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北大法律評論

PEKING UNIVERSITY LAW REVIEW

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《北大法律评论》编辑委员会

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《北大法律评论》　编辑委员会

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编者按语

本辑《评论》主要包括"论文""评论"和"北大讲坛"三部分。

宾凯的《法律如何可能》是一篇较为系统地研究卢曼法律社会学的论文。它试图对卢曼建构主义知识论与其一般社会理论及法律社会学之间的复杂关系进行重构:卢曼借助建构主义的"二阶观察"这个核心概念,在回答了"知识如何可能"的经典知识论问题的基础上,对"社会如何可能"和"法律如何可能"这些重要的社会理论问题给予了深刻回答。同时,文章也试图对当代中国法律社会学中社会理论的匮乏进行反思,并指出了"法庭与律师"的法律社会学以及法律经济学等研究路向在观察"法律与社会"问题上可能存在的不足。

唐纳德·G.吉福德的《公共侵扰与大规模产品侵权责任》探讨了美国侵权法领域新近出现的一种诉讼,为我们了解国外侵权法领域的动态提供了很好的例子。文章既详细描述了这种公共侵扰侵权之诉,该诉求寻求让产品制造商为大规模的社会疾病承担责任,又对不同法院对此给出的不同答案以及引起的争论进行了评析。文章最后指出了公共侵扰侵权的五个关键性限制要素,它们来自于长期的历史发展和最近判例法的发展,分析这些因素可以得出结论:公共侵扰不应当成为一种将原告武装起来,向产品制造商提出损害赔偿之诉的理论,无论原告是政府还是个人。

戴昕的《正义的形象》从一个新颖的角度——美术作品——提出了法理学的一个基本问题:什么是正义?正义有标准像么?作者考察了各个阶段的西方美术作品中正义女神形象,发现实际上并不存在一个放之四海而皆准的标准像,比如眼睛的刻画,而是随着不同的作者和不同的情况发生变化的。这或许

说明了为中国学者津津乐道的正义的含义在西方就不存在着一个统一的标准，社会大众的正义观念也不是一成不变的。由此得出的启示可能是多元的，但第一步应该是按照谱系学的方法揭示出观念传承与断裂之间的张力，这是中国法学最迫切的工作之一。

牛悦的《“武松”与“师爷”》是一篇典型的“法律与文学”研究。文章详细分析了中国古代师爷的“看语”的修辞和内容，指出他们是如何剪裁事实以达到种种效果的。作者进一步分析了这种做法在中国古代社会中实际上是常见的，其背后蕴含着当事人可能意识不到的环境与制度性因素，从而为这种制度性的司法修辞提供了正当性基础。一旦环境发生了变化，这种修辞的作用就完全可能大大降低。由此，“作为法律的文学”需要结合社会科学的方法作进一步具体研究。

作为一篇法律史文章，尤陈俊的《民事法制中的“旧惯”与日据台湾时期的治理术变迁》通过对日本在台湾殖民统治时期民事法制中“旧惯”的描述梳理，展现出一种与血腥镇压的刑法截然不同的图画和维度。作者最后的结论是，“旧惯”在日据台湾时期的角色变迁实际上反映了以掠夺为本质的殖民地民事法制下的具体策略变迁。

陈彤的《管制抑或竞争》探讨了美国联邦反垄断法的适用与州政府的管制之间存在的矛盾。为了解决这种矛盾，联邦最高法院通过判例创造了州政府行为豁免原则。依据这一原则，凡是可以被认定为“州政府行为”的限制竞争行为，都可以得到联邦反垄断法的豁免。在界定构成“州政府行为”的要件时，最高法院采用了程序性的标准，回避了一部分学者所主张的针对州政府行为的实质性审查。最高法院的这一选择源于其对联邦制下各州主权的尊重，源于其纵观全局的问题意识。这种问题意识用一句话概括就是：“管制抑或竞争：选择权应该交给谁？”

沈明的《前版权时代的智识权属观念和出版制度》融合了法律史、社会史和观念史的研究。作者考察了古代世界的“作者”与智识权属观念，认为古代并没有近代以来的那种“知识产权”观念，原因就在于古代并不存在思想与表达的二元划分，而这在近代版权法中是至关重要的。文章还分析了近代出版制度和版权观念的萌芽，指出经济利益的驱动是这一历史现象产生的最重要的因素。在漫长的社会发展过程中，“作者”的观念逐渐兴起，成为版权法兴起的重要社会舆论条件。

