·证据科学讲堂·

证据法革新的框架*

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【摘　要】法治如同一种粘合剂,将社会各部分安稳地维系在一起。它给人们提供了途径,以便事先知晓权利和义务,并可围绕其进行协商。我拥有某样东西,你想要得到这样东西。你就需要与我就其价格进行洽谈而不能肆意地侵占。因此,在这个重要意义上,法律实际上是赋予了人们自由而非限制。人们习惯上将法治的价值主要归结于对权利及其相应义务的描绘。这种观点有一定道理,但其模糊了某些同等重要的因素,即:没有争议的准确解决——换言之,若没有准确的事实认定——权利和义务便都失去了意义。证据法有助于准确的事实认定,是法治中最为关键的一环;一部完善的证据法虽无法确保法治的实现,但却绝对是法治的必要组成部分。然而,构建完善的证据法绝非易事,因为证据规则属于诉讼理论的一部分;诉讼理论又包含于政府理论之中;而各国的政府理论可谓是千差万别。此外,对于如何最有效率和效果地寻找事实真相仍然存在分歧,且与之相关的是,当追求事实真相的价值与其它社会价值处于竞争关系时,孰优孰劣、如何取舍的问题也存在着分歧。最后,外行事实认定者(如陪审员)的参与会影响到诉讼程序的架构。总之,证据法至少要安置好五方面问题,即:架构问题、认识论问题、社会问题、管理问题和执行问题。

【关键词】法治;事实认定;证据法;追求事实真相的价值;革新

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The Framework for the Reform of Evidence Law. *Tanslated by Wang Zhuhao and Li Yin*

【Abstract】The rule of law is a critical part of the glue that holds society together peacefully. It provides the means by which rights and obligations can be known in advance, and negotiated around. I own something. You want it. You need to negotiate with me over its price rather than just seize it arbitrarily. There is thus a critical sense in which the law, rather than being restraining, is liberating. The values of the rule of law are often attributed primarily to the articulation of rights and their reciprocal obligations. While true to an extent, this view obscures that without accurate resolution of disputes-without accurate fact finding, in other words-rights and obligations are meaningless. Evidence law that facilitates accurate fact finding is perhaps the most critical aspect of the rule of law; an appropriate law of evidence is not sufficient to ensure the rule of law, but it is necessary. Constructing appropriate evidence law is complicated, however, because rules of evidence are part of a theory of litigation; theories of litigation are part of a theory of government; and theories of government vary dramatically. In addition, there are disagreements about the most efficient and effective way to get to the truth, and relatedly the value of truth when it competes with other social goods. Finally, the presence of lay fact finders such as jurors may affect how the litigation process is otherwise structured. In sum, the law of evidence has at least the following five problems to resolve: the Organizational Problem, the Epistemological Problem, the Social Problem, the Governance Problem, and the Enforcement Problem.

【Key Words】rule of law, fact finding, evidence law, the value of truth, reform

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很高兴再次为你们演讲,这无疑是一项殊荣。我与中国政法大学及其他中国高校教师之间的合作迄今已逾十年,这是我第十五次来中国做演讲,并与有着共同关切的同仁们会面。对我而言,当初一个短暂关注别国法律的机缘,而今俨然已经发展成了我生活的一部分。同时,作为一名教师和学者,我欣喜地看到通过许多我曾有幸在美国西北大学所指导过的学生, 以及多年以来在美国和中国与我保持互动的学者们之贡献,中国已取得了巨大进步。

本次大会的主题可能会显得有些大胆。一个研究领域通过其会议主题暗示该领域的学者们相信其自身的努力将会有助于法治和文明进步,这并不常见。为了避免有人误认为组织本次大会的中国学者们有悖于他们日常的谦逊,我必须要抓紧指出,本次大会的主题是我本人建议的。这么做的原因在于,这预示了一个重要真理——实际上是两个真理。第一、证据领域对于法治而言至关重要;第二、法治是社会进步的关键。进一步而言,我认为法治研究中最为重要的一个领域便是证据,并且社会只能在法治中发展进步。

一、证据法的架构与革新

十年文革的浩劫已经让中国应验了上述真理。据我所知,在那个可悲的年代里,中国没有实质上的法律体系可言,全国绝大多数法学院也遭停课。显而易见,这种对法治的不尊重导致了经济上的灾难及中国本土制造业的大幅倒退。然而,文革结束之后,中国政府主导市场经济以来,这一自然效应仍在继续应验。改革开放之初,生产力飙升的势头很快地就开始回落,造成这种现象的原因恰恰就是一个高生产力的社会必然需要一套行之有效的法律体系与之配套。财富的创造依靠交易,但若没有一个行之有效的法律体系,除了最基础的物物交换以外,交易将不会发生。正是因为意识到了这一真理的存在,中国政府走上了漫长的重建有效法律体系之路,一个持续至今的过程。

正如我接下来将谈到的,该过程的核心实际上就是证据法,为此我将重申之前来华时曾说过的:本会议大厅中正在学习探索并在深化证据领域研究以及相关配套诉讼领域知识的你们, 正是中国这个持续进程中最为重要的一环。若没有你们和你们的努力,若没有证据和诉讼领域方面的不断完善,中国经济的发展将会迟滞,权利将会变得失去意义;若不能创造出财富,关于现代社会的种种期盼都只是泡影。更为重要的是,若没有准确的事实认定,无论是经济权利、人权,还是政治权利,从根本上来说就都失去了意义。这些正是我今天想要谈及的内容,我将先从法治说起。

