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CONTENTS

INTERNATIONAL LAW ISSUES

Abstract: China’s constitutional law study is facing a possible upcoming era of constitutional review. The institutional evolution from constitutional supervision to constitutional review since the reform and opening-up and academic preparations for the construction of a constitutional legal order constitute the external and internal conditions of self-examination of constitutional law study in the new era. The front-end – the guarantee of the constitutionality of draft law - and the rear-end – the review of the constitutionality of particular law in the recording procedure - of the constitutional review system under construction provide new issues for constitutional law study. The new constitutional review system has removed some of the institutional obstacles for constitutional law dogmatics. Distinguished from constitutional law dogmatics under judicial-centralistic constitutional review system, constitutional law study under the distinctive constitutional review system in China should emphasize the dogmatics in law-making, so as to provide intellectual support from the active and passive aspects for norm-shaping and limit-control in law-making. Meanwhile, in addition to fundamental rights, constitutional law dogmatics should pay attention to state institutions, strengthen the constitutional procedure law study, and interact with studies of other branches of law and other social sciences so as to promote the legal construction and modernization of state governance.

Abstract: Against the background of social transformation, the concept of rule-centered rule of law has displayed many practical dilemmas and functional limits. In contrast, due to the "substantialist" cultural genes of the feudal legal system and the leapfrogging nature, the time and space compression and local differences of social development, the pragmatic view of the rule of law is highly regarded in China today. The realistic prospect of the discourse expression and the practical orientation of the rule constraint reveal the alienation between the "natural phase" and the "epiphase" of the rule of law in contemporary China. The construction of the rule of law in contemporary China will always face the collision and tension between the western rule-centered outlook of the rule of law and the utilitarian outlook of the rule of law with Chinese characteristics. The mutual tolerance and reconciliation between the two must be based on the minimum consensus on the rule of law.

Legal Philosophy of Coexistence in the Era of Ecological Civilization

…… Zhu Mingzhe

Abstract: In the transition from industrial civilization to ecological civilization, the idea of "protection and utilization" in the era of environmental law has also been transformed into the idea of "coexistence" in the era of ecological law. As a result, the dichotomy between man and nature as the foundation of the contemporary legal order has been questioned. Through detailed field research, Descola provided us with four modes of thinking about the relationship between man and nature, from which we can extract a pluralistic ontological stance. Latour, on the other hand, conceived a cognitive framework at the political and philosophical level to determine the order of the coexistence of all things. In China, despite of the proposed ecological civilization construction policy, the law still regards the environment as an object that can be used but also needs to be protected. In European countries, although the idea of people owning the environment has continued, the new legal practice is tending to recognize the intrinsic value of the ecosphere. New international law recognizes the value of the nature, while facing up to the interdependence between nature and human society. In lawsuits about ecological governance, the judgment of the court relies more and more on scientific evidence, while scientists also more and more actively seeking the endorsement of the judicial authority for their scientific discovery. The distinction between human society and nature has never really become a reality, and it is inevitable for this distinction to be transcended. In conclusion, the legal philosophy of coexistence in the era of ecological law requires us to try to coexist with all things in nature.

Hotness and Coldness: Revisiting Legal Artificial Intelligence in China

…… Zuo Weimin

Abstract: In the field of legal artificial intelligence, there is a "cold and hot difference" between discourse and practice, and between China and foreign countries. China pays more attention to artificial intelligence than many other countries at the levels of top-level design, official policy, and academic research. However, far less attention is paid to this issue at the level of application effects in judicial practice. In foreign countries, especially in the United States, although the support and radiation at the government level seem to be far weaker than those in China, there are many bright spots at the level of local practice. The difference at the discourse level results from

the differences in the understanding of artificial intelligence between China and foreign countries. The difference at the practical level results from the differences in preparatory conditions, research methods, adequacy of legal data, and the technical bottleneck of legal artificial intelligence. In the future, China should attach more importance to and continuously strengthen the practical ability of legal artificial intelligence, and fundamentally change the "DNA" of law schools by introducing statistical and computer science talents, and offering such courses as legal big data and legal artificial intelligence, so as achieve true interdisciplinary interaction and communication.

Legal Analysis of the “Getting Credit Index” of World Bank and Proposals on the Revision of Relevant Chinese Laws and Regulations

…… Luo Peixin

Abstract: Each indicator of World Bank Doing Business Ranking is based on one classic paper. The indicator of “Getting credit” is supported by the paper of Private Credit in 129 Countries, which points out that the power of creditors and sufficiency of information are two determinants of credit market, while one well-established collateral system plays an important role in intensifying the power of creditors. With that in mind, the World Bank uses one modern collateral system to evaluate the indicators of legal rights of each economy, in which context the general description on secured debt is permitted, security interest could automatically extend to “products, proceeds and replacements” of the original collateral, and the unified rule of “enforceable against third parties” is established. Due to the facts that the relevant provisions in China are scattered in the Property Law, the Collateral Law and related judicial interpretations, and that there are discrepancies in wordings between World Bank questionnaires and Chinese laws, Chinese correspondents have made lots of mistakes in filling out the form. This paper corrects all the flawed answers and proposes the revision of relevant laws and regulations, with a view to raising China’s Doing Business Ranking.

