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**A Study on Promoting the Mechanism of the Rule of Thumb from the
Perspective of the Smart Court in China**

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A Study on Promoting the Mechanism of the Rule of Thumb from the Perspective of the Smart Court in China

Abstract: This paper manifested the ought functions of the rule of thumb, and analyzed the causes of the practical dilemma of applying it, such as the absence of the explanation function, two extremes in the application of the rule of thumb, the outdated doctrine of proof, the difficulty of systematization and so on. This paper gave a suggestion that the application of the rule of thumb should be promoted by three dimensions as following: (1) procedural dimensions promoting the use of the rule of thumb- doctrine of proof and procedural justice; (2) technical dimension promoting the use of the rule of thumb- application of artificial intelligence; and(3) physical dimension promoting the use of the rule of thumb- case guidance system. Against the background of the construction of "Smart court" and the reform of "trial priority", efforts must be made to overcome shortcomings in the application of the rule of thumb like inappropriate systematization and difficult to capture and evaluate, and give full play to the roles of the rule of thumb in identifying evidence, ascertaining the fact, and applying the law.

Key words: Procedural law; rule of thumb; artificial intelligence; smart court

1. Introduction

In the Chinese criminal evidence law science community, the rule of thumb is a controversial topic. Professor Zhang Jianwei insists that the rule of thumb, also known as "empirical rule", is a kind of rule, is the general term of regular recognitions obtained by people from the daily life experience, a variety of scientific experiments and so on. Dr. Zhang Yadong believes that the rule of thumb is the general knowledge about attribute of things and the normal relation between things that has formed by man in the long-term production and life after empirical induction and logical abstraction, and these knowledge belong to the commonsense unwritten rule with the inherent constraints. The way of Anglo-American law countries on how to define the rule of thumb is quite different from that of civil law countries, for instance, the German scholar named Prutting, he divided the rule of thumb into the law of life, the basic principles of experience and simple rules of experience from the high probability to low probability; Japanese scholar named Ishii Kazumasa divided it into daily rules of life, natural law and specialized disciplines based on the different application areas; Anglo-American law countries are more inclined to define it from angle of function, including assume the presumption, prove the transfer of responsibility, determine the relationship between evidence.

The rule of thumb refers to the knowledge or rules regarding the cause and effect or nature and state, which, lacking express terms in the law, is concluded from general repeated life experience and can be tested at any time. The rule is applied to identify the evidence, presume the fact, and explain the law and abstract concepts. But, it may do not work in a specific case when counterevidence or reasonable explanation is proposed. The rule of thumb, which is consistent with the public's common sense, is generally accepted. In the civil proceedings, Article 9 of the Provisions on Evidence of Civil Proceedings formulated by the Supreme People's Court stipulates that facts that can be presumed

according to the law, known facts and the life experience does not require the parties to prove, and Article 64 grants the judge the right to assess the effectiveness and degree of proof according to the life experience. Similarly, in the criminal proceedings, article 404 of the "People's Procuratorate Criminal Procedure Rules (Trial)" formulated by Supreme People's Procuratorate stipulates that proceeding which is against the logic and rule of thumb shall be denied. In addition, terms relevant to or similar with the Rule of Thumb, such as "experience", "common sense", "reasonableness", "logic" are also commonly used in the Criminal Law and Civil Law, covering the application of rule of thumb in certification and judicial presumptions.

2. Ought functions of the rule of thumb

The rule of thumb has the following functions at least:

First of all, it explains ambiguous legal provisions and abstract concepts. Generally, application of law is a process of deductive reasoning in which a definite judgement is made when the minor premise, namely the specific fact, is in line with the major premise, namely legal provisions. However, with the development of society, the transformation of values, and the emergence of new things, the original concepts and rules in the law may become ambiguous due to the legal abstraction and lagging. In the case, the rule of thumb plays a profound role in helping to get an abstract cognition of the new matters and interpret the law. For example, Article 263 of Criminal Law of the People's Republic of China stipulates that whoever intrudes into another person's residence to rob shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death and shall also be fined or sentenced to confiscation of property. However, in the face of the complicated cases, the judiciary's understanding of "household" is controversial until the Supreme People's Court in 2005 explained that "household" is the residence, which is characterized by two aspects, namely, supply the family life of others

and relatively isolate from the outside world, the former is the functional characteristic and the latter is the site characteristic. The above interpretation actually uses the rule of thumb, that is, "household" should have the function of residence and the characteristics of privacy according to the general experience of society. Another example, with the development of computer and Internet technology, the problem that whether virtual property can become the object of crime of property violation is also highlighted. Along with the repeated judicial practice, in the process of forming relevant to the judicial interpretation that theft of virtual property is not the theft, it is both related to the value choice and the application of the rule of thumb. At the level of value, if the virtual property becomes a criminal object of theft, it may violate the principle of suiting responsibility and punishment to crime, which may bring practical problems, such as the value of property cannot be confirmed. At the level of the rule of thumb, the virtual property does not conform to the public's general understanding for the property attribute, and it more in line with the legal attribute of computer information system data.

