ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202302_6(2).0003

On the Evidence Nature of the “Ground”

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Abstract

The “Ground” corresponds to concrete evidence and belongs to one of the means of proof, which is an indispensable concept of evidence law. The “Ground” has the characteristics of abstractness, implicitness, time and space limitation and probability events. In the process of judicial proof, The “Ground”, as a kind of knowledge experience, provides proof value for factual reasoning. In the theory and judicial practice of evidence law in China, the contents of The “Ground” include rules of experience, scientific rules, civil customs and civil adjudicated cases.

Keywords

The “Ground”; Implicit; Rule of thumb; Civil custom.

1. Definition of The “Ground”

The “Ground” corresponds to concrete evidence and belongs to one of the means of proof, which is an indispensable concept of evidence law. Professor Long Zongzhi divided evidence into concrete evidence and The “Ground”. The so-called concrete evidence refers to the evidence materials that bear evidence information (facts and opinions) and show in specific forms, which can be divided into three types, namely, witness, material evidence and documentary evidence. The concrete evidence is what we usually say, so we won't repeat it here. Correspondingly, The “Ground” refers to conceptual evidence obtained from concrete evidence, including evidential facts (empirical facts) and evidential opinions (expressions of certain laws, scientific principles and personal judgment opinions). In recent years, although the appellation is different, the proof value of The “Ground” has gradually been concerned by evidence law scholars. In order to keep the writing consistent, this paper borrows the concept of "The “Ground”" by Professor Long Zongzhi as the basis of discussion. The “Ground” is the credential knowledge used to deduce the facts of a case in the process of judicial proof, and plays a role as a bridge or link in the process of rational reasoning. [1] It is not directly derived from the imprint data formed by the facts of the case, but reflects the highly consensus knowledge of similar cases in a specific environment. We can further understand The “Ground” through the following characteristics:

1.1. The “Ground” is a summary of laws formed after abstract generalization and argumentation

According to the different content and nature of evidence, we divide the evidence into The “Ground” and concrete evidence. The concrete evidence originates from the data facts formed in the process of the initial civil disputes, and has the characteristics of directness, individuality and certainty of the facts. The so-called directness of concrete evidence means that the formation of concrete evidence is related to a specific case, and the evidence itself does not need to explain its applicability value to a case by means of "interpretation"; The so-called individuality means that specific evidence only has probative value for specific legal relations between specific subjects, and its probative value will not expand to other cases; The certainty of fact testimony is a further understanding of the first two characteristics. Because the specific evidence originates from the case itself, once the evidence is adopted by the fact-finder, the facts to be proved based on it are consistent with the facts of the case. For example, the specific

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202302_6(2).0003

evidence of IOU documentary evidence submitted by the parties in a specific lending dispute and undoubtedly cross-examined conforms to the above characteristics, which directly reflects the facts of the specific lending legal relationship between the dispute subjects and cannot be used as proof of other cases. The "Ground" is the knowledge that reveals the internal relations between things, and it is a category that reflects the role, position and function of rule of thumb or generalized proposition in evidential reasoning. The "Ground" does not come from a specific dispute case itself, but is the common knowledge contained in a kind of facts summed up by people through long-term historical observation. Its proof logic does not point to what happened in specific disputes, but establishes a reasoning argument, that is, some situations in the cases to be proved have a certain legal evaluation result in similar cases. Abstract knowledge summed up by the rule of thumb or scientific argumentation, which can be directly used by the fact-finder, reduces the burden for the fact-finder in the process of fact reasoning. [2]

1.2. The "Ground" has implicit and implicit characteristics

The "Ground" is the implicit inference basis in the process of judicial proof. In the process of judicial proof, many facts and evidences will not be presented directly in the process of proof materials or judicial proof. These unpresented experiences, facts and evidences often play an important role in proof evaluation. [3]These unpresented experiences, facts and evidences are all characterized by consensus. The higher the consensus of experience, fact and evidence, the greater the possibility that it will be implied in judicial proof. For example, some well-known facts, daily life experiences, industry rules, business habits and expertise are all self-evident. The contents of these rules are often not specially emphasized in civil and commercial activities, but they are widely observed. Although they are not expressed in the process of dispute resolution, they still constitute a part of the facts of the case and cannot be ignored.

