annulling of a specific administrative act, where the act has no legal basis, the content of the act violates a law, or the act has other circumstances which will infringe the legitimate rights and interests of citizens, corporations or other organizations.

Key Words: administrative procedure law, annulling a specific administrative act, lawbreaking mode of an administrative act

Abstract: The social security system has the functions of reducing social poverty, shrinking income differences, facilitating economic development and maintaining social stability. It can support the habitant with dwellings and ensure workers with higher knowledge and skills. It thus is the legal foundation of the harmonized development of economy and society.

The social security system established after the foundation of our country had greatly encouraged the initiative of workers to construct our socialistic country, promoted the development of state economy and laid the foundation of an independent industrialized system. The social security system established after the reform of economic regime has also exerted important effects in pushing economic development, improving people's living conditions and reducing poverty. However, due to its narrow applicative scope and low level of overall arrangement, and also due to the improper mode of medical insurance, the multiple collection of social security fee, the poor management of funds, the scarce investment of government in the compulsory education, and so on, although our economic construction has

achieved great accomplishment, our social development is delayed severely. Thus the population in poverty shows the increasing trend and social problems occur frequently.

Experiences from home and abroad have shown that, the soundness of the social security system is not solely determined by the level of economic development, and the social ideas of legislation have also great importance on the construction of social security system. So, the legislative ideas of social justice and social solidarity should go through the construction and perfection of our social security system.

Key Words: social security system, social insurance law, harmonized development of economy and society, rule of law

Abstract: The Constitution and laws of China (made by NPC and the Standing Committee of NPC) stipulates clearly that the expropriation of land should be based on the need of public interest, but in practice, the expropriation of land is sometimes implemented for a non-public purpose. Thus the land expropriation system has been alienated to resolve the practical problem of meeting the land demand due to the development of cities and industries. This alienation stems from the characteristic land system and construction land use system in China. The Regulations on the Administration of the Demolition and Removal of Urban Houses demonstrates the alienation of land expropriation system in China, which has induced several social problems.

The Regulations on the Expropriation of Houses on State-owned Land and Compensation Therefore has been issued by the State Council to reconstruct the system of land expropriation. However, it has its own defects and limitations, and many obstacles will be encountered in the process of its carrying out. To make the new system of land expropriation function well, we should not only reform the current construction land use system, but also take measures to satisfy the land demand for non-public interest.

To meet the land demand for non-public interest, negotiation between two parties can certainly be used. But under certain special circumstances, voting by the related residents is also an alternative way and it is avail to reduce the cost and risk of the transaction. The theory that the majority's interest is superior to the interest of the minority lays the foundation of this way. Although majority decision can justify the collective interest of the related residents, the abuse of the majority decision should also be avoided.

Key Words: property right, expropriation of land, demolition and removal of house, public interest, collective interest

Abstract: The reconstruction of condominium building is the most difficult problem in its management. However, in practice, the reconstruction is sometimes quite necessary or even urgent at that time. There are differences between the reconstruction of condominium building and the rebuilding, remodeling and additional building. In comparative law, there are two vote models for the reconstruction, i.e., the unanimous decision and the majority decision. The latter has been taken by our Real Property Law.

The reconstruction of condominium building in China should learn from the experience of Japanese law and establish concrete procedures for actual practice. The selling out claim and the purchasing back claim should be established during the reconstruction for the adjustment of rights among owners, and the right and interest of a third party should also be adjusted properly to carry out the reconstruction smoothly. The reconstruction should be carried out by the reconstruction group, which is different from the original owner group (condominium owner group) in its composing members, foundation purpose and dismissal time. As for the reconstruction of a specific condominium building and the whole condominium buildings in one residential area, the system of duplicate majority decision in Japanese law should be adopted.

The partial loss and destruction of the condominium building is the common reason for restoration (repair) and reconstruction. However, the restoration is under the prerequisite that the original building will be maintained, while the reconstruction means the demolishment of original condominium building and the rebuilding of a new one. Moreover, the restoration is carried out by the owner(s) or the administrator of the building, while the reconstruction is carried out by the reconstruction group. In the event the building is totally destroyed due to earthquake, fire, flood and typhoon, usually an “Act of Special Measures on Rebuilding” will be drafted to solve this problem in the comparative law.

Key Words: condominium, reconstruction, procedure of reconstruction

Abstract: The development of the knowledge economy and the rising of the digital network have diversified the knowledge innovation and transmission increasingly. The technical innovation is increasingly taking on heterogeneity in different industries and departments. Furthermore, the creation and transmission of literature, art and science have diversified and the trademark shows a binary distinction on using on line or not. These have changed the ecological environment of the intellectual property system.

