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Abstract: China introduced the doctrine of piercing the corporate veil formally in its 2005 company law overhaul, attracting widespread social and academic attention in China and beyond. This represents a bold move as well as an useful experiment in that China has codified a common law doctrine renowned for its perplexity and amorphousness. How has China codified the doctrine? How is it applied in practice? And what lessons, if any, can we learn from the Chinese experience? To answer these questions, this paper undertakes the first comprehensive empirical study of China's piercing cases adjudicated under the statutory veil piercing regime. The study produces some interesting results and compares them with similar studies in overseas jurisdictions, including the U. S., the U. K. and Australia. Based on the empirical findings, the paper evaluates the efficiency of the veil-piercing legal regime in China and makes proposals for improvement.

The key empirical findings of this study are as follows. Firstly, although the history of China's veil-piercing regime is relatively short, it has been actively utilized in practice, producing a significant number of cases. Secondly, the overall rate of piercing in China is significantly higher than those in overseas countries, and is still rising on a yearly basis, Thirdly, a large percentage of cases occurred in economically less developed regions in China, and the piercing rate there as a whole is also found to be significantly higher than that in economically more developed regions in China. Fourthly, all cases were found in the context of small limited liability companies, and there is a pattern that the more closely held the company, the more likely courts pierce. It is also significant to note that the veil was pierced in all the cases involving one-member companies. Fifthly, contrary to the theoretical predictions, the piercing rate is roughly the same in a tort context as in a contract context, and Chinese courts even pierce the veil less frequently in the corporate group setting. Finally, commingling appears the most often as the reason advanced for piercing the veil, and the highest incidence of piercing is in cases where the piercing argument was based on commingling of assets.

Key Words: company law, piercing the corporate veil, rate of piercing, empirical study

Abstract: The system of remanding judgment in civil litigation has aroused complaints among scholars, judges, lawyers and the public, which has rendered it necessary to amend the related

articles in the Civil Procedure Law. As there is no essential consensus between scholars, judges and lawyers upon this system, it is necessary to develop an “ought to be” interpretation in law. In order to limit the abuse of discretion in remanding judgments in civil cases, Chinese courts have implemented an approach that stresses detailed procedures through local rules and enhances organizational management measures. Compared to the western countries’ courts, Chinese courts are unique bureaucratic organizations that adjudication and (judicial) administration are integrated and the presidents have the overall responsibility for organizational performance such as judicial quality and efficiency and resources arrangement. However, such a model of “judicial procedure under the control of organizational management” can not avoid the appellate courts’ abuse of discretion by remanding judgments against relevant statutory provisions, regardless of the appealed issues and without judicial reasoning, but instead deprives the litigating parties and the public in general of their participation in the civil procedures, thus damages further the authority of judicial adjudication.

Of course, as Chinese judges lack enough professionalization and socialization, it is necessary and reasonable to strengthen and regulate organizational management of judicial adjudication in China nowadays. To adjust the relationship between judicial procedure and court organization, the autonomy of judicial procedure should be guaranteed in the background of organizational management and parties’ participation in judicial procedure should be restored. The reasoning for remanding orders, which is bound by the appellants’ claims and justified by judges themselves, is the key factor to guarantee the autonomy of adjudication. Therefore, the most important improvement about the remanding system should focus upon the judicial reasoning contained in orders in addition to amending the statutory conditions set forth for remanding.

Key Words: civil procedure, system of remanding judgment, organizational management of adjudication, reasoning for the order of remanding

Abstract: With the renaissance of mediation in China, the ultra-high rate of cases settled by court mediation in civil procedure appears on the headline of newspapers more and more frequently. Through the method of empirical study, we can find that the rate of cases settled by the way of mediation has shown winding growth rather than growing persistently no matter in the procedure of the first instance, the second instance or the retrial. At the same time, neither the rate of cases settled by mediation in the procedure of the first trial, the second trial and the retrial, nor the mediation rate of the cases on marriage and family, the cases regarding contract and the cases of torts is over 60% in general. And on the whole, the rate of cases settled by mediation in the first trial is higher than that in the second trial and in the retrial, and the rate in the retrial is higher than that in the second trial. In addition, the mediation rate of marriage and family cases is higher than that of contract cases, while the mediation rate of contract cases is higher than that of tort cases.