Secondly, the rule of thumb justifies the reasons for the evidence asserted. It is generally argued that judgement on the competence and probative force of evidence, basis on which the fact of a case is identified, directly determine the admissibility of evidence. However, there are different views: some scholars believe that the fact of evidence should be proved, so that the evidence needs to be proved by other evidence; but most argue that the fact of evidence does not need proving, because verification and corroboration of the evidence is a process of determination and judgment, which is unlike the proof of the fact of the case. From the author's point of view, the evidence itself, at least, does not need to be proved from the epistemological level. According to the principle of free evaluation of evidence, there are no predefine regulations on the judge's choice of evidence and determination of the force and application, instead, they are

independently determined by the judge based on the conscience and rationality, which is largely dependent on the rule of thumb. From the perspective of China's legal norms, many reviews and judgements of evidences use rule of thumb, such as Article 54 of Criminal Procedure Law of the People's Republic of China: if the collection of physical evidence and documentary evidence does not meet the correction rules of statutory procedures, the evidence provider is required to make corrections or reasonable explanations to determine the evidentiary capacity of the evidence; For another example, the provision in paragraph 3 of Article 12 of The Stipulations on Several Issues of Handling Review and Judgement Evidences of the Death Penalty Case, conjecture, commentary and inferential testimony of witnesses cannot be used as evidence, but the facts according to the general life experience. The article also makes a stipulation on the eligibility of the testimony with the rule of thumb; again, such Article 64 of Provisions on Evidence of Civil Proceedings makes it clear that the judge can use the experience of daily life to assess the credibility and degree of proof.

Lastly, the rule of thumb bridges the gap between natural and legal facts. The particularity, also the difference from the scientific evidence, of the judicial proof is that it requires the fact identifier to have a retrospective cognition of the previous facts within a limited period. According to the principle of evidentiary adjudication, judging the fact of a case shall be based on evidence, but some facts, as the exceptions, can be identified without evidence, which is called "alternative judicial proof", such as the judicial presumption. The so-called presumption means to directly determining the existence of the presumed fact by referring to the normal association relationship between the basic fact and the presumed fact if the basic fact has been proved. In the process of determination, unnecessary proof of the assorted relationship may cause a neglectful and incoherent logic, as the comment by Dammask" there seems to be a skipped gap between

the evidence and conclusion". The presumption which is based on the link between the basic fact and the presumed fact features probability, enabling a closer relation between the legal fact and the objective reality. And the connection between the basic fact and the inferred fact is dependent on the rule of thumb. For example, On December 13, 2010, Supreme People's Court has stipulated the "the purposes of illegal possession" in The Interpretation of Some Problems in the Application of Law in the Trial of Criminal Cases of Illegal Capital Raising, whoever carries out the following acts can be presumed that he has the purpose of illegal possession subjectively: (I) capital raising is not used for production and business activities or capital raising used for production and business activities is clearly disproportionate with the scale of capital raising, resulting in capital raising cannot be returned; (II) wantonly spend capital raising, resulting in capital raising cannot be returned; (III) escape with carrying a capital raising; (IV) use capital raising for criminal activities; (V) flee, transfer funds, conceal property, and evade the return of capital; (VI) hide, destruct accounts, or fake bankruptcy, fake collapse, escape the return of fund; (VII) refuse to give an accounting for the whereabouts of capital and evade the return of fund; (VIII) other circumstances in which the purpose of illegal possession can be determined.

3. The practical dilemma of the rule of thumb

It is obvious that the rule of thumb is essential in identifying the fact and applying the law. However, in the judicial practice, there are dilemmas in the application of the rule of thumb:

(1) The absence of the explanation function

Take the explanation of gun for example. In recent years, many cases of simulated guns happened. From the conviction and sentencing results, it varies from one to one, including life imprisonment, probation, innocence. Such as Tianjin Zhao Chunhua case,

Fujian Liu Dawei case, Guangdong Wang Guoqi case. Among them, Tianjin Zhao Chunhua case caused public concern. In October 2016, Zhao Chunhua, operating balloon game business stall in the streets of Tianjin, was arrested by the police. In December 27, the First Instance of Hebei District Court imposed Zhao Chunhua a three-year and six months sentence due to illegal possession of guns. Later, Zhao Chunhua instituted an appeal, on the eve of 2017 Spring Festival, Court of Second Instance sentenced his term of imprisonment for 3 years, suspended for 3 years.

Article 46 of the Gun Law takes "sufficient to cause casualties or loss of consciousness" as an essential feature of gun. The Criteria for Scientific Appraisal of Fire Injuries and the revised Regulations on the Performance Appraisal of Gun and Ammunition Involved in the Public Security Organs issued by current Ministry of Public Security changed criminal law on the identification of firearms since August 2001, identification of the threshold value of the firearms was significantly reduced, and it stipulated that " non-standard firearms that cannot launch standard ammunition, when the kinetic energy of the muzzle which launch pill is greater than or equal to 1.8 Joules / square centimeter, it is identified as a gun." It results a wide difference on the firearms between existing standards of gun justice standards and the majority of the people's awareness. The standard quantification makes the identification more accurate and easy, but whether it can achieve the " enough to cause casualties or loss of consciousness " determined by the higher-level law remains controversial.