当今的中国和世界对法治都有着浓厚的兴趣。然而,关于“法治”的定义有着许多不同的说法。我所指的“法治”,以及世界上所有关注“稳定”和“发展”这两大目标的国家会普通认同的“法治”含义首先是指:要求、指令或命令对特定人群具有约束力的评价标准得到了普遍认同。哈特(H.L.A. Hart)将此称之为“承认规则”,参照该规则,一个人便能够判断在社会中什么是可信的。[1] 正如哈特所指出的,“法治”还包含了允许社会根据其自身进化中不可避免的连带大环境变化而改变其权威性指令(即“法律法规”)之规则。在现代,这些规则通常被置于宪法之中,比如中国和美国,宪法创设了拥有此种权力的特定机构。诚然,如哈特进一步所指出的,“法治”的含义还包含了执行权威性指令和解决有关其纷争的手段。在现代,这往往归属于法院和各种形式的裁判。当然,关于“法治”的哲学基础还有许多可以谈及的,包括约翰·奥斯汀(John Austin)所强调的指令执行机制,[2] 汉斯·凯尔森(Hans Kelsen)所强调的法律层级本质,[3] 以及致使过去四十年中现代西方法理学上著名的哈特–德沃金(Hart–Dworkin)之争的法律与道德之内在关系,但为了今天演讲的主旨,我将抛开这些深奥有趣的问题,而仅聚焦于哈特所确认的法治先决条件,因为我相信这些法治的先决条件切中了常规语境下“法治”的常规涵义。

哈特观点的吸引力及其受世人追捧为社会变革方向的原因,既显而易见又深刻。哈特观念中的法律如同一种粘合剂成分,将社会各部分安稳地维系在一起。它给人们提供了途径,以便事先知晓权利

[1] H.L.A·哈特:《法律的概念》。

[2] 约翰·奥斯汀:《法理学或积极法律哲学讲座》。

[3] 汉斯·凯尔森:《纯粹法律理论》(1934)。

和义务,并可围绕其进行协商。我拥有某样东西,你想要得到这样东西。你就需要与我就其价格进行洽谈而不能肆意地侵占。因此,在这个重要意义上,法律实际上是赋予了人们自由,而非限制。法律开辟了人们赖以构建人生和追求美好生活的渠道,消除了不确定性和政府或他人对其私人空间不测侵犯的风险。

在这个大千世界,人们习惯上将法治的价值主要归结于对权利及其相应义务的描绘。这种观点有一定道理,但其模糊了某些同等重要的因素,即:没有争议的准确解决——换言之,没有准确的事实认定——权利和义务便都失去了意义。过去我在中国的演讲中已经多次指出了这一点,但请让我再次提醒你们,因为这一要点无论如何去强调都不为过,即:事实先于权利和义务,并且是权利和义务的决定因素。举一个简单的例子,有关你们身上穿着衣服的所有权。你们对衣服的所有权赋予了你们拥有、使用和处置这些衣服的权利,但是,假设我要求你们归还给"我的"衣服。也就是说,我坚持你们所穿着的衣服实际上是属于我的。你们会怎么做?你们会找到一个裁决者,会将你们所购买、制作、捡到或被赠予了这件争议衣服的证据呈现给他,并且,如果这种努力成功的话,裁决者会切实赋予你们衣服的所有权并施加给我相应的义务。这里的重点在于,这些权利和义务都依附于认定了什么样的事实,且是该事实认定的连锁反应。这一点的重要性不言而喻。把法治与真实世界的实际情况相联系的努力,锚定了可知事物中的权利和义务,并使其摆脱了反复无常和任性的支配。这就是相关性和实质性的理念对于法律制度构建具有根本重要性的原因。正是这些理念把法律体系牢牢地安置在了事实准确性的基石之上。这一点是真正具有普世性的。一方面,在对实际、相关发生的状况缺乏了解的情形下,权利、义务或是政策选择都无从谈起。另一方面,将权利与事实相联系赋予了权利以可靠性和稳定性,使得其不会被专横地剥夺。

如你们中许多人所知,在强调事实的重要性时我经常会以财产权作为例子。而这次我要另外举一个人权的例子。在今天这样的场合谈论人权,大多数人通常会以为美国人又要对中国的人权纪录进行批评,但这并非是我所想讨论的。相反,这个例子是爱德华·斯诺登所揭露的美国政府对其本国公民、外国人甚至是别的主权国家所进行的间谍行为。我不确定斯诺登先生是该被当作英雄还是叛徒来对待,但我确信,如果没有他的揭露,我和我本国的同胞们可能完全注意不到奥巴马政权期间所发生的对我们权利之诸多侵害。若没有这个认识,我或其他任何人就绝不可能行动起来去维护我们的权利。若没有这些事实,人们很有可能会说过去没有侵害发生。

由是,事关紧要的并不仅仅是哈特的"三位一体"式裁判,更是准确的裁判。如同我在中国已经多次提及的,这就是为什么你们中那些正在学习并不断精进有关证据、诉讼和法律体系结构方面知识,并将这些知识运用于中国法律改革的人,对于你们国家的持续发展至关重要。随着你们已经从较不任意专断的法律体系过渡到了更具有可预判性的法律体系,中国繁荣兴旺与蓬勃发展的能力也相应提升了。我为你们惊人的成就而由衷地赞叹,为自己在其中所起到的微小积极作用而感到荣幸,并将为你们继续向前努力而助力。