In present China, the reason why the rate of cases settled by the method of court mediation presents this face is the drive of the mediation policy, the different importance attached to mediation by the leaders of different courts in different areas of China, the diversity of

characteristics and nature of the handled cases, and so on. The negative effects of this kind of "movement" of mediation become more and more obvious in the judicial practice. In the future, China should handle the issue rationally and design the court mediation system on the basis of profound reflection.

Key Words: court mediation, rate of cases settled by mediation, empirical study, mediation policy

Abstract: Financial derivatives, especially OTC derivatives have posted great challenge to civil law counties, with the most notable example being the conflict between traditional civil and commercial law ideology and the derivative transaction customs represented by ISDA master agreement. The current theory attributes the conflict to such factors as common law versus civil law, exchange derivates versus OTC derivatives, and the real economy versus virtual economy. That explanation has ignored the common use of derivatives as the risk management tools for businesses in both common law and civil law countries, nor does it take into account the fact that derivatives, as financial contracts, are based on such legal rules as contract law, security law and so on.

The authors of this paper try to explain derivatives with legal logic rather than market language. Starting from the essential characteristics of the derivative contract, i.e., "contracting right now but performing in the future", the paper explores the specific risk inherent in the contract and illuminates the response from the market to control the risk. The controversial issues such as gambling contract may be attributed to the future performance element of derivatives. The transaction customs represented by ISDA agreement and the Exchange rules reflect the effort of market participant, given the absence of legal rules, to post disincentive on the parties for the breach of contract. Therefore, there is no difference between the OTC and exchange derivative, or between common law and civil law. The paper then builds a framework to analyze the legal issues around derivatives from contracting, performance to information disclosure and regulation. It ends with a call for the traditional civil and commercial law to accept the new kind of contract in order to provide a robust legal base for derivative transaction.

Key Words: derivative, derivative transaction custom, civil and commercial law, contract

Abstract: There are different models of constitutional review all over the world, but the two main

typical tasks of the institution of constitutional review are as follows. One is to protect the individuals' basic human rights granted in the constitution from the infringement by the governmental organ. The other is to safeguard the constitutionality and unification of the legal system. In addition, to justify certain state action is also one of the most important by-products of constitutional review.

According to the fundamental principle of constitutionalism, state action is justifiable only when it is done in accordance with the constitution. The constitutional decision may enhance the legitimacy of governmental actions, and further more it is a basic factor according to the principle of rule of law. In this regard, Charles L. Black argued that the legitimating function of the judicial review of constitutionality is of immense -perhaps vital- importance to the nation and the government of limited powers. In fact, the decisions in the majority of the constitutional cases were approved. From the perspective of comparative law, even the unconstitutional decision can provide legitimate foundation for some other state actions. As the case in the U.S. has shown, the unconstitutional decision is easily available for use as a seal of legitimacy for countless other controversial political acts.

When it comes to the function of constitutional decision, most of the constitutional scholars attach great importance to the function of check and balance. In this aspect, the theory of legitimating function provides a new perspective. Given the special political and social context in China, research on the legitimating function of constitutional decision is an urgent task for constitutional theory and constitutional jurisprudence.

Key Words: constitutional decision, legitimacy, constitutionality, unconstitutional decision

Abstract: As the main force of law enforcement, people's courts shoulder more significant mission and undertake more prominent and urgent task after the formation of the socialist system of laws with Chinese characteristics. On the one hand, people's courts should indeed enforce the law strictly and fairly, and ensure the effective implementation of the Constitution and other laws. On the other hand, people's courts are also responsible for the development and improvement of the legal system within its sphere of responsibility, in order to ensure the laws obeyed are good. Thus justice plays an irreplaceable and unique role in the improvement of the legal system. Not only the gap between legislation and application of laws needs justice to remove, the contradiction between law-abiding and law-reforming also needs justice to eliminate. Furthermore, the fusion of legal norm and legal character needs justice to refer to, and the combination of the factor of norm and the fact of people needs justice to achieve.