Allegedly, someone dedicated to the 1.8 Joules to make a demonstration test. Before the test, except the need for protection of the fragile head, basically he bared upper body, because the test hit the belly, the bullet was an ordinary toy bullet. Everything was ready, the shooter stood a few meters away, from the picture we can see that when the plastic bullet hit the belly, it produced a kind of state similar to water ripple in the

surrounding, then the bullet is bounced by the belly. After a short period of time, the belly began to leave two small red spots, feeling a little bit of tingling. From this test, we learned that the 1.8 Joule kinetic energy still has a certain risk, but it depends where it hits.

In recent years, due to the recognized standard of 1.8 joules / square centimeters, many cases of criminal guns were convicted of felony. If the scope of the identification of real guns expands to the scope that the parties can frequently touch the red line, it will lower the threshold of citizenship, extend the scope of criminal law regulation, deviate from the original intention of combating the law and the modesty principle of criminal law.

(2) Two extremes in the application of the rule of thumb

One is that the subject of the litigation tends to avoid the rule in open proceedings; the other is that subject of the litigation tends to abuse the rule in the non-public condition. For example, the following circumstances commonly exist in the criminal proceedings: the defense considers the facts claimed by the accuser unreasonable with supports by some rules of thumb, but the accuser refuses to make response directly to it and keeps the established accusing strategy, avoiding the contention of arguments. Obviously, this situation is not conducive for the judge to accurately identify the facts. In addition, in public concerned cases, negative impact may be bred. In QvodPlay trial, for instance, the defense claimed such rules of thumb as that "technology itself is not harmful", "we cannot claim the kitchen knife manufacturer guilty just for the fact that someone is killed by a kitchen knife". Without refuting in a targeted way by the prosecutor, it did caused a negative social consequences.

On September 13, 2016, Haidian court made the first instance judgement for of profit-making case by the defendant unit Shenzhen QvodPlayerTechnology Co., Ltd., the defendant Wang Xin, Wu Ming, Zhang Kedong, Niu Wenju by spreading pornographic

material, it held that the Shenzhen QvodPlayerTechnology Co., Ltd., the defendant Wang Xin, Wu Ming, Zhang Kedong, Niu Wenju spread obscene video on the Internet in order to make a profit, their behavior had constituted the profit-making crime by spreading pornographic material, the circumstances were serious, should be punished according to law. In the first trial of the case, the cross-examination and debate process between prosecution and defense of the two sides were public, resulting in huge some public opinions.

The prosecutor made the following views when he made his first public opinion 1, the behaviors of defendant unit Shenzhen QvodPlayer Technology Co., Ltd., the defendant Wang Xin, Wu Ming, Zhang Kedong, Niu Wenju have constituted the profit-making crime by spreading pornographic material. 2, the case should be identified as unit crime, the defendant Wang Xin, Wu Ming, Zhang Kedong and Niu Wenju also bear legal responsibility. 3, the defendant unit Shenzhen QvodPlayer Technology Co., Ltd.' and the defendants ' behavior has a serious social harm, should be punished according to law. 4, the defendant unit Shenzhen QvodPlayer Technology Co., Ltd and the defendants should bear the legal responsibility, the case is particularly serious circumstances, obscene documents of the case have achieved more than 500, the unit was imposed a fine and Wang Xin, etc. should bear the corresponding legal liability. 5, the defendant unit Shenzhen QvodPlayer Technology Co., Ltd and the defendant refused to admit their guilt, submitted consideration to the tribunal. Prosecutors hoped that through the trial to make the defendant reflect on their own legal responsibility, used their expertise to make the appropriate contribution for the country and society.

Then the first defendant Wang Xin argued that: porn sites are not the mainstream of the Internet. Evidence proved that many employees of the QvodPlayer company reflected the QvodPlayer knew the spread of obscene items, they cannot know the crime was still

work in the company. As a senior intellectual, confession witness Mr. He wouldn't join QvodPlayer company if he knew illegal activities. According to the evidences cited by the prosecutors, if there was such a large proportion of pornographic video, then it meant that there were a large number of Internet users seeing porn sites in China, which was not logical.

When the prosecutor supplemented the public prosecution opinion in the second round, he did not refute error logics "people wouldn't be involved in crime if he knows there is a crime" and "there is a proportionality between a large number of video and a large number of viewers" proposed by Wang Xin. In fact, most of the defendant and the attendant are not familiar with the law, some defense lawyers cannot be fully familiar with the various litigation rules, when the prosecutor is in response to the defendant's questioning or cross-examination, he should quote the full law, and then put forward his own views, rather than generally talk about how to deal with according to the law, so that most people can understand the focus of the dispute. The prosecutor can totally seize the details in violation of the rule of thumb in views of the defense to make a strong fight back, producing good social effects in this case.

