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Abstract: As the expression of the core theses of both natural law and legal positivism, the "unjust law theses" are the core theses of static philosophy of law which are used to deal with the relationship between morality and law. Due to different presuppositions of concepts of law, these two "unjust law theses" are consistent both in theory and practice rather than opposite in formal logic. Logical analysis and historical study have shown that both natural law and legal positivism can support freedom, democracy and rule of law, and can also object to totalitarianism, despotism and tyranny. As far as their practical function, the real significance of "unjust law theses" lies in the dynamic law-abiding process.

The concept of obligation to obey law is on one hand related to the dynamic law enforcement, and on the other hand related to the theory of morality of law, thus is an important category as a theoretic pivot. The complication of the theories about obligation to obey law derives from the change of the idea of justice, and has some positive significance. It reveals the defects of natural law, advocates strongly for the thesis of Dura Lex, Sed Lex, contributes to the formation and enunciation of the self-correction and society-stabilizing mechanisms of democratic constitutionalism, and reminders us the practical character of jurisprudence. The theories about obligation to obey law are not only the development and application of "unjust law theses" in the domain of dynamic law-abiding, but also the fulfillment and justification of it.

The "unjust law theses" and theses of law-abiding obligation which have coupling relationship between each other constitute two morality theses which appear sequentially in the theoretical system of natural law, and also constitute two separate theses in the theoretical system of legal positivism, thus form the systematic theory among morality, law and obligation to obey law. The systematic theory not only explains the realization of the "different but interlinked situation" between the two major schools, but also explains how they maintain justice, freedom and the rule of law together. The systematic theory also realizes the transformation of the philosophy of law from static to dynamic.

Key Words: morality and law, obligation to obey law, school of philosophy of law

Abstract: As a constitutional review method, presumption of constitutionality means that, in the course of constitutional review, legislation is presumed to be constitutional, except that there are obvious facts to proof it unconstitutional. It was originated in US, and then extended to Germany, Japan, Australia and many other countries. It plays a significant role in the rule of law. Chinese lack enough awareness of the method of constitutional presumption, which has negative influence on the effective operation of constitutional review system in some extent. To study the justification of this presumption can provide us with valuable experiences in methodology for our constitutional review system.

Presumption of constitutionality fits in with the requirement of protecting human rights. Constitutionalism is the balance between power and right. The structure of checks and balances among state powers under constitutionalism is an institutional protection of human rights. Presumption of constitutionality gives respect to legislative power, so that it can exert its positive functions effectively. In the background of modern welfare state, the purpose of respect to powers is to exert the protective functions of state powers, and is in end to protect human rights.

The justification of presumption of constitutionality comes also from the supreme position of constitutional law in the norm system. The supreme position requires the constitutional law to be more stable than other lower norms, and presumption of constitutionality contributes to safeguard its stableness. The supreme position also decides that the constitutional law is more abstract than other lower norms. Presumption of constitutionality can avoid the direct application of constitutional law in a great extent, thus conforms to its abstractness. Constitutional law and other norms of law have different functions, and presumption of constitutionality is benefit for them to exert their respective functions.

Presumption of constitutionality also has reasonableness according to economic analysis. It saves legislative costs, conforms to the economic logic of separation of powers, reduces the political risk of judges, and controls the number of constitutional cases to reduce litigant costs. The justification of presumption of constitutionality reflects both political and legal characteristics of constitutional law.

Key Words: presumption of constitutionality, constitutional review, constitutional method

Abstract: The analysis of object of right cannot be separated from the theory of right composition. Right is composed of inherent essentials and external ones. Inherent essentials consist of inherent formal and substantive essentials. The former are legal qualifications which are the outside clothes of right and the latter refer to the free will of subject of right which is the core of right. Right without legal qualifications is naked right, and right without free will is empty right. The analysis of the inherent essentials of right equals to the analysis of the right itself. External essentials of right consist of the subject and object that right relates to. The analysis of the external essentials of right is not the analysis of the right itself, but through this study we can achieve the goal of elaborate classification of rights.