Justice perfects the legal system by acting on the micro-dimension and the adaptation process of the legal system, constructing the contact between law and society, and overcoming the inherent defects of the statute law. The specific ways to improve the legal system through justice include judicial interpretation, legal interpretation, guiding case, judicial review, judicial advice, participation in and cooperation with legislation, submitting to the authority to review and decision, introducing legislative bills and so on. To perfect the legal system through justice, we need to establish correct concepts and identify carefully whether the justice can play a role, how it

work, and what the functions are.

Key Words: justice, legal system, judicial interpretation, judicial review

Abstract: Due to the operative closure of the legal system and the constitutional constraints on legitimate resources of law in legal decision making, public opinions could not be directly cited as first-order warrant in legal justification. The typology of legitimate legal reasons shows that public opinions have no normative force in justifying a legal consequence even if the court is substantially influenced by them or they causally determine the consequence. In other words, they are mere facts.

In easy (or ordinary) cases, however, public opinions might be treated as explanatory facts and thus supplement legal justifications in weak judicial discretions. This is the ordinary role that public opinions play in adjudication. They are the subsidiary reasons involved in the consequence-oriented legal reasoning when the court adjudicates a specific case. Subsidiary reasons (or explanatory facts) define or explain the actual spectrum of possible decisions but they neither legitimate nor support legal decisions from the normative point of view.

On the other hand, in hard (or exceptional) cases involving legal loopholes and thus inviting strong judicial discretions, public opinions might constitute substantial justifying reasons which justify specific decisions if they are supported both by strong social propositions and constitutional right norms (legal principles). These justifying reasons incorporate normative claims like “ought” or “ought not,” but they are the products of legislative facts. These legislative facts via social propositions constitute the basic justifications when the courts resort to judicial law making or policy making.

The crucial process in the whole structure of applying public opinions in legal adjudication lies in distinguishing ordinary circumstances from exceptional ones, subsidiary reasons from justifying ones, and explanatory facts from legislative ones. In transitional China, with increasing diversity and complexity, legal system needs to maintain a subtle balance between stability and flexibility as well as universal justice and particular justice. A balance is also needed between subsidiary reasons and justifying ones as well as explanatory facts and legislative ones when incorporating public opinions in legal adjudication.

Key Words: public opinion, adjudication, subsidiary reason/explanatory fact, justifying reason/legislative fact

Abstract: Emergency powers conflict with the modern legal system. Emergency Powers law is a combination of internal contradictions, which takes its earliest forms of Dictatura and iustitium in ancient Rome, the modern forms of martial law in Anglo-American law system and the law of state of siege in civil law system, and the present forms of emergency laws and provisions

worldwide. And the adjusting range of emergency powers law system has expanded from the war and civil strife to economic crisis, natural disasters and other accidents.
The western theories on law and emergency powers can be classified into two types, that is, the exception theory and the discipline theory. The former, including the necessary theory and the theory of prerogative, claims that emergency powers live outside the law. While the latter claims that emergency powers should be disciplined by the law, which includes the theory of commissarial dictatorship and sovereign dictatorship, the theory of constitutional dictatorship, the theory of absolutism, relativism and liberalism, and the model of accommodation, extra-legality and usualness. However, these theories neglect the practice of emergency powers law in socialist countries and authoritarian countries, who have provided two other models, i. e., the model of political mobilization and the model of authority dictatorship.
Emergency powers law system in China conformed to the model of political mobilization from 1949 to 1978. The model of accommodation arises after 1978 with many emergency laws. The decisions made and orders issued by the government in response to an emergency should be submitted for record to the standing committee of the people's congress in the corresponding level. The model of extra-legality develops rapidly after 2003 with millions of emergency plans. Public security incidents are governed by various documents which are regarded as unwritten law. Future development of the emergency powers law system in China should comply with the model of accommodation and absorb the advantages of the model of political mobilization and the model of extra-legality.
Key Words: emergency powers law, theory of emergency powers, model of emergency powers, emergency state