Similarly, the rule is occasionally evaded when a judge produces a written judgment. For example, the expression stating that the defendant explanation which is against the experience and the common sense fails to elaborate on whichever behaviors defying what kind of experience and common sense. According to the provisions of the *Interim Measures for Publishing the Judgement Paper of the Supreme People's Court Online* promulgated in 2013, all judgement papers of cases must be published on the Internet, other than those unpublishable according to law. By the end of 2016, more than 25.72 million judgement papers have been published on China Judgements Online, with website visits exceeding 4.7 billion. In this context, the judgement papers which are poor

in applying the rules of thumb, even without justification on the use of the rule, or identify the fact of a case just by the list of evidence without analysis may lead to the decline in judicial credibility. The abuse of the "rule of thumb", which is in stark contrast to the above situation, exists also in the judgement of the collegiate bench. The most common is the abuse of character evidence which means that the judge could unconsciously refer to the criminal means used previously by the defendant when determining the fact of a case sometimes. While judging the character plays a role in determining whether the defendant has committed a crime, there is a great risk in the use of character evidence.

(3) Too dependent on personal qualities

The process that applies the rule of thumb to infer the fact is complex, dynamic and difficult to grasp. The rules of thumb applicable to the process of factual facts need to consider the specific circumstances of the case, such as the degree of association between the chosen rule of experience and the specific facts, the choice of conflicting rules of experience, and so on, showing a considerable degree of complexity. People's experience updates from time to time, not only yesterday's experience is different from today's, one's experience will be different from other's experience, even for the same people, his personal experience differs due to changes in the time and place and others. Complex, dynamic rule of thumb don't have established rules of judgment, which will be greatly reduced in determining the role of the facts. The overall social values will affect the judge's value orientation in the use of the rule of thumb. The rule of thumb will more or less permeate moral elements, there are not only the true, the good and the beautiful, but also the fault, the evil and the ugliness. In the social environment, the judge uses the facts determined by the rule of thumb, who will inevitably be affected by personality, mood, psychological quality, moral sentiment, occupation level, other factors and the public

opinion in whole social environment and the impact and influence of values, resulting in the deviation of the facts presumed by rule of thumb. Due to the development limitations of the evidence legislation and procedural rules, there are a large number of discretionary discretion in judging the facts of the case with the use of the rule of thumb. In judicial practice, there are situations in which different courts or different judges of the same court make different affirmations for the same litigation evidence or the facts of the same case, which seriously affects judicial justice and authority.

For example, On the morning of November 20, 2006, the plaintiff waited for No. 83 bus at the Shui Xi Meng bus station in this city. At about 9:30 pm there were two No. 83 buses stopped at the same time. The plaintiff was ready to take the latter No. 83 bus, when he walked to the back door of the former No. 83 bus, the defendant first came out from the back door of the former No. 83 bus, then the plaintiff fell to the injured. After the defendant found it, he supported the plaintiff to side. After the arrival of the plaintiff's relatives, the defendant and the plaintiff's relatives sent the plaintiff to the hospital for treatment, the plaintiff was diagnosed with left femoral neck fracture and hospitalization, and treated with hip replacement surgery, resulting in medical expenses, care, nutrition and other losses.

The key to the case is whether the defendant and plaintiff were collided. The court thought that the plaintiff was injured after the collision with the defendant, the reason is that: after people are knocked by external forces, he usually first determines the external force source, identifies the people who collides with him, if the collided people escapes, as the person who is knocked down, his first reaction is for help and ask others to stop escape. The incident site was in the bus stations where were many people, was a public place, the time was in the morning with better insight, the process of the accident was very short, so the people who knocked the plaintiff cannot easily escape. According to

the defendant himself, he was the first person to get off, the possibility of colliding with the plaintiff was large according to the common sense. If the defendant was just doing a good thing, a more realistic approach should be to grab the plaintiff, not just supported him. If the defendant was just doing good things, according to social reason, he totally can state the facts and let the plaintiff's family sent the plaintiff to the hospital after the arrival of the plaintiff's family, and then left on their own, but the defendant did not make such a choice, its behavior was clearly contrary to reason.

If the defendant was just doing a good thing, a more realistic approach should be to grab the plaintiff, not just supported him, but the defendant did not do so." In the judgment, it is very doubtful for the judge to take "common sense" as a rule of thumb, because it is not an ordinary general social awareness. The rationality of the rule of thumb on which it is based is not sufficient.

The aforementioned difficulties denying the functions of the rule of thumb are essentially concluded as the following: first, backward doctrine of proof. The "Code of Criminal Procedure", which was formulated as early as 1979, stipulates that "collection, judgment, and the use of evidence must be based on the fact". And the "Civil Procedure Law" in 1991 also stressed that "the court must verify the evidence. They have legalized realistic system of evidence in our country. Public Security, Procuratorate and the Court, three national power organs committing to the objective truth of the case, tend to seek the system of legal evidence. Before the implementation of the reform and open up, the system of free evaluation of evidence in China has been criticized in the legal circle. It was not until the early 1980s that there have been critics believing that the system was bourgeois and idealism. In fact, this is a completely abandoned and distorted understanding of such system. Second, procedural justice is difficult to achieve. The parties are unable to fully engaged in the use of the rule of thumb- being short of the

