

——互联网思维下的消费者保护

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亲身体尝,是乌托邦还是街坊行为?

(代序言)

前三鹿奶粉的董事长会让自己襁褓中的孙子喝含有三聚氰胺的牛奶吗?

英国的农场主会吃自己牧场得了疯牛病的牛肉吗?

攫取了巨额利润的方便面老板会经常泡“问题方便面”吃吗?

出现水质问题的某些地方的父母官会每天饮用当地水源的自来水吗?

农民和当地的村镇干部日常餐饮中会食用喷洒了农药的蔬菜和有瘦肉精的猪肉吗?

由本书作者起草的《日用消费品生产者及其主要相关利益获利人〈亲身体尝法〉(建议稿)》(以下简称《亲身体尝法》),是为保证食品等日用消费品的产品质量,加强对日用消费品生产者及其主要相关利益获取人的合法监督,规范日用消费品的广告活动,保障公众生命权和健康权,而倡导立法。

所谓亲身体尝,是指日用消费品生产者的主要相关利益获取

人在日常消费中应主要使用该生产者生产的日用消费品,通过自证的方式向社会大众公示其履行了本法规定的亲身体尝的义务;自证应通过公证等方式进行并放置网络等媒体公示。国家相应管理部门、消费者权益组织以及广大消费者主要运用互联网对此进行监督管理。

该法案的主要法理源于“己所不欲,勿施于人”的中国传统观念。生产者亲身体尝是取信于消费者的最为朴素的方法,可从源头上保证食品等日用消费品的产品质量,相应增强生产者及其主要相关利益获取人的道德责任心。

亲身体尝揭示的就是这样一种基本的互惠关系:我现在是你的生产者,下一刻是你的消费者,“你们愿意人怎样待你们,你们也要怎样待人”。如果我生产的产品自己不愿体尝而只知道推销给他人,那么,下一刻我所消费的也可能是他人以对等的同理心生产的产品:他人所生产的产品他自己不愿体尝而只知道推销给别人。

本书并不仅仅满足于从一般性民法原则、消费者保护相关法理去推理,本书重点论证:

1) 公司制度加大了“匿名”社会的扩展,以“集体”遮蔽了个人的道德责任,破坏了包括投资者、管理者在内的主要利益相关者的人格整全,有可能造成生产者的道德角色分离,整个社会因资本流动性而有可能丧失道德的个人附着而存在“道德流动与漂浮”的风险。

《亲身体尝法》借鉴“戳破公司面纱”的概念,通过主要相关利益获取人的亲自尝试产品并对外发布,从而消除公司制度对于股东、经营者等主要相关利益获取人的匿名保护,从而使得消费者可以对有血有肉之人“指手画脚”,通过“闲言碎语”来制约股东、经营

者等主要相关利益获取人。《亲身体尝法》并不扩大以股东的以货币为计量的财务的“有限责任”,但剥夺了其道德的匿名权。它要求主要相关利益获取人必须承担道德的个人责任。亲身体尝是企业社会责任中的核心。

2) 法律专业知识的遮蔽,使得人数众多的“忍气吞声的被遗忘的大集团”愈发难以“集体行动”。消费者中的大多数人采取“理性无知”,即公众意识到公共事务的集体物品性质,以“搭便车”的心理理智地采取漠不关心的态度。法律知识的复杂和法律的专业分工带来了“隔膜”。“黑暗之子”进一步“操纵”,消费者的“法感情”变成无奈,放弃了“为权利而斗争”。

《亲身体尝法》试图以普通消费者朴素的经验感受与评判来降低法律认知的门槛。相对于专业的产品知识和对应的复杂的法律构建,《亲身体尝法》是一个弥补,试图降低消费者和生产者之间的信息不对称。

因为简单,因为开放,《亲身体尝法》也是罗尔斯差别原则在法律构建中的体现。它以一种专业知识认知的低就姿态来实现“平等的权利”,它低就信息不对称的消费者,试图使法律知识向所有人开放,从而“适合于最少受惠者的最大利益”。每个人在《亲身体尝法》体系面前都因为自身消费者和生产者的角色互逆,而保证它又遵从第一原则:每个人对与其他人所拥有的最广泛的基本自由体系相容的类似自由体系都应有一种平等的权利。

