

# Restatement of the Concept of Burden of Proof from the Perspective of Legal Rhetoric—Based on the "Triple Dilemma of the Concept of Burden of Proof"

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**Abstract:** Legal rhetoric is a kind of rhetorical skills and methods that are both logical and practical in order to better express legal views, demonstrate legal issues, persuade others or explain legal provisions. Legal rhetoric not only includes the choice of language and the construction of sentence patterns, but also includes logical reasoning, case analysis, the quotation of legal principles and other means. Professor Huo Haihong analyzed the concept of "burden of proof" in the article "Triple Dilemma of burden of proof", and believed that the concept has the dilemma of "deviation from substance", "lack of consensus" and "lack of efficacy". Based on the viewpoint of this paper and the perspective of legal rhetoric, the author puts forward suggestions and expectations for the restatement of the concept of burden of proof in China's civil procedure law.

**Keywords:** Legal Rhetoric, Legislative Rhetoric, Burden of Proof, Practice Needs, Behavior Responsibility, Outcome Responsibility

## 1. Foreword

The essence of Professor Huo Haihong's discussion on the concept of "burden of proof" is to compare the concept of burden of proof in the traditional civil procedure law with the concept under the current judicial interpretation through the method of law doctrine, and then to question the new concept of "burden of proof" from three different perspectives. Professor Huo used the famous comparative jurist Damashka: "People sometimes claim that there have been many consensus, and this consensus is mainly a rhetorical result." Figuratively and meaningfully describe the status quo of the new concept of "burden of proof" [1].

In the author's opinion, most of the legal disputes come from the difference in interpretation methods and literary meaning understanding, and such interpretation and understanding are essentially an interpretation of literary rhetoric. It cannot be denied that words and logic are the carriers of the law to establish the world, but the connotation of words is often different from the different positions or thinking habits of the interpreter. Therefore, the rhetoric of legal expression often plays a positive role in carrying the legal will; if the rhetoric of the new concept causes the confusion of the concept and the different perception of the same rhetoric [2].

This paper will briefly describe the structure of professor Huo Haihong's "Triple Dilemma of the Concept of Responsibility of proof", highlight the core ideas in the paper, display the research methods that can be used for reference, and elaborate the direction of the reconstruction of the concept of responsibility of proof in legal rhetoric.

## 2. Structural Overview and Content Reproduction of "the Triple Dilemma of the Concept of Burden of Proof"

The whole text is divided into three parts, that is, the triple dilemma of the concept of the burden of proof is discussed to "deviate from the essence", "lack of consensus" and "lack of efficacy".

### 2.1 The writing structure and content reproduction of the part of "departing from the substance"

In the section of "departure from substance", Professor Huo Haihong uses comparative analysis and historical analysis to discuss it. Through the official interpretation book of the Supreme People's Court, Professor Huo Haihong emphasized the necessity of adopting the concept of "burden of proof" as the point of entry to determine the general connotation of the concept of "burden of proof": 1. Clarifying the burden of providing evidence; 2. The burden of proof around evidence; 3. The legal effect of providing evidence can not lead to adverse consequences. And according to the connotation of the civil procedure law in the traditional burden of proof "double meaning" connotation, the first view "put forward the concept of the burden of proof this seems to be able to 'battle' actually ignored the 'double meaning' form of transition nature, also deviated from the double meaning said essentially the ultimate goal".

In the following article, Professor Huo Haihong discussed the development process of "double meaning" in China's civil procedure law, and pointed out that the legislators finally adopted the "double meaning" for the current general concept, that is, "who claims who provides evidence" and "those who cannot provide evidence can bear the adverse consequences". According to the two interpretations of "dual meaning" in the Chinese context, Professor Huo Haihong believes that the concept of "burden of proof" deviates from the essence of "dual meaning".

