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Abstract: The principle of reliance protection is legally based on the reasonable reliance of individuals resulting from the exercise of public power and the interest herein, which must be protected by law, otherwise the individuals may suffer an unexpected loss. But this principle is supposed to differ from other principles, norms or systems involving the protection of reliance and the interest herein. This principle does not originate from the principle of good faith, but from the principle of legal stability and the norms of basic rights, for the principle of good faith does not have definite normal connotations.

A probe into the abolition of the specific administrative act in favor of the administrative counterpart shows the extremely limited protection provided for the reliance interests by the principle of reliance protection. Specifically, the protection provided by this principle merely lies in the illegal reimbursement decisions in which the administrative counterpart's reliance interest deserves protection. In terms of legal or other illegal decisions in favor of the administrative counterpart, this principle functions together with the principle of administration by law. Compared with the latter, this principle is unique to a certain degree merely on a jurisprudential basis, which can be "legalized" and thus included in the latter. Besides, according to the base of reliance, the content of expectation, the core conditions of protection, and the phase and method of protection, the principle of reliance protection differs greatly from the principle of legitimate expectation protection.

The principle of reliance protection has not been stipulated in the Administrative Licensing Law of the People's Republic of China. On a jurisprudential basis, even this principle cannot be completely contained in the connotations of the principle of administration by law, it needs to be realized through the application of the latter. Thus it is supposed to make a further study on the possible meaning of the principle of reliance protection in our administrative law.

Key Words: principle of reliance protection, principle of good faith, principle of administration by law, principle of legitimate expectation protection

Abstract: Based on the different appearances caused by the changes of the external environment and its notion, structure and function, the development of modern administrative law in China can be divided into three forms. The first form can be summarized as "state administrative power-liberty rights", and the second as "liberty and social rights-state administrative power". Adapt to the new model of social governance, the third form can be summarized as "liberty and social rights-public administrative power".

The changes of the forms of modern administrative law in China reveals the law that administrative law has evolved through the alternate extending of the right protection range and the power subject structure. Now, modern administrative law in China has completed the change from the first form to the second, and it is in the transformation to the third form. No doubt, the third form is not the final form. In the near future, other rights such as political rights and development rights will be included into its scope of protection. The scope and structure of administrative law subject will be more diverse, and the ways of administration will expand. These changes will create the conditions to shape the future form of administrative law.

The new mode of social governance which can be summarized as "party committee leading, government undertaking, social coordinating and public participating" is the response to the conflict between the service-oriented government and limited government. The purport of constructing the third form of modern administrative law in China is to adapt to the new model of social governance and provide legal support to it. With the socialization of national task, administrative subject and behavior style, the third form is forming, which brings new challenges to administrative law and its theory. The government in the third form can be regarded as the fusion of the service-oriented government and limited government. In addition to the government, the administrative subjects should include authorized subjects and other organizations with the public affairs management functions. On the basis of the traditional administrative legal relationship, the scope of judicial review should be extended. In order to reduce the risk and cost of socialization reform, the government should take security obligations and supervision responsibilities.

Key Words: administrative law, form, social governance, public administrative power

Abstract: The claim method is one of the most important methods in the analysis of civil rights. This method can be introduced into administrative law, as the service administration (Leistende Verwaltung) plays a more and more important role in the society. A public law claim (Anspruch) refers to a request of a specific action or non-action against specific legal subject in public law, which is supported by an underlying right. Although a claim is rooted in an underlying right and in the serve of the realization of the function of the underlying right, it is a kind of substantive rights, has the general characteristics of a subjective right, and is also a link between substantive public law and procedural public law.

There are four types of typical public law claims, that is, claims based on rights to freedom and property, claims based on beneficial rights (social rights), claims based on rights to participation, and claims based on rights to equality. The norm basis of a public law claim can be a promise of an administrative agency, an administrative contract, a legal right which is stipulated in administrative norms, or the analogy of corresponding norms in civil law. A public law claim can also be traced back to a fundamental right in the constitution, if there are no specific legal norms to support this claim.

The incorporation of public law claims in the legislations and the effective protection of public law claims in the judicial practice play significant roles in a leakless protection system of public law rights. In order to promote the protection of public law claims in China, legislators should incorporate claims in norms directly and clearly, so long as it is possible in the specific situations. In addition, administrative litigation system should be reformed to meet the needs of effective and leakless protection of public law claims, especially, the litigation to apply an administrative organ to perform its statutory duties should be reformed to be one which can provide leakless protection for public law claims.