因此,有关争议解决方面的法律——证据法和诉讼法——具有普世的共性方面。准确的争议解决必然有斟酌可靠证据的理性人参与其中,这给争议的解决带来了更多普世的特征。然而,构建争议解决模式并不仅仅是一个优化普世共性(包括权利行使和理性意义等)的问题。其还有一个强烈的因地制宜因素。这里需要掌握三个要点:首先,所有构建证明过程的规则都源于且执行了某种争议解决理论。在美国,占主导性的争议解决理论是对抗程序理论,但对抗制并非普世的。第二个关联要点是,争议解决理论,如对抗制或大陆法系体制(也称纠问制),本身又发源于一国政府在民事案件私人之间及刑事案件公诉争议解决中所扮演角色的基础性理念。在英美法系传统中,政府在私人争议解决中所起的作用多是在提供便利。其为私人纠纷的公正解决提供了一个公平和利益无涉的法庭,这从本质上来说是所有政府有义务甚至是有权利去做的。这种争议解决的理念也在很大程度上影响到了刑事案件。政府在案件中提起公诉,但其在法庭上被视为与被告当事人处于平等地位的另一方个体当事人。法庭是中立的,换句话说,法庭并不是为了深化政府在某一特定审判中的特定政策利益而构建的政府机关;众所周知,美国法院向来是以通过排除规则之类的规定来阻碍美国政府政策目标的实现而闻名。

同样,这也并非众法律体系间的普世特性。

第三个前置性要点则位于更深的概念层级。司法系统和其他政府机构都是为了实现国家的根本性文献(如美国宪法和中国宪法)和国家传统中所体现出的政治抱负而设计的。这为我们的分析注入了另一个变量因素,因为并非所有国家都有着分量相当的政治理念。比如说,美国政府管理中的核心政治性问题是一个"委托代理"问题:政府是人民的代理人,首要问题是委托人——人民——怎样能够掌控其代理人——政府。出于对中央政府集权的恐惧,形成了对控制和限制中央政府权力的高度关注,这解释了美国政治架构中的两大根本性特征,联邦制和三权分立。这与许多东方国家政权形成了鲜明对比。例如,你们长期以来有着共产党单一政权的理论,因此中心政治问题是政府政策目标的有效执行问题。这些政治理念上的差别直接影响到了其下所构筑起来的法律体系。有人可能会预言,为了有效落实其政策目标,中国政府将趋于在争议解决过程中行使更多权力和控制。相形之下,在美国,政府拥有的权力更为有限,法院则主要是一个无利害关系的平台。

在法律体系类型和政府理念上的区别并不一定都会形成鲜明对比,但会以形形色色、不同程度的方式显现出来。例如,即使在有着许多共性的代议制民主国家中,政府在争议解决中的角色定位也并不一致。例如,在美国属于"私人"事务的争议在许多西欧国家并非如此,并且西欧国家政府在诉讼的绝大多数阶段都扮演着一个更为主动的角色。这些国家的政府常常会更主动地参与调查,庭审进程与美国相比更多地为法院所控制。这反映了公民之间的争议具有公共性特征,因此该争议的解决是一个共同关注的事件。对照而言,在美国,总的来说,私人间争议不被认为是社会所关注的事件,且政府在其中所扮演的角色要消极得多。当事人自己负责为调查和案件庭审做准备,并在很大程度上负责管控庭审中证据的呈交。类似地,上诉法院往往仅根据当事人所呈现给其的论证来决定案件,由此可能产生的结果是:事实几乎相同的两个案件由于所提出的法律论证不同而被作出了截然不同的判决。此处需要说明的是, 法院的职责仅限于根据当事人的供述来正确地对案件进行裁判, 而非在绝对意义上"正确地"对案件进行裁判。

法律体系的架构还受另外两个变量的影响。第一个变量包含法律认识论,即有关不同形式的争议解决方式在生成准确判决问题上效能如何之观念。在美国,尽管不无例外,但人们普遍认为对抗性调查和证据呈现比之一个由法庭支配的审判过程更有可能生成与事实真相一致的裁判。当事人比其他任何人都更了解自己的案件,并且有合理动机在争议解决中投入最优的资源。相比较于当事人更为详尽的知识和更为精细的动机,政府的职权主义通常是一种粗糙的替代品。那些更支持纠问制体系的人则强调,一个无偏私的法庭对证据滥用和操纵的几率更低,他们相信这会提高与事实真相一致判决得出的几率。

然而,社会利益涉及面很广,追求事实真相仅是其中一种,且如何权衡追求事实真相与其他社会利益(如隐私)之间的关系仍然是个争议话题。在美国,通行观点是,民事案件中的当事人在审理开始前应当有机会不受约束地获取有关争议的所有信息。获取该些信息的程序被称之为证据开示,且健全的证据开示制度是美国法律体系的标志性特征之一。其理念是审判应当真正地属于一种认识论活动且不应该充满意外或障碍。然而,正如我在中国的多次讲座中所谈及的,所有国家都会为了保护其他社会价值而在某些方面约束或限制对事实真相的追求。至于何种价值会在追求事实真相的价值之上则又是一个视社会具体情况而定的问题。

最后一个需要提及的前置性要点是陪审团或外行评审员对于法律体系架构的影响。在美国,陪审团一方面是被尊崇的,同时则又被视作是高度规范化法律职业者世界中的外来入侵者。美国证据法和诉讼法中相当一部分规定的形成正是源于法官与陪审团之分。在革新其他国家的证据法架构时应当牢牢记住这一点。

作为总结,当我们思考证据法的架构或革新时,须牢记以下五点:

1. 证据规则(及诉讼程序)是诉讼理论的一部分
2. 诉讼理论本身又是政府理论的一部分
3. 政府理论多种多样,区别巨大
4. 争议解决涉及到事实认定,并且,对于认定事实真相的最佳路径,以及当与其他社会利益相互

竞争时事实真相价值之高低都是有争议的

5. 陪审员之类的外行事实认定者参与可能会影响到诉讼程序的建构。

二、证据法改革需要考虑的基本问题

我们上述所讨论的各种问题表明了证据概念基础及其内涵的深度和奥妙，并连同创设了架构和革新证据法的框架。我迄今所讲的可能在概念上是有用的，有趣的，且甚至是正确的，但在实际操作中并无多大帮助，不是吗？我仅仅是将证据领域置于更大的背景下来谈，但并没有提供出证据法改革者们可以跟随的路线图。在下文中，我将试图从上述所提及的复杂因素中提取出证据法改革者们必须要考虑的普遍因素。证据法改革者们需要考虑五个基本问题。

