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CONTENTS

1. Analysis of the Constructing Thoughts of Judicial Interpretation.....Chen Su(3)

Abstract: In current judicial interpretation making process, there exists some thoughts and methods of system construction we should pay attention to. Firstly, the initiation of making a specific judicial interpretation may be based on inference or on experiences. Nowadays, the former becomes the main decisive basis in the formation of judicial interpretation, which is the logic reason of the judicial interpretation having shortcomings and being criticized. Only when the initiation on inference is replaced by the initiation on experiences in the formation of judicial interpretation, can the people's courts exert their advantages in judicial experiences and elevate the constructing quality of judicial interpretation.

Secondly, according to the nature and traits of judicial interpretation, the value-orientation of judicial interpretation should accord with that of the legislative policy, but in the practices of the commercial law judicial interpretations, judicial policy is formed independent of the legislative policy and embodied in the specific judicial interpretations. The creation of policy in the forming process of judicial interpretation not only exceeds the capacity of courts but also hurdles the normal operation of social mechanisms.

Thirdly, from the perspective of constructing method, the forming process of judicial interpretation may have different preferences for the method of interest adjustment or for the method of technological perfection. If particular stress is paid on interest adjustment, a standpoint of interest inclination is easy to be settled beforehand, which will easily lead to the result of the interest adjustment of the judicial interpretation exceeding the scope set by legislation. Thus judicial interpretation should lay particular stress on the technological perfection of legal text, that is, to provide the existing law with clear normal content, proper interest disposal, and effective regulating function and applicative mechanism.

To perfect the forming mechanism and insure the quality of judicial interpretation, the initiation of its forming process should be based on judicial experiences, its policy orientation should accord with the legislative policy, and its construction should pay more attention to the technological perfection of law.

Key Words: judicial interpretation, legal text, legislative policy, commercial law judicial interpretation

2. Legitimacy Supply Mechanism and Tendency in the Process of Medical Reform

Abstract: The legitimacy of public policy is not only an important issue in the legal theory, but also a significant variable in the formation of the legal order. Policy evolution of China’s medical reform in the past 30 years indicates that the public sphere is in a boom in China, which has promoted the transformation of the legitimacy supply mechanism of public policy to a new age. Firstly, the mechanism has transformed from the previous model of “internal decision” to the mode of “social engagement”, that is, to entrust some non-governmental organizations to develop medical reform plans and deliver the plans to the public for discussion, which can make the public policy formulation process full of brainstorm, critical reflection, dialogue, interactive debates and consultations, create a powerful “public opinion field”, and promote the decision-making pattern to the contemporary democratic type. Secondly, the mechanism has transformed from the mode of “public default” to the mode of “value regression”. The decision-making authority has altered the traditional mode of “leaders command, the masses follow”, but based the decision on people’s demand and the practice of social development, and human rights have been attached great importance to in public policy. Thirdly, the mechanism has transformed from the “correspondence theory of truth” to the “consensus theory of truth”. The decision-making authority delivered the reform plans to the public for the “uncertain” dialogue and consultation, and balanced the multiple and complex interests, thus has formed the inclusive consensus, value standard and policy orientation on the basis of diversity and dialogue. Fourthly, an open policy center has been established in the government, which no longer plays the traditional role of deciding direction, but does more on leading the public appeal. Thus the public appeal can work around this policy center and form a two-way interaction, and show the important democratization power of China’s public policy. Although there are still some matters to be resolved, it is certain that it has become a key support to the multiple harmonious order and a new force promoting the development of democracy and the rule of law.

Key Words: process of medical reform, public policy, legitimacy supply, legal order

3.Power of HKSAR Courts to Review Legislation for Conformity with the Basic Law
.....*Li Shuzhong, etc.*(37)

Abstract: The Basic Law of Hong Kong Special Administrative Region (HKSAR) enjoys a higher status than the legislation by the Legislative Council of HKSAR. The power of the courts in HKSAR to review whether the legislation by the Legislative Council conforms to the Basic Law is called the “Power to Review Legislation for Conformity with the Basic Law”. The common law tradition in Hong Kong provides the legal basis for this power, and the new legal order in HKSAR activates the judicial review power of the courts. Moreover, the incompleteness of the review by the Standing Committee of the National People’s Congress (SCNPC) makes it necessary for the courts in HKSAR to review the legislation for conformity with the Basic Law.