1.3. The "Ground" has the characteristics of time and space limitation

As The "Ground", the rule of thumb or generalization proposition originates from the knowledge base of both parties to the dispute and the fact-finder, but only the knowledge chosen by both parties to the dispute and the fact-finder can exist as the basis for reasoning in this case. This limitation of time and space is manifested in two aspects: on the one hand, knowledge itself has limitation of time and space. Under specific historical conditions and people's cognitive level, some rules are correct and can be universally observed. However, once the field changes, people's cognitive rules of experience, scientific knowledge and living habits will change. Therefore, although The "Ground" has commonality, it is not universal. On the other hand, whether a certain common knowledge can be selected as the basis of judgment in a specific case depends on whether there are other special agreements between the parties. Autonomy of will and the principle of disposition are the basic principles of civil and commercial activities, which should be observed in the process of dealing with civil and commercial disputes. Therefore, in the fact-finding process of dispute resolution procedure, The "Ground", as a major premise, can be obtained through two ways: the claims of the parties and the identification of the court. However, in principle, the claims of the parties are the main ones, and the facts ascertained by the court according to law are limited to procedural matters and knowledge with universal commonness of mankind. If special local knowledge is introduced, the fact-taker must fully explain it and give the parties the right to express their opinions.

1.4. The "Ground" is mostly a reflection of high probability events

A hypothesis of evidentiary rationalism is that the confirmation of the truth in the judgment is generally a probability problem, which cannot reach absolute certainty. From the purpose of dispute resolution, the facts found in civil litigation are all legal facts proved by evidence, and

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202302_6(2).0003

the task of trial is to solve the legal disputes between the parties, rather than simply pursuing objective truth. It is neither realistic nor for the purpose of trial to seek truth objectively for all the facts in a case, and the standard of proof in civil litigation is not as strict as that in criminal litigation. Therefore, it is feasible to apply rules of experience, civil and commercial customs and other things to assist factual reasoning in the determination of facts in civil litigation cases. [4]The reason is that these common knowledge such as rules of thumb and scientific rules have been proved by logical deduction, induction and scientific proof before entering litigation. This high probability can ensure that the presumed facts formed by judicial inference are true with a high probability, which meets the requirements of the standard of proof in civil litigation.

Of course, since The “Ground” is characterized by its highly probable law to prove the authenticity of the facts of the case to be proved, there will inevitably be case facts that cannot be covered by commonness. Therefore, The “Ground” also has a feature of revocability. Specific evidence is irreplaceable because it originates from the facts of the case itself. For example, the witness testimony only has the problem of probative force, but the witness is not applicable to the avoidance system, which is the embodiment of irreplaceable specific evidence. But for The “Ground”, if the parties to the dispute in a case have concrete evidence that can refute that The “Ground” is applicable to case reasoning, the relevant The “Ground” will be excluded from the reasoning application of fact determination.

2. The Factual Proof Mechanism of The “Ground”

The process of judicial proof is a complicated process of thinking and argumentation. At first, modern evidence scholars mostly focused on the "evidence" as the premise of judicial proof reasoning, and thought that the proof mechanism belonged to pure experience and skill, but lacked sufficient attention to it. Wigmore pointed out that "proof mechanism is a proof rule independent of human procedural rules", which belongs to the component of "evidence principle" together with "evidence admissibility rule", and both of them are indispensable. Wigmore's analysis of judicial proof process is based on focusing on the relationship between evidence and evidence, evidence and fact. He uses chart method to explain the process of proof reasoning, and uses various symbols to express the logical relationship between evidence and evidence, evidence and intermediate fact and final fact. [5]

At the beginning of the 20th century, Wigmore's research on judicial proof science did not attract much attention from the academic circles. In the second half of the 20th century, with the rise of "new evidence science", Wigmore's theoretical achievements gradually attracted wide attention. Ronald Allen and other scholars use the way of reasoning chain to analyze the process of judicial proof. In their view, the process of judicial proof is essentially the process of inference. (as shown in Figure 1) In the reasoning process, "each arrow represents an inference in a chain, which starts from the evidentiary fact and leads to a series of inferred facts, which are linked with the fact of facts that can be easily proved, and then with the essential element of the case." Bentham pointed out that evidence is "a kind of relationship", which can only be reflected in the connection between one evidence and other evidence, and it is impossible to obtain the facts of the case by examining each individual evidence in isolation. From evidential facts to inferred facts, and then from inferred facts to essential facts, it can not be completed through a simple reasoning. In judicial practice, due to the complexity of the case, a longer reasoning process may be needed. In linear factual reasoning, experience and common sense play a decisive role in this process. [6]