架构问题：证据法是规范法律体系中各方参与者——审判法官，陪审员和其他外行评审员，律师，当事人和证人(包括外行和专家)——之间互动的关键机制。证据法构建了审判的框架。它给每个角色成员分配了权力和裁量权。然而，审理的总体框架和个体在该框架内所扮演的角色可能需要视社会具体情况而定。于是乎，证据法的革新必须不仅需要追求在概念上有意义，而且同等重要的是，需要了解社会对于各类审判参与者们的期望值。当然，这两个变量是相互影响的。改革者们有时应当遵从社会期望值，而有时候又不需要这样做。一个很好的例子是，你们越来越多地在各种证据立法和提案中使用我们在美国称之为“证据开示”的程序。我相信完善的证据开示制度对于中国来说是个新概念，通过推动这些提案，你们的改革者们正慢慢影响人们接受这一概念。然而，这一点应该泛化，证据法从始至终都包含有最佳分析结构与社会期待或可行性并存的问题。

认识论问题：一个国家如何构造审判，以及如何塑造以便于审判的证据规则，受有关人类思维基本问题(了解某事意味着什么？)之信念的影响。审判是一项认识论活动，在其中有关认知的主张被提出、考量，拒绝或接受。我们所刚讨论的认知问题又引出了另一个基本问题：审判的单一目标或多重目标是什么？典型的回答总是关乎于准确的事实认定。正如我们所试着表明的，这种代表性回答本身有着重大意义。不过，在追求事实真相的问题上审判同科学一样么？且更重要的是，其应当同科学一样么？科学性决策和法律性决定相比有何不同之处？不同于科学追求的是，法律决定不能够无限期的拖延以便收集到更多的信息。要作出的判决亦是实际上发生了什么，而非在探究深层次的普遍规律。也许最能够说明问题的是，法律领域不像在科学领域那样存在着可应用于典型案件的知识体系。反之，事实认定者在做出决定之前必须要导入必要的背景知识。如果细想起来审判与科学(至少是某些科学门类)并不雷同，其是否与历史相似呢？历史的焦点在事实上，但其常常是作为一种增进理解的手段。在审判中，理解基本上是无关的(除非是作为说理)。或者说这并不准确？审判是否应成为恢复和维持社会安宁的手段，而不用考虑任何“实际”发生情况？一个人是否以及在何种程度上认为一个科学性真理或某种对历史事实的深刻理解是可获得的，将影响到其对于特定证据规则的看法。

在我看来，关注上述认识论问题对于中国的改革者们来说极为重要。你们倾向于推崇“证据科学”概念。无疑，关于证据、证据法和二者的重要性有许多知识。但构建法律体系及其组成部分，如证据法，需要不同于纯科学精髓的知识类型。它要求在繁杂问题之间进行权衡和平衡，并安置不同类型的人所具有的多样化实用功能。法律领域几乎不受作为纯科学标志的控制性实验制约，而且人们不应将不同类型知识的追求混为一谈。此外，法律能够并确实在随着新社会问题的出现而进行相应调整。许多情况下，推动改革者向前进的内在动力来源于对变化情况的理性妥协与回应，而非绝对真理。

恐怕上文中我已经触及到了最为重要的问题，即有关社会争议的认知可以通过多种渠道获得。我们可以将责任置于诉讼当事人或交由某个政府机构，并且任何社会中的关键问题都在于究竟何种模式更能促进有效的事实真相发现？庭审应当在何种程度上效仿自由市场；政府应该在何种程度上对其进行规范？在一定程度上，此类问题的答案来源于自然和人性的普遍规律，但同时其也受社会实践和期望值的影响。由此可以引申出下一个我所要讨论的“问题”。

社会问题：除了准确事实认定，审判还可以服务于许多其它目的。它们服务于非常重要的经济利益，这完全不同于其对当事人的影响。除了当事人之外，律师、法官、法庭书记员以及所有法庭工作人

员都在审判中有着既定的经济利益。此外,审判还有潜在的象征性和政治性目的。机构和个人二者都通过审判方式来作出声明并在事实上传播着各式各样的经验教训。总之,有一系列十分复杂的问题昭示着审判的性质,改革者们必须至少要问问这些问题中是否有任何一个会影响到证据法。

此处还有另一个深层次问题,即审判究竟是一种理想模式,还是种负面做法?法律体系的设计到底是为了鼓励审判,还是鼓励和解?其应当为什么而设计?各国社会在容忍争议的意愿之上是有区别的,审判的架构与鼓励私下解决争议之间存在着直接的相互关系。改革者们应当审慎地考虑这种平衡该如何建立。其与证据法直接交叉的一个好例子是特免权规则。健全的特免权规则能够保护人际关系和隐私,但也相应提高了诉讼成本,降低了诉讼作为解决争议选项的吸引力。

管理问题:证据法不止于构建事实认定;其还创造多种激励机制。我刚才提到了一个非常普遍的激励机制——个人在多大程度上会被鼓励来进行诉讼。但在绝大多数国家中,证据法能够为各种主流行为创设激励机制。我刚才提及的特免权就是一个例子,此外还有许多其他例子。从为鼓励对性侵害案件提起诉讼而设计的强奸相关性规则,到为鼓励个人通过排除危险情况来降低损害风险而设计的修复规则,证据法中的激励机制不胜枚举。准确的事实认定固然重要,但这里的深层次问题是当各种价值形成竞争关系时,该如何权衡准确的事实认定与其他社会价值之间的关系。