《亲身体尝法》不是一种唯理性建构,它也不预备“烧掉原有的”技术性法律。《亲身体尝法》的架构建立在惯例、习俗之上,它是惯例、习俗在互联网时代的进化。

3) 《亲身体尝法》具有司法操作的可能性吗? 互联网技术和

思维使之成为可能。互联网技术结构的平等性与去中心化,大数据的重关联与轻因果逻辑的思维,将与试图去除法知识遮蔽、唤起普通消费者法感情的《亲身体尝法》呼应和叠加。互联网思维下的《亲身体尝法》在开放互动平台上真正有可能实现“法律的平等”,包括法知识的获取平等、参与的平等,进而实现富勒所称的“大写的自然法——的无可争议的核心原则”,“我会说它存在于这样一项命令当中:开放、维持并保护交流渠道的完整性,借此人们可以彼此表达人们的所见、所感、所想。”

互联网技术结构的平等性带来了网状结构的社群存在,“每一个消费者和生产者都是自媒体”,在亲身体尝的网络平台上充分互动。而《亲身体尝法》用街坊语言消除法的神秘、法的疏离;戳破公司面纱后,主要相关利益获取者以平等的有血有肉的个体参与互动。互联网技术、思维,叠加《亲身体尝法》的简单和具象,这都将极大地唤起普通民众参与的法感情。

互联网思维下的《亲身体尝法》平台,将是草根的碎片时间和碎片信息的汇拢,将汇成人民战争的汪洋大海。消费者获得“空白委任状”,众筹后的力量将远远超过法官、工商执法部门。

上述思想也是本书对批判法理学的主要贡献。

亲身体尝是乌托邦还是街坊行为?对于这个问题的回答,首先是立足“从效率到良心”的历史境遇。

法律的与时俱进的观念,在古希腊是通过这样的神话来表述的:

荷马说,米诺斯每隔九年与宙斯相会,并跟他交谈,米诺斯定期向宙斯求教——宙斯俨然是个智者¹。

《亲身体尝法》不否定效率，也不否定追逐利润，而只是瓦解了效率的唯一目标性，它的实践将完全平伏“把理性等同于自利最大化”ⁱⁱ的理论自负。

《亲身体尝法》体现了进入 21 世纪的中国因商业诚信缺失的极大痛苦所带来的良心呼唤。

我们无法在一个价值观因冲突与侵损而泯灭的疯狂竞争的社会中使人类的能力得到最大限度的发展。但是，我们必须要有某种人类活动的秩序来限制人类行为，规定个人的职责，以保护现存价值观，推动新价值观的产生ⁱⁱⁱ。

《亲身体尝法》是一种良心发现机制，消费者可以发现公司面纱后面的主要相关利益获取人的诚信。在未来的淘宝、京东、亚马逊等商品网站，除了商品价格、功能、好评之外的比较外，还有一个商家“亲身体尝”的比较，如亲身体尝方式是否合理，频次、展示的可信度等。

除了比价，还有比良心。《亲身体尝法》呼唤社会对于更宽广的整体的人的目标追求。

要小心地注意，这里所倡导的良心和道德，不是威权统治者所要求的奴性“道德”（当然，也不得不捎带正义与平等的包装），也不是那种与过度自负所结盟的“道德狂热”（实际也是潜主，是威权的另类包装）。

《亲身体尝法》是知行合一的“仁”在当代法律尝试中的精神传承。它以日常的街坊行为构成情景式语言，使得广大消费者有着“直接、真实和清晰的体验”，它试图让生产者“心中创造最佳行为

动机”。“必须凭良心生活”的《亲身体尝法》将是“把人与人联系起来的精神的团结一致”的互动平台。新世纪的法学思考^{iv}，同样可以接续“克己复礼”，是孔子的“仁”。克己者，自我而克制，并不否认“自利”，而绝不是朱熹的“灭人欲”的伪道德；复礼，是回归古典自然法的传统，而不是“简单化地把整个法律意识视为尊重并遵守有权限的外在权威的命令的稳定习惯”，不是“仅以威胁为后盾”的威权秩序。最终，自律成为他律的源泉^v。

当埋头于法律技术的细节的耕耘^{vi}，浅薄而单纯的我们又仰望星空：寻求更基本的人性法则。

在全部被造物之中，人所愿欲的和他能够支配的一切东西都只能被用作手段；唯有人以及与他一起的每一个理性的创造物，才是目的本身^{vii}。

己所不欲，勿施于人。

顾继东 秦悦民

2017 年元旦

注：

i 《米诺斯》，[古希腊] 柏拉图著，林志猛译/疏，华夏出版社，2010 年，P32。

ii 《伦理学与经济学》[印度] 阿马蒂亚·森著，商务印书馆，2014 年。

P9：在标准经济学中，人们是如何描述理性行为的呢？一般来说，在主流经济学中，定义理性行为的方法主要有两种。第一种方法是把理性视为选择的内部一致性(internal consistency of choice)；第二种方法是把理性等同于自利最大化(maximization of self-interest)。