The first interpretation of "double meaning" is "The Dual Connotation Theory of the Monistic View on the Burden of Production"(Figure 1). This interpretation holds that the burden of providing evidence is equivalent to the burden of proof, dividing the burden of providing evidence into "responsibility for behavior" and "responsibility for result". The liability refers to the responsibility of the party to provide evidence to prove their authenticity; the liability refers to the responsibility of the party to prove the claim or the adverse litigation consequences when their claims cannot be proved.

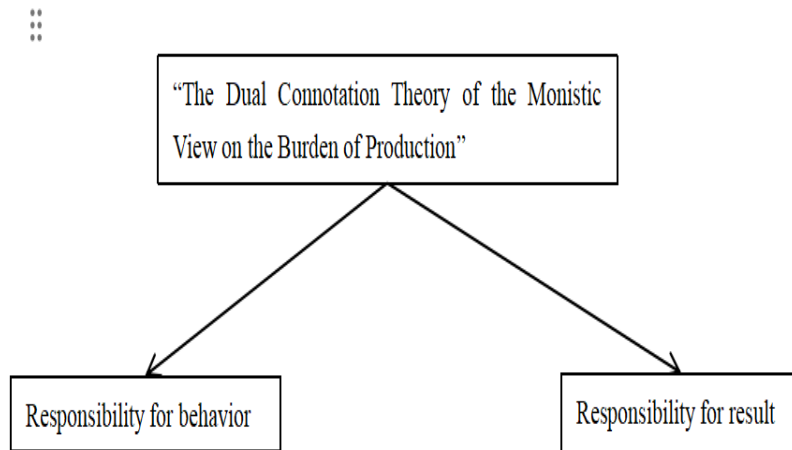


Figure 1: "The structure of 'The Dual Connotation Theory of the Monistic View on the Burden of Production'"

The second "double meaning" is that "The Dual Connotation Theory of Differentiating between the Burden of Production and the Burden of Persuasion" (Figure 2). The interpretation holds that the burden of providing evidence belongs to the burden of proof, placing the burden of proof as the core connotation of "double meaning", and dividing the Burden of Production into "responsibility for behavior" and "responsibility for behavior". Obviously, the burden of providing evidence is a duty of conduct; the burden of proving the evidence is a burden of result.

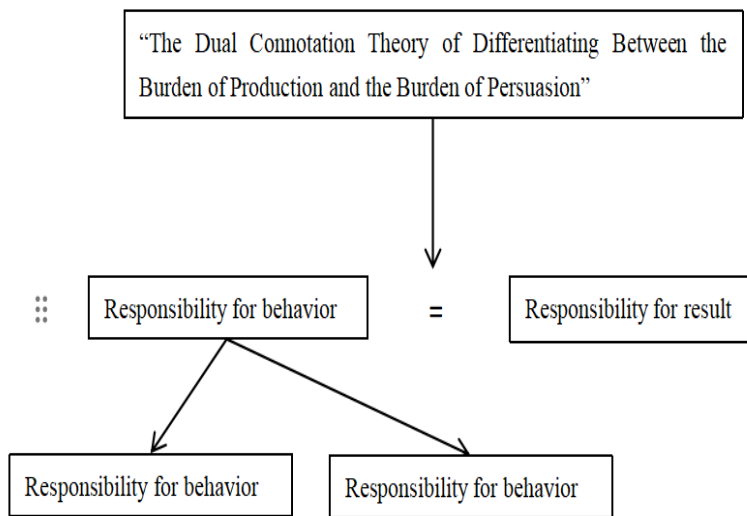


Figure 2: "The structure of 'The Dual Connotation Theory of Differentiating Between the Burden of Production and the Burden of Persuasion'"