The “Ground” is used as the basis for inference in judicial proof activities. It is not the information obtained from specific cases, but a kind of intellectual experience. The reason why this "empirical knowledge" can be used as evidence is that it is a generalization of the general behavior of human beings or things. In this regard, Binder and Bergman explained, "People

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202302_6(2).0003

often accept traditional wisdom about how people and things work in daily life. All of us, through our own personal experience, through listening to other people's personal experiences, and through books, movies, newspapers and television, have accumulated a huge knowledge base about commonly held ideas about the general behavior of people and things in our society. From this knowledge base, people can generalize typical behaviors. This generalization is also called the premise that enables us to connect specific evidence with a factor that people want to prove."[7]

As mentioned above, abstract knowledge is limited by the cognition of specific subjects and the space-time field, that is, in any society, the understanding of empirical knowledge will vary from group to group, individual and time. Even if there is a broad consensus, it may be untrue, speculative or flawed; Moreover, "common sense generalization" tends to be non-"purely factual" and contains a mixture of evaluation and prejudice. Therefore, whether empirical knowledge can be used in judicial evidence is also questioned by some sages. [8] Of course, there are also many British and American evidence law scholars who hold an optimistic attitude and take it for granted that rational people hold broad consensus. Professor Tillers pointed out that "instead of pretending to pursue an objectivity that we can't get, we should frankly admit the limitations of our knowledge". Therefore, we should abandon the idea of "evidence-only theory" to pursue objective truth, and realize the evidential value of The “Ground”, as long as it can form case facts that meet the standard of proof and help judges form evidence.

The “Ground”, as the reasoning basis in judicial proof, plays two roles in factual reasoning: first, factual proof; Second, it assists factual reasoning and argumentation. On the one hand, the “Ground” can be used as a supplementary means of proof when specific proof materials are missing because of its generality of facts. When there is no specific evidence to prove the facts of the case, it is difficult for the referee to identify the facts, and the referee is assisted to form staged evidence by supplementing The “Ground”. Because The “Ground” does not originate from the evidence materials in specific cases, its reliability of forming facts is not as good as that of specific evidence materials in cases, so the demonstration of the reliability of The “Ground” should be arranged in procedures. On the other hand, The “Ground” can be used as one of the evidence elements, and together with other concrete evidence, it can complete the reasoning of inferential facts, and play a role in strengthening the argumentation of the probative force of concrete evidence. The role of The “Ground” in assisting factual reasoning and argumentation is mainly manifested in value evaluation. Although the inferential facts derived from evidence have the actual basis of evidence, whether they can meet the standard of essential facts still needs to be further demonstrated through judicial reasoning. The relationship between facts is not only a logical law relationship, but also contains a "matter-of-fact" relationship, and many matter-of-fact relationships exist in the common knowledge of demonstrating the major premise. Therefore, in the process of determining essential facts from inferred facts, it is necessary to make the implicit law of things explicit, that is, to test the formation of facts with the characteristic elements of The “Ground” again. And The “Ground” itself is also a hierarchical knowledge. The application of The “Ground” from inferential facts to essential facts is not a simple repetition of the previous stage of proof process, but a new reasoning and cognition activity. For example, if the parties to a case put forward a certain daily habit as a means of proof in the proof link, so that the judge can form a certain inferred fact, the judge will examine whether the inferred fact meets the standard of essential facts, and one of the important criteria is whether the habit violates "public order and good customs", where the identification of "public order and good customs" is consensus knowledge higher than specific habits.