执行问题:在过去多次造访中国的经历中,我已经提醒了你们书本上法律和实践中法律两者的区别。编写法律和规则是一回事;以那些条款的起草者们所期望的方式执行法律又是另一回事。一部证据法典的起草者也许会有理有据地考虑将裁量权授予某种人——无论是审判法官还是律师,但其脑海中行使该裁量权的方法可能并不为该规定所规制的对象认同。更普遍地说,在如审判这样的社会活动中执行复杂的法典是很困难的。社会活动本身,比如审判,往往是易变且难以预知的,而且不存在将审判所做的每一个判决交由其他权力方来进行复议的可能性。

这里还潜藏着另一个深层次问题,这个问题首先涉及证据法和诉讼法之间的关系,还包括了这二者与实体法之间的关系。证据法所给予的,程序法可以夺走。并且,一方面证据法与诉讼法之间,另一方面这二者与实体法之间,确实有着类似的复杂相互作用。一国可以将诉讼程序设置成便于起诉,但这样一来,诉因的实质性定义就几乎不可能被证明。反之亦然:可以对权利进行宽泛的定义,但是这样一来,诉讼程序就几乎无法操作。

如此,作为总结,证据法的改革者需要考虑以下问题的影响:

架构问题

认识论问题

社会问题

管理问题,以及

执行问题

三、结语

你们已经非常耐心地聆听我讲了这么长时间,因此我将会为本次演讲划上句点。我将回到演讲开始之处来结束本次演讲。在这个会议大厅里的你们以及全中国范围内正在沿着正确学习方法刻苦钻研证据法和诉讼法的人们,很大程度上已将中国法治和社会进步的希望扛在了肩上。若失去你们的不懈努力,中国的法治和社会进步都将不会发生。与此同时,这些努力都将涉及所有今天我仅仅简略提及的难题。与中国接触的这十年间,我已经开始熟识你们中的许多人,我也已经看到你们正在开始巧妙地着手解决这些困难任务。前路将是漫长而复杂的,但我坚信,今天中国已取得的巨大进步将会被未来更伟大的进步所超越。我充满希望地期待着伟大进步的到来,也期待着在这一过程之中继续发挥我微小的作用。

非常感谢。

The Framework for the Reform of Evidence

Ronald J. Allen*

It is a great pleasure to be addressing you today, and a distinct honor. I have been working with the faculty of CUPL and other Chinese Universities for over a decade now, and this is my fifteenth trip to China to do lectures and meet with colleagues concerning matters of mutual interest. What began for me as a somewhat exotic excursion into the law of another nation has now become a part of the fabric of my life. And as a teacher and scholar, it is particularly gratifying to see the great progress that has been made in China through the contributions of the many Chinese scholars I have been privileged to have study with me at Northwestern University, and with whom I have interacted over the years in China and the United States.

The general title of this conference may appear a bit audacious. It is not often that a field of study implies through the title of its conferences that the scholars of that field believe that their efforts have contributed to the rule of law and the progression of civilization. Lest anyone think that the Chinese scholars who have organized this conference have belied their normal humility, I should hasten to point out that I was the one who suggested the title. The reason I suggested it is that it hints at a great and significant truth, two truths really. First, that the field of evidence is critical to the rule of law, and second that the rule of law is critical to the progression of society. I would go further and say that the single most important field of study to the rule of law is evidence, and that society can only progress within the rule of law.

You in China have confirmed these truths with a natural and in my opinion regrettable experiment that we in the West call the Cultural Revolution. Among the many things that occurred during that lamentable time was the essential shutting down of the legal system, and the shutting of all but one of the law schools, I believe. This had the predictable effect of devastating the economy and causing a horrific drop in the gross domestic product of China. This natural experiment, though, continued after the end of the Cultural Revolution when your government liberalized the economy. At first there was a great burst of productivity, but it quickly began to subside, and the reason is precisely that a functioning legal system is an absolute requirement of a productive society. The creation of wealth depends on trade, but trade will not occur except through barter without a functioning legal system. It was the recognition of this fact that led your government to begin the long process of reestablishing a functioning legal system, a process that con-

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tinues to this day.

As I will talk about in a few minutes, at the heart of that process is indeed the law of evidence, and thus I will say again what I have said before in China: Those of you in this room who are studying and furthering knowledge about the field of evidence, and its handmaiden procedural fields, are the single most important part of your country's continuing progress. Without you and your efforts, and without the continuing improvement of evidence and procedure, the economy will be retarded in its growth and rights will be meaningless; without the production of wealth, the aspirations of modern societies cannot be realized. More importantly, without accurate fact finding rights essentially have no significance whether those are economic, human, or political rights. These are the things that I want to talk with you about today, and I will begin with the rule of law.

There is great interest today in China and the world at large in the rule of law. The phrase "the rule of law" can mean many different things, however. What I mean by the phrase, and what all countries interested in the twin aims of stability and progress should mean by the phrase is, first, that there are generally agreed upon determinants of what makes a demand, command or order binding upon a certain set of people. H.L.A. Hart referred to this as the "rule of recognition," by reference to which a person can determine what is authoritative within a society.[1] As Hart pointed out, more is needed, including rules that allow a society to change its authoritative commands, its "law," in light of changed circumstances that the evolution of society invariably brings. These are often located in modern times in constitutions, such as that of China and the United States, that create certain institutions with such power. Yet, as Hart further pointed out, more is needed still, including a means of enforcing authoritative commands and resolving disputes about them. This again in modern times typically falls to courts and forms of adjudication. There is much more to be said about the philosophical basis of "the rule of law," of course, including the mechanisms for enforcement of commands emphasized by John Austin,[2] the hierarchical nature of law emphasized by Hans Kelsen[3], and the relationship between law and morality that has driven the Har–Dworkin debate that as occupied a good deal of modern western jurisprudence for the last forty years, but I will put aside for today's purposes these deep and interesting questions and simply focus on the prerequisites for the rule of law identified by Hart, for they capture the conventional meaning of "the rule of law" as it is being used in conventional discourse, I believe.