The practice of HKSAR courts shows that the power to review legislation for conformity with the Basic Law does not challenge the authority of SCNPC. It is generally helpful for the implementation of the Basic Law. It is not the courts’ reviewing practice that harms the

executive-dominated political structure, but the strong position of the Legislative Council. The viewpoint that the reviewing practice distorts the relationship between the Basic Law and common law is based on a misunderstanding of their relationship. As a power founded on the tradition of common law that has been practiced for more than ten years, it is not necessary for the SCNPC to recognize it by interpreting the Basic Law. Of course, due to their status in the legal order of HKSAR, the courts' power to review legislation for conformity with the Basic Law shall be subject to both external and internal constraints from outside and inside the HKSAR.

Key Words: the Basic Law of HKSAR, power to review legislation for conformity with the Basic Law, interpretation of the Basic Law

4. Comments on the Eclectic Theory of the Effect of Contract Dissolution... *Cui Jianyuan* (52)

Abstract: There are different opinions among scholars as to whether the legal effect of contract dissolution prescribed by Chinese Contract Law accords with the theory of direct effect or the theory of eclecticism. The theory of direct effect holds that the contract dissolution has the retroactive effect, and the obligations not carried out needs not to be performed any more, while the obligations already carried out should be restituted. And the theory of eclecticism believes that the obligations not carried out do not exist any longer from the time of dissolution, which accords with the theory of direct effect, while the obligations already carried out still exist and new obligation of restitution comes into being, which accords with the theory of indirect effect.

This paper holds that, the theory of eclecticism does not accord with the literal and normal meaning of Article 97 of the Contract Law. The viewpoint that dissolution does not extinguish the contract and contractual relation violates the objective fact. Besides, the effect of dissolution is not limited to the obligation of restitution. The theory of eclecticism makes some mistakes in the interpretation of Article 98 of the Contract Law and the recognition of the dependence of compensation for default on the existence of the contract. It is also at a disadvantage in the balance of interests. As to the mutual relationship among invalidation, avoidance and dissolution of a contract, the theory of eclecticism misplaces the emphasis of the legal valuation. Finally, the viewpoint that the exercise of the right of dissolution leads to the change of property right held by the theory of eclecticism cannot be established.

Key Words: dissolution of a contract, the theory of eclecticism, the theory of direct effect, restitution

5. Issue of Taxation on Remote On-line Sale and China's Countermeasure... *Liao Yixin*(71)

Abstract: Remote on-line sale has some features which are different from those of traditional commercial transaction mode, and has posed challenges to the application of Chinese current general turn-over tax systems such as the Value-added Tax and the Business Tax. In view of the contents of current various on-line sale transactions, the current taxation scopes of China's

Value-added Tax and Business Tax and the trends of international reconciliation on E-commerce taxation, China should clearly identify on-line digital transactions as supplies of taxable services or intangible property in the sense of the Business Tax.

For the sakes of avoiding both domestic and international double taxation, protecting China's tax rights and interests in remote on-line transactions and realizing the fair competition between onshore and offshore enterprises, China's current Business Tax system should differentiate the inland on-line sales from the cross-border on-line transactions, and apply the tax jurisdiction of the provider's place to the inland on-line transactions and the tax jurisdiction of the receiver's place to the cross-border on-line sales respectively.

With respect to the method of the Business Tax collection applicable to the cross-border on-line transactions, the reverse-charging tax collection mechanism should be applied to B-to-B on-line transactions. For B-to-C on-line sales, in order to reduce taxpayers' compliance burden and improve the efficiency of levying Business Tax on remote on-line sales, China's Business Tax system should adopt the taxation mechanism of requiring the non-resident enterprises to make tax registration in China, simplify the registration requirements on non-resident enterprises and provide them with necessary facilities to identify the identities of the customers and the countries they live in.

