Front. Law China (2006) 3: 432–454
DOI 10.1007/s 11463-006-0019-0

RESEARCH ARTICLE

WANG Yi

Substantive rules of argumentation for value judgment in civil law: In the context of academic practice of civil law in China

©Higher Education Press and Springer-Verlag 2006

Abstract Value judgment is at the core of civil law. This paper explores how scholars of civil law reach mutual understanding and consensus on specific value judgment by rational discussion in the context of multiple value orientation. Based on a brief evaluation of the theory of legal argument and with the basic value consensus of Chinese civil law scholars as the premise, this paper proposes two substantive rules of argumentation for scholars of civil law to discuss value judgment: First, a strong of equal treatment should be carried out in the absence of sufficient and justified reasons or otherwise; Second, the freedom of civil subject should not be restrained in the absence of sufficient and justified reasons or otherwise. To reach mutual understanding, and on the basis of that to reach new consensus on specific value judgment further, scholars of civil law should base their discussions on substantive rules of argumentation for value judgment, follow rules and forms of argumentation as procedural techniques, and apply proper methods of argumentation. This paper also explores the application of substantive rules of argumentation on two specific value judgment issues of civil law scholars.

Keywords value judgment，substantive rules of argumentation，equal treatment，freedom of civil subject

Received April 10, 2006

WANG Yi(✉)
Renmin University of China, School of Law, Beijing 100872, China

I Introduction

The civil law issue is the core of civil law science issue[1], and the value judgment issue is the core of the civil law issue[2]. As a tool of social control, civil law maintains the harmony of the social order through setting up the corresponding coordination rules on specific types of conflict for interest relations. The "specific type of conflict for interest relations" refers to the conflicts among civil subjects and refers to the conflict relations among the civil subject interests, national interests and social public interests. Civil law, as the core of private law, is not undertaking the mission to actively promote the realization of national interests and social public interests, but still must develop the function of protecting national benefit and social public interests passively. It should put forth efforts to prevent the arrangement of interests of the civil subjects from undermining national interests and social public interests. Therefore, civil law needs to set up corresponding coordination rules on this type of interests' relations conflict. Making the choice of the above-mentioned interests' relations conflict according to specific value orientation of the civil law, or the course for arranging the gradation of realization

[1] Under the tradition of statute law, my opinion is to distinguish the civil law issue and civil law science issue. Discussions of the civil law issues all rest with the design of the regulations of the civil law in the end. But there is not such restriction on this issue of the civil law science, so long as the target discussed relates to civil law, it belongs to the issue of the civil law science. A civil law issue must be a civil law science issue, but a civil law science issue may not be a civil law issue. For example, what is the characteristic of the succession and transplantation of China civil law science? What about the source and course of development of civil law science of China? What kind of academic orientation should civil law science turn to? Such issues mentioned above are issues of civil law science, but not civil law issues. Distinguishing of the civil law issue and civil law science issue contributes to our distinguishing of "the judging standards of civil legislation and judicature" and "the academic judging standards of civil law science". About the detailed analysis and discussion on this matter, see Wang Yi, *The Essence and Discussion Methods on Real Property Precedence*, in *Nine people review on the civil law science*, vol. 1; edited by Cui Jianyuan; (HK2003). P.327-332.

[2] Under the tradition of statute law, the civil law issue can be divided into: the judgment on facts, the judgment on value, the choice of interpretation and the legislation technique. The purpose of discussion about the judgment on facts is to reveal what type of interest relations in the living world, what method we choose in former times to coordinate these interest relations, how about the performance; The purpose of value judgment which is based on the conclusion draws from discussion about the judgment on facts, according to the specific value orientation, is to determine what type of interest relations are suitable for using civil law methods to coordinate in the living world; and make appropriate arrangements of the corresponding interest relations according to the specific value orientation in this sense, Though the value judgment issue of the civil law is an ethics problem stated in the civil law, not all that questioned by using "should" or "should not" are value judgment issues in civil law; The purpose of choice of interpretation is to express the conclusion of value judgment and subsidiary factor with the language of the civil law in achieving the conclusion from "living world" to "civil law world", and open up the possibility for codification of the civil law; Legislation technique issue is to discuss how to accommodate the conclusion of value judgment properly in a code or a special law, during the process of codification of civil law. As for civil law issues of all kinds, the judgment on facts is the prerequisite of the value judgment issue and the discussion of judgment on facts, at the same time, under the circumstances of "reviewing type" rules it can also examine the function of interests coordination strategy of civil law (namely value judgment conclusion); The choice of interpretation and the legislation technique are both growing out of value judgment issue and part of legal technology of implementing value judgment conclusion in one code or one special law. In this respect, the author holds that the judgment on value is the core of civil law issue. About the detailed analysis and discussion on this matter, see Wang Yi, *Legislative Choice on Pattern of Real Property Transaction*, in *Yue dan civil law & commercial law*, 2003(2). P.70-93.

of the interests, is a course of making value judgment. The issues that civil law scholars discuss and pay close attention to in the academic practice mostly relate to this.

In a society where there is a single value orientation, when facing the value judgment question, the discussants achieve consensus easily. But in a society where there are many value orientations, because of the discussants' differences of social experiences, educational background as well as individual preferences, they always adhere to different value orientations, and it's hard to reach an agreement during the discussion about value orientations issues. Therefore, the value orientations issue becomes a difficult problem that puzzles human wisdom. The discussants unavoidably go into three schools when facing the infinite question: One is infinite recursion, below that it is unable to establish any foundation for the discussion; Two, carry on the vicious cycle between the points of view that supports mutually; Three, terminate the discussion process arbitrarily rested on a certain opinion that is chosen subjectively, for example, to terminate the argumentation chain with the religious belief, political ideology or other ways of "creed".[3] Therefore, analysis philosophers directly deny that the value judgment issue can be discussed rationally. They hold that "a sentence that only expresses the value judgment does not state anything, which is pure emotional expression". So "ethics cannot be discussed. Ethics is transcendental."[4] And "we must keep silent regarding the things which cannot be discussed."[5]

The problem is civil law, as a crucial tool, that puts society in order by rules, undertakes the mission to convince the mass to accept rule-governing. People who take civil law science research as a career, are unable to "escape from the real world" like the philosophers. The civil law scholars must respond to all kinds of value judgment questions in real life to provide a model for civil legislation and the civil judicature on the basis of full analysis. How do the civil law scholars complete the task, which seems impossible to complete? In other words, how can the civil law scholar discuss the value judgment issue rationally?

