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**Judge-oriented Mode or Court-oriented Mode?..... Gu Peidong**

**Abstract:** There are two basic modes of establishment and operation of court system: the judge-oriented mode and the court-oriented mode. To a certain extent, there is a tendency of transition from the court-oriented mode to the judge-oriented mode in the process of the court reform in China. However, this kind of tendency is not compatible with the institutional arrangement of the Constitution, the status of court system in the political structure, the social ecology of the judiciary, the existing incentive mechanisms, constraint conditions of judges and the demand to distribute judicial resources in a comprehensive way – all of which require China to adhere to the court-oriented mode of establishment and operation of court system. Academic researches advocating the so-called “independence of the judge”, which is encompassed by a judge-oriented mode of court system at the technical level, could not stand the test of logic and practice. The direction of court reform should be a transition not from the court-oriented mode to the judge-oriented mode, but from the court-oriented mode dominated by bureaucrats who bear the identity of judge to the court-oriented mode of court system dominated by judges who perform the actual function of trial. The current comprehensive coordinated reform of the court system should proceed in accordance with this idea and the basic requirements of the court-oriented mode should be satisfied.

**Keywords:** court reform; the judge-oriented mode; the court-oriented mode; independence of judge

**The Consumption and Reconstruction of the Law Enforcement Capability**

..... **Liu Yang**

**Abstract:** Law enforcement is a is a complicated practice in which deviation and correction intertwine with each other and the consumption and reconstruction of the capability for law enforcement is a quite useful point of view by which we can understand this complicated practice. Law enforcement capability may be eroded slowly as a result of the tension in the current internal administrative system, leading

to not only internal control failure and local protectionism, but also the lack of cooperation among various government departments. Law enforcement capability can also be consumed in social structure, resulting in such phenomena as the dilution of law enforcement resource and the alienation of the law enforcement process. Faced with the consumption of law enforcement capability, law-enforcers can re-create the capability in frontline law enforcement scenarios by adopting such strategies as flexible enforcement, legal interpretation, rule creation, centralization of law enforcement resource and creation of new law enforcement space. Also, lawmakers and decision makers need to continuously reform and optimize the current law enforcement system and reconstruct the law enforcement capability by strengthening control, reassigning responsibilities, extending organization and mobilizing social forces. Analyzing the consumption and reconstruction of enforcement capability by taking grassroots law enforcement as the analytical sample can help us to get an comprehensive understanding of the practical logic of law enforcement in the transitional period in China, and provide us with inspirations for the reform of the law enforcement system and the building of law enforcement capability.

**Keywords:** law enforcement deviation; law enforcement capability; law enforcement process; law enforcement system; frontline law enforcement

**A Research on Punitive Damages from the Perspective of Administrative Law**

..... **Zhao Peng**

**Abstract:** Traditionally, China has relied heavily on administrative regulation systems to correct misconducts in economic and social life. However, the efficiency of this system is not satisfactory, and the failure of administrative regulation has led to many public accidents that incur a lot of public criticism. The introduction and development of punitive damages in China is largely a response to this failure of administrative regulation. Compared with administrative regulation, punitive damages can stimulate private participation in public regulation through the mobilization of private litigation. While invigorating the entire regulatory system, punitive damages can also bring

about excessive and inefficient litigation, and lead to the exploitation of the irrationality, inconsistency and ambiguity in the legal system. In this regard, a necessary institutional condition for the extensive application of punitive damages is to develop a more professional and dynamic judicial system, which can develop and improve the skills and capabilities for regulating private actions. Meanwhile, due to the already existence of complicated administrative regulation, the introduction of punitive damages requires subtle design to ensure that punitive damages are coordinated with the functions of the administrative regulation system. Especially, we should make sure that punitive damages complement, but not overlap with, the corresponding administrative penalties. Finally, like punitive damages, the expansion of the lawsuit requesting the administration to perform duties also expands the role of private individuals in public regulation. China should pay attention to this new situation and ensure that equal importance is attached to both of the two institutions in the process of institutional evolution.