Key Words: remote on-line sale, business tax, taxation principle of consumption place, taxation mechanism

6. Carbon Tax and National Strategic Interests.....*Chen Hongyan*(84)

Abstract: Carbon tax was initiated for the issue of global warming, but the interests it protects are not the environmental interests only. Theories and practices of the developed countries indicate that carbon tax can not only balance the significant even mutual-conflicted national strategic interests, such as environmental protection, energy safety and tax system perfection, but also, to some extent, limit the competitive edge of the developing countries. When reviewing the rule system of carbon tax in the developed countries, we can find that these rules focus on the multiple national strategic interests and are generally constituted with four basic aspects. The general rules are used to elaborate the direction of the national strategic interests. The flexible tax rate rules are used to take account of the multiple national interests. The tax preference rules are used to protect the specific industries, sectors or groups. And the tax revenue rules are used to ensure the tax neutrality.

China should introduce carbon tax. The requirement for the construction of a resource-conserving and environment-friendly society calls for carbon tax. Relieving the huge international political pressure China confronts and dealing with the carbon tariff threat from the developed countries also call for carbon tax in China. When designing the specific rules of carbon tax, especially the rules about the taxable object, the subject of tax, taxation basis, tax rates, tax preferences and tax application, we should give priority to the consideration of national strategic interests. These national strategic interests involve not only long-term interests, such as energy safety and environmental protection, but also current interests, such as industrial competitive power, resident adapting capacity and so on. The design of carbon tax rules should also keep the tax system practical and convenient. As to the tendency of the carbon tax institution in the world, in the short

run, the introduction of carbon tax is confronted with many difficulties, such as its conflict with the short-term national interests, but in the long run, common national interests will promote the development and implement of carbon tax.

Key Words: carbon tax, national strategic interests, institution construction

7.The Consent of the Victim in the Theft Crime.....*Che Hao*(101)

Abstract: The consent of the victim is a very important subject in the field of the general theory of the criminal law. As a justification beyond the legislation, the consent's function of justification has become the common view in the academic of the criminal law. The consent of the victim in the property crimes may affect both the subjective and objective constitutive requirements. According to the dogmatic theory of the criminal law, the objective constitutive requirements of the theft are to transfer the control of the property in violation of the will of the controller. Instead, taking away the property under the consent of the controller could be excluded from its objective constitutive requirements. The integration of the general principle of the consent of the victim and the specific characteristics of the objective constitutive requirements of the theft could achieve some new and independent dogmatic fruits which coordinate the general theory and the specific theory of the criminal law.

Firstly, by applying the theory of the "preset consent", we can resolve a series of problems effectively occurred in ATM and other self-service machine cases. That is, obtaining property by using counterfeit currency from machines constitutes the theft crime, and withdrawing the real currency after obtaining property by use of real currency from machines constitutes the theft crime against the real currency. Moreover, illegally using other people's credit card to get money from the ATM does not constitute the theft crime, and using a credit card to draw money from the ATM by utilizing the ATM's malfunction constitutes the theft crime. In addition, according to whether there is consent about transferring the control of the property, the accomplished theft and the attempted theft can be distinguished on the theft trap occasions. Finally, to distinguish the indirect principle offender of the theft and the triangle defraud according to the standard of "objective authority + examination obligations" reflects the respect for the will of the victims.

Key Words: the consent of the victim, theft, transfer of control, theft trap

8.Chinese Mode of Examination System of Arrest and Its Reform.....*Liu Jihua* (122)

Abstract: According to the Article 37of the Constitutional Law of PRC, the examination system of criminal arrest with Chinese characteristic, i.e., the People's Procuratorate approves and decides criminal arrest in the period of investigation and the People's Court decides criminal arrest in the period of trial, is conformed, whose theoretical foundation is the theory of procuratorate supervision. From 1998, as regards the question who should have the power to decide criminal arrest, there are very hot and concentrated arguments among the communities of criminal law science and procurators. Such arguments are not accidental, but the legal reform problem deriving from China amending the constitutional law and forwarding the procedural justice.

Quantitative analysis shows that arrest is applied widely in China, which violates the three constitutive requirements of detention stipulated by the Criminal Procedural Law, and has negative influence on fair trial and effective defense. Qualitative analysis demonstrates that the reason for the general application of detention is the People's Procuratorate enjoying the approval and decisive power over detention is a prosecutorial organ, and its substantive standard and ideology in prosecution, its intentional control over non-detention rate, and the deviation of detention function push away the applicable space of alternative measures of custody, such as posting a bail and awaiting for trial with stricted liberty of moving. It peels out the natural limitation of the theory of procuratorate supervision as well.