The immense change of its ecological environment further exposes the congenital defects of the intellectual property system and makes it confront with unprecedented crises. The balances between copyright protection and copyright limitation and between promoting creation and promoting dissemination in traditional copyright system have been broken. The patent system has nearly been broken because of poor quality or questionable patent, patent thicket, difficulties in the commercialization of the patented products and public health crisis caused by patenting of increasingly intensive and heterogeneous technology. And there are some negative effects brought about by the trademark expansion. Therefore, people not only reform the current intellectual property system through improving patent system, perfecting copyright system and limiting the expansion of trademark, but also begin to practice and probe the alternative or supplementary mode for the intellectual property system, such as innovation award fund system, patent purchase system, none-exclusive patent system, public conservancy, open access, etc.

Because of the diversity, substitutability and environmental adaptability of innovation incentive system, only a diverse system can realize an optimal incentive on knowledge innovation and dissemination in the heterogeneous intellectual domains and realize the balance between knowledge innovation and dissemination. The diverse mode is the evitable choice of the intellectual property system in the future.

Key Words: intellectual property system, knowledge innovation, knowledge dissemination, substitutability, environmental adaptability

Abstract: Business associations operate through organizational rules in the process of internal decision-making and external obligation-performing or liability-undertaking. This paper concentrates on the functions and limits of organizational rules, especially their relationship with the contracts among members of the association or between the members and the association.

The nature of organizational rules lies in the functions of business associations. Firstly, with the help of organizational rules, business association acquires its personality. Organizational rules guarantee the association's independence by protecting it from the intervention of its members. If the members do not perform their obligations such as capital contribution, the association can sue for their performance. Meanwhile, since the members and the association are both independent persons, the association has no right to impose limitations on the transfer of shares between members or to an outside acquirer either. Secondly, organizational rules can also be viewed as the rules for collective decision-making. They set out a framework for further negotiation among the members and are more efficient compared to the "case for case" decision-making. Thirdly, organizational rules serve the function of maintaining the independent property right of the association. Business association law in this context is a branch of

property law. This also explains why the organizational rules apply once the business association enters into transactions with third parties and why the organizational rules, instead of contracts among members, should apply when the creditors' rights are at stake.

Key Words: organizational rule, member contract, bylaw, share transfer, derivative suit

Abstract: The nature and internal value of criminal law determines that it is the last resort to social control and it can only shoulder important and restrictive tasks. As for social control, it cannot be said that criminal law has no effect at all, but pure function-orientated criminal law is certainly not ideal for effective social control. However, the criminal legislation and practice since 1979 in China have either ignored or abandoned this understanding of criminal law. From the characteristics of criminal legislation and practice it can be seen that Chinese criminal policy has obviously overestimated the possibility that criminal law can influence human action. Criminal law has kept the inertial habit of functionalization.

Criminal policy should be based on the reliable empirical evidence of criminological research so that a just and reasonable new goal should be set, which is restricted by those basic principles such as culpability, rule of law and humanity. Before such reasonable criminal policy is established and the absolute theory of punishment directing punishment system and structure is thoroughly adjusted, the striking problem of harsh punishment in the field of criminal legislation, justice and enforcement will continue. Crime control in China has the structural characteristic of punitivism.

After analyzing relevant data, it can be found that punitivism is ineffective to reduce the increasing crime rate and control the seriousness of crimes as a whole. Harsh punishment cannot prevent crimes. On the contrary, it will accumulate the obstacles to the rehabilitation of the offenders, lead to the formation of crime-conducive environment and the reoffending of these offenders. Punitive criminal policy, punishment system and practice will cause the citizens to pay high cost for security. The criminal ideal and mode of severe punishment should be ended in the age of respecting human rights and advocating humanity.

Key Words: punitivism, functionalization of criminal law, structure of criminal punishment, crime control

Abstract: On June 13, 2010, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice jointly issued the Provisions on Issues Concerning the Examination and Evaluation of Evidence in Death Sentence Cases and the Provisions on Issues Concerning the Exclusion of Illegally Obtained Evidence in Criminal Cases, effective as of July 1, 2010. The enforcement of these two provisions on criminal evidence is a huge improvement of Chinese criminal evidence system. These two provisions have clarified the procedures for court to hold illegal evidence, the assignment of burden of proof, and the corresponding standard of proof, which make the exclusionary rules against illegally obtained evidence operable. However, the two provisions on criminal evidence used some ambiguous languages regarding to the issues of the admissibility and the evaluation of evidence.

The examination of evidence by judges should be divided into two steps. The first step is to determine the admissibility of evidence, in other words, the evidence should firstly be allowed to be used in the trial. The second step is to determine the reliability and the value of evidence, in other words, it concerns how to evaluate the admitted evidence. Judges should focus on the lawfulness and relevance of evidence in the first step, while focus on the truthfulness and sufficiency of evidence in the second. The rules of admissibility should be rigid, while the standards of reliability and value of evidence should be flexible. The separation of these two steps is good for the development of the evidence law. It shifts the research orientation, promotes the evidence rules, especially the exclusionary rules against illegally obtained evidence, and helps to prevent wrongful convictions by reinforcing legal acquisition of evidence.