The attractions of the Hartian view, and why so many people around the world are calling for reform that takes societies in that direction, are as profound as they are obvious. Law in the Hartian sense is part of the glue that holds society together peacefully. It provides the means by which rights and obligations can be known in advance, and negotiated around. I own something. You want it. You need to negotiate with me over its price rather than just seize it arbitrarily. There is thus a critical sense in which the law, rather than being restraining, is liberating. It channels the ways in which people can construct their lives and pursue their livelihoods and removes the risk of arbitrary and unpredictable intrusions into their personal spheres, whether from governments or other individuals.

In this social dynamic, it is conventional to attribute the values of the rule of law primarily to the articulation of rights and their reciprocal obligations. There is some important truth to this view, but it obscures something equally profound, which is that without accurate resolution of disputes—without accurate

[1] H.L.A. Hart, The Concept of Law.

[2] John Austin, Lectures on Jurisprudence, or The Philosophy of Positive Law, two vols., R. Campbell (ed.), 4th edition, rev., London: John Murray; reprint, Bristol: Thoemmes Press, 2002.

[3] Hans Kelsen, The Pure Theory of Law (1934).

fact finding, in other words—rights and obligations are meaningless. I have made this point to you many times in my lectures in China, but let me remind you once again, for the point cannot be emphasized enough, that facts are prior to and determinative of rights and obligations. Without accurate fact finding, rights and obligations are meaningless. Consider the simple case of ownership of the clothes you are wearing. Your ownership of those clothes allows you the "right" to possess, consume, and dispose of those assets, but suppose I demand that you return "my" clothes. That is, I insist that the clothes that you are wearing actually belong to me. What will you do? You will search for a decision-maker to whom you will present evidence that you bought, made, found, or were given the clothes in question, and, if successful in this effort, the decision-maker will indeed grant you those rights and impose upon me reciprocal obligations. The critical point is that those rights and obligations are dependent upon what facts are found and are derivative of them. The significance of this point cannot be overstated. Tying rights and obligations to true states of the real world anchors rights and obligations in things that can be known and are independent of whim and caprice. This is why the ideas of relevance and materiality are so fundamentally important to the construction of a legal system. They tie the legal system to the bedrock of factual accuracy. This point is truly universal. On the one hand, neither rights nor obligations nor policy choices can be pursued in the absence of knowledge of the actual, relevant states of affairs. On the other hand, tying rights to facts gives them solidity and stability so that they cannot be removed arbitrarily.

As many of you know, often when I emphasize the importance of facts, I use property rights as the example. Let me give another example, this time of a human right. At this point in events like this, most people normally expect an American to be critical of the Chinese record on human rights, but that is not the example I wish to discuss. Instead, it is the spying by the American government on both its own citizens, foreigners, and even foreign sovereigns that has been disclosed by Edward Snowden. I am not sure whether I think Mr. Snowden should be treated as a hero or a traitor, but I am confident that without his disclosures I and my countrymen would have been completely oblivious to the massive violations of our rights that have taken place during the Obama administration. Without that knowledge, there is simply no way I or anyone else could have vindicated our rights. Without the facts, one can almost say that no violations occurred.

Thus, it is not just adjudication in the Hartian triumvirate that matters, but accurate adjudication. Again as I've said many times in China, that is why those of you who are studying and advancing knowledge about evidence, procedure, and the structure of legal systems, and bringing that knowledge to bear to reform your law are absolutely fundamental to the continuing progression of your country. As you have moved from a less arbitrary to more predictable legal system, your prosperity and ability to flourish have improved commensurately. I commend you for your astonishing achievements, am humbled to have played a small role in them, and charge you to continue in these efforts.

There are thus aspects of the law structuring dispute resolution—evidence and procedure—that have universal aspects. And of course accurate dispute resolution involves rational people deliberating upon reliable evidence, which introduces more universal attributes into the mix. However, structuring dispute resolution is not just a matter of optimizing these universal aspects of the enforcement of rights and the meaning of rationality. It also has a heavily contextualized component. Here there are three critically important points to comprehend. First, all rules that structure the process of proof, are derived from and implement a theory of dispute resolution. The dominant theory of dispute resolution in the United States is the adversarial process, but this is not universal. The second and related point is that theories of dispute resolution, such as the adversarial system or continental (sometimes called the inquisitorial) system, are themselves derived from underlying conceptions of the appropriate role of government in the resolution of disputes be?

tween private individuals in civil cases and in the prosecution of criminal cases. In the Anglo American tradition, the role of the government in private dispute resolution has been largely facilitative. The government provides a fair and disinterested forum for the impartial resolution of private disputes, and that is essentially all the government has an obligation, or even a right, to do. In an extraordinary way, this conception of dispute resolution affects criminal cases as well. The government prosecutes cases, but the government is conceived of as analogous to a private party that stands on equal footing with the other private party, the defendant, before the courts. The courts are neutral, in other words, and are not part of the organs of government structured to further the government's specific policy interests in the particular trial; indeed, as is well known, the courts in the United States are famous for obstructing the policy objectives of the government through such things as exclusionary rules. Again, this is not a universal characteristic of legal systems.