约瑟夫·J. 诺顿的《全球金融改革视角下的单一监管者模式》试图从政策和事后回顾的角度，对英国的单一金融监管机构——金融服务局的效率、功效

和适用性进行重新评估，评价其作为全球金融改革中金融监管备选模式的可行性。文章还考察了英国模式的“完善性”（或者准确地说是“不完善性”），以及与此相应的两个重要的附带问题。作者的基本观点是，从全球金融改革的目的出发，对英国—FSA 模式的理解和借鉴必须置于英国金融历史的背景之中，并在很大程度上受限于其种种特殊性。这种模式尽管有其不可否认的优点，但不应（在任何整体移植的意义上）被不加批判地看作未来全球金融改革的国际标准。就单一监管与功能性监管之争而言，似乎并无结论性的答案或方式，而是有诸多不同的可能方式。而就存款保险而言，作者提倡一种有别于英国模式的、单独和独立的“现代”机制，但发展中国家、新兴市场国家和转型国家应当以一种循序渐进的态度看待这个问题。

最后在“编后小记”中，我们对从 1998 年《评论》创刊以来的各卷进行了引证次数的统计研究，得出了一些初步结论，算是对我们一个阶段工作的总结和回顾。

《北大法律评论》(2005)
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Editor's Notes

This volume contains three parts : article, notes and PKU forum.

Bin Kai's *How is the Law Possible* represents an attempt to reconstruct Niklas Luhmann's theory, which deals with the complex relationship between the constructivism theory of knowledge and his general social theory together with the sociology of law. By using '*the second-order observation*' (i.e., a key expression stemmed from constructivism), he answered the classic question: "how is the knowledge possible?". This has further allowed him to clarify other important aspects rising from the questions: "how is the society possible?" and "how is the law possible?". Meanwhile, this paper is a reflection on the lack of social theory in the Chinese contemporary researches involved with the sociology of law. Until now, the approach selected and used for explaining the '*law and society*' problems was mainly based on two methods: the sociology of law about "court and lawyer" and the economic analysis of law, but this paper points out that those methods might not be sufficient anymore.

Donald G. Gifford's *Public Nuisance as a Mass Products Liability Tort* discusses a new kind of suit that appears in the American tort law, providing us a good example to understand the developments of foreign tort law. The article describes the recent emergence of the public nuisance tort as a claim in lawsuits seeking to hold product manufacturers liable for large-scale social ills, and also comments on the different answer to this question by different court and the quarrels among them. Finally the article outlines the five critical boundaries of the tort of public nuisance derived from its long history and more recent case law and applies these criteria to

reach the conclusion that public nuisance is not a theory that should be used to enable a plaintiff, whether a government plaintiff or a private one, to recover damages in an action against a product manufacturer.

From a new point of view, Dai Xin's *Images of Justice: Lady Justice in western fine arts and some implications for general legal discourses* comes up with a basic problem in jurisprudence: what is justice? Has justice a standard image? The author investigates the Lady Justice in western fine arts in different stage of western world, finding that there is no standard image actually, such as the description of the eye. Many arts vary with the different authors and conditions. This may indicate that there is no uniform standard of justice, which is on the contrary took delight in talking about. The implication from the article may be pluralistic, but it should be the first step to reveal the intention between the inheritance and rupture of ideas in the way of genealogy. This may be one of the most exigent work of Chinese jurists.

Niu Yue's "*Wusong*" *and* "Shiye": *An Understanding of Chinese Traditional Adjudication* is a typical research of law and literature. The article analyzes the rhetoric and content in the "*kanyu*" of "*shiye*", who is the adjudicative assistant of local governor in ancient China, and indicates how they cut out the facts to realize some kind of outcome. The author further analyzes such kind of behavior id quite common in ancient Chinese society, behind which there implicates some environmental and institutional factors that the actors may not realize. These factors justify the institutional judicial rhetoric. Once the outer environment changes, the effect of such judicial rhetoric may decrease. So the research of literature as law needs to be combined with the method of social science so as to advance legal theory.

You Chenjun's *The "Jiuguan" In the Civil Legal System and the Change Of the Governing Tactics During the Period of Taiwan's Occupation by Japan* (1895—1945) describes the history of the change of role of "old customs" in the civil legal system, which provides us with a picture of change of the detailed tactics of Taiwan's occupation by Japan. The civil legal system, as well as the criminal one, demonstrates the colonial character during the period of Taiwan's occupation by Japan from different aspects, and also projects the essence of the colonial legal system.

Chen Tong's *Regulation or Competition: Who Is the Optimal Decision Maker* indicates that some amount of conflict is inevitable between federal antitrust laws and state regulation. This conflict is resolved by state-action doctrine developed by the Supreme Court case by case. The state-action doctrine gives antitrust immunity under certain circumstances to regulatory actions of state governments. The Court has

determined the scope of state action immunity using a process-oriented test instead of substantive criteria proposed by some scholars. The Court's position is based on its respect for the sovereign state and its awareness of the values of federalism.

Shen Ming's *Conceptions of Intellectual Ownership and Publication System in the Era of Pre-copyright* combines the researches of history of law, society and intelligence. The author investigates the conceptions of "author" and intellectual ownership in ancient world, in which there is no modern conceptions of intellectual property. The reason is that there is no division between thought and impression, which is quite important in modern copyright law. The article also analyzes the germination of the modern publication system and conception, indicating that the drive of economic interest is the most important factor of this historical phenomenon. In the lengthy development of society, the conception of "author" rose gradually and became the important condition of public opinion.