Professor Huo Haihong expressed a certain positive attitude to the second explanation, and found the affirmation and application of the second interpretation in the official interpretation book of the Civil Evidence Provisions 2001. On the basis of the above discussion, professor Huo Haihong think concept "burden of proof" violates the behavior and legal effect in the process of proof, the results (objective) burden of proof (burden of proof) directly called "burden of proof", the behavior (subjective) burden of proof (burden of proof) directly become "burden of evidence" advice. The author thinks that from the perspective of the content of the two explanations, the burden of proof in the civil procedure law is inseparable from the behavior and the evidence itself authenticity, legitimacy, relevance, behavior is the premise of the result is behavior, both are indispensable elements of litigation process of litigation. No matter from the perspective of theoretical understanding or from the perspective of practical application, the interpretation of the connotation of the burden of proof should be made under the standpoint of two between behavior responsibility and result responsibility.

## 2.2 The Writing Structure and Content Reproduction of the Part of "Lack of Consensus"

In this part, Professor Huo Haihong adopted a large number of empirical analysis methods to compare the different interpretations of "the burden of proof" with the official interpretation books of different periods in China, and then through the contents of the judgment made by different courts of different levels, further highlighting the lack of consensus on the concept of "the burden of proof" in China.

In 2015, the concept of "the burden of proof" was first proposed, which is the first interpretation of "double meaning "Double burden of monism"Return, but in judicial practice, the connotation of this concept has produced a lot of false consensus, that is, a theme under the words from.

The first aspect of false consensus exists in inconsistent official concepts. For example, the official interpretation uses "burden of proof" for the stated purpose, while the specific interpretation clause reads "This article is about the meaning of the burden of proof...". It can be seen that the 2015 official Buddhist book itself does not explain or reinterpret the structure of the new concept, but seems to only modify the text or unilaterally cater to the connotation of "double burden monism". For another example, in the series of judicial interpretations specially formulated based on the Civil Code, the rhetoric of "burden of proof" or "burden of proof" is also inconsistent. Professor Huo Haihong believes that if the new concept is only a rhetorical change, it has no material impact or significance on the rules themselves.

The second aspect of false consensus exists in the use of the concept of "burden of proof". Professor

Huo Haihong listed three kinds of rhetorical expressions of the new concept of "burden of proof" in the current judgment documents, namely, "burden of proof", "burden of proof" and "burden of proof". In addition, through the contents of the judgment documents of the Supreme People's Court, the Provincial High People's Court, the Intermediate People's Court and the grass-roots court, that in judicial practice, the legal workers may not distinguish the connotation of this rhetoric, so the status quo of "self-speaking and self-speaking".

### ***2.3 The Writing Structure and Content Reproduction of the "Insufficient Effectiveness" Part***

In this part, Professor Huo Haihong, on the basis of the explanation of "burden of proof", further demonstrated the confusion that the concept of "burden of proof" affected the litigation mechanism.

Professor Huo Haihong believes that the concept of "burden of proof" will aggravate the boundary between procedural and substantive issues. The concept of the burden of proof in the traditional civil procedure law has a duality, and the context of the system of the burden of proof has not been separated on its dual, in the legislation of the concept of burden of proof of "responsibility" and "responsibility" binding in a concept, "burden of proof" concept just reinforce the legislation, it is not conducive to the legal workers in the subsequent judicial practice of rhetoric and connotation consensus consistent effect

Professor Huo Haihong believes that the concept of "burden of proof" weakens the theoretical basis of the concept of burden of proof, that is, "double meaning". The author thinks that the necessity of clarifying the concept of burden of proof should be elaborated from the perspectives of the parties and the judge. The lawyer provides evidence to prove that the client's evidence is to achieve the burden of appeal, and it is the burden to take evidence. According to the rules of procedure, if the judge who understands the concept of burden of proof unilaterally adopts the concept of burden of proof in the end, it will weaken the concept of burden of proof in the parties providing evidence and the "pun" of evidence.

