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中国司法转型的法理探析

——从达玛什卡的司法类型学出发

Jurisprudence Research of Chinese Justice Transformation:

A Perspective from Damaška's Typology of Justice

周宗良

指导教师姓名: 宋方青 教授

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周宗良

指导教师

宋方青

教授

厦门大学

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作者签名：周宗良

日期：2008年4月15日

导师签名：

日期：2008年4月15日

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内 容 摘 要

中国司法改革虽历经沧桑二十几载,但仍然处于层层迷局之中,从根本上说,这是由于对司法类型范畴以及在改革路径方面缺乏实质性理论指导的结果。当务之急首先必须厘清我们对司法形态的混沌认识,树立现代司法程序的“类型”范畴,然后才能明晰方向并做出路径上的选择。对于司法形态的研究,美国学者达玛什卡的司法类型学处于一种独一无二的地位,对我国司法改革大有裨益。本文力求全面精确地介绍和分析他的司法类型学,进而阐释如何借鉴该理论使中国走出司法改革的迷局,实现从“政策实施”向“纠纷解决”型司法转变。

本文除引言和结语外,共分为五章:

第一章中国司法改革的迷局及理论引入。本章描述了中国司法改革的迷离局面,指出它根源于缺乏对司法类型概念明确的理论认识,表明引入达玛什卡司法类型学的必要,同时对达玛什卡司法类型学的一些误读进行批判。

第二章达玛什卡在司法类型学上的卓识与路径。本章从司法类型分析的“政治”进路、“理想类型”方法、理论框架等方面,力求全面而精确地对达玛什卡的司法类型学进行阐释。

第三章中国司法转型的应然。本章论述了达玛什卡司法类型学对中国司法转型的指引价值,并大胆地把达玛什卡从价值判断的幕后推向台前,就我国现代司法的应然形态属“纠纷解决型”进行正当性补证。

第四章中国司法转型的实然与展望。本章分析了我国传统司法带有过浓的“政策实施”色彩的表现与原因,接着从官方理念和司法实践二方面来论述中国司法正向“纠纷解决型”转变,最后对这种转型进行了展望并提出相关建议。

第五章通过法律移植的中国司法转型。本章从路径依赖性、本土资源、国际化、可行性等方面论证了我国司法转型必须且主要走法律移植之路的观点,并指出法律移植不仅应注意由外而内的政治适应性,还要注意由内而外的政治改良。

关键词: 国家权力; 司法转型; 法律移植

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ABSTRACT

Chinese justice innovation has been carried out for twenty years, but we seem still in a big maze. It's radically because we lack essential guiding theory about justice type and path of innovation. So, the urgent affair is to clarify the chaos knowledge of justice type, construct modern type ideals of justice, then identify the correct direction and choose a proper innovation path. As for research of justice type, Damaška's typology of justice takes a unique place, it will benefit Chinese justice innovation a lot. So, this thesis tries to introduce Damaška's typology of justice roundly and accurately, and demonstrate how Chinese justice can go out of the innovation maze under the guide of it and transform from Policy-Implementing Type to Conflict-Solving Type.

Besides the preface and conclusion, the whole thesis can be divided into five chapters as follows:

Chapter 1: The Maze of Chinese Justice Innovation and the Necessity of Introducing Damaška's Theory. It describes the chaos maze of Chinese justice innovation, points out it's radically because we lack essential guiding theory about justice type and path of innovation, thus indicates the necessity of introducing Damaška's typology of justice. In addition, it rectifies some misunderstanding about Damaška's typology of justice.

Chapter 2: Damaška's Sagacity and Research Approach of His Typology of Justice. It tries to introduce Damaška's typology of justice roundly and accurately from his political research approach, ideal type method and analytic framework, etc.

Chapter 3: The Proper Aim of Chinese Justice Transformation. It reveals the guiding function of Damaška's typology of justice to Chinese justice transformation, boldly pulls Damaška from the curtain of value judgment to the stage, and demonstrates why the proper aim of Chinese justice is Conflict-Solving Type Justice.

Chapter 4: The Status Quo and Prospect of Chinese Justice Transformation. It reveals that Chinese traditional justice is deeply covered with the color of Policy-Implementing, and analyzes its reasons. Then, it indicates that Chinese official

justice idea and practice are transforming to Conflict-Solving Type. At last, it views the prospect of Chinese justice transformation to Conflict-Solving Type and gives some advice.

Chapter 5: Transform Chinese Justice to Conflict-Solving Type Mainly by Way of Law Transplant. Firstly, it demonstrates why we must transform Chinese justice to Conflict-Solving Type mainly by way of law transplant from the perspectives of path-dependence, native law resources, internationalization, feasibility, etc. Secondly, it points out that the law transplanted from Overseas should adapt to domestic political situation, and also we should improve domestic political systems for better law transplant.

Key Words: State Authority; Justice Transformation; Law Transplant

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