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202302_6(2).0003

3. Specific Types of The “Ground” in Civil Litigation

According to Wigmore, "In the context of debate on factual issues, every reasoning step from evidence to intermediate proposition to the final proven matter or hypothesis requires a guarantee. This guarantee usually takes the form of the “Ground” summary. Back to the “Ground” generalizations can be case-by-case (for example, based on local knowledge or some general aspects of a specific case), or they can come from acknowledge base 'shared more or less by relevant societies or communities. From the perspective of perceived reliability, knowledge inventory may vary greatly, but the continuous integration of common sense, expert knowledge and scientific knowledge can roughly represent reliability, which belong to a shared belief library. It can be seen that the common law rules of common sense, expert knowledge, scientific knowledge and judicial notice, based on the connection point of "general experience", are all within this conceptual framework. [9]

Academic circles generally believe that the typical manifestations of The “Ground” include rules of experience and scientific rules. However, judging from the characteristics of The “Ground” and its proving mechanism, the knowledge that helps judges to determine the facts of cases in China's civil judicature should be extensive, including civil customs and guiding cases besides general rules of experience and science.

3.1. Rule of thumb

Rule of thumb refers to the rules or knowledge about the causal relationship or attribute state of things induced by people from life experience. The rule of thumb includes common sense summed up by ordinary people in their daily life, as well as specialized knowledge, such as science, technology, art, commerce and so on. The rule of thumb is not the fact itself, but the empirical understanding of the state, relationship attribute and movement rule of things existing in people's consciousness, and it is the result of induction. [10] Therefore, the knowledge summed up by the rule of thumb is not necessarily true or complete, which fully reflects the objective state or law of the existence of things. However, because this understanding reflects the normal state of things, the rule of thumb is justified as the basis for inferring and ascertaining facts.

The rule of thumb is obtained by abstract induction of individual experience, which not only exists in individual experience, but also surpasses its individual experience. It is through repeated experience of a single individual, and finally rises to a universal understanding of the laws of things beyond the individual, and becomes a kind of social common sense, which can be understood and known by ordinary people. Ordinary experience, which fails to rise to the rule of thumb, cannot be used as the basis of judicial reasoning because of the lack of universal argumentation. As some scholars have suggested, the concept of rule of thumb is not simple common sense or social consensus, but needs more restrictions. [11] This limitation actually divides the boundary between experience and rule of thumb.

The rule of thumb can play a positive role in judicial reasoning, which is inseparable from the development of free evaluation of evidence system. In the era of formal evidence, judges' knowledge of the process of fact determination cannot exceed the facts outside legislation, and their knowledge must come from authoritative documents, rather than their personal experience judgment obtained through direct observation or empirical research. Therefore, at this stage, outside the legislative facts, the personal experience of the fact-finder is excluded from the process of fact-finding. At the end of the 18th century, France gradually replaced the formal evidence system with the system of free evaluation of evidence. The core connotation of the system of free evaluation of evidence lies in that the probative value or probative force of evidence is not presupposed by law, but judged freely by judges using their own logical experience and daily cognitive methods in the process of judging. With the rise of scientific and

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202302_6(2).0003

technological revolution, geographical discovery and Renaissance, people's ability to know the world has been improved by leaps and bounds. Similarly, in the process of judicial reasoning, more and more judges' personal experiences have become knowledge materials in the process of judicial proof. At the beginning of the establishment of the free evaluation of evidence system, the experience knowledge that can be used for judicial reasoning is unlimited, and as long as the judge can achieve inner conviction, he can make a determination of the facts. Later, people found that in judicial practice, there are absurd and impermanent empirical knowledge as the basis of referee reasoning, and the binding view of free evaluation of evidence was gradually widely accepted. Therefore, the rule of thumb can only be regarded as consensus knowledge in factual reasoning.

Most of the fields where the rule of thumb applies occur in the trial stage. In the process of trial, the rule of thumb plays the following three roles and functions. The first one can be called "enlightening" function; The second can be called "cognitive" function; The third can be defined as "probative" function. The proof function of the rule of thumb is embodied in the stage when the judge makes the final ruling on the facts of the case. In this process, the judge sets out the reasons for his decision, that is to say, he needs to come to the conclusion that the confirmed facts were made on the basis of a certain degree of proof of the available evidence. What often happens in practice is that most of the conclusions come from the help of the rule of thumb, and then on this basis, the credibility of the evidence and the presumed obvious facts are further verified. Here, the rule of thumb can be said to be a comprehensive proof and evaluation standard for logically drawing conclusions under the premise of specific designation. [12]