**Keywords:** administrative regulation; punitive damages; professional claimer; lawsuit requesting the administration to perform duties

**The Integration of the Rules on the Assignment of Claims and Pledge of Claims in the Chinese Civil Code .....Li Yu**

**Abstract:** Claim has become an important subject matter in modern financing and other transactions. In practice, assignment of claims and pledge of claims are frequently used. Assignment and pledge are similar in economic function and legal rules. In China, the Contract Law provides for assignment of claims and the Property Law provides for pledge of receivables. The relevant provisions in the two laws are inconsistent in subject matter and there are legislative loopholes in both laws. The Contract Law contains assignment rules that are applicable to all ordinary claims, but no rule on the effect of assignment on third parties, such as publication (or perfection) of assignment. The Property Law contains pledge rules that are applicable to receivables only and establish modern notice-filing rules on pledge, but no rule on the

effect of pledges between the parties and on the debtor, such as pledge notice requirement to the debtor and the defenses and right of the debtor to set-off. The dual scheme generates much inconvenience and confusion in judicial practice and is not adapted to the economic reality. The solution is to unify assignment and pledge rules by adopting the functionalist approach, including unifying the scope of claims as well as the internal and external effect of assignment and pledge, and setting aside only special rules on the enforcement of pledge. The Contract Law is to be incorporated in the Chinese Civil Code as a separate title in the code. However, to solve the above-mentioned problems, it is far from enough to add a new chapter on factoring contract in the Title of Contract of the Civil Code. The provisions in the Chapter on Factoring Contract are not exclusive for factoring contract, but are about general rules on assignment of claims. This legislative approach is against the maximization of the value of civil codification. Therefore, it is better to improve current rules on assignment of claims in general than to make factoring contract rules only.

**Keywords:** assignment of claims; pledge of claims; pledge of receivables; factoring; asset securitization; civil code

**The Retention or Abolition of Articles 402 and 403 of the Contract Law from the Perspective of the Codification of the Civil Law..... Fang Xinjun**

**Abstract:** The original legislative purpose of articles 402 and 403 of the 1999 Contract Law was to solve special problems in foreign trade agency. The location and content of these two provisions changed from time to time during the legislation process. Later, due to the lack of a thorough understanding of the transplanted system and the stimulation by some special domestic factors, severe alienations have happened to these provisions, especially Article 402, which belongs to neither the civil law system nor the common law system. Article 402 magnifies many times the effect of the system of undisclosed agency on the privity of contract provided for by Article 403, and this has a great impact on third parties. Now the original legislative purpose has already faded out, but the provisions remain, causing frequent judicial

chaos. Specifically, these two provisions do not make the law clearer, but on the contrary are used by parties to evade liabilities and other legal consequences. Moreover, different courts have different understandings of these provisions. As a result, like cases are rarely treated alike. It is suggested that, in the upcoming Civil Code, Article 402 should be deleted completely and Article 403 should modify by changing its location in the code and adding qualifications to it, so as to better maintain the privity of contract, while at the same time remedying the unfair treatments in the event of the agent's insolvency in traditional civil law jurisdictions.

**Keywords:** indirect agency; undisclosed agency; right of intervention; right of choice; the privity of contract; nominal standard

**The Global Transition from Substitute Decision-making of Adult Guardianship to Assisted Decision-making..... Li Xia**

**Abstract:** The assisted decision-making system, which acknowledges the civil capacity of persons with mental retardation, is fundamentally different from the substitute decision-making system in traditional civil law, which denies the civil capacity of persons with mental retardation. As a brand-new system in the 20th century, assisted decision-making system has been widely used in the legislation and practice of the two major legal systems, with positive results. This system is also working very well in China's civil and judicial practices. Now the draft Title of Marriage and Family of the Chinese Civil Code has been released to the public for soliciting comments from various sectors of society. Taking this opportunity, the author of this article puts forward the following suggestions on the improvement of the draft law: guardianship should be provided for as a separate chapter in the Title on Marriage and Family after the chapter on adoption and this chapter should be divided into two parts: adult guardianship and child guardianship. Adult guardianship should be further divided into monitoring and assistance. The section on monitoring should provide for the final monitoring principle and the minimum monitoring principle and clarify the sequence of application of monitoring and assistance, so as to gradually

reduce complete monitoring in preparation for its ultimate abolition; persons with mental disability should be given the permanent right of appeal to ensure their participation in the process; "the respect for self-determination" should be provided for as a part of the standard on the performance of functions by guardians; special guardianship measures should be provided for; and, in the section on "assistance", Article 33 of the General Provisions of the Civil Law should be further elaborated by providing for durable powers of attorney agreements and medical advance directives.