Key Words: evidence, admissibility, reliability

Abstract: According to the different relationship between evidence and the object of proof, evidence can be divided into two categories, that is, the substantial evidence and the auxiliary evidence. While the substantial evidence is thought to be "produced" by the existence or occurrence of the facts to be proved, the auxiliary evidence is regarded relatively independent of the facts to be proved. Auxiliary evidence can be further broken into various sub-categories, among which the distinction between in-case evidence and out-case evidence is the most important type decided by the "distance" between the facts to be proved and the facts bringing forth the auxiliary evidence. There are many problems in distinguishing the substantial evidence from the auxiliary evidence correctly, such as the imprecise definition of the object of proof, and the in-case auxiliary evidence being misapprehended as the substantial evidence.

To some extent, the prescriptive implication of this classification lies in the establishment of some practical permission and prohibition for the abstract proof standards, which can not only overcome the difficulties in judgment

but also prevent the judicial arbitrariness. In western criminal procedures, due to the different proof standards for various processes such as conviction, arrest, stop and search, the applicable rules are different accordingly and generally reasonable. However, these rules and methods can not be directly found in the statutes but more as a legal and practical conception. Comparatively, in the corresponding and similar proving processes in Chinese criminal procedure, the auxiliary evidence, especially the out-case one is often not properly regulated due to its illegal status, while the substantial evidence and the in-case auxiliary evidence, especially the former are unduly relied on.

The classification and its prescriptive implication of substantial and auxiliary evidence are universal and fundamental for law and practices. Thus, while research and education in this aspect should be strengthened, steps should also be taken in legislation and judicial interpretation.

Key Words: substantial evidence, auxiliary evidence, rationale of distinguishing, prescriptive implication

Abstract: The practices of additional payment and redemption in the land trade prevailed in the Ming and Qing dynasties, that is, the sellers of land, due to the rising of land price after sale, asked the assignees to pay additional money or return the land. There were several reasons for such practices. One of the key factors was the constantly rising of land price and the contradiction between less land and more people. Another reason was the land register system of the Ming dynasty which made the discrepancy between the time of bargaining and the time of transfer. The third reason was the vague distinction between “sale for ever” and “sale with redemptive right”. Besides, the value orientation of mutual benefits pursued by both buyers and sellers made such practices very popular. Therefore, a large number of disputes around land trade occurred since the mid-term of the Ming dynasty.

The bases to resolve such land disputes were diversified. The central governments of the Ming and Qing dynasties enacted series of laws and regulations to stabilize the land trade according to different situations respectively. However, the laws and regulations had certain limits and therefore the local officials played a very flexible role in resolving these disputes. The notices, injunctions and judgments issued or rendered by local officials had become the important basis to resolve the land disputes. Besides, the contracts to increase price or redeem land were also important basis.

National decrees, local injunctions and folk practices were in the state of conflicts. In order to avoid conflicts, national laws had to coordinate with folk practices. In order to stabilize the land trade order, to ease the social conflicts

and to maintain the social order, the central governments of the Ming and Qing dynasties had kept adjusting the related laws or decrees, and local officials made efforts to take flexible measures. These experiences are very meaningful to us.

Key Words: additional payment, redemption, Huizhou contract, laws and regulations of the Ming and Qing dynasties, land trade

Abstract: Lei jingtian joined the Chinese Communist Party in 1925. He participated in the Nanchang Uprising, and was one of the founders of Youjiang Revolutionary Base in Guangxi Province. He experienced the Long March, and had a revolutionary seniority. He had served as the President of the High Court of the Shaan-Gan-Ning Border Region for six years, and had a major impact on the judicial development of the Border Area.

The judicial thoughts of Lei Jingtian are a concentrated reflection of China's new democratic revolutionary judicial thoughts. "The tradition of politics and law" of the Soviet justice, the reform thoughts of the regularization of justice in the Shaan-Gan-Ning Border Region from 1942 to 1943, and the Chinese-style trend of Marxist theory are the main sources of his thoughts. In 1940, he proposed two important concepts, that is, the new democratic justice, and the new democratic justice system. In his view, the new democratic justice should serve the politics and protect the interests of all classes of people fighting against Japanese. The new democratic justice should also have three characteristics of equality, unity and democracy. Around his new democratic concept of justice, Lei Jingtian put forward series of viewpoints, including applying the principle of democratic centralism thoroughly in the judicial organizations, integrating of the worker and peasant cadres with the intellectual cadres in the judge team, maintaining appropriate separation between the political standpoint and the judicial practice in invoking the Complete Volume of Six Chinese Laws, and persevering judicial democracy and increasing its convenience in judicial procedures. The revolutionary way of thinking and the empirical way of thinking are the two features of his thoughts, which are the product of the integrated influence of historical background and his subjective experiences.

Key Words: Lei Jingtian, judicial thought of new democracy, legal history of Shaan-Gan-Ning Border Region, High Court of Shaan-Gan-Ning Border Region