The proof function of the rule of thumb is mainly manifested in that when judges want to get an effective cognitive basis according to experience reference, the quality of experience itself is particularly important. If we can say with certainty that the experience comes from the laws of natural science or from the effective laws with general universality, then we can prove that the judgment obtained from it is a good judgment, and it is obvious that our judgment on the facts of the case at this time is a reasonable and realistic judgment verified by evidence. If we see that the rule of thumb shown in the judge's reason statement is based on the pseudo-general conceptual characteristics, or simply reflects the judge's personal prejudice or the general view of the individual social group, it is difficult for us to determine that the judge's judgment conclusion must be bad, but the rule of thumb used by the judge is not suitable for confirming and verifying the facts of the case and making a reasonable basis for judgment. In the latter case, the result is that the reason explained by the judge for the judgment result of the case is a false reason, which leads to the fact that this false reason itself cannot be a good explanation and explanation for the judge's judgment of the case facts.

3.2. The Law of Science

With the development of science and technology, in the process of judicial proof, it is more and more common to rely on scientific means and scientific evidence. Some scholars even assert that the scientificization of evidence law has become the main trend of the development of evidence law at present. Scientific laws refer to the objective laws about nature, society and psychology discovered and summarized by human beings through scientific research activities. Whether the law of science can be a type independent of the rule of thumb has not been decided at present. There are not a few scholars who regard scientific laws as specialized knowledge under the rule of thumb. For example, German scholars regard scientific laws as a kind of "professional knowledge" under the rule of thumb; Influenced by this, scholars in Taiwan regard scientific laws as "special rules of experience". Based on the formation and operation mechanism of scientific rules and different from the rule of thumb, the author thinks that they should be distinguished. [13]

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202302_6(2).0003

The scientific rules in evidence science have the following four characteristics: First, it is based on the principles of science and technology and mainly comes from experimental science. The emergence of scientific laws originates from empirical scientific methods, and the objective conclusions formed by means of technical principles, experimental instruments and operation methods are different from the laws of daily life summarized by induction and deduction. Scientific laws have strong objectivity, and the truth value of laws is mainly influenced by objective factors such as experimental environment, experimental methods and experimental instruments. Second, scientific laws are often expressed by digitalization and data. Different from empirical cognition or subjective judgment, scientific laws are based on experimental data, which can accurately determine the occurrence probability of an event or fact, thus providing quantitative reference for fact-finders. Therefore, when scientific laws are used as The "Ground", they often provide sufficient and powerful support for the probability of events in proof. Third, the scientific experiment process is repeatable and the results are verifiable. Compared with the evidence materials in specific cases, once the dispute facts occur, they will be solidified and cannot be reproduced, while scientific experiments can be repeated many times, and the influence of different methods, conditions and experimental environment on the results can be recognized by changing the experimental conditions. Therefore, the scientific law is not the demonstration of a single result, but the systematic knowledge including the experimental method, experimental environment and the change of the threshold value of the result. The more experiments are repeated and the more comprehensive the database is, the closer the conclusions drawn by this scientific rule can be to the specific cases. Finally, it should be emphasized that compared with other rules of life experience, the content of scientific laws has the characteristics of objectivity. Compared with the rule of thumb, the habits discussed below and the judgment rules summed up in judicial cases, the scientific law is determined by its natural science itself. It is an objective conclusion obtained by using experimental means to the objective world, rather than knowledge formed by the thinking induction of the subject, and is not affected by the cognitive purpose and intention of the cognitive subject.

Therefore, we can further summarize the differences between scientific laws and empirical laws as follows: First, the principles and sources of proof are different. Scientific laws are based on scientific principles and come from scientific experiments and verification. The rule of thumb is based on ordinary social experience and comes from people's subjective observation, experience and summary in social life. Second, prove that the carriers and methods are different. The evidence carrier of scientific rules can be all kinds of scientific evidence, such as specialized opinions, big data analysis reports, etc., with various forms. The rule of thumb is not directly proved as evidence, but as the premise and back to the "Ground" knowledge to analyze and judge evidence and facts, to test evidence and facts, or to establish the connection between indirect evidence and indirect facts. In other words, scientific rules usually judge evidence and facts by scientific evidence, while empirical rules have no specific evidence carrier. Third, the degree of objectivity of proof is different. The source and proof principle of the two are different, so the degree of objectivity is high or low. Scientific laws depend on scientific laws, which have the characteristics of digitalization, repeatability and verifiability, and show high objectivity and certainty. Although the rule of thumb has been tested by practice and recognized by the public, the subjectivity and uncertainty of experience itself may still cause exceptions, so the rule of thumb only has relative certainty. Fourth, the scope of proof is different. Although scientific laws are important, their functions mainly depend on the collection and application of scientific evidence, mainly aiming at specialized facts, and the scope of proof is limited. Moreover, criminal proceedings pay more attention to the protection of human rights than other types of litigation, and the access conditions for scientific evidence are stricter, which further limits the space for the role of scientific laws. The rule of thumb can be applied to the judgment of all evidence and case facts, and the application opportunity is very wide.