Abstract: In the legislation of the accomplice system all over the world, there are two basic opposite modes, that is, the system of all participants being perpetrators and the system of differentiating between the perpetrator and the accomplice. The nature of the accomplice system in Chinese Criminal Law can boil down to the latter. Therefore, how to distinguish the perpetrator and the accomplice is a problem that also should be solved by Chinese criminal theory.
In the Criminal Law of Germany and Japan, the identification of the perpetrator can fulfill two functions, that is to say, distinguishing between the perpetrator and the accomplice serves to convict and sentence the participants at the same time. Under such single-layer differentiating system, the theory concerning domination by criminal facts and the theory of important role which value the participants' essential power or role in the process of implementing illegal facts are logically appropriate.
As to the classification of accomplices, Chinese Criminal Law adopts simultaneously two standards of function and role which co exist without contradiction and play their role respectively. Under the standard of function, the distinction between the perpetrator and the accomplice mainly aims to solve the problem of the conviction of the participants and their relationship. However, it doesn't determine and evaluate the participants' punishment directly, and

the principal and the accessorial offender classified according to the role standard perform the function of measuring the punishment. Under such double-layer differentiating system, the distinction of the perpetrator and the accomplice should adopt the theory of the normative perpetrating act which is based on constitutive elements.

Key Words: system of differentiating between perpetrator and accomplice, perpetrator, accomplice, theory of perpetrating act

Abstract: In Chinese criminal law, some special articles provide lighter punishment than the ordinary articles, which leads to a Chinese-style controversy about the special relationship of the concurrence of articles, i. e., whether to stick to the principle of “priority of special articles”, or to apply the principle of “severe articles are superior to lenient articles” supplementally?

Some scholars claim that there is no need to distinguish strictly the concurrence of articles and the imaginative concurrence of crimes, and all the concurrence should be treated according to the severer crime. But the structural difference of the concurrence of articles and the imaginative concurrence in “one crime” and “several crimes” shows their different treatments of declaration of crimes, thus the above claim cannot be established. The identity of legal interest is the substantive standard to distinguish the concurrence of articles and the imaginative concurrence.

The phenomenon of “special articles provide lighter punishment” appears in the heterogeneous concurrence of articles, which is not haphazard according to the dual tasks of the quota factors of the special articles of embodying the infringing extent to plural legal interests and the typical legislative method. Even if the special articles are really haphazard, there is also no reason to ask the actors to pay for legislator’s mistakes.

In Chinese criminal law, the constitutive elements of a crime can be divided into the “quality factors” and the “quota factors”, and the latter only shows the degree of the misfeasance or crime. However, the theory of the concurrence of articles from abroad can be applied only in the meaning of the type of act. Thus we should first use the theory of the concurrence of articles to decide the type of behavior, and then determine the division of public powers according to the quota factors. The behavior which did not reach the amount standard of the special article but had exceeded the amount standard of the ordinary article cannot be convinced according to the ordinary article. Only in the cross and double-inclusive concurrence of articles can we use the principle of “severe articles are superior to lenient articles”.

Key Words: concurrence of articles, special relationship, imaginative concurrence, quota factor, double-inclusive relationship

Abstract: Treatment on mental disorders in criminal justice is regarded as an important social

problem related to personal liberty and social safety. Several recent typical cases on mental disorders reported by China's media illustrate the terrible situation of forensic examination on mental disorders. Through empirical study, we found five characters of such examination which make the public suspect its objectivity and reliability, that is, the complexity of people's minds, the difficulty of tracking past facts and experiences, the interdisciplinary knowledge, the limitation of testing tools, and the subjectivity of examination result. This paper analyzes five problems and relevant solutions.

