经济法与法人类学研究文库

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竞争法的新发展

张世明　王济东　刘亚丛 / 主编

SYSTEMATIZATION AND METHODOLOGY OF ECONOMIC LAW

New Development of Competition Law

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费肯杰（Wolfgang Fikentscher） 教授、世界著名法学家、德国战后竞争法的共同创始人、德国新自由主义（Neoliberalismus）第二代代表人物之一，担任过联合国和欧洲共同体的法律顾问，获得德国联邦共和国功劳勋章一级功勋十字章（Bundesverdienstkreuz 1. Klasse des Verdienstordens der Bundesrepublik Deutschland），研究领域主要包括债法、经济法和法律方法论、法律人类学等方面，对于《国际技术转移行为规范》(Code of Conduct on the Transfer of Technology，TOT-Code）、《联合国卡特尔行为规范》（UN-Kartell-Kodex）等的起草发挥了决定性作用，著有《债法》（*Schuldrecht*, 1965）、《经济法》（*Wirtschaftsrecht*，1983）、《法律方法比较论》（*Methoden des Rechts in vergleichender Darstellung*）、《思维模式：法律与宗教的人类学研究》（*Modes of Thought：A Study in the Anthropology of Law and Religion*）等著作。

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伊姆加德·格里斯（Irmgard Griss） 1970 年在格拉茨大学获得博士学位，曾任奥地利最高法院院长，长期担任格拉茨大学的客座教授，2016 年作为无党派独立候选人登记参加奥地利总统选举。

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Preface

ZHANG Shiming　WANG Jidong

Since Masaji Chiba's book, *Legal Pluralism: Toward a General Theory Through Japanese Legal Culture*, has been translated into Chinese, it echoes in China each other with Clifford Geertz's book, *Local Knowledge: Further Essays in Interpretive Anthropology*, which makes the concepts of local knowledge and legal pluralism become fashionable terminology in many academic works, the discourse thrive at astonishing rate. The present book is to reflect on the bias of the theoretical discourse, reveals the essence of the synepeische method put forward by Wolfgang Fikentscher from the perspective of legal anthropology, in order to express another kind of sound and avoid tunnel vision. Although the Chinese economic law research has made great achievements during the past three decades after open and reform, but scholars often merely argue their personal point of view, and it is difficult to havea rational dialogue. This kind of basic work is taken seriously under the evaluation system of Chinese universities; however, academic development needs of some people who were willing to pave the way. In this regard, we should actively break vision limitations and progress unremittingly on the basis of digestion and absorption of western legal theories to obtain globle vision, rather than simply copy those theories as a kind of local knowledge. The contribution of researcher from different countries un-

doubtedly helps to form a fusion of horizons in the field of economic law, and especially competition law.

According to Prof. Wolfgang Fikentscher, the method of Synepeik is to make it possible of the comparison philosophical way somewhat similar to the comparison law by analyzing the correlation between the premises and the results. According to the theory of Synepeik, each mode of thinking has its inherent and rational logical approach. So, the comparison of various mode of thinking can show the essential nature. Therefore, we will get a collection of elements to choose from, and then you can seek out the common denominators of the analyzed model. Sypepeik respects for the existence value of every culture, especially non-western culture. It is the tolerance to different cultures that will strengthen the understanding to different mode of thinking and philosophic cognition behind it.

An Introduction to Reconstruction of "Economic Law" —For Establishing the Recycling-Based Society is contributed by Prof. Kyohei Sakai from in Kyoto University Graduate School, who ever once worked for Japan Fair Trade Commission with extensive and broad experience in competition law. He analyses the theory of economic law displayed in lectures during the past nine years in the graduate school, in particularly Kanazawa Yoshio's *Economic Law* as well as Tanso Akinobu and Hiroshi Iyori's *Economic Law General Remarks.* Besides, Prof. Kyohei Sakai clarifies his views on the object of economic law, the status of anti-monopoly law in the system of economic law and the hierarchical structure of modern economic law. According to Prof. Kyohei Sakai, based on the thought of Freiburg School, the theory of social market economy is rooted into German economic law,

and "environmental-social market economy" further promoted by Wolfgang Fikentscher① manifests the right direction to balance free market economics, the strive for social fairness and the sustainable use and protection of the natural resources. Prof. Kyohei Sakai suggests reconstructing economic law to build a sustainable economic-social system.