Key Words: public law, claims, administrative law

Abstract: The dilemmas of modern law are the contradictions and conflicts between the uniqueness of individual and the universality of law. For one thing, the uniqueness of individual is

a fact and a kind of necessity. Natural talent, living environment and the capability of self-creation form the uniqueness of every individual which is different from others. For another, the existence of community, the law in quest of formal justice and the ideal nature of law, make law consider the common nature of man more than its uniqueness.Moreover, the unity of individual's nature, the openness of self and the similarity of individual's action ensure the public characters of law. Through abstraction, typification, identification and personalization of legislation, modern law finally establishes the universality of law. However, the conflicts between the uniqueness of individual and the universality of law are very obvious.

Firstly, the universality of law focuses on man's action and forgets his existence. In other words, the universality of law qualifies its regulating object on the action and neglects the subject who adopts the action. Secondly, the universality of law emphasizes equality and ignores differences of men, which does not consider the differences of capability, inner quality and so on among people at all. Thirdly, the universality of law stresses the objectivity and omits subjectivity. Emotion, desire, intention, purpose and so on are not the objects of law.

Because of these conflicts, the tension between the legal rules and real individuals cannot be reconciled. In order to solve these dilemmas, the law must protect the private sphere of individual and the freedom of personality so that it can provide a favorite institutional environment for the forming of the uniqueness of individual. And then, the modern law must determine the weak in law and give them special protection. At last, through the way of individuation, the modern law prescribes different legal rules and makes different adjudications basing on the uniqueness of individual in legislative and executive levels. Accordingly, the abstraction and rigidity of legal rules can be minified properly.

Key Words: uniqueness of individual, universality of law, individuation of law

Abstract: In order to interpret appropriately Article 106 of the Real Right Law, it is necessary to ascertain the doctrine behind it, make sure the relationship between public reliance and bona fide acquisition, and confirm the relevance of the concepts among publicizing, public reliance and public reliance intensity. The provision of Article 106 is based on the reliance principle, which determines the consistency of the basic structure of real estate bona fide

acquisition and chattel bona fide acquisition. Meanwhile, there are some divergent details of real estate bona fide acquisition and chattel bona fide acquisition, which depend only on the different public reliance intensity of register and possession and their different abilities to show the existence of real rights. Public reliance and bona fide acquisition are two aspects of one thing, that is, both real estate bona fide acquisition and chattel bona fide acquisition are the reflection of public reliance.

However, in German law, real estate bona fide acquisition and chattel bona fide acquisition are provided separately in different provisions and based on different principles, so they have different legal structures. The public reliance of real estate register is regarded absolute in German law. Such an absolute public reliance notion and the discrete protection model of chattel and real estate transaction security are inappropriate in its value judgment. In Chinese civil law, both of the register and possession are entitled with public reliance, and the intensity of the former is stronger than that of the latter. Chinese law does not adopt the theory of absolute public reliance, the real estate bona fide acquisition and chattel bona fide acquisition are stipulated in one clause of the Real Right Law (Article 106), and they are established according to an uniformed doctrine. These are reasonable choices. The public reliance intensity has various representations in diverse transaction backgrounds and fields, and it is fluctuating continuously and is specified ultimately in the given case by the influence arising from the degree of imputation and the reasonableness of reliance.

Key Words: bona fide acquisition, principle of reliance, mean to show the existence of real right, public reliance, public reliance intensity

Abstract: The right to name is a personality right, hence an absolute right. However, the object of this right is, different from those of other absolute rights provided by law, only a symbol, a combination of several Chinese characters. It is also quite ordinary that different people have the same name, which means a monopoly of a specific name does not exist. The author holds that such monopoly cannot exist given the reality that the amount of Chinese characters is limited and all people need a name. On the other hand, due to the uniqueness of each person, a right to monopolize one's name should be recognized by law when the monopoly concerns to preserve the right connection of a particular name and its holder. In this respect right to name belongs to "right to keep one's identity".

It should be noted that name is not only a sign guiding people to find out a particular person, but also an attribute of personality itself, for the latter is in modern law trinity of corporeal, spiritual and social existence and name is the very form of one's social existence. An infringement on one's name is thus attack to the personality of that person. Moreover, name as personality attribute has its economic value, thus can be commercialized by means of advertisements or other business propaganda. Courts in the U.S.have already observed the development of merchandising personality attributes such as image, name or even voice and awarded a new right in common law named publicity right to the exploited person. As China is member of continental legal system, legal protection of one's interest to merchandise his name should be acknowledged as function of right to name.

