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THEORETICAL FRONTS

Realobligation: Structure, Value and Implications for China

Chang Peng'ao

［**Abstract**］

Realobligation is a concept in Swiss civil law theory referring to the obligations that have both the quality of relativity and the function of restricting the real right of the assignee. From the perspective of the basis of its occurrence, Realobligation could be divided into legal obligation and arranged obligation. But in either category, Realobligation coexists with real right and follows the basic principles of property law, such as numerus clausus and public summons. Realobligation has similar functions as propertilized obligatory right, but in contrast to the latter, it has such academic advantages as higher degree of academic consensus, easiness to learn and to teach, better explanatory power, and simpler regulatory mechanism. Because of these advantages, as well as the lack high-degree of consensus on propertilized obligatory right in Chinese academic circle and the existence of many legal norms in China that are similar to the Swiss Realobligation, it is necessary for China draw on the system of Realobligation. In doing so, China should focus on arranged Realobligation and expand the scope of preliminary registration system to cover parties' agreement on real right.

The ADR Movement in the US from the Angle of Sociology of Knowledge: a Historical Examination from both Institutional and Intellectual Perspectives

Xiong Hao

［**Abstract**］

Based on a close reading of intuitional and intellectual history, this article provides a comprehensive examination of the development of ADR in the US context. The author argues that the evolution of the dispute resolution system and people' preference in coping with conflict are deeply embedded in social structure. The ADR mechanism has long been operating in the US and its role has been highlighted or effaced in different historical periods. The modern ADR system is the outcome of a series of social changes, including immigration, labor movement, and civil rights movement. Intellectually speaking, the discourses of ADR have also experienced a shift of focus from criticism to realism and pragmatism, which makes the ADR a highly effective dispute resolution method.

An Empirical Study on the Mode of Examination and Determination of the Voluntariness of Confession: Also on the Causes of the Difficulties in the Exclusion of Illegally-obtained Confession and Ways of Overcoming Them

Kong Lingyong

［Abstract］

After the formal establishment of the rule on the exclusion of illegally-obtained confession by the 2012 Criminal Procedure Law, the mode of examination of the voluntariness of confession in China, like that in other countries, has showed a tendency of differentiation into subjective judgment mode and objective examination mode. An empirical study of 400 copies of judgments relating to the exclusion of illegally-obtained confession made since 2013 shows that subjective judgment mode differs from the objective examination mode in the types of applicable confession, criteria of the initiation of exclusion, admissibility of evidence, method of examination and judgment, as well as conclusions. However, currently the objective examination mode has not yet played any role and the examination of results evidence is still the dominant mode of determination of the voluntariness of confession in China. The fact that these two modes have both failed to overcome the difficulties in the exclusion of illegally-obtained confessions is directly related to their tendency towards convergence. The factors leading to such convergence include the subjectivization by judges of the objective examination mode and the gradual alienation of objective trial mode in practice. Convergence of the examination and judgment modes has not only reduced the rate of exclusion of illegally-obtained confessions, but also led to the formalization of the rule on the exclusion of illegally obtained evidence. Therefore, it is necessary for China to adopt a comprehensive examination and judgment mode in the current practice of criminal justice, so as to ensure the effective determination of both the voluntariness and the accuracy of a confession, thereby indirectly guaranteeing the correct application of objective examination mode and overcoming the difficulties in the exclusion of illegally-obtained confession at the technical level.

Physical Evidence Revisited

Pei Cangling

［Abstract］

Exhibit and physical evidence are two different concepts. The former is not a piece of evidence in itself, but an object that contains evidence. Physical evidence refers to two kinds of facts obtained from an exhibit: facts contained in an object and facts embodied in an object. These two kinds of facts become evidence when they are associated with other facts that need to be proved in a case. An inspection transcript should not be regarded as physical evidence, nor should an expert conclusion be regarded as testimony of witness. It is even more improper to regard inquisition or inspection transcripts and expert conclusion as two

kinds of evidence parallel to physical evidence. They are only evidentiary materials that reflect evidence and can be referred to as physical evidentiary materials. Physical evidence is the best evidence and has been attached more and more importance to in Chinese criminal justice system. From the historical point of view, the shift of emphasis from testimony of witness to physical evidence represents a fundamental transformation that will open up a new era in the history of criminal justice in China.