feasibility, both in institutional and technical level, and the procedural relief. In *Regulations on Evidence of the Civil Proceedings* formulated by the Supreme People's Court, deductions on the factual presumption are simply provided, but there are no rules on the provision of the deductions and questioning by the parties. Although the rule of thumb is used in civil proceedings for cross-examination to prevent the parties from sudden striking to a certain extent, it can only be stated if it is adopted in the verdict, instead of certification on court, so that the parties are denied the chance to promptly adjust strategies based on the use of rule of thumb. In the criminal proceedings, however, it is almost unlike to adopt the rule of thumb in the court's evidence and cross-examination parts, and rarely to appear in judgements. It is used only in non-public materials like the collegiate record. This results in that the defendant is unable to express his/her views on the application of the rule. Neither appealing to the relief for the misuse of such rule. Finally, difficult to achieve standard systematization. The rule of thumb is a universal rule which is formed by abstracting a great amount of individual experience. Unlike the logic rules, the rule of thumb cannot be expressly stated by numbers and symbols or simple statements. In addition, it is different from the scientific theorem through which correct conclusions are possibly made in a specific case. And it, unlike the legal norms, involves in so many complicated and unrelated subjects that a system is hardly to form. The above characteristics determine the fact that the rule of thumb is difficult to find and argue in the proceedings timely. Besides, the rule of thumb features dynamic development, which means that it is inappropriate to legally standardize the rule because behaviors previously in line with the rule of thumb behavior may be excluded in a specific condition.

4. Promoting the use of the rule of thumb

(1) Procedural dimensions promoting the use of the rule of thumb- doctrine of proof

and procedural justice

The traditional doctrine of proof in our country refers to a realistic idea which is committed to finding the objective truth. Even this epistemological doctrine of proof has gradually evolved with the development of modern evidence system, There is still inertia resistance against the development of judicial practice. Therefore, the diversity of the doctrine of proof should be attached great importance. Firstly, the doctrine of proof, compared with the concept of truth, is essentially a retrospective cognition of the happened fact of multi-subjects using information. In the process, truth obtainment should be regarded as the final pursuit instead of the minimum standard. If the absolute truth is treated as a standard of proof, criminal proceedings are going to be proved lack of operability. On the other hand, ignorance of truthlikeness in judging facts fails to explain if the judgement is wrong or if it is necessary to conduct remedial procedures. Second, procedural justice. litigation proof are uniquely valuable in standards for process of the proof, instead of the final judgement. A legitimate proof is the inherent requirement to achieve the procedural justice. The essence of evidence is to respect the right to engage in the proof by both parties, and ensure an accurate fact finding. It is helpful to make a more acceptable conclusion. Third, the idea of value weight. In litigation proof, there may have multiple conflicts and trade-offs of interests, such as external legal and moral fairness, judicial fairness and economic efficiency, judicial justice and traditional culture, religious belief and social concept. In the case, various values need to be weighted to maximize the overall interests. This means that during the proof, long-term, comprehensive and extensive benefits should be fully considered while including gains and losses in every link and party, or a regional trend.

Engagement and transparency are two important attributes of procedural justice. The engagement means that people or their representative involving interests of the

proceedings are able to engage in the litigation and have access to know and express views on matters relevant to their identity and property. Judicial transparency means granting specific or non-specific people access to partially understand the processes or contents of judicial activities and know the litigation documents and evidence materials in judicial activities, so that the judicial activities are known to these specific or non-specific people. In litigation, a party should present not only evidence materials, but also specify whichever attributes are drawn to support his/her views. If there is a linkage between the fact proved by the evidence and the legal fact claimed in connection with the rule of thumb, the party has the obligation to state the rule of thumb involved as one of the attributes attached to the evidence, allowing the other party to carry out cross-examination. The other party may either express an objection for against the rule of thumb, or refute by presenting evidence or reasonable explanations proving that such rule of thumb is inappropriate in the case or showing other rules of thumb against the effectiveness and proof of the evidence in the case. In addition, on the condition that the court identifies that written judgement should specify the rule of thumb which is applied in the evidence and legal facts, or the court has used the rule of thumb beyond the scope of the debate between both parties in the court trial and there is no previous reference, opinions by both parties of prosecution and defense should be fully expressed before the judgement. And the defendant may appeal against the rules of thumb expressed by the court in the judgment, and the court of second instance should respond hereto.

Fortifying judgement instrument with legal interpretation and analysis is an important step to enhance the judicial credibility and social identity and contribute parties to accept the conviction. It is also a necessary requirement to manifest judicial civilization and fairness. A reasonable judgement instrument needs to present objectively evidence and causes by the parties, fully reflect the basis and wisdom of the judge's

discretion, and eliminate, to a certain extent, the parties' intention to appeal and complain irrationally. Therefore, written instrument should state clearly reasons for accepting or denying controversial but key evidence by both parties of the prosecution and defense or the parties. In case of the use of rule of thumb, it should be clearly stated as well. If there is a factual presumption in written judgment, the evidence proving the existence of the premise of the action should be firstly listed, analyzed and judged. Given the premise exists, the rule of thumb based on which the act is presumed must be demonstrated so as to identify the fact. While judging whether the new thing is in conformity with the original legal provisions, that is, the interpretation of the legal provisions, the rule of thumb based on which the judgement is made needs to be stated in the verdict.