The theory of legal argument[6] was established on Modern Logic, Language Philosophy, Pragmatics and dialogue theory as well as absorbed the achievement of the theory of ethical argument. It attempts to propose a feasible method for discussion of value judgment issues: so long as the

[3] Shu Guoying, Get out of Minsch Hausen's trap. See: Robert Alexy. *Theory of Legal Argument*, translated by Shu Guoying. China Legal Publishing House (Beijing), 2002. P.1-2.
[4] Wittgenstein, *Tractatus Logico-Phiosophicus*, translated by He Shaojia, The Commercial Press, 2002. P.102, 6.421.
[5] Wittgenstein, *Tractatus Logico-Phiosophicus*. P.105.
[6] About the detailed introduction and analysis of theory of ethical argument and theory of legal argument, see Robert Alexy, *The Theory of Legal Argument*. China Legal Publishing House, 2002. P.1-2.

discussants follow the specific proof rules and forms, the conclusion may be considered as conforming to the correctness request. In other words, the theory of legal argument tries hard to provide some kinds of rational foundation for the correctness request through the procedural techniques.[7] The representative personage of the theory of legal argument, Robert Alexy, believed that, the rationality should not equate 100% credibility, so long as it has observed the certain discussion rule and form, then the normalize topics could be proved in the rational way, and the conclusion can be called the rational conclusion[8]. This train of thought could certainly be used to discuss the value judgment issues in civil law. But can the legal proof theory solve the former problems sufficiently? The answer is no. Just like the representative personage of German legal hermeneutic, Arthur Kaufmann, criticized in view of the theory of legal argument, that in the philosophy standpoint the theory of legal argument nearly all takes analysis philosophy as the background, and the flaw of analysis philosophy also becomes the flaw of the theory of legal argument naturally. Therefore, this theory could only be used to discuss the value judgment issue with semantics rule.[9] This criticism is for sure. Although Alexy had never neglected the discussants' predetermination, he emphasized once again that "the theory of legal argument is carried out under a series of restricted conditions. On this, it must be pointed out especially that it must be restricted to codified law, following the precedence, also dogmatics, which is expressed by legal science promoted by institution, as well as by the justice system".[10] "The predetermined normalize believes, the desires, the explanations of demands as well as the experience information that the discussants have constituted the start point of the argumentum."[11] But he gave up the essential analysis and inspection on the discussants' predetermination, and rest on such reasons, namely "totally different normalize believes, the desires, and the explanations of demands are all possible to be the start point".[12] The theory of legal argument is unable to answer the question proposed in this article just because of this.[13] It is of great importance for

[7] Shu Guoying, *Get out of 'Minsch Hausen's trap*.

[8] Yan Juean, Law, Rationality and Argumentum: Robert Alexy's Theory of Legal Argument, *Law Review*, P.25.

[9] A. Kaufmann, W. Hassemer. *The Philosophy and Theory of Law*, translated by Zheng Yongliu. Law Press (Beijing), 2002. 150 – 151. In this book, he pointed out that pure theory on procedures has the flaw that it considers giving up meanings and experiences to be possible." see Arthur Kaufmann , *The Philosophy of Law*, translated by Liu Xingyi. Law Press (Beijing), 2004. P.400.

[10] Robert Alexy, *The Theory of Legal Argument*. China Legal Publishing House (Beijing), 2002. P.19-20.

[11] Robert Alexy, *The Theory of Legal Argument*. China Legal Publishing House (Beijing), 2002. P.21.

[12] Robert Alexy, *The Theory of Legal Argument*. China Legal Publishing House (Beijing), 2002. P.2.

[13] Certainly, this is too rigorous to Alexy's Legal Proof Theory. On this point, I agree with Shu Guoying, the translator for Chinese vision of *The Theory of Legal Argument*, which tells "although the theory of legal argument lays particular stresses on the procedure theory, moreover, even if this procedure theory is not perfect" "all theory is impossible to solve all human difficulties in theory or practice, but so long as it has advanced the process of understanding them, even if it only reveals the difficulties in solving them, it should be commented to be of worth." see Shu Guoying, *Get out of 'Minsch Hausen's trap*'. P.25.

the civil law scholars when discussing the value judgment issue to make certain of the common predetermination of the discussants, that is, the least value consensus, while entering into the proof procedure. Lacking the least value consensus, the civil law scholars are unable to reach mutual understanding, to say nothing of reaching consensus on concrete value judgment issues. Our Chinese academic practice of civil law science has also provided support for this judgment.

In fact, the civil law scholars always discuss the value judgment issues on the specific background of rule of law, rather than considering it as "a game on a bottomless checkerboard". The civil law scholars can always seek the least value consensus on the specific background of rule of law, as the common predetermination, to set up an academic platform for their discussion of value judgment issues, which is most obvious when the civil law scholars discuss the value judgment issues from the hermeneutic aspect. Discussions from the hermeneutic aspect must be carried out on the background of present codified law, and the discussants must respect the legislators' value orientation, which is shown in the codified law. In view of some concrete value judgment issues involved in the regulations, even if the discussants may dispute on a certain value the legislators show in it, they could at least reach the least value consensus on the basis of the legal fundamental principle, as a platform for further discussion.[14] If the civil law scholars discuss the value judgment issues from the legislation aspect, it seems as if the discussants cannot reach value consensus because there's no need for them to consider the value orientation that the legislators express in codified law. But the academic practice experience tells us that the discussants can still reach the least value consensus on some abstract basis. Our civil law science academic practice has proved this point: Even if discussing the value judgment issues from the legislation aspect, the discussants can still reach value consensus on the basis of the fundamental principle of civil law. Taking this understanding as a premise, the viable method for the civil law scholars to discuss the value judgment issues rationally, could be minimally expressed as: taking the discussants' value consensus regarding the fundamental principle of civil law as premise, establish the corresponding rules of substantive argumentum, seeking for mutual understanding by way of rational discussion, and reach a new value consensus as much as possible on the concrete value judgment issues on this basis.

[14] Prof. Zheng Chengliang holds a more optimistic view: (if we discuss the value judgment issues from the hermeneutic aspect) as for certain value judgment issues, because the legislators' value orientation has been expressed clearly in fact and logic judgment, the legislators have also been strained by them. However, there is no such a field that the discussants can express their minds limitlessly that turns to a kingdom dominated by rationality and logic. This makes the change from discussions on certain value judgment to facts and logic judgment possible. See Zheng Chengliang, *Justice in Law*. Law Press (Beijing), 2002. P.90-91.

This article tries to propose two substantive argumentum rules of the value judgment issues that the civil law scholars discuss on the grounds of the fundamental principle of civil law, and expounds the corresponding proof burden rule. The so-called substantive argumentum rules are argumentum rules not as the procedural techniques in legal proof theory, but taking the civil law scholars' least value consensus as its content. I deeply believe that, if the discussants take the substantive argumentum rules as premise, following the argumentum rules and forms as the procedural techniques, and utilizing the appropriate argumentum methods[15], they would certainly reach mutual understanding, and further open up the possibility for forming new value consensus.