Object of right which particularly manifests the legal benefit of subject gives an explanation of right's foundations, so it is the cross-point of free will and benefit of subject of right. The concretion of benefit is the specific classification of object of right. Right is the external existence of subject's free will, and object is the external existence of right.

Object of right should be analyzed according to different levels of rights. The first level of object of right includes physical object and ideal object. Right in the second level is the result of the running of right in the first level, and object of right in the second level is right in the first level principally, yet there are exceptions for new types of rights which are created by right in the second level. Right in the third level is the result of the running of right in the second level, and object of right in the third level is right in the second level principally, and so forth.

Object of right is the base of establishing right, and subject-matter of right is the target to exercise right. For the classification of rights in the first level, there is no significance to distinguish object of right and subject-matter of right, as they are just coincident. But distinguishing them is very important for the classification of rights in the second level and beyond, especially for the classification of contractual obligatory rights.

Key Words: Object of right, subject-matter of right, content of right, level of right

Abstract: The basic presumptions of the status system in private law differ from those of traditional civil law. The traditional theories in private law can not satisfactorily define status relationships, and most of the general rules in German Civil Law do not dominate status law.

With individual relationships and structural existence of civil society as the presumptions, the construction of the status system in private law confirms that the state of human being's existence is a model of "individual-identity body-civil society". Individual lives in the identity body, which is an important carrier of private order as well as the organization or community where people live and develop. As a status unit, it allocates specific benefits to specific groups so as to meet the needs of its members. Members can share the benefits of the identity body, with their internal and external relationships defined by their statuses. They enjoy the rights, burden the obligations, and are bound by the internal rules within an identity body. The logic of an identity body is that status decides power, and power decides benefit share.

Allocation-type status arranges status posts within an identity body. Thus the differentiated order is realized by endowing different statuses and benefits to individuals. Remedial status defines homogeneous members according to certain natural and social attributes to remedy the inequality resulting from the operation of allocation-type statuses. As a result, the inequality can be controlled in an acceptable scope.

The elements of the status system include status benefits, value orientation, differentiation mechanism, behavioral rules and external marks. The construction of status system should be innovated by defying the traditional theoretic presumptions of private law. The status system regulates a particular type of organization or community instead of an individual and recognizes the coexistence of the strong and the weak in the real life. Thus the special forms and functions of status rights are established, with their object directly pointing to benefit shares. The status system applies the governance pattern of "order-obedience" in place of equal consultation, and the functions of party autonomy are restricted in the process of creating, altering and terminating status legal relationship.

Key Words: status, status system, identity body, construction in private law

Abstract: Reverse-engineering can be defined as the acts of acquiring technical information of others' known products by detaching, measuring and testing their products. The existence of reverse-engineering is reasonable in some certain circumstances. The reverse-engineering is a kind of legal disposal of products owned by the applicators. With the research works done by the applicators, it is a sort of fair use of current technologies. It can not only prevent innovators from monopolizing technologies and promote technological progress, but also save research investment and protect consumers' benefits.

In traditional industries, reverse-engineering can be implemented legitimately when the applicators acquire the products for reverse-engineering through legal ways, have application conditions, undertake no obligation to veil others' trade secrets, and find out others' trade secrets through reverse-engineering. The cost of reverse-engineering on IC designs is very low. In order not to harm the prior designers' benefits excessively, such reverse-engineering should not only meet the ordinary requirements in traditional industries, but also have new designs with originality stemmed from it.

The reverse-engineering on software should satisfy the following requirements. Firstly, applicators should gain the software for reverse-engineering through legal ways and undertake no obligation of maintaining confidentiality. Secondly, they cannot gain necessary information about software through any way except reverse-engineering. Thirdly, the reverse-engineering should be based on due purposes. Applicators should limit their access only to necessary portions of programs for their purposes and conduct actual research works. Finally, they should not spread the information gained through reverse-engineering to others and cannot produce or sell infringing softwares.