(2) Technical dimension promoting the use of the rule of thumb- application of artificial intelligence

It will be greatly helpful in judicial practices if few and different rules of thumb are formed into a dynamic system in which the new rules continue to be included and obsolete rules are omitted in time. On the one hand, judges will make a great progress in trial experience in a short term; on the other hand, objective reference system will be available to both parties of the trial when applying the rule of thumb.

As for the systematization of the rule of thumb, Japanese scholars like Gotou and Ito made a study. The latter systemized the rule of thumb as realistic rules. They include that property acts, also known as trading behaviors, are conducted to seek economic interests; property acts have the principle of self-defense; in case of the specific circumstances, such as interpersonal relationships and other situations, people shift their purpose for the pursuit of economic interests and self-defense in the property acts. The rules of thumb related to the evidence behavior are another aspect. They include that people leave behind evidence after a property act; people do not leave evidence after a property act in

special circumstances; people sometimes do not leave evidence on purpose after a property act with good intension. There were researchers who tried to study the application of the rule of thumb in civil trials with real examples in our country after conducting a deep study of the systematization plan put forward by the Japanese scholar. But they failed as a result of the following: First, the cases of the rule of thumb they collected were so limited that they were unable to conclude and form a system of such rule. Second, a number of social investigations are required for forming a systemic plan regarding the rule of thumb, especially in China with a vast land and a large population. It is difficult to achieve the goal just relying on limited labors within a short term. However, with the progress in artificial intelligence technology and the construction of the "smart court", systematizing rule of thumb becomes possible. With the purpose of ensuring the fairness and efficiency of justice and by taking advantaging of technologies, such as the Internet, cloud computing, large data, artificial intelligence, "Smart court" is devoted to promoting the modernization of the trial system and capacity and achieving a highly intelligent operation and management. Computer has borne functions like formal logic inference and scientific calculation in the legal system for a long term. But as the finding of fact and legal application is mainly dependent on the experience and the value judgment, rather than formalities or scientific theorem, it is just an idea to alternate human trial with the computer. However, the rapid development of science and technology has made supporting artificial intelligence trial possible. In recent years, technologies, such as intelligent voice recognition, intelligent image and document recognition, data intelligence analysis has been partially applied to the court trial.

I believe that artificial intelligence technology plays an irreplaceable role in promoting the use of rule of thumb. Specifically, the technology promotes the use of such rule through the collection and capture of basic data, massive data analysis to build the

system of rule of thumb, and precise introduction of similar cases. In June 2015, Supreme People's Court managed to bring together case data of the country's 3512 courts which are divided into four administrative levels in its centralized data management platform for the first time, forming basically a great data net covering all four levels of national courts and nearly ten thousand of detached tribunals. On the basis of this, the use of the rule of thumb in the cases of four-level national courts can be concentrated and updated through the centralized management platform of the Supreme People's Court. Of course, during the statistics, it is difficult to capture the key information. Unlike easily operated information like the defendant's situation, gender, age, education, it can only rely on data intelligence analysis to refine the rules and the use of an optimal algorithm to summarize existing experience. However, compared human labor which seems to need just a few samples as a result of experience and efficient algorithm, the machine is inferior to capture, requiring a large number of samples. Therefore, during model construction and algorithm design, computer professionals solve only the technical problems. And in the system development and testing, algorithm and model which based on the rule of thumb are dependent on legal professionals. It is only first-class talents in the legal field who play an essential role in promoting molding and development of law-related artificial intelligence and contributing the machine for deeper study.

To some extent, all legal workers are customers of artificial intelligence software. To avoid common drawback that final product modeling is difficult to achieve due to variable customer's needs in software design, evolutive and iterative software model, such as prototype model, can be used for development.

From author's view, two phases are required to develop artificial intelligence software for capturing key rule of thumb of: the first phase is to input information manually. At the beginning of systematizing rule of thumb, judges have hardly a specific

standard for abstracting and refining rule of thumb. They have to turn to capture the application of rule of thumb in a specific case related to their current case with a limited number of references. For example, in the application of such rule in a specific case, some judges possibly sum as like that "goods trading conducts at a price as same as current price", but some may take the rule that "property act is committed to seeking interests". Meanwhile, application of the rule of thumb expressly stated in the judgement instrument has no guide with a fixed format, resulting in difficulty to automatically identify and collect by the computer in a limited number of samples. To solve it, attention should be paid to a reasonable classification of rule of thumb in the first stage. This requires a special department composing of legal and computer professionals to timely communicate to achieve the transformation of such rule to legal and computer language. The second stage is to learn and refine rules of thumb by computer. It will be easier for the computer to refine the application of rule of thumb in vast data if such rule in judgement instruments has a fixed pattern. At this stage, when judges enter the case and publish judgement instruments, they need only to check the application of the rule which is automatically generated by the computer before gathering automatically to the data platform. Precise introduction of cases of the same kind is relatively easier than the above. It can be achieved by manually entering key words like cause of action or identifying automatically key words of the current case by computer. In the case, judge will be relieved by the presence of cases using the same rule of thumb.