**Keywords:** assisted decision-making; legal capacity; adult guardianship; substitute decision-making; the Title of Marriage and Family

**The Systematic Position of the Ability to Make Different Choice in the Theory of Crime..... Chen Xingliang**

**Abstract:** The ability to make different choice is a controversial concept in the dogmatics of criminal law. The focus of the controversy is on the question of how to determine the systematic position of the ability to make different choice. There are three approaches to locating the ability to make different choice, i.e., in the theory of conduct, in the theory of wrongdoing and in the theory of culpability. The theory of conduct argues that the ability to make different choice is an issue of whether there is a conduct in criminal law and therefore should be dealt with in the theory of conduct. The theory of wrongdoing thinks that the ability to make different choice is the ground for excluding the wrongdoing and therefore the issue should be solved in the theory of wrongdoing. And the theory of culpability argues that the ability to make different choice is the ground for blame and therefore should be examined in the theory of culpability. This author argues that the ability to make different choice is an element of conduct in criminal law and analyzes this ability through the examination of relevant cases.

**Keywords:** the ability to make different choice; freedom of the will; conduct; culpability

## **The Normative Nature and the Standard of Judgment of the Duty of Care**

..... **Chen Xuan**

**Abstract:** The criminal law requires citizens not only to avoid violations of norms in the case of realistic compliance, but also to ensure that they have the necessary capabilities to comply with norms. The actor's improper reduction of his or her ability of compliance with norms is the basis and premise for the establishment of a negligent crime. And the criterion used to determine whether an actor has improperly reduced his ability is whether he has violated the duty of care. From the perspective of the nature of the norm, the duty of care is different from code of conduct, the latter is the norm of legal interest protection, whereas the former is the norm of ability maintenance. The function of the duty of care is to keep the actor's ability to comply with the code of conduct above a certain level. An analysis from the points of view of the purpose of criminal law, theoretical thinking and policy effects shows that the monobasic individual standard of the perpetrator should be adopted in the judgment of duty of care. The double-layered duty of care judgment method, which is quite popular in criminal law theory, is not desirable. The laws, regulations, rules and other norms used to fill the blank facts of crime can not only typologically infer the duty of care, but also define the boundary of the allowed risk. However, the specific actor's ability to foresee and avoid is still the "ballast stone" in determining the violation of duty of care in professional negligence crime. First of all, only the filling specification related to the maintenance of the capabilities for prediction and avoidance is eligible to be a source of duty of care. Since the "violation of traffic management regulations" in Article 133 of the Chinese Criminal Law is a stipulation on the violation of duty of care - the essence of which lies in the actor's negligence of his duty of care - that results in the decline of his/her ability to anticipate and avoid, the key to the determination of whether a certain act constitutes a traffic accident crime is not whether the act violates a traffic law nominally, but whether it weakens his/her ability to foresee and avoid the result by violating traffic regulations. Secondly, the presumption effect of the filling specification on the duty of care may be negated in



cases of a “failed” or “excessive” situation of the filling specification. Finally, the basis of the exclusion of an allowed risk lies not in the synoptical permission of risky behaviors, but in the cancellation of condemnation of the perpetrator’s status of ability deficiency. The allowed risk can be established only when “the behavior is consistent with the filling specification related to the maintenance of his/her capacity” and “the perpetrator’s capacity is actually absent”.