The third preliminary point is at a deeper conceptual level. The judiciary and the other branches of government are all designed to further the political aspirations reflected in the founding documents and traditions of the country, such as the United States Constitution of the Chinese Constitution. This injects another contingency into the analysis, because not all countries have commensurate political theories. For example, the central political problem of governing in the United States is a principal-agent problem: The Government is the agent of the people, and the primary problem is how the principal—the people—can control its agent—the Government. This concern about controlling and limiting the central government out of fear of its tendency to concentrate power in itself is what explains the two defining features of the political structure of the United States, federalism and separation of powers. This stands in stark contrast with numerous eastern sovereigns in particular. For example, you have long had a theory of unitary political power located in the Communist Party, and thus the central political problem is the efficient implementation of the policy objectives of Government. These differences plainly affect the legal systems that are constructed in their reflection. One would predict that the Chinese government will tend to exercise more power and control in the dispute resolution process in order to efficiently implement its policy goals. In contrast, in the United States the government has more limited power and the courts are primarily a disinterested forum.

These two distinctions between types of legal systems and theories of government do not necessarily involve stark contrasts but come in many different shades. For example, the conception of the role of the government in the resolution of disputes is not uniform even in representative democracies that otherwise share many traits. In many Western European countries, for example, disputes are not "private" matters to the extent that they are in the United States, and the government plays a much more active role in virtually all phases of litigation. The government often is more actively involved in investigation, and the trial process is controlled more by the court than is true in the United States. This reflects the view that disputes between citizens have a public feature, and thus that the resolution of disputes is a matter of collective concern. In the United States, by contrast, private disputes are not understood to be matters of social concern for the most part, and the government plays a much less active role. The parties are responsible for investigating and preparing the case for trial, and in large measure controlling the presentation of evidence at trial. Similarly, appellate courts often purport to decide cases based only on the arguments presented to them by the parties, thus generating the possibility that cases with virtually identical facts will be decided differently due to the legal arguments advanced. The critical point to understand is that the obligation of the court extends to deciding the case correctly based on what the parties have put forth rather than to decide it "correctly" for all purposes.

The structure of legal systems is also affected by two additional variables. The first involves legal

epistemology, which refers to beliefs concerning how effective different forms of dispute resolution are in producing accurate verdicts. In the United States, it is generally although not universally believed that adversarial investigation and presentation of evidence is more likely to yield a verdict consistent with the truth than is a process more dominated by a tribunal. The parties know their case better than anyone else and have the proper incentives to invest the optimal resources in dispute resolution. A government bu?鄄reaucracy normally would be a poor substitute for the more thorough knowledge and more finely calibrated incentives of the parties. Those who favor more inquisitorial systems emphasize that control by a disinterested tribunal will lead to less abuse and manipulation of the evidence, which they believe may increase the chance that verdicts consistent with the truth will emerge.

The pursuit of truth is not the only social good, however, and there are disagreements about how that particular social good interacts with others, such as privacy. In the United States, the general view is that in civil cases the parties should have essentially unfettered access to all the pertinent information concerning a dispute before the trial begins. The process of obtaining that information is called discovery, and its robustness is one of the defining features of the American legal system. The idea is that trial should truly be an epistemological event and not full of either surprises or road blocks. However, all countries compromise the pursuit of truth by favoring from time to time other values, as I have discussed in various lectures here in China. What values outweigh truth again is quite socially contingent.

The last important preliminary point to mention is the effect that juries or lay assessors have on the structure of a legal system. In the United States, juries are at once revered and simultaneously treated as alien intruders into the otherwise professional world of the law who must be regulated and controlled. A considerable part of the law of evidence and procedure in the United States is driven by the judge-jury divide. It should be looked at to reform the structure of evidence law in other countries only with this point well in mind.

To sum up, as we think about the structure or reform of evidence law, we must keep in mind these five points:

1. Rules of evidence (and procedure) are part of a theory of litigation

2. Theories of litigation are themselves part of a theory of government

3. Theories of government vary dramatically

4. Dispute resolution involves fact finding, and there are disagreements about the most efficient and effective way to get to the truth, and relatedly the value of truth when it competes with other social goods

5. The presence of lay fact finders such as jurors may affect how the litigation process is otherwise structured.

The various issues that we have discussed above illuminate the depth and profundity of the conceptual foundations and implications of evidence, and together create the framework for the structure and reform of the law of evidence. What I have said so far may be conceptually useful, interesting, and perhaps even correct, but it is not very useful programmatically, is it? It situates the field of evidence in its larger con?鄄text, but does not provide any sort of roadmap for the reformer of the law of evidence to follow. In what follows, I try to extract from the complex considerations referred to above the general considerations that must be attended to by the reformer of the law of evidence. The reformer of the law of evidence faces five general issues, or what I call "problems."

The Organizational Problem: The law of evidence is a critical mechanism to regulate the interactions of the various participants in the legal system: trial judge, jurors and other lay assessors, attorneys, parties, and witnesses (both lay and expert). The law of evidence constructs the framework for a trial. It allocates both power and discretion to each of the actors. However, the general framework for trials and the role in?

dividuals play within that framework can be highly socially contingent. Thus, the reform of the law of evi?dence must ask not just what makes most conceptual sense, but also and equally important, what are the social expectations of the various participants? These two variables interact, of course. Sometimes the re?former should defer to social expectations and sometimes not. A good example of this is the increasing use in your various evidence enactments and proposals of what we in the United States call discovery. Robust discovery is somewhat new to China, and by advancing these proposals your reformers are slowly conditioning people to accept them, I believe. This point should be generalized, however, and throughout the law of evidence is woven the issue of the best analytical structure and what is socially expected or feasible.