REVIEW OF FOREIGN LAWS

Voluntariness of confession in US and Its Sinicization

Wang Jinglong

［Abstract］

Voluntariness of confession is the basic and substantive rule of confession. During the evolution of this rule in US, although its grounds have experienced a change from the common law to the Constitution and its value pursuit has shifted from reliability to voluntariness, the criterion of voluntariness has remained a difficult problem faced by all courts in US. The traditional "totality-of-circumstances" test has the defects of vagueness and uncertainty. The U.S. Supreme Court had been continuously trying to find a simple test and eventually created a mandatory presumption-the famous "Miranda Rule". But this technological exclusionary rule, which can be automatically applied, has experienced a transformation from "irrefutable presumption" to "refutable presumption". With the increase of exceptions, it has eventually become a new "totality-of-circumstances" test. Today, voluntariness of confession has been basically established at the normative level in China. In practice, however, it has encountered many difficulties and obstacles, the biggest one being the difficulty in the determination of the voluntariness of the confession. China should draw on the experiences and lessons from the US and introduce mandatory presumption and burden of proof as technical norms, so as to increase the operability of the rule and reduce the difficulty and the obstacles faced by judges in making the relevant rulings.

The Reform of the Electronic Application Mode of Justice in Germany

Zhou Cui

［Abstract］

E-Justice represents a trend of future development. After over a decade of exploration, Germany promulgated in 2013 the E-Justice Law (E-Justiz-Gesetz) and the Law on Strengtheing the Application of Video-conference Technology in Court Procedure and in the Procedure of the Prosecutors Office (Gesetz zur Intensivierung des Einsatzes von Videokonferenztechnik in gerichtlichen und staatsanwaltschaftlichen Verfahren).

Additionally, the Law on the Reform of the System of Ascertainment of Property in Enforcement (Gesetz zur Reform der Sachaufkl rung in der Zwangsvollstreckung) came into force in the beginning of 2013. These three laws deal with the e-communication between parties and courts, e-trial and e-enforcement, respectively, and together they build the legal foundation of E-Justice in Germany. The E-Justice-Gesetz provides for the norms on such matters as e-filing, e-service, e-act and e-document. In 2013, video conference began to be used in civil trial in Germany, but the recording of the conference is forbidden in order to protect right of personality. In the enforcement proceedings, electronic technology is also widely utilized. Some scholars have also suggested that e-pretrial process be introduced in the future so as to further improve the efficiency of litigation and ease the burden of judges.

Evolution of the Appeal-right Sentencing Model in UK and Its Implications for China

Peng Wenhua

［Abstract］

Appeal-right sentencing is a model according to which a court of appeal establishes the rules of sentencing and oversees and controls the sentencing by the lower court through appellate review. The appeal-right sentencing model in Britain takes the check and balance of the power of judicial discretion through strict appeal procedure and timely revision and improvement the system of appeal review as its basic characteristics. Its main trend of development is to establish a sentencing commission to work together with the appeal court to formulate and issue sentencing guidance, thereby appropriately structuralizing and increasing the transparency of the sentencing system and enabling it to focus more on the appellate review of the reasoning of sentencing. China should draw on the appeal-right sentencing model in Britain, give the appellate court broader discretion in sentencing, determine the reasonable steps of sentencing, promulgate and modify sentencing rules and standards in due time, attach more importance to sentencing reasoning and its review, and establish a database of sentencing.