**Keywords:** negligent crime; duty of care; objective imputation; allowed risk, blank facts of crime

**The Right Disposition of the Accused ..... Guo Song**

**Abstract:** The right disposition of the accused is not only the key mechanism for modern criminal procedure to maintain the legitimacy of the negotiable or administrative case handling method, but also the inherent reason for the full flexibility and activity of criminal procedure system in the western countries under the rule of law. There are both practical demand and theoretical basis for China to clearly establish the mechanism for right disposition of the accused at the institutional level. It can also strengthen the spirit of the individual self-responsibility and self-determination of the accused, promote the transition of the role of the public authority from the controller and leader of criminal procedure to the negotiator and guider, and finally induce the change of the traditional bureaucratic and compulsory judicial mode. Of course, recognizing right disposition of the accused does not mean that the right to waive under any conditions is justified, or that right disposition can be free from any restrictions. On the contrary, right disposition of the accused must meet certain substantive and procedural requirements. The substantive requirements mean that the accused has the ability to dispose and the declaration of will of disposition is voluntary; the procedural requirements means that the public authority has the obligation of notification and that the right disposition of the accused should be limited by the rights of others, public interest and compulsory provisions of the law. In view of the fact that right disposition inevitably reduces the legal protection of the

accused and is indeed convenient for public authority to handle cases and that there are many omissions in the mechanisms for guaranteeing the legality of right disposition of the accused in China, the most important task in the current system construction is to clarify the constituent elements of right disposition and the scope of the right that can be waived, and establish of the necessary verification mechanism, so as to prevent right disposition of the accused from being reduced to a tool used by the public authority for achieving specific purposes.

**Keywords:** right disposition of the accused; procedural choice; limit of disposition

**The Origin and Development of Eight Deliberations and Cultural Interaction Between the Central Plains Regime and Frontier Ethnic Regimes……Su Yigong**

**Abstract:** The legal articles of Eight Deliberations were incorporated into law in the Wei Dynasty and, after the development through the Jin and Tang dynasties to the Ming and Qing dynasties, had become one of the distinctive features of Chinese inherent laws. However, with the spread of Western culture to the East, the Eight Deliberations have also been subjected to severe criticism. This article argues that the Eight Deliberations etymologically originated from the Ba Pi (Eight Regulations) in the Rites of Zhou, and they might in an abstract sense reflect the spirit of etiquette in the Western and Eastern Zhou dynasties. Specifically, the Eight Regulations probably came from the etiquette between monarchs and ministers, or certain aspects of the monarch-minister etiquette, to show the monarch's compassion and special care for his ministers. An investigation into the state system, the regime as well as the monarch-minister relationship in the Western and Eastern Zhou dynasties also shows that it is possible that such a monarch-minister etiquette had existed. Moreover, this article compares the monarch-minister relation and political ethics between the Central Plains Regime and that of frontier ethnic regimes and points out that the former is a kind of superiority-inferiority relationship and the latter is a kind of master-slave relationship. The legal articles of Eight Deliberations, which originated from the Eight Regulations in the Rites of Zhou, were the unique creation of the

Central Plains Regime and depended on the support of farming culture. When the frontier ethnic regimes dominated by nomadic, fishing and hunting culture came into power, all sorts of variations would inevitably take place.

**Keywords:** Eight Regulations; Rites of Zhou; monarch and minister ethics; farming culture; nomadic, fishing and hunting culture

**The Application of the Principle of Consistent Interpretation in International Trade Administrative Cases ..... Peng Yue**

**Abstract:** Article 9 of Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of International Trade Administrative Cases provide for the principle of consistent interpretation with a view to ensuring through judicial review that administrative bodies in China act in accordance with relevant provisions of international treaties, especially WTO agreements. Based on internationalist policy considerations, this principle requires domestic courts to assume their responsibility of actively integrating domestic and international legal systems. Judicial practice shows that Chinese courts usually avoid applying the principle of consistent interpretation in domestic legal context, where the practice of application, interpretation and performance of treaty are not yet mature. Even in cases where this principle is applied, the relevant judgments are hardly enlightening for lack of methodological awareness. The reason for this is that the principle of consistent interpretation under Article 9 one-sidedly emphasizes the rationale of internationalism and ignores the status quo of the allocation of interpretative power in domestic legal system. The principle of consistent interpretation should be embedded into the principle of judicial compliance, so as to give full play to its function of system integration and realize positive interaction between domestic and international legal systems.

**Keywords:** the principle of consistent interpretation; the principle of judicial compliance; the allocation of interpretative power; system integration