As to the relationship between the rights to reputation and honor and right to name in Chinese tort law, the author argues that the former two also belong to right to keep one's identity because they aim to prevent any one from forcing derogating facts upon particular person, including by using one's name. Therefore right to name should be limited to protect name-holder against fabricating neutral or even positive social impression which he will not. Besides, since there is no "general personality right" or right to keep one's identity in Chinese tort law, right to name should be established as a substitute, thus make the personality protection full and complete.

Key Words: right to name, interest to keep one's identity, commercial value of name, tort law

Abstract: Insider trading is one of the major illegal financial frauds throughout the development of Chinese security market. Paragraph 3, Article 76 of the Security Law of the People's Republic of China, amended in October 2005, provides the civil liability of insider trading. However, the questions whether there exists causation between insider trading and the loss suffered by investors, what category of investors suffer loss and how much loss they suffer remain uncertain and controversial. Many scholars and professionals in China tend to strengthen the civil liability and provide relief to investors to save their confidence. In their opinion, insider trading civil liability is also a kind of private enforcement method, which can combat and deter security frauds by requiring the law-breakers to pay a big amount of compensation. They insist that the Supreme People's Court should promulgate judicial interpretation on the civil liability of

insider trading as soon as possible and presume the causation between insider trading and the loss suffered by investors, thus remove the chief obstacle of civil action on insider trading.

This thesis is trying to deliberate and cast doubts on the compensating and deterring function of civil compensation liability of insider trading, the focus and starting point of which is the causation between insider trading and the loss suffered by investors. There are two different types of victims in insider trading, namely victims due to the insiders'transaction behavior, and victims due to the undisclosed inside information. Investors are not actually deceived, induced or misled by insiders. There are no causality between insiders'transaction behavior and the loss claimed by the contemporaneous traders, since such loss comes largely from the risk of market information asymmetry. Technically speaking, even if it is possible to presume causation in order to make civil action convenient, the compensation liability of insiders should also be limited. There is no reason to transfer the decision-making risk which should be undertaken by investors to those insiders who are just detected after the normal transaction. Moreover, due to its born limitation, civil action has little effect in terms of assisting law-enforcement and deterring insider trading. Therefore, the only result of encouraging civil action may increase the cost of parties and courts and get no more benefits. The more effective policy solution is to strengthen the information disclosure system and the public (especially administrative) enforcement by all possible means.

Key Words: insider trading, causation, civil liability

Abstract: The theory on rights of future generations was first proposed in 1971 by Joel Feinberg, a well-known contemporary philosopher in the United States. Since then, this theory has been further developed and supported by majority of scholars under the background of environmental crisis. Scholars support, systematize and practice this theory by using different theories from different angles, among which representative scholars and their theories include Professor K.S.Shrader-Frechette's theory on intergenerational contract, Professor Edith Brown Weiss'theory on intergenerational equity and Professor George Wright's theory on interpretation of the intergenerational community.

The theory on rights of future generations from its origin to its rapid development has widespread impact in the world. The following logic connotations can be found through the course of its development. Firstly, this theory aims to protect the environment by the name of the rights

of future generations. And it characterizes the relationship between mankind and nature as the dominant control relationship of possession. Moreover, it artificially divides the whole of mankind into two independent and opposing subjects of contemporary and future generations. At last, it is an integral part and the inevitable result of the expansion theory of the subject of rights, which is intricately linked with the natural rights theory.

However, through the rebuttal analysis, the theory on rights of future generations can be found a theory on fictional relation between right and obligation. Nonetheless, its purpose of environmental protection is no doubt correct, only its approach to achieve this purpose will not work. Protecting the Earth's environment which is a necessary condition for human beings to survive and propagation can only rely on assuming the general obligation to protect the environment. Whether in theory or in practice, the pursuit of rights of future generations only leaves people the real obligations to protect the environment. At this point, it shares the same views with the theory on obligations to protect environment. Obligations to protect environment are not only the essence of the theory on rights of future generations, but also its right way out and its end.

Key Words: right of future generation, intergenerational equity, intergenerational contract, intergenerational community, obligation to protect environment

Abstract: In the theory of four-element crime constitution, there is no room for the objective punishment condition. But the objective punishable condition already exists in the criminal legislation of our country now. How to understand and apply these provisions is an issue that cannot be avoided in theory.