In this level of demonstration, Professor Huo Haihong raised such a question: in China's civil litigation practice, is there a difference between "action responsibility" and "result responsibility"? What is the point of a legal rhetorical distinction if it is not strictly made in practice? Finally, Professor Huo Haihong summarized his views and stressed the necessity of distinguishing concepts: "The theory of civil procedure law advocates a clear distinction between the burden of proof and the burden of proof by 'double meaning', because it tries to make a clear distinction from the perspective of 'litigation structure' to avoid theoretical confusion and mutual substitution in practice."

## **3. Restating the Burden of Proof from the Perspective of Legal Rhetoric**

The essence of the problem shown in Professor Huo Haihong's article *The Three Dilemma of the Concept of burden of proof* is the balance between the logic and the practicality of legislative rhetoric in legal rhetoric. Rhetoric is a subject of practice, rather than scientific knowledge, so the purpose of legal rhetoric is not to analyze the consistency between logic and rhetoric, or legal logic and rhetoric, but to fully analyze the differences between rhetoric and law in practice [3]. On the other hand, the problem raised by the concept of "burden of proof" is in fact whether the rhetoric of the concept can be agreed and echoed in practice, which is also the intention of legislative rhetoric, that is, through the legal speech behavior mode in the explicit context of legal text, so that the general public can understand the explicit legislative purpose in the first time [4].

Obviously, from the perspective of legislative rhetoric, the proposal of the concept of "burden of proof" has produced a certain phenomenon of false consensus and concept confusion in practice. The rhetorical skills of legislative language are crucial to improving the persuasion, attractiveness and acceptance of discourse, which needs to be focused on in the top-level design of Chinese legal discourse system. Through carefully designed rhetorical devices, the legislative text can be made more clear and more powerful, thus enhancing its influence and acceptability to the public. Therefore, the concept of "burden of proof" should be based on the guidance of legal rhetoric and retold with practice.

### ***3.1 The Legislative Rhetoric of the Concept of Burden of Proof Should Be Combined with the Practical Needs***

The British philosopher Wittgenstein said: "All theoretical contradictions or paradoxes are only solved in people's habitual activities." Easy to say, the problems arising from rhetoric in the concept of

law can be quickly found for universally accepted explanations by returning to the needs of practice [5].

From the perspective of legislative rhetoric, China does not clear some specific principle norms through the form of legislation, and at the same time, these principles are reflected as legal will in judicial interpretation or legal provisions stipulating a specific rights and obligations. Such as debt binary this concept has never been stipulated in the legislation in our country, but in the Supreme People's Court on business contract dispute cases of applicable legal issues (2020 amendment) in paragraph 2 of article 26 intangible established the "burden behavior without disposition" this based on the debt binary theoretical rules. Another example is the provisions of Article 38 of the People's Republic of China (hereinafter referred to as the Enterprise Bankruptcy Law). As the right of the right of claim, the object of the right is the broad property, that is, the general equivalent of currency is also covered in the "property". Generally, the equivalent does not belong to the only property in the sense of property right in the academic circle. Therefore, in the process of dealing with the bankruptcy property, the money debt generated by the intended debt cannot be returned through the way of the right of the right of claim. If the money debt after "specific" means, with the characteristics of the property sense, which has the specificity and independence, the money debt through the form of creditor's rights, on the basis of the "enterprise bankruptcy law" article 38 back, request the debtor return the subject matter of the money debt. It can be seen that China has affirmed the concept of two debts in judicial practice, and passed on its legal will through the legislative rhetoric of judicial interpretation and judgment rules. Although this rhetorical method does not clearly explain the connotation of the dichotomy of material debt with clear legal norms, the highly technical and professional concept of the legal dichotomy is shown to the general public through the above legislative rhetoric, which is more conducive to its understanding and application. Therefore, the elaboration of the concept of legislative rhetoric needs to be considered in combination with practical needs.