II Two substantive rules of argumentation

The Strong of equal treatment should be carried out in the absence of sufficient and justified reasons or otherwise. The first Substantive Rules of Argumentation has something to do with the equal principle of civil law. The so-called equal principle is also called the principle that everyone's legal status is equal. Article 3 of the General Principle of the Civil Law of China explicitly states that the parties in the civil activities are all equal legally. The equal principle epitomizes the essential characteristic of the civil legal relation and is the main difference between the civil legal relation and the others. The equal principle is the most basic one of all the principles of civil law, and is also the logic prerequisite of the autonomy principle of private law. Without the assumption of the general equality among the civil subjects, the civil law will lose the foundation of its existence[16], and so will do other basic principles.

The equal principle is firstly reflected as the civil legislative and judicial criterion, that is, the legislator and the judge should treat the civil subjects equally, which is the requirement of the distribution of justice. The chief meaning of the word "justice" is that one should be treated equally without discrimination. Meanwhile, the regulations passed by the political legislators and the laws admitted by the judges prove to be reasonable by such fact: the bearer of the law is treated as a free and equal member of the law community. In short, while we protect the integrality of the personality of the right

[15] So-called utilizing the appropriate argumentum methods, including utilizing methods of linguistic analysis of law, logical analysis of law, historical analysis of law, sociological analysis of law, economic analysis of law and comparative analysis of law, and so on.. These methods can all be used for verifying the discussants' value orientations to be in justice.

[16] Wang Liming, *On General Stipulations of Civil Law*. China Renmin University Press (Beijing), 2003. P.107-108.

subject, we should treat them equally[17].

As stated above, the civil law, which serves as a tool of organizing sociality, sets up a corresponding coordinating rule to the conflicting interests' relationship in order to realize the function of adjusting and controlling the social relations by itself. But there are two types of equal treatments of different meaning in the linguistic context of distributing the interests and burdens: one is a strong of equal treatment, which requires that everyone should be considered as "the same one", and everyone taking part in the distribution could obtain an equal "share" of the interests and burdens. So we should avoid the classification on groups as much as possible. The other one is the weak of equal treatment, which requires the classification on groups according to certain standards, and those in the same category should obtain the equal "share". As a result, the weak of equal treatment means not only equal treatment but also treating differently: the same treatment for the same situation and the different treatment for the different one[18].

The modern civil law[19] attaches more importance to the strong of equal treatment. So the equal principle mainly reflects the equality of the civil capacity of the civil subjects for civil rights. In other words, the abstract personality of the civil subjects who serves as "the person" in the civil law should be of equality[20], and the persons in the civil law include natural person, legal person and other organizations. All the natural persons, disregarding of nationality, age, gender and profession, and all the economic organizations, disregarding of big, middle, small enterprises, should have equal capacity for civil rights because they are all persons in civil law. And some concrete types of persons, such as laborer, employer, operator and consumer and so on, are all regarded as the "person" and have equal personality in civil law, too. Just for this, civil law could realize the transition from legislation on identity to conduct jet which is from the legislation that gives different

[17] Juegen Habermas, *Between Facts and Norms*, translated by Tong Shijun. SDX Joint Publishing Company, 2003. 514.

[18] Zheng Chengliang, *Justice in Law*. P.40.

[19] The so-called modern civil law refers to the whole system of the conception of civil law, the principle, the rule, the theory and the ideality, which finally stabilized through the code compiling of the European countries in the 19th century after the development of the 17th and 18th century. In the scope, it includes the Continent law system such as Germany, France, Japan and the old China civil law, and the private law in Common Law system. See Liang Huixing, From Modern Civil Law to Contemporary Civil Law, *Civil and Commercial Law Review*, 1997(7).

[20] When it comes to the first remarkable characteristic of modern civil law, きた がわ ぜん た ろう once emphasized that the so-called social and economic model, which is based on the economic person (may be rational person). When we make this concept of economic person institutionalized legally, then it forms the concept of abstract and equal legal personality, which is also called the capacity for rights. The concept of person and legal person in the general rule of civil law and the concept of commercial person in the commercial law are just this sort of concept. In modern sociality, the municipal persons are the basic items of free activities. The concept of personality as the subject of rights was just formed by the institutionalization of the civil law.た がわ ぜん た ろう，ゆう ひ かく，1993. p.13-16.

rights according to different identities, to the one that gives the same legal effect on the same conduct disregarding the identity of the social members[21]. And just for this, by the form of written law, civil law could adopt extremely accurate, pure and technical language and serve as the abstraction from and transcend over the living conditions and world outlooks of various kinds of socialites, and expresses a surprising special quality of surmounting the system[22]. All of the above are because the modern civil law is based on two basic judgments on the social life at that time, and these two basic judgments are the foundation of the modern civil system and theory. The first one is equality. Under the undeveloped market economy system, the subjects engaged in the civil activity were peasants, handcrafters, shop-keepers and work-shop owners. There is almost no difference on economic force among those subjects, and one part is seldom remarkably superior to the other. As a result, the legislator made a basic judgment on the social life at that time that the civil subjects were actually equal. The second one is the interchangeability. The so-called interchangeability means that civil subjects frequently exchange their positions in the civil activity. In this way, even if the basic judgment about equality may have deficiencies, it will be just remedied by the existence of the interchangeability[23]. In this sense, interchangeability is subjected to equality. And just these two basic judgments offer the solid social foundation for the general equality assumption between the civil subjects, and offer the justification for the insistence of modern civil law on the strong of equal treatment. Naturally, modern civil law includes the weak of equal treatment. For example, the civil law distinguishes different capacities for civil conduct of a natural person according to the natural person's age, intelligence and spiritual and physical status mainly, and set up respectively different law rules.

The contemporary civil law is different from the modern civil law. While laying emphasis on the strong of equal treatment, the equal principle on the contemporary civil law pays more attention to the weak of equal treatment. Since the end of the 19th century, the life of human society has changed deeply. Therefore, the two basic judgments as the foundation of the modern civil law has been challenged, and the division and antinomy among some social groups have appeared. Above all, it is the division and antinomy between enterprisers and laborers, then it is the division and antinomy between producers and consumers, and the laborers and consumers become the weak groups in social life[24]. Facing the above division and antinomy, the assumption

[21] Li Kaiguo, *On General Stipulations of Civil Law*. Law Press(Beijing) ,2003. P.70-71.
[22] Su Yongqin, Enforcement of State in Self Rule of Private Law. *Peking University Law Journal*, volume 1, 2001.
[23] Liang Huixing, From Modern Civil Law to Contemporary Civil Law.
[24] Liang Huixing, From Modern Civil Law to Contemporary Civil Law.

of general equality among civil subjects has been challenged too. If we insist exclusively the strong of equal treatment, and emphasize only the equality of the abstract personality of the civil subject, we can not sustain social peace in some specific domains. The weak of equal treatment has then obtained more and more focus and emphasis day by day. It is exemplified as follows: in the field of living consumption we divide the civil subject into the operator and consumer; in the field of production and operation, we divide the civil subject into the employer and laborer, and we set up respective corresponding law rules in order to enhance the protection of the interests of consumers and labors. The equal principle stated by civil legislation in China refers to the equality in the modern civil law. On one hand, it insists on the equality in a strong sense and emphasizes the abstract equality in civil subjects; on the other hand, it emphasizes the equality in a weak sense in some specific domains at the same time. In our country, the Law of Protection for Consumers' Interests and the Labor Law pay more attention to protect the consumers and the laborers respectively.