iii 《法律史解释》[美] 罗斯科·庞德著，华夏出版社，2013 年。

另参 P99：个人良心应受良好的法律的指引和开导，在人的行为发

生危机时,法律应给予光明的指点。

- iv 我们必须思考苏力的问题。《法治及其本土资源》,苏力著,中国政法大学出版社,2004年。

PVI: 就过去的一百多年来说,中国无论在自然科学、社会科学还是人文科学(特别是前两个学科)都主要从外国、特别是从西方发达国家借用了大量的知识,甚至就连这些学科划分本身也是进口的——尽管它们现已成为我们无法摆脱、也不想摆脱的生活世界的一部分。然而,在借鉴这些外来的知识之后,在经济发展的同时或之后,世界也许会发问,以理论、思想和学术表现出来的对于世界的解说,哪些是中国的贡献?

- v 此段写作,启发于《法律意识的实质》,[俄]伊·亚·伊林著,清华大学出版社,2005年。

P22: 要想具有成熟的法律意识,心灵中就必须获得一种特殊的经验,它大概可以这样来表示:这首先是对某种触摸不到的、具有客观意义的对象进行的直接、真实和清晰的体验。

P28: 法的精神使命在于:要活在人们的心中,用自己的内容去“充实”他们的感受并以此在他们的意识中形成内心确信,影响他们的生活和外在行为方式。法的任务则在于:要在人的心中创造最佳行为动机。

P23: 如同要研究良心的实质就必须实施良心的行为和体验良心的呼唤,也就是说,必须凭良心生活;同样,要研究精神健康的法律意识也只能在自己心中寻找它,在生活的体验和实现中培养它、巩固它和深化它。

P235: 自律应该成为他律的创造性源泉,应该把他律视为自己的必然产物并使之神圣化,然后使它成为能让自己得到普及和繁荣的武器。

P236: 法是一种能把人与人联系起来的精神的团结一致现象。

- vi 引自《全球化与法律理论》,[英]威廉·退宁著,中国大百科全书出版社,2009年,P371。

钱向阳:没有过去的纠缠,我们可以更快地适应新的世界;没有遗产的负担,我们可以获得更贴近全新的世界的全新认识。在这一点上,遗产的缺乏似乎成了中国人的优势。

优势是可能的,劣势却是肯定的。遗产的失去使我们失去了思想的武器,也因此失去了深层思考的能力。当今中国法学界沉醉于细枝末节的法律技艺,而且还本末倒置,把这些末端的技艺误作是法律与法学最重要最根本的所在。

vii 《实践理性批判》，康德著，韩水法译，商务印书馆，2015年。

P95：第一卷第三章

在全部被造物之中，人所愿欲的和他能够支配的一切东西都只能被用作手段；唯有人以及与他一起的每一个理性的造物，才是目的本身。

P144：第二卷第二章

在目的的秩序里，人（以及每一个理性存在者）就是目的本身，也即他绝不能为任何人（甚至上帝）单单用作手段，若非在这种情形下他自身同时就是目的。

P177：结论

有两样东西，我们愈经常愈持久地加以思索，它们就愈使心灵充满日新又新、有加无已的景仰和敬畏：在我之上的星空和居我心中的道德法则。

Preface: Trying it yourself, a Utopia or Just Neighbors' Gossip

It is possible for the chairperson of Sanlu Group to feed her/his grandsons in infancy with the milk containing melamine?

Is it possible for the British farmers to eat BSE-tainted beef on their own farm?

Is it possible for a rich owner of instant noodles to eat his/her own problematic products?

Or if the water quality problem occurs, would the local officials still drink the tap-water from the local waterworks?

Or would the vegetables containing pesticides and pork containing lean meat powder be the daily food intake of those farmers and the village officials?

Firsthand Experience Law on the Producers and Other Main Stakeholders of Daily Consumption Goods (proposal), drafted by the authors, is aimed at ensuring the quality of daily consumption goods like food, strengthening the supervision of

those producers and other main stakeholders, regulating the advertising activities and guaranteeing the right to life and health for all the citizens.

The so-called trying it yourself requires the producers and other main stakeholders of everyday consumption goods to mainly use their products in the everyday consumption. This shows to the public that they have already fulfilled their responsibility required by law through the way of *self-proof*. *Self-proof* is supposed to be made through the way of notarization and uploaded to social networks. The Internet will be the main form of supervision for the corresponding governmental authorities, consumer protection organizations and consuming public.