There are few provisions relevant to reverse-engineering in Chinese legislation, which is far from the needs of judicial practices. Our legislation on reverse-engineering should be improved and perfected by perfecting its definition, explicitly providing its implementing conditions on traditional industries, IC designs and software respectively according to their different characteristics, and denying the validity of "terms of prohibiting reverse-engineering".

Key Words: reverse engineering, legitimacy, implementing condition

Abstract: Joint ownership of shares in a broad sense means that two or more legal subjects own the interests of shares jointly. While in the narrow sense, it means that the joint owners of shares are registered on the stock ledger according to the Company Law. The joint ownership of shares has the attributes of quasi-joint-ownership, so the provisions of Civil Law related to joint ownership can be applied to it. However, the provisions of the Company Law on the jointly-owned shares should prevail in application.

The provisions on joint ownership of shares in Company Law include four aspects. The first aspect is the norms regulating the exertion of rights on the jointly-owned shares. It is the most important content concerning to joint ownership of shares in the Company Law, whose purpose is to make the exertion of rights on the jointly-owned shares adapt to the requirement of modern company system. Thus the joint owners of shares should designate a representative to exercise their rights. If no representative is determined, the rights on the jointly-owned shares could not be exercised by any of the owners unless the company or related parties recognize the validity of such act.

The second aspect is the norms regulating the notification and delivery by the company to the jointly-owned shareholders. Such norms help to judge the validity of related corporate behaviors, maintain a good order within the company, and safeguard the interests of the joint owners of shares. In general, the company should notify or deliver to the representative of the joint owners. If the representative is ambiguous, the company could notify or deliver to any of the joint owners instead.

The third aspect is the norms regulating the joint owners' joint and several obligation of paying off the contributions. It is a mandatory provision on the joint owners of the shares to satisfy the requirement of the company capital system. The last one is the norms concerning the registration of joint owners on stock ledger, which is the basis of the Company Law to regulate joint ownership of shares. This article also provides some suggestions for §35 of the draft judicial interpretation (third) of the Company Law.

Key Words: joint ownership of shares, quasi joint ownership, representative, stock ledger

Abstract: Chinese Labor Contract Law and other labor-related laws are applied to all employers including all enterprises as well as individual industrial and commercial households despite of their sizes and differences. Such regime needs further consideration.

Small and medium-sized enterprises including individual industrial and commercial households are playing a more and more important role in economical development, state revenue and employment, etc. Furthermore, compared with large ones, small enterprises are disadvantaged in their size, capital, management, human resources, and so on, and have special needs in employment policy, especially need more employment flexibility. Moreover, some provisions of Chinese employment laws are very difficult to be observed by small enterprises and in theory, favorable treatments to small enterprises would not necessarily undermine the interests of their employees. Accordingly, to ease the burden on small enterprises, support their growth and promote the enforcement of employment laws, favorable treatments should be offered to small enterprises in employment laws.

It is common in many jurisdictions to provide favorable treatments to small enterprises in employment laws. Considering their features, many employment laws in the US give immunity to small enterprises. For example, most antidiscrimination laws governing workplace in the US don't apply to small employers with certain number of employees or less. Also, in Germany, where labor protection is well-known, there is strict termination law to protect the employees from unfair dismissals, however, such law also gives immunity to small enterprises. More similar provisions could be found in countries or regions such as Japan, Korea and Chinese Taiwan.

In light of the foreign experiences and Chinese situations, some favorable treatments should be given to small enterprises including individual industrial and commercial households, sole proprietorship enterprises, partnership enterprises and share-holding cooperative enterprises which share similar features and have few employees on average. These enterprises could be exempted from the provisions concerning to dismissal, working rules, social insurance, etc.

Key Words: labor law, Labor Contract Law, small enterprise, favorable treatment

Abstract: In the domain of civil procedure that belongs to the adversary proceedings, based on the jurisprudence of the burden of proposition, the party should raise legal elementary facts to

the court actively. Only when the party's proposals correspond with the requirement of specification, can they be taken on as proper proposals, and only then has the party fulfilled his duty of specification. The specification of proposals requires the party to state specifically, and meanwhile forbids discretionary or aleatory statements.