The Epistemological Problem How one constructs trials, and thus the rules of evidence one fashions to facilitate trials, is a function of beliefs concerning one of the fundamental questions of human thought—what does it mean to know something? A trial is an epistemological event at which claims of knowledge are advanced, considered, rejected, or accepted. The question of knowledge just discussed leads to another fundamental question: what is the purpose or purposes of trials? The typical response has much to do with accurate fact finding, and as we have tried to make clear that typical response has enormous significance. But, are trials like science in its pursuit of truth, and more importantly should they be? How do scientific and legal decision making differ? Unlike scientific pursuits, legal decision-making cannot defer judgment until more information is collected. Also, the judgment to be made is what actually happened rather than what the underlying universal laws might be. Most tellingly, perhaps, there is no organized body of knowledge that is applicable to the typical case, as there is in science. To the contrary, the fact finder has to import the necessary background knowledge for a decision. If, on reflection, trials do not seem a lot like science (at least some types of science), are they like history? The focus of history is on facts, but as a means, generally, of greater understanding. At trials, understanding is largely irrelevant (except as a matter of persuasion). Or is that not accurate? Should trials be the means by which social peace is restored and preserved regardless of any considerations of what "actually" happened? Whether, and to what extent, one thinks a scientific truth or a deep understanding of historical facts is obtainable will affect one's view of particular evidence rules.

In my opinion, the epistemological issue is critically important for Chinese reformers to concentrate on. You tend to refer to "evidence science." To be sure, there is much knowledge about evidence, the law of evidence, and the significance of both. But constructing legal systems and their constituent parts, such as the law of evidence, requires knowledge of a different sort than is the aspiration of the hard sciences. It requires the weighing and balancing of numerous issues, and the accommodation of very diverse utility functions of many different people. Very little within the field of law is subject to controlled experiments of the sort that are the hallmark of the hard sciences, and one should not conflate the different types of pursuit of knowledge. Moreover, the law can and does adjust as social issues unfold. Much of what the reformer does is driven by reasonable compromises and responses to changed conditions rather than absolute truth.

Perhaps the most important issue here is one I touched upon above, which is knowledge about social disputes can be obtained in different ways. One can put the burden on the litigants or on some governmental organ, and the critical question in any society is which model is more likely to foster efficient truth-seeking? To what extent should trials look like free markets; to what extent should the government regulate them? To some extent the answer to such questions comes from universal laws of nature and human nature, but at the same time will be informed by the contingencies of social practices and expectations. This leads to the next "problem."

The Social Problem Trials may serve many other purposes in addition to accurate fact finding. They serve very important economic interests, quite apart from their effect on the parties. In addition to the parties, the lawyers, the judges, the court reporters, and all the court personnel have vested economic interests in trials. There are in addition potential symbolic and political purposes to trial. Both institutions and individuals make statements through the means of trials, and actually impart lessons of various kinds. There is, in short, an extraordinarily complex set of issues that inform the nature of trials, and the reformer must at least ask whether any of them should influence the law of evidence.

There is another deep question here, and that is whether trials are the ideal or instead are perverse. Is the legal system designed to encourage trials or settlement? What should it be designed for? Societies differ in their willingness to tolerate disputes, and there is a direct correlation between the structure of trials and the encouragement of private dispute resolution. How that balance is structure should be thought about carefully by the reformer. A good example of how this directly intersects evidence law is the law of privileges. Robust privileges can protect relationships and privacy, but they also increase the cost of litigating, making it a less attractive option for resolving disputes.

The Governance Problem Evidence law does not just structure fact finding; it also create incentives of various kinds. I just mentioned a very general incentive—how much individuals will be encouraged to litigate. But the law of evidence can create, and in most countries does, incentives for various primary behaviors. Privileges, which I just mentioned, are one example, but there are many others. They range from rape relevancy rules that are designed to encourage the bringing of sexual assault cases to things like the repair rule that are designed to encourage individuals to reduce the risk of harm by eliminating dangerous situations. Accurate fact finding is important, but the deep question here is how accurate fact finding competes with other social values.

The Enforcement Problem Many times in my trips to China, I have reminded you of the distinction between the law on the books and the law in action. It is one thing to write laws and rules; it is another to enforce them in the way anticipated by the drafter of those provisions. The drafter of an evidence code may think that allocating discretion to someone, whether trial judge or attorney, makes sense, but he will have in mind an approach to exercising that discretion that might not be shared by those being regulated by the rule. More generally, it is hard to enforce complex codes in social events such as trials. The event itself, the trial, is often fluid and unpredictable, and in any event it would be impossible to have every decision made at trial second guessed by some other authority.

Again, there is another deep question lurking here, which involves first the relationship between evidence law and procedural law, and in addition the relationship between both of them and substantive law. What evidence law giveth, procedural law can taketh away. And there is a similarly complex interaction between evidence and procedure on the one hand, and substantive law on the other. One can have a procedural context that makes litigation easy to bring, but substantive definitions of causes of action that are essentially impossible to ever prove. And the opposite can be true: There can be broad definitions of rights, but procedural contexts that are essentially impossible to employ.

So, to sum up, the reformer of the law of evidence has to consider the implications of:

The Organizational Problem

The Epistemological Problem

The Social Problem

The Governance Problem, and

The Enforcement Problem

You have kindly listened to me for some considerable time, and thus I will bring these remarks to an

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end. I will do so by returning to where I began. You people in this room and across China who are so assiduously studying the law of evidence and procedure in good measure carry the hope for the rule of law and the progression of society on your shoulders. Neither will occur without your continuing efforts. At the same time, those efforts will involve all the complexities that I have just briefly alluded to today. I have come to know many of you well over the ten years or so I have been involved with your country, and I have seen how ably you have begun to discharge these difficult tasks. The road away will be long and complicated, but I am confident that the tremendous progress that has already occurred will be exceeded by even greater progress in the future. I look forward to seeing that happen hopefully continuing to play a small role in the process.

Thank you very much.