We should say that the strong of equal treatment constitutes the foundation for the existence of civil law. Without the assumption of general equality among civil subjects, not only the autonomy principle of the private law will lose the prerequisite for existence, but also civil law will lose the justification for its existence. Without the assumption above, the civil law's goal in adjusting and controlling the social life by the written law will be impossible for lack of reliability. In this sense, the weak of equal treatment is the exception of that in the strong sense. Only if civil law hasn't lost the justification in adjusting and controlling social life, the weak of equal treatment will exist as the exception. The equal principle in this sense means a substantive demonstration rule of the question on value judgment of the civil law. Without sufficient and justifiable grounds, the strong of equal treatment should be insisted. This rule corresponds to the rule of burden in demonstration, that is, the discusser who maintains the weak of equal treatment to solve the problem on value judgment must bear the demonstrative burden to prove on the basis of sufficient evidence and justifiable reasons that we need to adopt the weak of equal treatment on the problems about specific value judgment. Otherwise, the argument could not be proved to be right. It means that, facing the problem of specific value judgment, the discusser who maintains the weak of equal treatment should not only demonstrate positively that there are sufficient and justifiable reasons, which make it unnecessary to carry out the strong of equal treatment, but also refute all the reasons that the discusser puts forward who maintains the strong of equal treatment. Meanwhile the discusser who advocates the strong of equal treatment just needs to refute effectively the presented reasons from the discusser who advocates the weak

of equal treatment.

According to the rules on demonstrative burden, the presented reasons from the discusser who bears the demonstrative burden, need to have the justification in essence and form in order to make the reasons sufficient and justifiable. The so-called justification in essence refers to the discusser (who bears the burden in demonstration), who must prove that if we don't adopt the weak of equal treatment, the interests' relationship will be out of balance among the social groups who are in the status of division and antinomy. This makes the party in the weak position fail to express his own will freely, and further makes the autonomy principle of private law useless, which is built on the assumption of general equality among the civil subjects. The so-called justification in form refers to the discusser (who bears the burden in demonstration), who could actually prove that if we adopt the weak of equal treatment, we still meet the demand from the systematic enforcement[25]. As a result, it does not violate the principle of rule of law that the situation should be treated similarly.

After the announcement of the Contract Law of the People's Republic of China, Article 52.1 item 1 and Article 52.2[26] point to "the State's interests" whether comprising the interests of state enterprise and of the state holding or joint company, the academic group and the practice group have had different opinions. As the answer to the question will determine whether the corresponding contract behaviors of the state-owned enterprise and of the state-joint company are absolutely invalid or are altered or rescinded[27], thus it influences the profit arrangements among civil subjects directly, which makes it a typical value judgment. I plan to use it to demonstrate the application of the former rules of argumentation.

As for this question, there exist in the field of the civil law two opposing views: one claims the interests of the enterprise and of the state holding or joint company are the state's interests[28]. Contract law should classify the

[25] So-called systematic enforcement means that the constitution of the civil law should try its best to form a system and realize the consistency, if there are not enough sufficient and justifiable reasons, we can't set up an exception for it. It concretely includes two aspects of contacts: one refers to the systematic enforcement in essence, which emphasizes the harmony of value orientation; the other one is the systematic enforcement in form, which emphasizes the harmony of logicality between different law systems. On the details about the systematic enforcement, please refer to Wang Yi, *Systematic Enforcement of Civil Law Code,* in *Analects on History and Future in Scenario of One-Century-Celebration of China Civil Law.* Law Press (Beijing), 2003. P.73-85.

[26] Contract law, Article 52.1 confirms "either party enters into the contract by means of fraud or coercion and impairs the State's interests", the contract is invalid; Article 52.2 confirms "there is malicious conspiracy causing damage to the interests of the State, of the collective or of a third party", the contract is invalid.

[27] If holding the interests of the State enterprise and of the state holding or joining company are not the State's interests, under the same condition, the concerned judgment about the contract behavior validity mainly is the application of Article 54 of the Contract Law. The article affirms under special conditions, such as one party is deceived or intimidated, the validity of the contract behavior is altered or rescinded.

[28] Xie huaishi. *Principle of Contract Law*. Law Press (Beijing), 2000. 117. What needs to point out is, the writer of this article doesn't agree with the quoted view in the text.

market bodies — dividing them into the market body as the state enterprise and the state holding or joint company and as other types, set out different lawful regulations respectively, while the other insists on the interests of the enterprise and of the state holding or joint company aren't the state's interests[29], so neither should classify the market bodies nor set out different lawful rules. It is easy to see that the two opposing opinions reflect two kinds of different equality standpoints. When in the face of the same value judgment problem: the former advocates the equal treatment in the weak sense, while the latter insists on the strong one. According to the above-mentioned demonstration principle and its deprived proof principle, the debater who sticks to the idea that the interests of the state enterprise and of the state holding or joint company belong to the state's interests should undertake the corresponding proof responsibility. Not only should the debater prove the necessity of the equal treatment in the weak sense with sufficient and justified reasons, but also disprove all the reasons that insist on the equal treatment in the strong sense.

During the course of the discussion, the debaters who uphold the idea that the interests of the state enterprise and of the state holding or joint company belong to the state's interests, exclude the interests of the state enterprise and of the state holding or joint company from the state's interests, thus changing the corresponding contract behaviors from absolute invalid into altered or rescinded. If the governors of the state enterprise and of the state holding or joint company are irresponsible thus giving up the right of altering or rescinding the contract, does that not let the state properties be let loose?[30] This reason is put forward by the debater from the logical inference angle; its validity is determined by the answers to the following questions of the fact judgment: whether there exists real proof to prove that the interests of the state enterprise and of the state holding or joint company belong to the state's interests will set back the loss of the state properties. If the debaters who persist that the interests of the state enterprise and of the state holding or joint company belong to the state's interests can not introduce real proofs to prove their reasons, the reasons based on a mendacious proposition, they cannot play the demonstrative role. In fact, up to today, we still can not see such evidences.