Commentary on the Legislation of the Standard on the Punishment of Bribery in China

Wang Gang

［Abstract］

Currently there are many problems in the application of criminal law provisions on the punishment of the crime of bribery in China. These problems can be divided not two categories: those at the legislative level and those at the judicial level. The former mainly refer to the structural flaws in the standard on the punishment of the crime of bribery. There are essential differences between bribery and embezzlement. Therefore, it is not appropriate for the two crimes to share the same punishment structure and separate provisions should be adopted on the determination and punishment of bribery. Although the

Ninth Amendment to the Criminal Law made partial revisions to the provisions on the crime of bribery, it fails to solve the problems with the punishment standard. In the future revision of the Criminal Law, further improvement should be made to such standard: as far as the element of crime amount is concerned, the criminalization standard of 5,000 yuan should be maintained while at the same time the standard on the amount of crime in sentencing should be appropriately raised, so as to implement the principle of suiting punishment to crime; with respect to the element of the circumstance of the crime, since bribery violates the purity and the fairness of the performance of public duties, importance should be attached to circumstances other than the amount of the crime that are also important factors in the determination of criminal responsibility, so as to ensure the implementation of the "crime amount + circumstance of crime" dual punishment standard.

Reforms of the Bank Regulatory System in UK and US after the 2008 Financial Crisis

Su Jieche

［Abstract］

The 2008 Financial Crisis exposed the defects in, and led to the restructuring of, the banking systems and regulatory frameworks in the UK and the US. The two countries introduced the 'ring-fenced bank principle' and 'Volcker rules' to reduce the conflicts of interest between financial institutions and their customers, improve transparency of financial activities, and avoid systemic risk resulting from the cross-sector transfer of financial crisis. At the same time, the integration of fragmented regulatory framework became the focus of the reform in both countries. The US established the Financial Stability Council to improve the fragmentation of the regulatory system resulting from the existence of multi-regulators whereas the UK adopted an improved 'twin-peak model' in response to the developments of financial markets. Both countries need to strengthen the role of the central bank in financial regulation and mitigate conflicts of interests between monetary policies and financial regulation and ensure the independence of financial regulators. Currently, there are similar financial developments in China. Consequently, it is also necessary for China to integrate fragmented regulatory systems to avoid systemic risks.

INTERNATIONAL LAW ISSUES

Impact of Human Rights Law on International Civil Jurisdiction: an Analysis Based on the Application of Article 6 (1) of the European Convention on Human Rights

Huang Zhihui

［Abstract］

With the increasing integration between human rights law and private international law, human rights law, as represented by the European Convention on Human Rights (ECHR),

may also have an impact on international civil jurisdiction. In a normative sense, Article 6(1) of ECHR provides for the right to fair trial and the right to access to justice. An examination of the relevant judicial practice indicates that domestic courts of contracting states of ECHR must consider the human rights provided for in Article 6(1) of ECHR in deciding whether or not to exercise jurisdiction over foreign-related civil cases. For many reasons, the impact of human rights law on international civil jurisdiction of domestic courts of contracting states of ECHR is still limited. With respect to the issue of intervention in international civil jurisdiction on the basis of Article 6(1) of ECHR, it is still necessary to clarify the relationship between the Brussels system and Article 6(1) of ECHR, specify the conditions under which such intervention is allowed, and strike a balance between the right to access to justice stipulate in Article 6(1) of ECHR and the right to fair trial.

IP Border Measures in the Process of Trade Regionalization and Countermeasures Thereof

Yang Hong

［Abstract］

In the Doha deadlock, FTAs developed vigorously under the promotion by developed countries. Pushed by the newly adopted TPP and negotiations such as TTIP, a trend of trade regionalization is developing steadily. TRIPS-plus IP border measures are widely found in those FTAs, equipping customs with stronger power and vaguer standards, and bringing more subject matters, especially goods in transit, into the scope of border measures. The uncertainty and the vulnerability to abuse of these new border measures have brought new challenges to free trade and trade facilitation. As response to these challenges, China should collaborate with other developing countries to resist such measures, take advantage of WTO dispute settlement procedures to challenge the legality of border measures under TRIPS, especially those against goods in transit, and adopt its own new rules of IP border measures.