The general view in the foreign countries is that the objective punishable conditions do not require the actor's cognition and foresight. However, regarding the objective punishable condition in general is suspected of oversimplifying the problem. According to substantial connection between some certain condition and illegality, the objective punishable condition can be divided into the internal and external condition two types, if we insist on the hierarchical constituents of crime theory .The most worthy of discussing is the internal objective punishable condition. It is in the "extended line" of behavior which increases the risk of infringing the interest in law when intervening factors appear. Although it is different from typical illegal element, it can produce

illegal effect. Actor just needs to know the possibility of internal objective punishment condition. To the contrary, external objective punishment condition belongs to the category of criminal punishment, has no effect on the illegality and responsibility, and does not require the cognition and foresight of actors.

The research of internal objective punishment condition is of great significance to understand and apply some provisions in our criminal legislation. There is necessity for the internal objective punishment condition to exist in the present stage. To put it further, recognizing this concept is in consideration of the doctrines of legally prescribed punishment for special crime and legal interest protection. If we recognize this concept, there is no need to advocate the concept of "objective surpassing elements". The problems regarded under the name of objective surpassing elements can be analyzed according to the approach of internal objective punishment conditions.

Key Words: constitutive elements of crime, internal objective punishment condition, atypical element of illegality, external objective punishment condition

10、Mean of Declaratory Sentence of Crime

without Statutory Sentencing Factors and Its Significance……*Bai Jianjun*(135)

Abstract: Basing on the study of criminal judgments for 70,000 cases from 77 courts of 21 provinces and municipalities, this paper intends to answer the question of the relationship between practical sentencing status and statutory sentencing range of Chinese Criminal Law. According to this research, the mean of declaratory sentences of those cases without consideration of any statutory sentencing factor is generally lower than the median of their statutory sentencing range.

Lower than the median of statutory range, as a group choice of judges, such mean is both legitimate and reasonable. In fact, the sentencing benchmark in the "Sentencing Advisory Guidelines of People's Court" issued by the Supreme People's Court of China is also significantly lower than the median of statutory range. According to this research, once we take the provisions from Criminal Law and Sentencing Advisory Guidelines as the dominant sentencing benchmark, then, the practical mean of declaratory sentence of crime without statutory factors can be deemed as the recessive sentencing benchmark, the third frame of reference for sentencing practice.

By following this, we never intend to restrict judges'discretional act, instead, we offer better choices for them. This policy of persuasion, through respecting the activity of judges and

encouraging them to be close to the average of judicial practice, will lead individual judge to keep consistency with other judges. Still, it can effectively avoid the whirlwind of ups and downs in sentencing practice. Furthermore, the mean of declaratory sentence of crime without statutory factors can learn actively and be adjusted passively. All in all, the plan of abstracting such mean from good-sized model cases should be an active experiment of absorbing the essential parts of common law into our statutory law system.

Key Words: sentencing, mean of declaratory sentence of crime without statutory factor, case

Abstract: The defense conflict between the accused and his attorney is a prominent problem in the defense practice in our country. There are two major modes to solve defense conflict in other countries, one is the "litigant-oriented" mode, which is represented by the U. S., and the other is the "independent attorney defense" mode, which mainly exists in Continental countries. The former mode stresses the loyalty of the attorney to his client, while the latter stresses the attorney's duty to serve pubic interest and to promote the correct implementation of the law. Both modes have their respective theoretical basis and operational logic, and they are closely related to the different recognition of the attorney's responsibility in the two law families as well as to their different cultural ideology and litigious systems.

The solution of defense conflict in our country should mainly refer to the "independent attorney defense" mode in Continental countries. Taking in the merits of this mode, we should develop a mode which suits the unique situations in our country. We stress not only the independence of the attorney's defense activity, but also the communication between the attorney and his client and the efficiency of defense activity, thus turn from "absolutely independent defense" to "relatively independent defense". On the one hand, we should clarify that the independence of attorney is the basis of defense theories and practice in our country. On the other hand, we should be aware that excessively stressing the independence of attorney may bring about a lot of negative results in practice.

In solving defense conflict, we should respect and reveal the will of the accused, especially the full expression of the defense grounds by the accused. When defense conflict happens, the attorney should have full communication with the accused which can urge the accused to give up his unreasonable ideas and accept his attorney's reasonable opinions. Moreover, it can also help the attorney to modify his original defense opinions and tactics. If the attorney and the accused can not reach an agreement after communication, unless the accused clearly states his refusal to the attorney's defense, the attorney can present his defense opinions according to his understanding of the facts and law, but such opinions should not harm the rightful interests of the accused.