In order to solve the problem of the general application of detention in China and guarantee personal freedom in a wide extent, we should establish a system of court examination based on the constitutional principle of "mutual check", which empower the court to conduct the power of decision over detention, that is, based on the initial examination by the procuratorate, to add an examination process by court so as to check with the investigative power of the procuratorate and the public security organ. The examination of detention by court is just the same as its hearing of public prosecution case. To conduct the uniform power over arrest by court enjoys constitutional and jurisprudential support in China. The reform is scientific, rational, pragmatic and feasible.

Key Words: arrest, personal liberty, due process, examination mode of arrest

9.Principles of Judicial Proof :A New Research Field Urgently Needed to Be Explored.....*Feng Liqiang* (143)

Abstract: The principles of judicial proof refer to the inherent laws and theories of the evidence reasoning activities participated jointly by all subjects of proof. They aim to reveal the complex interactive relationships among subjects of proof, means of proof and objects of proof in the course of evidence reasoning. Without the thorough understanding of the principles of proof, we cannot reach reliable conclusions by mixed masses of evidence. At present, Chinese scholars have not paid close attention to the principles of proof yet, which has been attached on the research of evidence law in the forms of experiences and skills. As a matter of fact, judicial proof depends not only on perfect evidence law but also on scientific mechanism of fact-finding. Therefore, the research of the principles of proof is of great importance for us to solve the present dilemma of judicial proof.

The current significant turn of Anglo-American evidence scholarship, namely the rise of the New Evidence Scholarship, has been largely ignored by Chinese scholars, whose research still focuses on the Anglo-American evidence rules. In recent decades, Anglo-American scholars have rediscovered Wigmore's thoughts of science of judicial proof, and applied multidiscipline methods, such as mathematics, logics, psychology and so on, to explore the principles of proof, thus created a new interdisciplinary field. The main branches of NES include but are not limited to probability and proof, chart method of analysis, psychology and evidence, studies of discourse, legal argumentation and evidence, integrated science of evidence, artificial intelligence and proof, etc. Although the achievement of NES should not be underestimated, there are several defects within the research due to the background of adversary system and jury system.

The thoughts of NES have offered domestic scholars beneficial enlightenment for the exploration of the principles of proof. However, we should critically absorb and draw lessons from their research results according to our national conditions. The object of our research is the reasoning mechanism in judicial proof, which is an area of interdiscipline. As a result of the significant differences of epistemology tradition, litigation system and judicial structure between the Anglo-American countries and China, we should choose a different path from Anglo-American scholars.

Key Words: judicial proof, principles of proof, science of proof, New Evidence Scholarship

10. Trial of the Cases concerning Aliens in Harbin Liberated Areas.....*Sun Guangyan*, etc. (163)

Abstract: Harbin was the first international city where the Chinese Communist Party established a stable regime. There were large alien population and a large amount of legal disputes in Harbin Liberated Areas. From 1946 -1949, the courts of Harbin Liberated Areas accepted 447 criminal cases and 813 civil cases concerning aliens, around 8.3% and 14.7% of the total number of criminal and civil cases they accepted. The democratic regime of Harbin Liberated Areas explored and tried many ways to form a multiple trial basis in the practice of the trial of cases concerning aliens.

First of all, the courts of Harbin Liberated Areas applied the old law of the Chinese Kuomintang, which was determined not only by the nature of the democratic regime, but also by the needs of the particular situation. Moreover, the prerequisites for the application were that the law was not inconsistent with the democratic principles of Harbin Liberated Areas, and was not in conflict with the revolution policy and ordinance of the Communist Party. Secondly, the application of the policy of the Chinese Communist Party as the basis of trial was a measure under specific context. At the beginning of the establishment of the regime, there were not enough revolutionary legal institutions to adjust the social relations in big cities. Policy instead of the law was a realistic choice with both advantages and disadvantages which should be given a full understanding. Again, the application of the Soviet law in cases concerning aliens had political reasons. It was also inseparable from the historical conditions at that time. Moreover, the court of Harbin Liberated Areas also fully respected to the good customs of aliens, mainly the recognition of the marriage established in the church. The judicial application of the law of the Soviet Union and the foreign customs was an attempt to apply the conflict law. The judicial practice in Harbin Liberated Areas of respecting for and applying the old law, the Soviet law and foreign customs is still a reference in our legislative and judicial practice.