In contrast to the above-mentioned points, the debaters who insist that the interests of the state enterprise and of the state holding or joint company are not able to put forward a number of favorable proofs to support carrying out the strong of equal treatment about the value judgment question. This mainly

[29] Xie huaishi, *Principle of Contract Law.* P.117.
[30] Hu Kang-sheng. *The Contract Law Explanation of the People's Republic of China*, Law Press (Beijing), 1999. P. 89-90.

contains as below:

First, the greatest difference between definitely invalid contract and altered or rescinded contract is that: holding the contract definitely invalid means using the state's public power to put direct interference upon the market trade relations, deny the contract's validity among the parties, and forbid the contract to realize the anticipated lawful effects of contract subjects. Therefore, where the contract is definitely invalid, there is no implementation and embodiment of the contract liberty principle, maintaining the altered or rescinded contract can leave the contract subjects more room to make their own decisions. That the disadvantaged parties trading positions because of the meaning expression is un-free or is defect can choose to use the rescission right to wipe out the contract effect, or choose to employ the alteration right to adjust the interest relationships among the parties. The state public power does not get involved in the market transactions directly. Regarding the state enterprise and the state holding or joint company as the state's interests for presupposition, it will result in the following questions that: Up to now, the main theme of economic system reform being carried out in our country for the state enterprises is "to rent the rights and lose the profits". It is a qualified market body. In this sense, making the state enterprises embrace market decision rights is one of the most important content of our economic system reform. If the state's interests include the interests of the state enterprise and of the state holding or joint company, which is under many conditions of market transactions, applying the decisions come from the state's public power in place of the decisions from the market bodies, such as the state enterprise and the state holding or joint company. This deviates from the direction of the whole economic system reform. Then, when the state enterprise and the state holding or joint company in a inferior status out of the counterpart's deceiving or intimidating behavior, in case, only by altering the contract can the trade purpose be realized and also prevent itself from encountering damages through regulating the beneficial relations. Maintaining that the interests belong to the state's interests, which leads to the above contracts being definitely invalid, will result in the state enterprise and the state holding or joint company losing the possibility to tune profit relations flexibly in practice. Therefore, ranking the disadvantaged position in the market competition violates the original intention of keeping and adding values of the state's properties.

Second, if maintaining that the state's interests include the interests of the state enterprise and of the state holding or joint company, the judge will face a puzzling problem in the trial practice: a holding company's 60% share is governed by the state, the state makes a contract with other market bodies, the counterpart executes deceiving or intimidating behaviors, and damages

the state holding company's interests, how will the judge confirm the validity of the contract? Is the whole contract invalid? or does the state hold 60% share, so 60% of the contract is definitely invalid, and the remaining 40% is altered or rescinded in accordance with Article 54 of the contract law? If the whole contract is deemed as absolutely invalid, the 40% share of the company may be controlled by a natural person or a private enterprise. Then according to the concerned lawful regulations that protect the state's interests, on what account should we deem the corresponding contractual behavior concerned with the shares definitely invalid? If 60% of the contract is absolutely invalid and 40% is altered or rescinded, then the unimaginable case will emerge that the same contract behavior for the same reason is partially definitely invalid and partially altered or rescinded. Also, if one party uses deceiving or intimidating behavior, which damages the interests of the state holding or joint company, the contract should not be dealt with as definitely invalid and only regard those contracts which damage the interests of the state-invested enterprise and so on as definitely invalid. This can't meet the demand of system compulsion, violates the lawful principle of similar questions/disposal, and opposes the idea of establishing a society based on the rule of law.

Third, under the background of China's accession into the WTO, holding a strong equal treatment and giving all market subjects equal treatment without discrimination are consistent with the demands of the WTO's regulations and our country's promises. It is obviously incorrect to think that the interests of the state enterprise and of the state holding or joint company belong to the state's interests and adopt different lawful rules toward other market bodies.

Until today, the debaters who stick to the equal treatment in weak sense, neither have proved the existence of sufficient and reasonable reasons to claim that the special value judgment question does not need to enforce equal treatment in strong sense, nor have they made effective counter arguments to those who uphold executing the equal treatment in strong sense in the course of the demonstration. Their viewpoints are unproved and do not exist. Based on this reason we can draw the conclusion that the interests of the state enterprises and of the state holding or joint companies do not belong to the state's interests.

III The freedom of civil subjects should not be restrained in the absence of sufficient and justified reasons for otherwise

The second substantial argumentation rules have a close relationship with the

principle of the autonomy of the private law. The principle of the autonomy of the private law, or the autonomy principle of will, is a guideline for civil subjects to carry out civil activities based upon their will affirmed by laws. Grounded upon the principle of the autonomy of the private law, the law system endows every civil subject with, or protects, the possibility of adjusting the relations between them through the civil conducts, especially the contractual conducts, to some extent. The core of the principle of the autonomy of the private law is to confirm and protect the freedom of the civil subjects. It requires that "the individual has the highest freedom to do everything he wants to do, according to the legal possibility and the factual possibility."[31] Article 4 of the General Regulations of Civil Law provides that the civil activities should be abided by the principle of freedom. This article is the confirmation of the principle of civil autonomy.[32]

The principle of the autonomy of the private law is the most important principle. It is the embodiment of the basic civil law's essence. The most important mission of civil law is to confirm and guarantee the realization of the freedom of the civil subjects. The principle of equality is the logical prerequisite of the principle of the autonomy of the private law; the principle of justice intends to find a balance of interests between both sides. It is unfair to arrange interests against the principle of the autonomy of the private law that should be modified by the principle of justice. Therefore, the principle of justice is an available supplement of the principle of the autonomy of the private law. The principle of faithfulness and credit raises the least moral desire to the legal desire, in order to find harmony between the individual interests and the common interests. The principle of public order and virtuous customs has a dual function of rectification on the contradictions between the individual interests and the national interests or the common interests. The principle of faithfulness and the principle of public order and virtuous customs are the necessary restrictions of the principle of the autonomy of the private law, aiming at the coexistence of harmony and freedom between different civil subjects.[33] It is obvious that the principle of the autonomy of the private law is the core, with respect to the relationship between the principles of the civil law.

---

[31] Robert Alexy,*Theorie der Grundrechte,* Baden-Baden,1985. P.317.

[32] Although on the theory of interpretation, the principle of freedom can be explained into the principle of the autonomy in private law, but on the theory of legislature, the concept of freedom only means out of coercion, which can hardly contain the meaning of the autonomy of the private law or the autonomy of will. Maybe we can use the concept of autonomy in private law or the autonomy of will in the coming civil law code to replace the concept of freedom.

[33] The least moral desire is the core of both the principle of faithfulness and the principle of public order and virtuous customs. The principle of faithfulness and credit force the civil subjects to achieve a particular moral desire positively in the civil activities and make a moral standard for the civil subjects to achieve it through the civil activities. However, nor does the principle of public order and virtuous customs, which only passively make a baseline for the civil subjects not go beyond in the civil activities .