Firstly, difficulties of initiating forensic examination in criminal justice are just facial phenomenon. The deeper reasons are the over-subjectivity of examination results and the limitation of the supporting institution of compulsory commitment. We do not think the law should be changed to give the defendants the rights of initiation. However, in some special death penalty cases, as long as the defendants raise such request, the examination process should be initiated. In addition, in other ordinary cases, the defendants should have the right of appeal if the first application for examination is denied. Secondly, we should adjust the role division between forensic experts and legal professionals. Forensic experts should only focus on the mental state, while the problem of the capacity for criminal responsibility should be judged by the legal professionals. Thirdly, the liberty of the suspects or defendants with mental disorders should be deprived according to separate and clear legal framework. In addition, the defendants should get the assistance of another forensic expert to cross examine the examination result. Fourthly, compulsory commitment to hospital should be decided by independent judges, not by police officers or prosecutors. More importantly, China should increase the capacity of commitment hospitals as soon as possible. Lastly, according to current law, only hospitals appointed by the provincial governments can process such examination, which ignores the reality of China and results in the resource waste and the undesirable examination quality. China can get back to the rank management system and establish the entry criteria and training system for forensic experts.

Key Words: forensic examination on mental disorder, difficulty of initiation, compulsory commitment

Abstract: There was a common phenomenon of replacing the relatives to be punished in the judicial activity of ancient China. There were such kinds as replacing father, mother, elder brother, younger brother, husband, etc., showing the characteristics that the elders and men were mainly replaced. The main reason of the request to replace the relatives to be punished was the promotion of filial piety, righteousness, fraternal love, etc., also included the secondary cause of chasing fame and oppressed by morality.

Although it's common, the phenomenon of replacing the relatives to be punished was not framed by the basic laws in ancient China. In most cases, it was handled flexibly in the form of order issued by the ruler, which provided the ruler with great chances to decide whether to execute the replacement or not, and led to many arguments between the ruler and his courtiers, also among the courtiers. Although such arguments played a decisive role, the way to request was also very important. The key to success was often the skills of words and deeds in the request. Generally

speaking, there were several skills that could make the request succeed such as having both reason and filial piety, blending the sentiments and legal principle, catching the time and space, smiling in the face, etc.

In order to avoid revenge that might occur owing to the permission of the replacement, rulers had to take measures such as the order of migration and financial compensation and the injunction to revenge. By those measures, not only the ruler realized his purpose of controlling the people, but also the victims' sentiments of revenge could be dissolved or held back to the largest extent.

The evaluation of the Confucian on the case of Zhigong was the ideological source of replacing the relatives to be punished respected by the Confucian. Although it was almost in a dilemma for the law enforcement, the replacement was unable to be avoided because the opposition cannot win the permission, and the legal principle cannot win the moral principle.

Key Words: replacing the relatives to be punished, filial piety and fraternal love, argument of sentiments and law

14.On the Right to be Free from Poverty and It's Legal Mechanism……*Wang Xigen*（194）

Abstract: Poverty has been among the international academic hotspots and research on this issue may be summed up as six perspectives, including the income approach, the equality approach, the capability approach, the basic need approach, the approach based on human right, and the responsibility approach. These points of view, all being right-based approaches, are no more than the modern versions of classical theories of human rights which have inevitable defects both from the aspects of legal ontology and the actual effects of legal norms. They should be replaced by the approach of right to be free from poverty. The right to be free from poverty, from the perspectives of social solidarity and global justice, can be defined as a right of people, as individuals and groups, to obtain necessary physical and spiritual materials for a decent life, which is realized by the positive act of them to participate in, contribute to and share the achievement of the process of poverty reduction.

It is not only necessary but also rational to construct this new concept of the right to be free from poverty reasonably. The right to be free from poverty is closely bonded to human dignity and has all the acknowledged elements of a right. Also, it is a right different and independent from the existing forms of human rights enumerated in the Covenants on Human Rights (1966) including the right to live, the right to health, the right to food, the right to housing and the right to work, therefore can not be replaced or covered by them, which has been proved by empirical studies from legal sociology.

The stereotype of treating the reduction of poverty as a pure moral obligation should be broken, and a new pedigree of obligations to serve the implementation of the right to be free from poverty should be established. The foundation of the reduction of poverty will be established only when the transformation within this pedigree, that is, from moral obligations and the obligations with good faith to the institutional obligations, contractual obligations and interventional obligations, is finished. The path we have to take to achieve the reduction of poverty is to design a forcible legal mechanism which consists of five parts of empowerment, regulation, monitoring, cooperation and remedy.

Key Words: human rights, the right to be free from poverty, the right of equal development, international law