How the requirement of specification was established in Germany and Japan are different. In Germany, it was established by the precedents in the period of Empire Court and Federal Court. While in Japan, it's generally considered that §258 (1) of its former Civil Procedure Code and §180 (1) of its current one declare or imply the request that the party's proposals should be specific. The significance or theoretical foundations of the specification of proposals are to secure the trial interest of the courts, the defensive interest of the other party, and also the due interest of a third party as a means of proof. In order to avoid prejudication and enable the court to decide effectively whether the party's proposals need evidence investigation or not, proposals should be specific enough to enable the court to decide whether they have enough importance for judgment. As the distribution of the burden of proposition don't always accord with the party's ability of proposition, in the cases when the main evidences are under one party's control, we should assuage the requirement of specification and permit the other party to state abstractly, so as to strive for substantial justice.

To ensure our courts to investigate the evidence convergently and substantially, to protect the defensive interest of the party who don't bear the burden of proof, to limit the issues between the parties effectively, and to avoid litigation delay, our Civil Procedure Law should take examples from the precedents and theories about the specification of proposals in Germany and Japan, and stipulate clearly that the party undertakes the obligation to make his proposals specific.

Key Words: burden of proposition, specification of proposals, subject of proof

Abstract: In English, public prosecution means to "report, inform against, charge, and initiate legal proceeding by public organ". It is translated as "jian cha" in Chinese because the prosecution organs in western countries, especially in continental legal system countries, possess the attribute of supervision, which also fits in with the legal culture embodied by the royal censor system in ancient China. The connotation of prosecution have four aspects, that is, prosecuting as its main function, supervision as its attribute, safeguarding the unity of rule of law, and

representing the state and social interests. These four aspects support for each other and any of them cannot be in shortage.

The connotation of prosecution varies in different countries. In China, it has a number of characteristics. For example, its attribute has been elevated to “legal supervision”. And prosecution in China has a wider range of functions than in other countries, and all the functions are subject to legal supervision. Moreover, the role of the subject of prosecution transits from the “representative of state and social interests” to “state’s legal supervisor”. The aforementioned Chinese characteristics of the connotation of prosecution have a number of advantages. They make the four elements of the connotation of prosecution more harmonious. They are beneficial for prosecution organs to take an impartial position in enforcing the law, and are also beneficial for them to exercise powers independently and realize the justice, and thus good for realizing the goal of safeguarding the unity of rule of law.

The connotation of prosecution gives us the revelation that the four elements of prosecution are an organic unity, which can be neither separated nor opposed, as otherwise it may lead to errors in theory or practice. Specifically speaking, there are four revelations. Firstly, prosecution organs in China are legal supervision organs but not public charging organs. Secondly, “legal supervision” derives from the internal attribute of supervision and cannot be deemed as deviant. Thirdly, contradictions within the prosecution are not antagonistic and the “destroy the party” approach may not be necessary. And finally, multiple measures should be taken to address problems and prevent contradictions.

Key Words: connotation of prosecution, supervision, coordination, reform

10、Relationship between Offence of Rape and Whoring with Girls under 14…*Che Hao*（136）

Abstract: With regard to the relationship between the rape offence and whoring with girls under 14, there are several different theoretical viewpoints in criminal law. The basic perspective in this thesis agrees that, from the view of law interpretation, the above-mentioned relationship is mutually exclusive. This is determined by the different basic elements of the two crimes. Lack of valid consent is the constitutive element of rape offence, while provided with valid consent is the key element of the latter one. In case with the consent of the girl under 14, the object of the rape offence is only the young girl who does not have the ability to consent. To the contrary, the object

of whoring with young girl is the young girl who has such ability. As a consent cannot be both valid and invalid, only one characterization can be selected between these two crimes which cannot be concurrent. In addition, standing on the point of legal criticism, the second opinion can also be acceptable by demonstrating the necessity of law amendment from the perspectives of articles concurrence and unordered settings of criminal penalty.