The deep integration of modern science and technology and trial can bring a qualitative leap to the trial and effectively enhance the function of the trial to solve the dispute (especially in confirming disputed facts).

Take the Shang's and An's fraud case for example. Shang was well acquainted with An. Shang rented 50 acres of collective land in A village and built factories, including

buildings and workshops. A few years later, this land was pulled down, An exactly was the government staff for the coordination of the demolition, he took the demolition company and the assessment company to Shang's factory for measurement, An was there throughout. Since then, in accordance with the demolition agreement, all the buildings in Shang's factory should be demolished, but after the demolition, the relevant projects did not take up all the factory, so Shang still kept an office building, but the buildings around the office building have been removed. Since then, An suggested to plant more than 500 trees on the land that had obtained demolition compensation. A year later, the land was demolished again, as the person in charge of the demolition, An knew that the above-mentioned trees had obtained demolition compensation, but he still signed to accept compensation again, resulting in the loss of more than 300 million state demolition compensation. In the process of hearing the court, An always denied that he constituted a crime of fraud, argued that he did not know the land where planted trees had received demolition compensation, did not know the specific location where had received demolition compensation in the factory.

Because the identification on whether the defendant subjectively know or not is involved, it is necessary to apply the factual presumption, and standards of the factual presumption involves the understanding and application of the rule of thumb. Due to the lack of direct evidence, it did not find An's explanation had a violation of the rule of thumb. But in the latter process of presenting the evidence, An mentioned that he was very familiar with the Shang, almost every week he would go to Shang's office for playing mahjong. The case of the judge found the clue in a timely manner, so he asked An to present contrary evidence or make a reasonable explanation for the rule of thumb that "people should have a more accurate understanding on whether surrounding buildings is demolished or not if he regular access to this place", but An could not respond, which

directly prompted the judge to have an inner assurance that An knew that the land had obtained compensation for demolition.

In this case, the determination of the facts depends on the correct use of the rule of thumb, but more depends on the judge's life experience. The use of law is not logic, but experience. But people have different experiences; it is not easy to enrich life experience and practical experience.

However, after the intervention of artificial intelligence in the trial, it can analyze and refine the litigation participant's language in time, compared with the massive rule of thumb in the database, and feedback to the judges where may be contrary to the rule of thumb in time, so that it will be convenient for the relevant personnel to ask and verify. In the question, the facts of the case can only be presented. At the same time, due to the timely introduction of the rule of thumb in front of both parties, they will be able to avoid the procedural defect that they cannot adequately argue on the relevant issues.

(3) Physical dimension promoting the use of the rule of thumb- case guidance system

In accordance with the "Legislative Law" in our country, the National People's Congress and the Standing Committee of the National People's Congress exercise legislative power. The above provision shows that China is a country adopting statute law. It means that legal interpretation is necessary to overcome the lagging. Although the Standing Committee of the National People's Congress has awarded the right of legal interpretation to the Supreme People's Court, which also issued a provision stressing that the judicial interpretations issued by the Supreme People's Court are legally binding, judicial interpretations, like the law, are so limited that they are impossible to cover vast case. In addition, formal justice requires the same kinds of cases ending with the same outcome. Some believe that there is no possibility of two identical cases, and "cases of the same kind with different judgments" make sense. But I think that the same standard

should be implemented when dealing with cases of the same kinds with the same law and rule. It, on the one hand, confines the judge's discretion, on the other hand enhances social acceptance for juridical justice. However, that how to unify the judicial and judgement standard and regulate the judge's discretion become a major problem confining formal justice.

In order to solve the above problems, the case guidance system came into being. As the case features timeliness, flexibility, pertinence, easiness to capture, actions judged can serve as physical references for the case to be judged. The case guidance system presents judgement criteria making up the lack of legal and judicial interpretation. It can realize fair justice through the unified judicial standard, which is helpful to reform juridical by implementing the judicial responsibility system, improve the quality of the trial, carry forward the socialist core values, promote social value and the rule of law.

The rule of thumb features universality, abstraction, dynamic and possibility. If we impose laws and judicial interpretations on such rule, it will be difficult to adapt to the judicial practice because of the limited content and the lagging of the provisions. On the other hand, the case guidance system is almost seamlessly consistent with the characteristics of the rule of thumb. Specifically, guidance of the system is corresponding to the universality of the rule of thumb; rule refining is matched with the abstraction; "access" and "exit" mechanisms is conformity to dynamic characteristics; and the flexibility links the possibility. For the reason, the application of the rule should be included in the case guidance system.