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202302_6(2).0003

Scientific law depends on scientific evidence to play a role of proof, and scientific evidence has the characteristics of clarity and objectivity, which can make up or even replace the judgment of rule of thumb with strong subjectivity and insufficient certainty. The greater the role of scientific laws, the objectivity and accuracy of proof will increase accordingly, and the error of judgment will decrease. Using the rule of thumb, we can't ignore the compensation and inspection functions of scientific rules. Scientific law is a "hard science", while empirical law is a "soft science". Making up and testing the judgment of empirical law with scientific law is a proof method to test subjective judgment with objective evidence, and it is also an effective means to improve the accuracy and scientificity of judgment.

3.3. Civil custom

Habit has two meanings. One refers to the action mode that is consolidated by repetition or practice and becomes necessary; Second, it means that after continuous practice, it has been able to adapt to the new situation. The custom in the legal sense can only be the habit in the first meaning, that is, the social habitual behavior rules. Civil custom refers to the behavior rules that people follow in civil activities that are not formulated by the state. Custom is one of the important forms of legal sources, so it is needless to say that the precedent system in Anglo-American common law attaches great importance to custom. The folk custom of our country has a long history. In the civil law of ancient China, custom occupies an important position, and the legal disputes such as "household marriage, land, money and debt" are mostly based on folk custom. The behavior habits formed for a long time have great stability and continuity, and play a direct role in adjusting and standardizing people's civil activities. China's Civil Code, as the general program to guide civil acts and civil adjudication, also pays attention to the regularity of habits in the field of civil life. In addition to Article 10, which generally regards custom as the substantive basis for dealing with civil disputes, there are more than ten places in the whole Civil Code about taking custom as the basis for judging specific civil acts, Including the effect of silence, the determination of the true intention of the counterpart, the treatment of neighboring relations, the acquisition and commitment of legal fruits, the principle of contract performance, the supplement and explanation after the unclear content of the main contract, the debtor's option to perform, the collateral obligation after the termination of debt, the delivery of the seller's documents, the actual determination of the inspection period, the determination of the interest of the loan contract, the establishment of the passenger transport contract, the exception to the establishment of the custody contract, the proof of the delivery of the custody, and the determination of the surname of the minority natural person.

Professor Su Li pointed out, In contrast, in the legal context, we should see that“habit”or“convention” has always been more regular and normative than“specific situation”. Habits and conventions are generally norms gradually formed through people's behavior interaction in a relatively long-term social life under various existing constraints. Therefore, habits and practices generally blend more local and industrial long-term influential specific situations, and the most important thing is that they are expressed by rules. They are an endogenous social system. It can be said that they condense the information about the environmental characteristics of a specific society, people's natural endowments and conflicts between people, that is, their solutions, and are the “stereotypes” that people must follow in their daily life after repeated games. Since habit can form binding guidance and influence on the behavior of civil subjects in people's daily civil activities, the dispute resolution procedure based on it has to pay attention to the judicial knowledge function of habit. [14]

When the "custom" expressed in the civil entity norms is applied to judicial cases, whether the "custom" is a "custom in customary law" or a "de facto habit", there are some controversies and discussions in the academic circles, which are briefly introduced here. First of all, the mainstream view in academic circles holds that there should be some differences between them.