It cannot be accepted to interpret these two crimes as articles concurrence and further affirm the principle of “heavier article is superior to lighter one”. According to this view, when the interpreter thinks that the punishment does not suit the crime, this principle should be applied in conviction and sentencing. However, applying the weight article without clear provision by law shows a false cognition in the nature of punishment right and is actually utilizing the legislative power in the name of interpretation.

In addition, this article is also not in favor that the two crimes are imaginative coincidental offence so that the severe punishment should be applied. Even if people acknowledge that the two crimes are concurrent, such concurrence can only be constant and necessary, so it can not be imaginative coincidental at all but articles concurrence only. Furthermore, the allegation of fully utilizing the imaginative coincidental offence is not suitable for current national conditions. It is likely to be abused without limitation in prevailing judicial environments, and works as a foundation for severe cracking down on crime or an excuse to cover up questionable points for conviction.

Key Words: rape, whoring with girls under 14, articles concurrence, imaginative coincidental offence, valid consent

Abstract: Unlike the modern evidence law taking competency of evidence as its core, the traditional Chinese evidence study does not focus on the competency of evidence. Rather, it puts emphasis on weight of evidence. In legal practice, judges call for and create the rules of weight, and put them into practice. Thus forms the image of the rules of weight in China. Judges hope to construct detailed rules of weight to solve the problems of proof and improve the accuracy and efficiency of judgment. The judicial authorities have a common view on the rules of weight and have enacted many new types of rules to alter the main format of the rules of weight. Particularly,

there are also hidden rules, such as the rule of negative weight, the rule of degrading weight, the rule of corroborative weight, the rule of prior weight and the rule of presumptive weight, etc.

Why do rules of weight remain vigorous in spite of strong criticism from scholars? The main reasons are as follows. The individual fact-finders long for rules to be relied on to avoid risks and get rid of improper interference. The courts take efforts to restrict trial discretion in fact finding and make it objective. And the traditional litigation culture which emphasizes weight of evidence shapes the rules of weight, which can be widely accepted by the parties. At the same time, the trial model centralized on the files and notes also yields the rules of weight. In brief, rule of weight is a necessary product of the current evidence law. Based on that, we should have a wide view and forward-looking perspective on this issue, rather than unprincipled compromise or criticism. We should take the strategy of pragmatism to find a way out.

On the issue of weight of evidence, the academics lack subjective conscientiousness, while the legislation has embodied certain amount of subjectivity, especially in the field of legal practice. The emphasis on subjectivity is not equal to acceptance of the legal practice. The subjectivity in practice reminds us that we should not ignore the rules of weight as they are hard to control like undercurrent. By contrast, they are the power to decide the model of Chinese evidence law. Only through the insight on practice and control over undercurrent, can we truly understand the movement of Chinese evidence law.

Key Words: evidence law, rule of weight, competency of evidence

12、An Empirical Study on Operation of Chinese Criminal Procedure Law…*Xu Meijun*(174)

Abstract: Based on data collected from China Law Year Book and practice in one district in east of China from 1997 to 2007, this paper conducts an empirical study on the operation of current Chinese Criminal Procedural Law. Although there are some variations, the data from the district demonstrates all the characteristics demonstrated by China Law Year Book, that is, very low rate of non-prosecution and non-guilty decision, low percentage of defendant appeal and high rate of affirmation of original judgment in second instance trial and trial supervision procedure, which strengthens the conclusion that Chinese criminal process is decided by criminal investigation.

A process decided by investigation procedure means once a case is transferred by the investigative organ to be reviewed and prosecuted, it is very likely to be convicted. Most of the first instance trial just reviews and verifies the evidence collected in the investigation procedure. Such process is different from the “trial-center” criminal procedure of western countries. Such process has some advantages, such as encouraging investigative organs to find out the truth of the case by all means and to screen out most of the suspects in the early stage of criminal process to save procedural resources and make suspects get rid of criminal proceedings earlier. However, it does have some disadvantages. It makes investigative organs under great pressures to collect guilty evidence, which would infringe the human rights of the suspects. Moreover, it also makes the public trial a “rubber stamp” to the investigation procedure and cannot revise errors made in investigation.