The reason why the principle of the autonomy of the private law is the heart of all the principles in civil law is that civil law is the basic law of the society of citizens. Here, the society of citizens is not the traditional expressed by the ancient Roman thinker Cicero.[34] It is the society of citizens with the neoteric meaning. Hegel brings forward the concept of the society of citizens with the neoteric meaning in his book "The Principle of Philosophy of Law", with the prerequisite of the division of the body politic and the society of citizens. Habermas hit the nail on the head. He argues that the society of citizens is a kind of "the individual fields of autonomy" independent from the body politic.[35] Therefore, the autonomy is the basic characteristic of the society of citizens. The autonomy of the society of citizens means that the subjects of the society of citizens can do the things independently with no interference from the outside, especially the public power, when they are dealing with their personal affairs. Accordingly, Mr. Xie huaishi asserts that "What are the essences of the civil law? It is acknowledging that the individual has his independent personality, is the subject of the laws and some parts of the individual life cannot be interfered, especially by the body politic without the permission of the individual."[36] Just at the point! Freedom for civil law is just like souls for lives. Civil law is unnecessary and cannot possibly exist without the beliefs and adorations on freedom. Civil law is to protect and confirm freedom of the civil subjects at this point. So in civil law, it is those free decisions without reasons that hold the dominant status; it is those restricted ones in the public law."[37]

The principle of the autonomy of the private law emphasizes that the legal relations between individuals should be decided by the civil subjects with their own will. Thereby, it provides freedom protected by laws on civil subjects. This kind of freedom is the individual freedom, including (1) the passive freedom decided without interferences; (2) the positive freedom which ask the public power to protect the free decision with their wills. "The independence of any conducts of the civil subjects is absolute, on the aspects of their own. The individual is the highest sovereignty, according to his body and soul."[38] The history of the social development tells us a rule of experience, that is, the system that can guarantee the realization of personal decision is

[34] It means that the society of citizens is not only a single country but also a living circumstance that developed widely to merge into a civil political community of a city. Refer to David Miler, Vernon Bogdanor, *The Blackwell Encyclopaedia of Political Science,* edited by Deng Zhenglai, Chinese Political Science and Law Press, 1992, p125. Before 18th century, people ordinarily take the concept of society of citizens in classical perspective, which means the civilized society of human being. It is not the political state opposite to the society of citizens, but naturally the different situations of the human beings and the brutal tribal life.

[35] He Zengke, The Evolving of the Concept of Society of Citizens. *Social Sciences in China*, 1994(5).

[36] Xie Huaishi, From the 100th Anniversary of Germany Civil law code to the Problem of Chinese Civil Code. *Peking University Law Journal*. 2001(1).

[37] Dieter Medicus, *General Theory of Germen Civil law.* Law Press (Beijing), p.7.

[38] John Stuart Mill, *On Liberty*, translated by Cheng Chonghua. The Commercial Press (Beijing), 1996, p.10.

humanistic and has the strongest vitality. Meanwhile, the history of economic development also iterates that "the free decision is an effective method to regulate the economy. It can dispatch labor and capital to which has the most benefits, especially in a competitive economic system. Other regulative methods, for instance, the national regulation, is more complex, slower, and more expensive, therefore, less beneficial collectively."[39]

The civil law concepts, such as the autonomy of corporation, the sanctity of civil rights (whose core is the sanctity of ownership), freedom of contract, freedom of marriage, the autonomy of family, the freedom of testament, and the responsibility of fault, is the incorporation of the principle of the autonomy of the private law in different fields. Generally speaking, civil law guarantees the principle of the autonomy of the private law. To guarantee the realization of the civil law concepts discussed above is to guarantee realization of justice and fairness pursued by civil law. Fairness and justice of the civil law are based upon the constituents of the freedom of wills rather than any constituents with reasonable contents and validity. Therefore, the legal proverb says, "there is no unfairness to the man who is most willing to do something."

Of course, the principle of the autonomy of the civil law is not absolute. Freedom protected and confirmed by the civil law is also not unlimited. For instance, in a sense, the history of freedom of contract is a record of restricting and pushing forward the practice of the contract justice. The neoteric civil law is influenced by the legal ideology of individualism. So it emphasizes that the individual obtains rights and bears responsibilities with his own will, in the relations of the private law. The body politic cannot interfere. Any contracts concluded by the individuals with their own wills should be protected without exception, no matter what their contents are. Only when there are dissensions between the parties, the body politic can arbitrate by the institution of judgment. The decision should be made based upon the contract between the parties without any alteration. This kind of absolute freedom of contract is, "cooperate with the development of the free economy smartly".[40] However, the realization of the absolute freedom of contract requires that everyone should be absolutely equal in the social and economic lives. Otherwise, "it is unavoidable that the poor with low social status will be oppressed by the wealthy with high social status under the so-called freedom of contact".[41] "It is a poignant irony to talk about freedom of contract with the man who gives up sweat and toil in order to get the little pay in

[39] Dieter Medicus, *General Theory of Germen Civil Law*, P.143.
[40] Grant Gilmore, *The Death of Contract*, translated by Cao Shibing, Yao Jianzong, and Wu Wei from *Civil and Commercial law Review.* Vol.3, Law Press (Beijing),1995.
[41] Zhengyubo, *General Rules of Civil Law*, Sanmin Bookstore Ltd.1979. P.11.

return".[42] This is because "legal freedom, the legal admission to do the things with one's own will, is worthless, without the factual freedom of decision or without the possibility to choose to do the things permitted in fact".[43] From the 20th century, freedom of contract has been restricted by the public law and the private law, to some extent. The regulation on the free competition is the embodiment of restrictions in the public law, which aims at pushing forward the realization of the pubic policy. The restriction of the exterior borderline of freedom of contract is the embodiment in the private law, which aims at pushing forward the principle of faithfulness and credit and the principle of public order and virtuous customs. Therefore, "the private law seems to surpass the goal of protecting self-determination and serves for the realization of social justice; 'the guarantee of the survival of citizens and the protection of the weak has the same status like the pursuit of individual interests in the private law.'"[44]

It is obvious that the question of freedom and its restriction are the heart of civil law. The question of value-judgment in civil law mostly belongs to the question of freedom and its restriction. Freedom cannot be without restrictions, otherwise it cannot be realized or not be very good. However, we should limit the restrictions of freedom. Civil law will lose its legitimacy without the confirmation and protection of freedom. Then we can ratiocinate a substantial rule of argumentation of the question of value -judgment in civil law: We cannot claim to restrict the freedom of the civil subject without sufficient and fair reasons. This rule also corresponds with a rule of argumentation burden: the man who claims to restrict freedom of the civil subjects should bear the responsibility of legitimacy of his value. If he cannot prove he has sufficient and fair reasons, he should confirm and protect their freedom.[45] In this level, when facing a particular problem of value-judgment, the man who claims to restrict freedom of the civil subjects should not only actively demonstrate he has sufficient and fair reasons but also contradict someone who opposes to restrict freedom of the civil subjects. While the man who opposes to restrict freedom of the civil subjects only needs to contradict who brings forward the reasons effectively.