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202302_6(2).0003

German scholars believe that the difference between customary law is mainly reflected in the following aspects: first, one is a fact and the other is a law; Second, one is consciously accepted by the public and the other is recognized by the state; Third, in the application of invocation, one requires the parties to invoke on their own initiative, and the other is that the judge has the obligation to review the application on his own initiative. Of course, some scholars believe that with the statute law becoming the most basic source of law, the possibility of producing new customary law no longer seems to exist, and there is no room for continued application of customary law, so there is no need to distinguish between customary law and custom. [15]

Secondly, scholars who think that "custom" in Article 10 of the Civil Code refers to "customary law" mainly demonstrate from the following two aspects. First, from the perspective of written expression and rule origin, the expression form of Article 10 of the Civil Code of China is similar to the provisions on custom in the Civil Law of Taiwan, while Taiwan generally believes that "custom" here refers to "customary law". Secondly, judging from the restrictive provisions of Article 10 of the Civil Code that civil customs "shall not violate public order and good customs", it shows that not all customs can become legal sources, that is, "customs" in Article 10 of the Civil Code should refer to "customs" screened by "conforming to public order and good customs and not violating mandatory provisions of law", that is, "customary law", while "Articles 140 and 142" Scholars who advocate that "habit" in this article is "de facto habit" mainly hold the following opinions. First, since only "de facto habit" can violate public order and good customs, from the restrictive provisions of Article 10 of the Civil Code that "civil custom shall not violate public order and good customs", the habit in this article can only refer to "de facto habit". The "habit" here covers trading habits and civil habits other than trading habits, and is a "de facto habit". Second, customary law should have been recognized by the state and must not violate public order and good customs. Some scholars have pointed out that "customary law" needs to be confirmed by law. If "custom" in Article 10 of the Civil Code is understood as "customary law", how to judge whether it constitutes "customary law" in judicial practice will become a difficult point. Some scholars have demonstrated that this "custom" should be a "de facto custom" rather than a "custom in customary law" from the perspective of legal logic. He believes that if the "custom" in Article 10 of the Civil Code is understood as "customary law", it will not only violate the self-consistency of the Civil Code itself, but also do not conform to the legal source orientation of its effectiveness, and it will also be with the current effectiveness of customary law. At the same time, interpreting it as "de facto custom" not only conforms to the judicial reality of our country, but also satisfies the logical self-consistency of the legal source orientation of the effectiveness of "custom".

Although there are as many as 19 concerns about "habits" in the Civil Code, there are some differences in specific expressions, such as using "habits", "trading habits", "local habits" and "customs and habits". It can be seen that the connotation of "habits" in the Civil Code, which is the basis for handling civil disputes, is rich and multi-level, including both "customary law habits" and "de facto habits", including "local habits" and "customs" with wide applicability, and individual "trading habits" formed in the transactions of specific subjects. Generally speaking, "customary law habits", "local habits" and "customs and habits" are the restraint mechanism of behavior based on social consensus, and are habits in the sense of social norms; The "trading habit" emphasizes the unique rules formed in many civil exchanges in individual civil exchanges, which are not stated between civil subjects. This habit is not universal and is a case rule, that is, "the law in the case". Therefore, although "habit" is an abstract expression, it should have the value of evidence science for the case facts formed according to habit.

The author thinks that the current debate on the legal attribute of "custom" in Article 10 of the Civil Code does not affect its value and position in evidence science in judicial argumentation. Both "customary law habit" and "de facto habit" can become evidence to identify the facts of a case, but their roles in evidence value and judicial argumentation are different. The value of

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202302_6(2).0003

"custom in customary law" in judicial reasoning is mainly reflected in two aspects: one is to assist the formation of case facts as implicit evidence, that is, it belongs to the “Ground” material; On the other hand, in judicial reasoning, it appears as the basis for evaluating reasoning facts. At this level, its role is to explain the reason between inferred facts and essential facts. The "habit of fact" mainly exists as a method of evidence, which is used to construct the facts of a case. The difference between it and concrete evidence lies in that concrete evidence can be embodied concretely by some expressive techniques of evidence materials, such as material evidence, documentary evidence and witness, but custom, as a conceptual fact, is often not embodied in concrete material forms in cases. In addition, from the normative sense of Article 10 of the Code, "customary law" is not final and supreme, but also evaluated by the value of "public order and good customs". For "custom in customary law", the proof requirement of claiming responsibility can be applied, and it can also be ascertained by the judge's authority; However, for the "de facto habit", because it is only a case fact formed between specific subjects, it does not have universal applicability, so it can only apply the proof requirement of claiming responsibility.