Following the above historical and biologic analysis of the origin of Economic Law, Professor Liu Guanghua from the Law School of Lanzhou University in China presents us with another perspective to understand the formal foundation of Economic Law by interpreting economic law with a mainstream juristic tool—the analytical jurisprudence paradigm, which is long been ignored of its importance and meaning by Chinese legal arena. In order to gain his ends, Professor LIU discussed in his paper *On Marriage between Economic Law and Analytical Jurisprudence Paradigm*, firstly the theoretical and practical meaning of the analytical jurisprudence paradigm to specific legal department which is a key word/basic concept in continental law especially in Chinese legal philosophy, and its advantages with comparison to the value-oriented paradigm such as the natural law; Then based on a preposition that any legal department/institution is a trinity of specific institutional facts, legal value and legal logic, the paper re-examines the historic evolution of the analytical jurisprudence, especially its several vital academic turns. It also explores the dynamic interaction between legal theory and practice, and the relation between specific legal insti-

① In fact, the concept of an Eco-social market economy was already developed by Austrian politician Josef Riegler during the 1980s.

tution, relevant legal value and analytical jurisprudence; Finally, it draws some conclusions that every school of jurisprudence must be or has to keep pace with the times, and there is a possible marriage between the so-called new analytical jurisprudence—the institutional theory of law and the analytical research of economic law. Professor LIU has furthered the study on this topic in his monograph—*On Economic Law: A Perspective of Analytical Jurisprudence* (*Beijing: Renmin University of China Press*, 2008.) and a series of academic papers. In his follow-up research works, from the perspective of analytical jurisprudence paradigm, Professor LIU systematically discussed the analytical foundation of economic law, namely the concept of economic law, the classification of economic law, the economic law system, the enforcement of economic law, the legal relation of economic law and the consequence of economic law etc., aiming to provide a solid linguistic and logic foundation for institutional facts and legal value of economic law.

Social law services to the realization of social justice and social security. The aim of economic law is to form the legal framework for the market order, and to prevent the destruction of competition. Based on the long-term thinking, Prof. Andreas Hänlein pays attention to the social law development in Germany and the EU, namely: the advancing of market oriented and entrepreneurial thinking in field of social law, social law as the economic law being the fruitful reaction to the current development. Prof. Andreas Hänlein firstly puts forwards the basic connotation of proposition, then properly supplies with some examples to prove. In the third part, it clarifies the practical advantages of this method that the social law draws close to economic law. Finally,

Prof. Andreas Hänlein reveals the significance of paradigm shifting to social law science.

Prof. David J. Gerber in his contribution summarizes Wolfgang Fikentscher's perspectives and insights expressed in his works. Wholly speaking, from the anthropological perspective, Fikentscher argues that European competition law should pay more attention to "a less economic approach", given that Europe has unique experience and conditions. Fikentscher's scholarship is rooted into profound philosophical underpinning. In Fikentscher's view, neo-classical economics has significant deficiencies as a guide to the task of competition law, the central role given to economics in the more economic approach should be replaced by justice, power relationships should be concerned to protect the weak against abuses of power by the strong and so on. Prof. David J. Gerber also comments on Fikentscher's propositions, and argues that some of Fikentscher's depiction for neo-economics might lead to misunderstanding of his perspectives, and claims about the centrality of justice deserves further support to be widely accepted, the prevalence of "the more economic approach" in Europe is promoted by economic globalization and Europeanization, and the style which ignores the values represented by Fikentscher inevitably forms a barrier to share of his claims. Finally, Prof. David J. Gerber puts much importance to the value of Fikentscher's work and perspectives, and concludes that competition law should take Fikentscher's voice seriously.

The fundamental nexus of private law and competition policy is mundane: Economic competition requires a functional market, which in turn requires effective institutions for the enforcement of contracts. The economic constitution in an Ordo-liberal sense, therefore,

consists not only of a regulatory part, which aims at protecting competition against state restrictions (fundamental freedoms) and private limitations (antitrust law) alike; it also entails a facilitative part, which aims at protecting individuals against opportunistic behavior of their transaction partners (private rights and remedies). In this paper, *Private Law and Competition Policy in the Global Economy*, Prof. Gralf-Peter Calliess and his student Jens Mertens criticize the so-called "more economic approach" to European competition law for disregarding the importance of a functional system of private law. Based on the availability of market governance as an alternative mode for organizing transactions, this approach presumes that vertical integration is economically efficient. Since the enforcement of cross-border contracts by state-organized systems of private law, however, is insufficient, "make or buy" decisions in international commerce are prejudiced against "arms' length" transactions on markets. Consequently international transactions are integrated vertically into firm-structures to a higher degree than comparable domestic transactions organized in the shadow of domestic private law. The resulting over-integration of world markets leads to reduced competitive incentives and high bureaucratic costs. Contrary to the fundamental assumptions of the "more economic approach", vertical integration does, therefore, not per se foster consumer welfare in the global economy. However, as this over-integration is a reasonable reaction to the deficits in state protection of cross-border contracts, it cannot be countered by a strict world antitrust law without suppressing cross-border exchange. Thus, international private law policy establishing legal certainty in the enforcement of cross-border contracts currently seems to be the instrument of choice in promo-

ting competition in the global economy.