According to Article 2 of the Regulations of the Supreme People's Court on Case Guidance (hereinafter referred to as the "Regulations on Case Guidance"), the guiding case shall be confined to correct judgement and instruction. The former refers to the judgement came into force shall be clear in the fact, correct in applicable law, and

reasonable with positive legal and social effect; the latter refers to the judgement which plays a role in solving unequivocal disputes by summarizing new rules and standards in the legal text, judicial judgements and legal theories. Specifically, the rule of thumb is used to identify evidence or a fact, explain "applicable" legal behaviors. It also is applied to counter against the rule of thumb in the court by the parties or the defendant. In contrast, the controversial latter seems to be more instructive, but relatively specific and difficult to abstract and refine than the former, which is easy to refine but exists doubts. To solve the above contradictions, the guidance case for the rule of thumb can be published in groups, which mean that several cases using the rule of thumb are issued while exclusions denying such rule are also released. Meanwhile, Smart Court system is used to present the ratio of the cases using "applicable" rule of thumb and cases against such rule. In Article 4 of the "Regulations on Case Guidance", roles and basic functions of four administrative levels of the courts in our country are specified. Case Guidance Office, Supreme People's Court shall be responsible for the collection, selection, review, publication, compilation and research of the cases using the rule of thumb; trial organizations under the Court take charge of the recommendation and examination of the relevant cases; superior people's courts shall be responsible for the recommendation, investigation and supervision of the case guidance within the jurisdiction; intermediate and grassroots courts may make recommendations to the superior people's court for guiding cases. In Articles 9 to 11 of the Regulations on Case Guidance, references to the guiding cases are provided. I believe that application of the rule of thumb referred to by the parties for supporting their excuses in specific cases shall be considered for reference.

For example, Crime of contract swindling and contract dispute are two different nature phenomena, but the objective performance of the two have the same or similarities. Crime of contract swindling refers to a behavior that takes illegal possession as the

purpose and uses fictitious facts or conceals the truth to cheat the other party's property in the process of signing and performing the contract, the amount of larger. And the contract dispute means that one of the parties in the contract does not perform or does not fully perform the contract, so that the other party suffered losses, and one party may have some deceptive factors when signing the contract. The difference between the two is whether the perpetrator is willing to fulfill the contract, which is to say whether he has the purpose of illegally possessing the property of the other party.

Under normal circumstances, even if the perpetrator illegally uses other units to sign a contract, if it has the ability to perform the contract and cannot continue to perform the contract due to objective reasons, because the perpetrator does not have the purpose of illegally occupying other people's property, it should not be identified as crime of contract swindling. Therefore, the guidance case can take the rule of thumb that "the person who has the ability to perform the contract signs and obtains the property with the deceitful means but cannot fulfill the contract because of objective reasons generally does not identifies that there is illegal possession of other people's property" as a general situation to stat and provide cases.

However, there are also counter-examples, such as the defendant Zhang's crime of contract swindling. Zhang is individual business personnel for processing steel and he did not have company. He undertook a project in Songyuan City, Jilin Province in affiliated way. In order to be able to supply the project with the steel, he falsified the seal and used a well-known construction company in the industry to sign a steel purchase and sale agreement with the victim. The victim agreed to first supply goods and then collected money. After the victim gave Zhang steel, the steel was transported to the construction site in Songshan City and used. Since then, the victim urged Zhang to pay for goods, but the Party A of the project did not close expense, Zhang couldn't pay the

victim money.

If in accordance with the above rule of thumb in the case, Zhang did not constitute the crime of contract swindling. However, Zhang escaped after that, he neither asked the Songyuan City project to recover the money, nor changed the contacts and refused to contact the victim, resulting in the irretrievable loss of the victim. Until five years that Zhang was arrested and brought to justice. In this case, it can be said that Zhang was equipped with the ability to perform, but also he cannot fulfill the contract because of objective reasons, but his follow-up escape behavior can directly reflect the intention to illegally possess victim's property subjectively. Therefore, "escape after the acquisition of other people's property can generally be able to identify that he has the intention to illegally possess other people's property" can also be used as a rule of thumb to be added in guidance cases for analyzing this type of perpetrators' subjective intention.

5. Conclusion

The application of the rule of thumb should be promoted by three dimensions, the guidance of procedural justice, support of artificial intelligence technology and regulation of the case guidance system. Against the background of the construction of "Smart court" and the reform of "trial priority", efforts must be made to overcome shortcomings in the application of the rule of thumb like inappropriate systematization and difficult to capture and evaluate, and give full play to the roles of the rule of thumb in identifying evidence, ascertaining the fact, and applying the law.

References

- [1] Zhang Jianwei, Evidence Law Essentials (kindle e-book), Peking University Press, June 2009 edition, p.7443.
- [2] Zhang Yadong, Rule of Thumb: The Scale of Free Proof, Peking University Press, January 2012 edition, p.389.
- [3] Ishii Kazumasa, Japan Practical Criminal Evidence Law, translated by Chen Haoran, Taipei Wu Nan Book Publishing Company 1989 edition, p.25.
- [4] Japanese Ito Tsai, Basis of the Fact, Yuhikaku 1996, pp.89-102.
- [5] Huang Yongwei(ed.), Twelve Lectures on Judicial Frontier Issues, People's Court Press, March 2017, p.241.
- [6] CAO Zhixun, Two Models of Applying the Prima Facie Evidence: Reconsidering the "Pengyu" Decision, The Jurist, No.5, 2019.
- [7] Ji Gefei, Study on the Rationality of the Application of Commonsense, Evidence Science Vol.20 No.1 2012.