Current judicial reform chooses trail procedure as the breakthrough, and the investigation procedure seems quiet by comparison. This approach of reform is wrong. To be successful in criminal judicial reform, we must start from investigation procedure. The reform of investigation procedure is too ambitious a topic for this paper to look into. But the decision made by the investigative organ at the end of the investigation is the turning point of criminal proceeding. Establishing effective supervision of this turning point is the key to Chinese criminal process.

Key Words: criminal procedure, “investigation-center” mode, empirical study

Abstract: Norm conflicts constitute a vital aspect of the fragmentation of international law. The principle of lex specialis requires the more specific norm be applied when two or more international norms are in conflict. It is an important way to solve the norm conflicts in international law, and should be closely considered both in theory and practice.

There exist indeed conflicts and the subject matters of general law and special law are the same are the two preconditions to apply the principle of lex specialis. If the application of one international norm will lead to the violation of another, or the party to the norms cannot satisfy the requirements of the two norms in the same time, it can be thought that the conflict really exits. Norm Conflict is mainly due to the lack of both legislative and judicial bodies in the highest level in contemporary international society. The criterion of the same subject matter should be interpreted in a broad way. If two different norms or sets of norms can be invoked in regard to a

same problem, or as a result of interpretation, the relevant norms seem to point to different directions when they are applied by a party, such criterion has been satisfied. Besides, the application of the principle of lex specialis cannot violate the preemptory norm of international law, and there should be no special way provided by related norms to solve such conflict.

As to the criterion to determine whether the law is general or special, if the subject matter of one norm is more specific than that of another, it can be said that the former is the lex specialis of the latter. The contracting parties to different norms can also help to determine general or special law. A special norm may be considered as an application of a general one in a given circumstance, or it may be considered as a modification, overruling or setting aside of the latter. Anyway, the application of a special norm does not necessarily mean the general one is no longer valid. It is generally held that international treaties are lex specialis while international customs are legi generali. The differentiation of lex specialis and legi generali exists both within one international treaty and among different treaties, which provides a broad space for the principle of lex specialis to be applied in international law.

Key Words: lex specialis rule, norm conflict in international law, fragmentation of international law, law of treaties

Abstract: As a representative idea of ancient China in settling criminal cases without clear facts raised by some people in the Jin Dynasty as they were fabricating the classical, the doctrine of lenient treatment of doubtful guilt argued that the suspects whose criminal facts had not been proved should be punished more leniently than the criminal facts were proved.

Ideation of this doctrine was based on the acknowledgment to the familiar judicial practice tracing back to the Han Dynasty of lenient punishment to the uncertain guilt, and was connected with the traditional thinking mode of moderation and the idea of ensuring the offenders to be punished. The thinking mode of moderation requires balancing the interests of both the accused and informer, and thus requires a moderate judicature. Being endowed with significance of prudent penalty and lenient justice by the creator and the subsequent interpreters, the doctrine succeeded in being recognized by the legislators and the judiciary in the period of Confucian rule of law.

As a result, the importance of the doctrine of lenient treatment of doubtful guilt was strengthened by the status of legal tradition, which can be seen from the fact that the only choice in dealing with the criminal cases with unclear facts was lenience, according to the legislation of Jin and the afterword dynasties, the fact that the regulations of Ming's and Qing's dynasties adhered to the doctrine of lenient treatment of doubtful guilt which had been abrogated by the criminal codes, and the fact that the judicial officers were so deeply influenced by the doctrine in judicial practice that they were inclined to unhesitatingly choose the lenient attitude when the criminal facts could not be proved, with the result of more or less unjust penalty to the innocence or misdemeanor.

Key Words: lenient treatment of doubtful guilt, project of grand Yu, thinking mode of moderation, ensure the offenders to be punished