Joseph J. Norton's *Global Financial Sector Reform: The Single Financial Regulator Model Based On The United Kingdom FSA Experience — A Critical Re-evaluation* attempts, from a policy and retrospective vantage point, to re-evaluate the efficiency, efficacy, and relevance of the UK's mega-regulator for financial institutions, the Financial Services Authority (FSA), as a viable international regulatory model of choice with respect to global financial sector reform structures. In doing so, this article also considers the "completeness" (or, more accurately the "incompleteness") of the UK's regulatory approach *vis-à-vis* two important collateral regulatory issues. The main proposition presented by the author is that the adoption of the UK-FSA, for global financial sector reform purposes, needs to be understood within and largely limited to the particularities of the UK historical backdrop, and that this regulatory model (while not without its virtues) should *not* be uncritically looked to (in any wholesale transplantation mode) as an international benchmark for future global financial sector reform. As to the debate of unitary versus functional regulation, again there appears to be no one conclusive answer or approach — with a range of variant approaches possible. With respect to deposit insurance, a separate and independent "modern" scheme is advocated, unlike that currently employed by the UK; albeit, developing, emerging and transitioning countries should look at this issue in a "sequenced" manner.

Finally in the postscript, we make a statistical research on the quotation time of articles in former volumes of PKU Law Review from 1998. We get some conclusions as a preliminary retrospect to our former work.

论　文

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法律如何可能:通过"二阶观察"的系统建构

——进入卢曼法律社会学的核心

宾　凯*

How is the Law Possible: The Construction of System Through "The Second-order Observation": Entering the Core of Niklas Luhmann's Sociological Law

Bin Kai

内容摘要:本文试图对卢曼建构主义知识论与其一般社会理论及法律社会学之间的复杂关系进行重构:卢曼借助建构主义的"二阶观察"这个核心概念,在回答了"知识如何可能"的经典知识论问题的基础上,对"社会如何可能"和"法律如何可能"这些重要的社会理论问题给予了深刻回答。同时,本文也试图对当代中国法律社会学中社会理论的匮乏进行反思,并指出"法庭与律师"的法律社会学以及法律经济学等研究路向在观察"法律与社会"问题上可能存在的不足。

* 北京大学法学院2002级博士研究生,电子邮箱:binkai@pku.edu.cn。

关键词:卢曼 法律社会学 自创生 二阶观察 系统论

Abstract: The present study represents an attempt to reconstruct Niklas Luhmann's theory, which deals with the complex relationship between the constructivism theory of knowledge and his general social theory together with the sociology of law. By using '*the second-order observation*' (i.e., a key expression stemmed from constructivism), he answered the classic question: "how is the knowledge possible?". This has further allowed him to clarify other important aspects rising from the questions: "how is the society possible?" and "how is the law possible?". Meanwhile, this paper is a reflection on the lack of social theory in the Chinese contemporary researches involved with the sociology of law. Until now, the approach selected and used for explaining the '*law and society*' problems was mainly based on two methods: the sociology of law about "court and lawyer" and the economic analysis of law, but this paper points out that those methods might not be sufficient anymore.

Key words: Niklas Luhmann the sociology of law autopoiesis the second-order observation the theory of system

一、社会理论与"大问题"

当代中国,像甘阳这类智识敏锐的学者已经注意到,"中国已经是一个高度复杂的现代社会(重点符号为引者所加,卢曼的社会系统理论就是对西方高度复杂的现代社会的自我描述),但我们对'现代社会'这个大问题研究得很不够,对现代社会的了解非常片面"[1]。2005 年,国内针对经济学家发出了普遍抱怨,这不仅是对经济学家个人信用的质疑,而且是对试图用经济学方法全盘解答社会问题的学科帝国主义的质疑,甘阳极有见地地评论说:"从正面意义看,2005 年批评经济学的象征意义在于,中国的'简单经济学时代'已经结束,中国的发展在呼唤'中国社会学时代'的到来,呼唤'中国整体人文社会科学时代'的到来。"[2]

中国的法学研究似乎早就已经开始了自己的"社会学思考",但是,请注意甘阳接下来的严谨措辞:"中国下一步应该发展社会学的研究,尤其是社会学的理论研究。"[3]国内法学者中流行的法律社会学研究包括个案研究、访谈问卷、田野考察等等实证研究或经验研究(这些研究也还做得很不够),他们希望

〔1〕 引自吴铭:"甘阳访谈:关于中国的软实力",《二十一世纪经济报道》, http://finance.sina.com.cn, 最后访问日期 2005 年 12 月 25 日。

〔2〕 同前注。

〔3〕 同前注。