The legal theory of this draft comes from a traditional Chinese notion — do not do to others what you do not want other to do to yourself. The firsthand experience of the manufacturers is the simplest approach to win the trust of consumers, to guarantee the quality of the daily consumption goods from the very beginning, and to correspondingly strengthen the ethics of the producers and other main stakeholders.

Trying it yourself reveals the basic relationship-mutual benefit; do to others what you want to be done to yourself. This time, I am your producer. Next time, I will be your consumer. The products can't be sold without the manufacturer's firsthand

experience. Otherwise, there is a high possibility that the products I get may not be the appreciated products by its own manufacturer. This is all based upon the theory of empathy.

This book is not limited to making reasoning based merely upon the general principles of civil law and consumer protection. The focal points are demonstrated as follows:

(1) Company institution expands the development of Anonymous Society, covering the individual ethical responsibility with collective ethical responsibility, damaging the character fulfillment of manufacturers and other main stakeholders and likely splitting the producers' moral roles. Due to the participation of immoral individuals, capital mobility of the whole society will likely be faced with a risk of "morality hazard".

Firsthand Experience Law on the Producers and Other Main Stakeholders of Daily Consumption Goods ("Firsthand Experience Law") borrows the concept of piercing the corporate veil. Through the direct and personal experience of main stakeholders and public announcement, it makes the shareholders and operators unable to be protected anonymously under the umbrella of company institution. This makes it possible for the consumers to use the tool of gossip directly to restrain the specific stakeholders like shareholders, operators and etc. Hence, Firsthand Experience Law wouldn't deprive shareholders of their limited liability measured by capitals, but the law would

deprive their anonymous right in morality. Firsthand experience is the core of corporate social responsibility.

(2) The masking of legal professional knowledge makes it harder and harder for that “big weak-spirited and forgotten group” with vast population to work collectively. The vast majority of consumers take the attitude of being rationally ignorant. Even though they have already realized the characteristic of public affairs, they tend to be rationally indifferent due to the expectation of “freeriding”. The complexity of legal professional knowledge and specialization of law become the barriers. The vicious power makes a further control and the legal emotion of consumers turns into frustration abandoning the struggle for rights.

Firsthand Experience Law endeavors to lower the threshold of legal cognition by consumers’ simplest experience and judgment. Compared with professional product knowledge and the corresponding complicated legal construction, firsthand experience law acts as a kind of compensation, trying to rebalance the information asymmetry between the consumers and the manufacturers.

Due to its easiness and openness, firsthand experience law is a representation of Rawls’ difference principle in the aspect of legal construction. It lowers the difficulty of professional knowledge to realize the right of equality. It favors consumers under information asymmetry. It tries to make legal knowledge

open to the general public and can deliver the maximum interests to the minimum beneficiaries. Before the firsthand experience law, everyone has to be both the producer and consumer, which enables all the people to obey the first principle; the right to equality will be experienced in the freedom system just like the broadest basic freedom system.

Firsthand experience law is not just a ration-based construction. It does not aim at eliminating the originals of technical laws. Firsthand experience law is constructed under the customs and habits. Firsthand experience law is the evolution of customs and habits in the Internet age.

(3) Does firsthand experience law have the feasibility of being tested in judicial practice? The Internet makes it possible. The Internet has the features of being equal and decentralized. It attaches more importance to relations and may ignore the causality, all of which is helpful to demask the barriers of legal knowledge and encourage the law emotion of ordinary consumers. Under the Internet thinking, firsthand experience law has the possibility to realize “legal equality” on the open and interactive platform, including the equality of legal knowledge acquisition and participation. That satisfies “the undisputed core principles of great nature law” mentioned by Fuller. “I would say that it exists in such an order: opening, maintaining and protecting the integrity of the communication channels could make people express what they have seen, felt

and thought”.

The equality of the Internet brings social groups in medulla oblongata. “Every consumer and producer is a medium”. They enjoy sufficient interaction on the Internet platform and gain firsthand experience. Firsthand experience law shall use the tool of neighbors’ gossip to eliminate the law’s mystery and distance. After piercing the corporate veil, the main stakeholders have no choice but to interact equally as ordinary individuals. Internet technology and thinking, empowered with the simpleness and concretization of direct experience, will tremendously provoke the law emotion of ordinary people.

The platform of firsthand experience law, under the Internet thinking will gather the fragmented time and information of all the people, eventually turning into an integrated strong power promoting People’s war. It means that consumers have access to a “blank letter of attorney”. There is no doubt that the gathered power from those consumers will be much stronger than the power from judges and the administration of industry and commerce.

The above content of this book is the main contribution to Critical Jurisprudence.

Trying it yourself, a utopia or just neighbors’ gossip? The answer to this question should first stand in the shoes of “from efficiency to conscience”.