Key Words: defense conflict, litigant-oriented defense, independent attorney defense, relative independence, communication between the attorney and the accused

Abstract: Empirical study is a method of producing knowledge essentially. Compared with the theoretical study, its particularity lies in that, it directly takes living person as the research objects, and takes the facts as the basis. Thus its process and result should be more persuasive. However, big scale empirical study often needs certain financial aid, and some sponsors also intentionally or unintentionally influence the research process and result. The sponsor decides which topic to fund, and the researcher chooses which topic to study. These potential preferences enable the empirical study to have certain subjectivity. In addition, because the objects of empirical study of criminal law are always the criminal victims, suspects, defendants or prisoners who are at a disadvantage, their right to know, right of privacy or others are easier to be infringed by the empirical study. Even more, the empirical study may also cause miscarriage of justice. From the research angle, the empirical study will sometimes create research pollutions that affect the smooth development of other empirical studies.

This requires making clear the rights, responsibilities and duties of the related research fellows in empirical study. The overall thought is to unify the autonomy, discipline and law. Especially, it is necessary to formulate the ethical standards of empirical study, clear about the respect, protection, equity, comprehensiveness and other basic ethical principles of empirical study, and set up the ethic review committee and the review procedure. In practice, to develop an empirical study also faces many difficulties. So it also needs to establish the corresponding

safeguard mechanisms, such as entrusting specific organizations the power of developing empirical study, stipulating the coordination and tolerance duties of the objects, and giving the full safeguard in the research fund and time.

Ethic and technique are the two important aspects in the empirical study. The researcher should be good at balancing the relationship between them. Correspondingly, whether the empirical study projects is successful or not should also be weighed and evaluated from two aspects. One is whether it has followed the ethical standards of empirical study, and the other is whether it has a substantive breakthrough in its research result or its method technique.

Key Words: professional ethics, research ethics, ethical standard, research technique

Abstract: There was actually no such a general stipulation in regard to legitimate self-defense in ancient Chinese law. However, there were indeed some concrete stipulations concerning legitimate defense against some infringement. One of the most representative items since the Tang Code was the item of "intruding an individual's dwelling house without any proper reason".

Actually, this item could be traced back to West Zhou. According to the Tang Code, any intruder intruding into an individual's dwelling house at night, the punishment was 40 blows with light stick. If the host killed the intruder the moment he intruded the dwelling house, the host could be exempt from criminal charge. There are three important variations in this item in the Tang Code compared with the original items. Firstly, the intruding should occur at night. Secondly, the place intruded into was restricted to the dwelling house. Thirdly, the host can only kill the intruder without criminal charge the very moment the intrusion occurred.

Compared with the Tang Code, the item specified by the Ming and Qing Codes displayed important differences. Simply put, the punishment of intrusion was getting more severe, and the punishment of the host for injuring or killing the intruder already held was getting less severe. It merits a mention that the Ming Code did not even stipulate the situation of "awareness of non-intentional infringement" as the Tang Code had. In the New Great Qing Penal Code, the legitimate self-defense system was validated formally and the punishment for intruding into an

individual's dwelling house was not specifically restricted to the night any more. Thereafter, the item specified by the Tang Code ceased to exist.

Key Words: intruding an individual's dwelling house without any proper reason, legitimate self-defense, the Tang Code, the Ming and Qing Codes

Abstract: At present, jurisprudential circle at large holds that a constitution-based socialist legal system with Chinese characteristics has initially taken form, mainly consists of seven branches and three levels. The seven branches include the constitution and the constitution-related laws, civil and commercial laws, administrative laws, economic laws, laws on society, criminal laws, and litigation and non-litigation procedural laws. And laws, administrative regulations, and local, autonomous and separate regulations are its three levels. However, international treaty has not been contained in the legal system.

China is a state party to Vienna Convention on the Law of Treaties. Article 26 of the convention prescribes Pacta sunt servanda, that is, every treaty in force is binding upon the parties to it and must be performed by them in good faith. Thus international treaty is an indispensable part of Chinese legal system with socialist characteristics. It is necessary to define its status in Chinese legal system.

From the perspective of the actual conditions of China's concluding and implementing international treaties, international treaties binding China have actually constituted one part of Chinese legal system, which can be applied directly and indirectly. They have a status which is lower than the constitutional law and higher than laws. The foreign relations law should be a branch and international treaty should be one hierarchy of Chinese legal system. It will be of great significance to clarify such a status of international treaties in Chinese legal system to improve the socialist legal system with Chinese characteristics, implement in an all-round way the basic strategy of rule of law and achieve the great target of establishing a harmonious world. Therefore, it is essential to define the status of international treaties in the Chinese Constitution and establish the principle of resolving the conflict between international treaties and Chinese laws in the Legislation Law.

Key Words: international treaty, legal system, international law