Key Words: Harbin Liberated Areas, the trial of cases concerning aliens, the legal history of revolution

11. *Bayi*: An Ancient Legal Rule Made in the Han Dynasty.....*Long Daxuan*(179)

Abstract: *Bayi*, as a legal rule in ancient China, has conventionally been believed to be primarily made in the period of Cao-Wei. The author of this paper concludes that *Bayi* was made systematically early in the Han dynasty. First of all, although the rule of *Bapi* had been established in the Zhou dynasty, it was abolished in the Spring and Warring times when the new force strongly demanded the legal privileges exclusively owned by the former aristocratic class be abolished. It was in the early Han dynasty that *Bayi* was resumed as a frequently quoted legal concept. In the second place, from the legal heritage handed down from the Western and Eastern Han dynasties, we can find most of the essential constituents of *Bayi*. According to the rule of *Bayi*, when eight kinds of person committed a crime, the punishment should be decided after argument, so as to give them special lenience. Furthermore, from the ancient classics like *Ji Lv* and *the History of the Han Dynasty*, and the interpretation of Confucius classics by citing legal regulations by ancient classicists, we can find the specific scope of the eight kinds of person and how to reduce penalty for them. The last point is that the judicial practice in the Han dynasty had conventionally taken *Bayi* as a legal basis for the conviction and measurement of penalty.

Key Words: *Bayi*, imperatives and ordinances, the legal systems in the dynasties of Han and Wei

12. Some Controversial Problems concerning to the Law of Law Application of Foreign Civil Relations..... *Wang Shengming*(187)

Abstract: It is not appropriate to prescribe the definition of the foreign civil relation in the Law of Law Application of Foreign Civil Relations. The second meaning of the theory of close connection, that is, if the law to be applied does not have close connection with the foreign civil relation, then the law which has close connection should be applied, may interfere with the correct application of the said Law. The mandatory provision prescribed in Article 4 of the Law is mainly the mandatory provision in the criminal law, the administrative law and the economic law in our country. The Law has no definite provision about evasion, but provides against the application of the conflict law of other countries clearly. The Law allows the parties to select the applied law concerning the chattels by agreement, which has certain considerations. Due to the complexity of the international treaty, the Law does not prescribe the application of the international treaty.

Key Words: law application of foreign civil relations, the theory of close connection, mandatory provision, evasion, the international treaty

13. International Financial Law Reform of Strengthening the Shadow Banking Regulation *Yuan Dasong*(194)

Abstract: The outburst of the 2008 financial crisis is closely related to the collapse of shadow banking which runs beyond the system of financial regulation. In the post-crisis era, an important part of the financial regulation reform in the international community is strengthening the regulation of shadow banking. Countries with developed financial industry such as the U.S. and European Union have taken various measures and realized that the regulatory reform toward shadow banking has not finished yet and needs further actions. International organizations led by

the Financial Stability Board have also done research on the regulation of shadow banking, and have formed its basic implication, scope, regulatory framework and tentative measures to strengthen the regulation.

The shadow banking can be broadly defined as “the system of credit intermediation that involves entities and activities outside the regular banking system”, which not only covers entities outside the regular banking system but also includes the traditional banking entities taking use of shadow banking approaches, and shadow banking vehicles and products. Shadow banking is featured in that it participates in credit intermediation but is not regulated or is merely lightly regulated compared with regular banking. Shadow banking may bring threat to the financial system, mainly systemic risk and regulatory arbitrage. Systemic risk may cause impact to the whole financial system while regulatory arbitrage may undermine the effectiveness of financial regulation law in preventing risk and financial crisis and meanwhile bring additional risk to the whole financial system. Therefore, the construction of a systematic regulatory legal system toward shadow banking should be focused on.

In this era when the financial globalization is strengthening gradually, the construction of a regulatory legal system toward shadow banking should be based on actions from both the international community and individual countries domestically. For our country, considering the growing size of shadow banking and the potential threat it may bring into financial system, the strengthening of shadow banking regulation turns to be a necessity in the legal reform of financial regulation.

Key Words: international financial law, shadow banking, financial regulation