The man who claims to restrict freedom of the civil subjects should

---

[42] Bernard Schwartz, *The History of American Law*, translated by Wang Jun, Hong De, Yang Jinghui, corrected by Pan Huafang, China University of Political Science and Law Press (Beijing), 1990. P.210.

[43] Robert Alexy, *Theorie der Grundrechte,* s.458 f.

[44] Habermas, *Between Facts and Norm*s, p.495 - 496

[45] The opponent of liberalism, Germen politician Carl Schmitt said: the basic principle of a liberal constitution is that, generally, people's freedom is infinite and the government's power to intervene is limited. In another word, people do not need to prove the rationality of their behavior, but the government must show its rationality when intervening in people's freedom. Joseph W. Bendersky, Carl Schmitt, *Theorist for the Reich,* Princeton, New Jersey: Princeton University Press, 1983, p.107-122. Indirectly cited from *Liberalism on Constitutional Government and Constituting Country*, by Li Qiang, in *Public Collection of Essays - Constitutionalism and Contemporary Country*, SDX Joint Publishing Company, 2003.

provide sufficient and fair reasons to support his value orientation, according to the rule of argumentation burden. The so- called sufficient and fair reasons here need to have legitimacy in substance and form.

The so-called substantial fairness is that, the debater must prove that the principle of honesty and credibility or the principle of public order and good habits will be breached only if the freedom of the civil subjects is not restricted. Of the two principles, the principle of honesty and credibility is to maintain the lowest moral requirements and here the moral requirements are mainly concerned with the trade moral requirements. And the lowest trade moral requirements are the preconditions of the smooth circulation of the market economy. So the principle of honesty and credibility, in the form of compulsive regulation, carries out the mission of restricting the principle of autonomy of private law and thus maintaining the social public interests. The principle of public order and good habits, which is the incorporate concept of public order and good habits, has two meanings: One is the public order defined from the state angle, and the other is the good habits defined from the social angle. In modern society, the principle of public order and good habits, from which the interdictory regulations derive, carries out the mission of restricting the principle of autonomy of private law and maintaining the state and social public interests. So it can be concluded that the adequate, sufficient and due reason for restricting the freedom of the civil subjects, lays its foundation on the state and social public interests. The state interests referred here cannot be widely interpreted and should only be confined in political, economic and safety interests of the state as a whole.

As far as the social public interests is concerned, it has a rich content as below:

First of all, it means that the private interests of the uncertain third parties, which is equal to the interests of most people, is an important component part of the social public interests.[46]

Secondly, it means that the private interests are connected with the fundamental legal values, such as the life interests, the health interests and so on. Although these interests can formally be thought to be only concerned with the given civil subjects, the respect and protection for the individual life and health maintain the basic order of society, so it is also within the range of the social public interests.

Thirdly, it means the private interests are connected with the low moral requirements. In the modern civil law, the low moral requirements are widely translated into the legal requirements in different countries and regions, and the principle of honesty and credibility and the principle of public

[46] Wang Liming, *On Contract Law*, China Renmin University Press (Beijing), 2002. p.649.

order and good habits are recognized as the basic principles of civil law and applied to different areas of civil law. That makes a transformation of the rule of being a civil subject from "being harmless to others" to "being kind to others" under certain conditions, and cultivates the credibility among the civil subjects so as to keep the harmony of the social relationship. Only the state interests and the social public interests can be the arguments for restricting the freedom of the civil subjects in civil law. They definitely draw a boundary line not only for the freedom of the civil subjects, but also for the state administrative rights for intervening into private lives[47].

The so-called formal fairness is where the debaters bearing the responsibly of demonstration must speak well of the fact that when it comes to the judgment of the specific values, the restriction of the freedom of the civil subjects measure up the system compulsion, and the principle of the rule of law, that similar problems should be dealt with in a similar way, can be surely put into practice.

In the course of drafting the property right law, quite different opinions on the legislative choice of protection strategy of the safety of transaction in the alteration exist in the academic circle. One opinion is that, on the premise of real right alteration based on the obligation right-formalism, the protection problem of safety of transaction can be solved by the institution of bona fide acquisition; and the other is that, on the premise of real right alteration based on the property right-formalism, the protection problem of safety of transaction can be solved by both the principle of abstraction of the juristic acts of real rights and the institution of bona fide acquisition.[48] Different protection strategies can lead to different interest arrangements among the parties. And in this very sense, the debated problem in the academic circle is a typical problem of value judgment. I would like to present the application of the rule of demonstration.

If we take the alteration of ownership for example, protection of safety of transaction in the real right alteration is mainly concerned with the interests of three parties: the owner, the seller without right of disposal[49], and the third party who intended to acquire the ownership of the property from the seller without right of disposal. Whether it is the institution of bona fide

[47] It should be pointed out that the state interests and the social public interests restricting the freedom of the civil subjects must ultimately fall on the private interests. The state interests and the social public interests are the private interests expressed in the name of "the state" or "the society" in the final analysis. It is a main strategy of coordinating the conflict of interests in the civil law, i.e., some kind of private interests is affirmed as the state interests or the social public interests, and thus is in the prior place among the conflicting interests relationship and can be confirmed and protected. The function of civil law as a tool of organizing the society largely depends on that strategy.

[48] Wang liming, *On Real Right (revision)*. China University of Political Science and Law Press (Beijing), 2003, p.142; Wang Yi, *On the Alteration of Real Right*, China Renmin University Press (Beijing), 2001, p.320 – 330

[49] On the premise of real right alteration based on the property right-formalism, the person with the ownership has a duty of returning the unjust enrichment, which is also included.

acquisition or the principle of abstraction of the juristic acts of real rights, they both protect the interests of third parties, i.e., the interests of obtaining the ownership of the property from the seller without right of disposal, by means of restraining the owner's interests under certain conditions, i.e., denial of the effect of the claim of ownership. As is previously stated, the incarnation of the principle of autonomy of private law in the property law is the inviolability of ownership. Correspondingly, the previously-stated rule of demonstration can be embodied in the property law as this: There should be no exception in the principle of the inviolability of ownership without the adequate, sufficient and due reason. And we can put it to test whether there is adequate, sufficient and due reason in the institution of bona fide acquisition and the principle of abstraction of the juristic acts of real rights when it comes to the restriction of the interests of the owner, thus we can remark on the opinions based on that.