3.4. Resolved civil and commercial cases

Applicable case adjudication is an important form of judicial activities, which plays a certain role in different legal traditions. Since the Supreme People's Court put forward and implemented judicial reform measures such as case guidance and case retrieval, how to apply case adjudication under the statutory law system has become a hot topic in judicial practice and theoretical circles in China. According to the 2020 Guiding Opinions of the Supreme People's Court on Unifying the Application of Laws and Strengthening the Search of Class Cases (Trial), class cases refer to cases that are similar to pending cases in terms of basic facts, focus of disputes, application of laws, etc., and have been judged by the people's courts. The original intention of the design of the adjudication system of similar cases is to realize the same adjudication of similar cases by summing up the experience of adjudication, and to play the role of case guidance or reference, so as to realize the unity of law application and enhance judicial credibility. It is generally believed that the core value of the case-like guidance system is to unify the standards of adjudication and provide basis and reasons for judicial adjudication. Therefore, guiding cases are often cited as reasons for judgment and expressed in the interpretation and reasoning of judgment documents. The reason why "class case" is regarded as a kind of The “Ground” in this paper is mainly based on the recognition standard of "class case" and its role in the process of judicial reasoning and argumentation conforms to the characteristics of The “Ground”. Therefore, the author believes that "decided civil and commercial cases" is also the knowledge as the basis for inference in the process of judicial proof in civil litigation, and belongs to a kind of judicial specialized knowledge. [16]

The identification of class cases is the premise of class case judgment. To judge whether there is similarity between the decided effective cases and the pending cases, Professor Wang Liming advocates starting from four aspects: the key facts of the case, the legal relationship, the controversial points of the case and the legal issues disputed by the case. According to the research group of Beijing No.3 Intermediate People's Court, the key points of comparison in the identification and selection of similar cases are legal facts, application of law and focus of dispute, and the cause of case, the claims of the parties, the basic case and the gist of judgment are the auxiliary elements. Professor Zhang Zhiming further proposed that "based on the connection between case facts and specific legal provisions, that is, taking the legal characteristics of case facts as clues, we should determine whether the facts of two cases involve the same legal issues and belong to cases of the same legal nature as a whole." According to the Guiding Opinions of the Supreme People's Court, the judgment of similar cases is also made from three aspects: the similarity of facts, the similarity of controversial focus and the

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202302_6(2).0003

similarity of legal application issues. Although the requirements for the similarity of facts, whether it is the "basic facts" expressed in the Guiding Opinions, or the key facts, main facts, necessary facts or legal facts adopted by theoretical and practical circles, all point to the case facts corresponding to the normative (constitutive) elements, because there is basically no simple case facts, and the case facts contain the value judgment stipulated by law. If the corresponding legal provisions are not considered, it is difficult to draw a conclusion on whether the pending cases are similar to the cases. Moreover, facts will be similar only after abstraction. [17]

When using the rules of adjudication to resolve disputes, judges need to use a variety of reasoning methods to explain and compare the rules of adjudication, and then make a decision. Using the rules of adjudication to try cases requires both deductive reasoning and analogical reasoning. Political scientists Professor March and Olson believe that what is related to responsible behavior is the logic of appropriateness; Determining responsibility requires linking rules and scenarios to establish appropriateness; At this time, similarity or difference is taken as the standard, and analogy and metaphor are used for reasoning. The same is true in legal practice. In many cases, analogy is used to convince people of the application of legal rules and adjudicative rules. It can be said that when using cases to judge whether cases are similar or not, and when judging cases with reference to cases, it is often necessary to use deductive reasoning and analogical reasoning at the same time. In order to determine whether the pending case has relevant similarity with the case, we need to apply the adjudication rules under the guidance of analogical reasoning. It can be seen that in the process of reasoning from inferential facts to essential facts of pending cases, the role of fact connection played by similar cases is the same as that of The “Ground” such as rules of experience, scientific rules and habits. Although there are differences in the choice of similar cases and the comparison of similarities influenced by judges' personal experience, it does not affect the possibility of its application as evidence.

Acknowledgments

Fund projects: 2022 Graduate Training and Curriculum Reform Project of Northwest Normal University (2022KGLX008); 2019 Northwest Normal University Young Teachers Research Enhancement Program-“Research on the Substantive Normative Structure of Civil Litigation Evidence” (NWNU-SKQN2019-45).

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