In the civil procedure law with the doctrine of parties, the proof itself is the act of constantly proving the rationality of the parties in order to realize their own demands. Only when the parties begin to provide evidence for the first time can the litigation procedure be launched. From the perspective of the order of the development of the litigation activities, the essence of the proof mechanism is to allow the parties to display the facts legally and orderly, and to give the parties with litigation needs the right to rely on the facts for reasoning. The judge, as the middle judge, arranges the order of the "lift" in the process of proof, and allocates the proportion of the proof burden according to the proportion of the "proof" in the process of evidence according to the three characteristics of the evidence facts. Therefore, from the perspective of the practice in litigation activities, the first step to solve disputes is the series of legal concepts that the parties themselves know what to provide proof, why, how and how much of proof. Secondly, the judge adopts the evidence provided by the parties and makes a judgment according to the provisions of procedural law and substantive law. It can be seen that the rhetoric of the concept of burden of proof should take into account the understanding of the parties as the general public, and clarify the definition of the concept through clear and accurate expression, rather than mixing various connotations into one rhetoric. Only by dividing the concept closely, the rhetoric itself can accurately convey the will of the law, which is not only conducive to the parties to better safeguard their own rights, but also conducive to the needs of the judge to ensure the same case and judgment in the process of judgment, which is more conducive to the improvement of judicial efficiency.

### ***3.2 The Reconstruction of the Concept of Burden of Proof Should Be in Line With the Purpose of Legislative Rhetoric from the Standpoint of Behavior Responsibility and Result Responsibility***

The degree of realization of legislative rhetoric directly reflects the quality and effect of legislation. A "good law" should pursue an efficient mode of speech behavior, to ensure that the legal text can clearly and accurately convey the intention of the legislator, so as to effectively guide the practice and achieve the expected social effect. According to the above, the construction of the concept of burden of proof should be combined with the needs of the parties in litigation activities and the necessity of unified identification of judges.

In the process of constructing the concept of burden of proof in China's civil procedure law, the concept of burden of proof based on "double meaning" has long been produced, and the significance of double meaning is to elaborate the connotation of burden of proof as the litigation rules jointly established by behavior responsibility and result responsibility. The behavior responsibility emphasizes the behavior obligation of the parties to voluntarily present evidence in the process of litigation. The core of this responsibility is to encourage the parties to actively show the facts and promote the presentation of the truth through the presentation of evidence. The setting of behavior responsibility,

just like the hand of law, guides the parties on the stage of the court, with the evidence as the sword and the facts as the shield, to launch a contest about the truth. In contrast, the outcome liability focuses on the legal consequences of failure. When a party fails to fully meet its burden of proof, the law will regard it as a default of the fact and thus may be decisive of the outcome of the action. The existence of the outcome responsibility, just like the eye of the law, examines the efforts and negligence of each party in the process of providing evidence, to ensure that the justice of the law is not ignored.

Under the purpose of legislative rhetoric, to reconstruct the burden of proof, means that the legislators need to find a balance between guarantee litigation justice and efficiency, in the judicial practice and legislative rhetoric, clear behavior in the process of proof responsibility and the result of responsibility, and not the consciousness of the two points covered under a rhetoric. This is conducive to building a legal framework that can not only encourage the parties to actively provide evidence, but also ensure the fair and reasonable litigation results. This reconstruction is not only an optimization of the legal rhetoric, but also a profound embodiment of the spirit of the law.

#### 4. Conclusion

The practical demand that should be combined with legislative rhetoric is to return to the social environment itself. In the "big context" in line with the social environment, appropriate words can produce the legislative effect consistent with the legislative purpose. As can be seen from Professor Huo Haihong's discussion in "The Triple Dilemma of the Concept of the Liability of Proof", it is still true that the false consensus and the concept of the burden of proof are confused. Through the conceptual scope and practical requirements of burden of proof, this study should clarify the difference between burden of proof in the act of responsibility and the connotation of responsibility based on the "double meaning" theory, guide parties to better safeguard their own interests, promote judges to apply unified rhetoric, and strengthen the top-level design of China's legal discourse system.

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