Prof. Tanaka Hiroaki fromKobe Gakuin University in Japan gives pondering over the role of Germany in the progress of European competition law. In his view, German influence on the initial movement of European competition law is very significant. German neo-liberalism thought is related with German market economy and competition law so closely, and provides a unified framework centering on competition law for European. Furthermore, many of the specific ideological part of the German competition law and experience also add strength to this thought. The author's interesting investigation from the angle of Japanese scholar on competition law thought in European integration after World War Ⅱ echoes Fikentscher's work, *Methoden des Rechts in vergleichender Darstellung*, and David J. Gerber's previous research in *Law and Competition in Twentieth Century Europe: Protecting Prometheus.*

In her article, *The Interface between Anti-monopoly Law and Anti-Unfair Competition Law*, Irmgard Griss points out that Anti-monopoly Law and Anti-unfair Competition Law is an integral part of the whole system, ensuring the free and fair competition. The two fields of law are marked with Europe characteristics to regulate market behavior. Therefore, there are inevitably overlaps. According to the case of the Supreme Court of Austria, unlike under the German law, an antitrust infringement also may be charged in reference to the general clause in Anti-unfair Competition Law.

SSNIP test is also called "hypothetical monopolist test", which is based on the Chicago School view from the perspective of market forces to define an antitrust market. In recent years, the test method at home

and abroad has been more and more widely applied to judicial practice. However, under the background of the economic imperialism in contemporary, the most of the arguments is provided by economics rather than from the perspective of law itself. Prof. Zhang Shiming from Renmin University of China, discusses the application of the Hypothetical Monopolist Test in competition law. Through the interpreting of the legal text, the present article explores the origins of the SSNIP test methods, reveals similarities and differences of its application in the United States and EU competition law practice, as well as the difficulties which it is likely to face in reality, especially the objective comments from an academic perspective are made on the pros and cons of experience China's judicial practice in availing this test in Tencent v. Qihoo case. According to the present article, the argument of economics is often inevitably tired interests, then it is important and useful for us to keeping a cool head towards the technology-oriented doctrine.

Prof. George L. Priest in his paper addresses why Robert Bork's *The Antitrust Paradox* appears to have had such influence on the Supreme Court, leading the Court to largely adopt the Chicago School analysis of antitrust issues. The author attributes this influence to Bork's endorsement of the per se prohibition of price fixing—not embraced by others of the Chicago School—which Bork claimed required the Court to rethink its treatment of vertical restraints. The author also attributes the influence to Bork's emphasis on neutral principles for judicial decision making, to Bork's service as Solicitor General, to the delayed publication of his book until after that service, and to the appointment of John Paul Stevens to the Court. Though it has not been generally publicized, Stevens, like Bork, was heavily influenced by Aaron Director and was

well aware of the many economic criticisms of Court antitrust opinions published in this journal.

Prof. Tsuchida Kazuhird of Waseda University Graduate School in Japan investigates the public welfare regulation based on the anti-monopoly law and the enterprise law and tries to grasp the relationship between the law of anti-monopoly and the law of economic regulation. Viewing the part content of economic regulation law at least being close to the content of the anti-monopoly law, the authors holds the theory of mutual complement, and in situations of conflict between the anti-monopoly law and the law on enterprise for public welfare with limiting competition character, recognizes the anti-monopoly's priority. The author also proves the necessity of the mutual complement by using the example of the two extremes of the legal system, and to some extent investigates the status quo of the anti-monopoly law and the law on enterprise for public welfare which aims to promote regulatory reform. According to the author, they are not theoretically contradictory to affirm the anti-monopoly laws priority when the limit competition becomes a major problem while maintaining the theory of mutual complement when promoting the competition becomes a major problem.

Prof. Uwe Blaurock's main areas of research include corporate law and comparative law, who was dean of the law faculty of University of Freiburg from 2002 to 2004 and became emeritus in 2011. As Prof. Uwe Blaurock pointed out, in order to achieve wide protection of *Act against Restraints on Competition* (*Gesetz gegen Wettbewerbsbeschränkungen*), Konzern is seen as a single one in this framework. The coordination between their respective companies no

longer belong to the protection of this law, and thus be entirely free from the regulation of the Federal Cartel Office (Bundeskartellamt). As long as the formation of Konzern is not dominant from the regulation of merger, it provides free space for participating in the formation of enterprises. Although Konzern in *Banking Act* (*Kreditwesengesetz*) does not have business property, many requirements have considered dangers from the combination of complex shareholding structure of credit institutions in order to effectively achieve the purpose of protection of bank supervision. But in any case, the comparison of the areas of supervision shows that no general statement can be made about whether Konzerns are total regulatory regarded as privileged or disadvantaged, which always depends on the particular purpose of protection of the law.

As Mary LaFrance's *Passing Off and Unfair Competition: Conflict and Convergence in Competition Law* observes, with respect to both registered and unregistered trademarks, there is a distinct cultural difference between legal regimes that give primary importance to the policy of preventing consumer deception, and those that treat this goal as subsumed within the larger goal of regulating competition. For the most part, the narrower goal of consumer protection predominates in the common law countries, while civil law countries have embraced the broader concept of unfair competition. At present, although significant differences between the passing off and unfair competition regimes remain, the gap has been narrowing. In a piecemeal fashion, case law in common law countries has broadened the concept of passing off to apply to an ever-broadening group of activities. The common law regime that has come under the greatest pressure to abandon the decep-