Firstly let us testify the institution of bona fide acquisition. The institution of bona fide acquisition means that in the alteration of real right based on the juristic acts, at the premise of unauthorized disposition, the third person can acquire the ownership of the property from the seller without right of disposal if he doesn't know the seller he is dealing with is the one without right of disposal and other conditions are eligible, and the right of the former owner of the property is correspondingly exterminated. The reason for its confirmation in law is based on this: There is a fundamental judgment and assumption that the market subjects are in a situation of insufficient information when they are dealing with each other in the modern market economy. Thus the problem on how to keep the safety of transaction in the transfer of real rights is of great urgency. Locally speaking, there are two choices for the legislators: One is the denial of the institution of bona fide acquisition, and the market subjects have to take great efforts to obtain the concerned information. That means any market subjects entering the market have to do a detailed and reliable research on the source of the property so as to eliminate the possibility of obtaining rights from the seller who has no right of disposal, when they are purchasing goods or obtaining the rights on the property. As a result, it not only slows the course of transaction, but also sharply raises the cost of transaction, thus undermining the foundation of the market economy. If the market subjects are unwilling to pay for the cost of research, in an environment in which the separation of possession and ownership of personal estate is a normal state and the disagreement between the states of rights notified in the register of real property and the actual states of rights sometimes occurs, the market subjects have to watch out for someone's right of the real claim. Thus it will affect the full use of the property. So it can be seen that the first possible choice is a high-cost choice; the other choice is

the acceptance of the institution of bona fide acquisition, and it accepts not only the basic premise that the market subjects deal with each other in an environment of insufficient information, but also the doctrine that the market subjects will obtain the protection of transaction safety in most cases only if they deal under the precondition of the information in hand. So the institution of bona fide acquisition is the legal protection of the "movable" safety of transaction, and it protects the interest of the most indefinite market subjects in the market transaction, and makes the transfer of property and dealings easy-going, thus achieving the overall benefits of society. It is not difficult to see that, based on the need of preserving social public interests, the institution of bona fide acquisition justifies the restriction of the principle of the inviolability of ownership, and the reason is adequate, sufficient and due.

The principle of the abstract nature of juristic acts of real right is quite another way. The principle of abstraction is a matter of whether the juristic acts of real right independent of the juristic acts of creditor's right needs a causal intention stipulation or not (a matter of "content abstract"), and whether the effect of juristic acts of real right depends on the effect of the juristic acts of obligation (i.e., of the juristic acts of creditor's right) or not (a matter of "external abstract")[50]. The matter of external abstract is directly connected with the protection of the safety of transaction, which means that although the contract concluded by the parties of transaction has not come into existence or is null, the legal effect of the transfer of ownership can occur and the transferee can obtain the ownership from the transferor as long as the contract of real right is valid. The transferee also has the further right to transfer the property, i.e., authorized disposition. Thus the principle of abstract nature of juristic acts of real right is also included in the legal institution aimed at keeping the safety of the transaction. However, the principle of abstract is beside the point of the original legal purpose of preserving the safety of transaction in some degree. As previously stated, the very reason for the protection of the safety of transaction in the market transaction is that, the law assumes that the market subjects deal with each other in an environment of insufficient information, and the interests of the most indefinite market subjects, i.e., the social public interests, will be ruined if there is no legal institution of preserving the safety of transaction. It is in the very sense that it justified the recognition of the legal institution of keeping the safety of the transaction and the exception of the principle of the inviolability of ownership. However, according to the principle of abstract nature of juristic acts of real right, the sub transferee can obtain the ownership of the property from the transferor even if he knows the fact that the obligation contract

[50] Baur Stürner, *On Property Law in Germany*, translated by Zhang huang-gen. Law Press (Beijing), 2004. p.92 .

concluded between the transferee and the former transferor has not come into existence or is null, and the transferee has no legal reason for obtaining the ownership of the property. So the principle of abstract nature of juristic acts of real right gives the protection for the sub transferee with sufficient information, and thus deprives the right of the primary owner. We should also not say that the reason for restricting the principle of the inviolability of ownership is adequate, sufficient and reasonable.

Furthermore, the argument that the problem of keeping the safety of transaction in the process of the alteration of real right can be resolved by the principle of abstract nature of juristic acts of real right and the institution of bona fide acquisition at the premise of the legislative model of the alteration of the real right of the property right-formalism, also lacks of the rationality in form. The reason is that in the same code, the institution of bona fide acquisition and the principle of abstract nature of juristic acts of real right restricts the principle of the inviolability of ownership based on quite different reasons, and it doesn't conform to the requirement of the system compulsion, and breach the principle of rule of law that similar problems should be dealt with in a similar way.

So it can be concluded from the application of the rule of demonstration previously discussed that we should keep the safety of transaction in the alteration of real right by means of the institution of bona fide acquisition at the premise of the legislative model of the alteration of the real right of the obligation right-formalism in our future legislation of the property law.

IV Brief conclusion

We have to acknowledge that when civil law scholars discuss value judgment, they cannot always reach consensus on every specific value judgment, even if they abide by the above-mentioned rules of argumentation. These two rules, at most, provide civil law scholars with a scholar platform of the basic value judgment: On the one hand, abiding by these two rules, civil law scholars could try to keep the discussion of value judgment away from the domain of self-talking and the expression of pure feelings and preference of one's own; On the other hand, on the basis of the basic consensus of value judgment, the rules could provide a platform for civil law scholars to reach mutual understanding and further seek new consensus of value judgment. The reason why the substantive rules of argumentation are limited in the research of civil law science is mainly that the discussion of civil law science is greatly different from that in the process of civil legislature and civil jurisdiction. It is unnecessary that civil law scholars have to get the same points.

If the scholars could seek mutual understanding with the basic consensus of value judgment, we could say we have got the goal even without new consensus. Civil legislation and civil jurisdiction, however, are of great difference. Both legislature and the judge must make the sole and explicit judgment; otherwise they will lose their duties. The most common way of practice is that when the legislature and the judge cannot get the same points, or not reach consensus by discussion on value judgment in the limited time, they will make the judgment through the legal procedures and rules of voting. This is a way of solving problems of value judgment in civil legislation and jurisdiction. In fact, this process makes use of the force of procedure rather than the force of logic. However, it doesn't mean that the substantive rules of value judgment in civil law are limited in scholars' discussion. Contrary to this, in the process of civil legislature and jurisdiction, and in limited time, the legislature and the judge also should base their judgment on the substantive rules of value judgment, follow rules and forms of argumentation as procedural techniques and apply proper methods of argumentation to justify their own value orientation. Only in this way can the decision made by civil legislation and jurisdiction be ensured reasonably rather than built on the judgment without reason and arbitrariness without rationality.