The Breach Prevention System in Financial Law…… Chen Chun

Abstract: The breach of contract should be dealt with by the system of liability for breach of contract. However, financial law often prohibits breach of contract and avoids applying the above system, but instead uses public law measures to punish or remedy breach of contract. The system of liability for breach of contract has

limitations and is unable to cope with systemic breaches and the resulting contagiousness in the financial sector. The application of the system may trigger and aggravate systemic risks. The Financial Law has established a breach prevention system to prevent systemic breaches and implement financial security principles in such aspects as performance reserve, capital adequacy ratio, leverage ratio, liquidity, information disclosure, contract size, relevance, and systemically important financial institutions. The Chinese financial law should incorporate the breach prevention system into the financial contract system to make up for the defects in the system of liability for breach of contract, and improve the breach prevention system in such aspects as systemization, civil liability system, etc.

Questioning the Retroactivity of Set-off ····· Zhang Baohua

Abstract: It seems that people have taken the retroactivity of set-off for granted. From the perspective of comparative law, however, set-off retroactivity is just one of many institutional choices. The historical origin of set-off retroactivity theory lies in the Pandectists' adherence and concession to the traditional idea that set-off only can be pleaded in court, as well as the compromise and even misunderstanding of Roman law texts. The functions of simplifying payment and equitable settlement of set-off cannot justify its retroactivity. Set-off retroactivity violates the principle of non-retroactivity of legal acts, damages transaction security, and cannot integrate itself with the rules of settlement, prescription and unjust enrichment, thus leading to negative system effects. Since the 1990s, there has been a legislative trend towards restricting, even abandoning, set-off retroactivity. The legislative mode in which set-off has only prospective effect is compatible with the legislative mode of set-off by declaration, has legitimacy in interest balance, is able to uphold transaction security, makes the entire system clear and concise and, therefore, should be adopted by China in the formulation of the Civil Code.

The Rule on the Breach-of-duty-type Abuse of Agency Power: A Discussion Centered on the Interpretation of Paragraph 1 Article 164 of the General Provisions of the Civil Law ····· Hu Donghai

Abstract: The four kinds of abuse of the agency power provided for in the General Provisions of the Civil Law all belong to the case that the juridical act is performed within the power, but deviates from the principal's interests. According to the theory that the agency power is separated from the basic legal relationship, the abuse of agency power in the agency relationship and the violation of obligation in the basic

legal relationship have different constitutive requirements and legal effects. Paragraph 1 Article 164 of the General Provisions of the Civil Law adjusts breach-of-duty type of abuse of agency power, and includes two essentials: the violation of duty on the part of the agent and non-good faith on the part of the opposite party. The duty of the agent is the obligation in the basic legal relationship whereas the opposite party's non-good faith means that he is fully aware of the violation of the duty or the violation is obvious to him. The legal effect of breach-of-duty type of abuse of agency power is that the agent loses the agency power and the validity of the juridical act is undetermined. In accordance with Paragraph 4 Article 171 of the General Provisions of the Civil Law, the agent in fault shall assume the contracting fault liability. If the opposite party is also in fault, the fault counteraction rule shall be applied. Just like the breach-of-duty-type abuse of agency power, malicious collusion agency, self-agency and bilateral agency also have the legal effect of unauthorized agency. In the sense of different types of abuse of agency power having the same legal effect, abuse of agency power is a unified concept.

Restructuring the System of Cross-Border Remote Collection of Electronic Evidence

……Liang Kun

Abstract: In the Internet era, more and more electronic data is stored overseas, thus posing a great challenge to criminal evidence collection both at the technical level and at the legal level. Over the past several years, China has taken the unilateral route of empowering investigative organs to have access to overseas data by such means as remote network inspection, technical investigation and so on. However, this procedural system is inconsistent not only with the Convention on Cybercrime and the national legislation of some other countries, but also with the position taken by China’s foreign affairs departments and its current criminal judicial assistance mechanism. According to the principle of state sovereignty and ideas of protection of rights and control of investigative power in the network environment, it’s necessary to strictly limit investigative organs’ power of cross-border access to electronic data by unilateral means. More specifically, the norms on investigative procedure with respect to cross-border remote access to data can continue to authorize online taking measures. Consent-based remote network inspection and search measures should be specially designed, and search without consent by technical means should be incorporated into technical investigation measures and their application should be strictly limited. On this basis, it is necessary for China to simplify the criminal judicial assistance mechanism or respond to the practical evidence collection demands with cross-border

data disclosure, and take it as an alternative way of restricting cross-border remote access to data.

Abstract: The UK and US both have established the interlocutory appeal system to review verdicts on the admissibility of evidence. Interlocutory appeals are conducive to correcting wrongful verdicts, saving judicial resources and ensuring the accuracy of judgments. In accordance with the principles of equality of arms and fair trial, both parties should have the right to file interlocutory appeals. In order to control the number of appeals and enhance the quality of interlocutory reviews, the UK and US adopt the systems of discretionary appeal and the requirement of leave to appeal, and set high thresholds for interlocutory appeals. The court can approve an application for the leave to appeal and hear the case only if it meets the necessary conditions. Interlocutory verdicts are final. Studying the functions of interlocutory appeals and analyzing their constructions serve to highlight the importance of the exclusion of illegally obtained evidence as early as possible. China's trial-centered reform can offer room for the exploration of the interlocutory appeals and provide supportive mechanisms. However, interlocutory appeals should never cause the abuse of right or delay of proceedings, or jeopardize the central position of trial.

Abstract: Compared with substantive issues of IP protection, IP customs enforcement has more direct impact on the expansion of openness and the realization of other goals of pilot FTZs. Meanwhile it is also faced with some special problems that involve the special characteristics of pilot FTZs. Goods in pilot FTZs are subject to different procedures and consequently have different statuses. The relevant customs measures should be applied in a manner that distinguishes different statuses of goods. Goods in transit, in temporary storage and under export procession are some of the typical examples of different statuses of goods closely related to special functions of pilot FTZs. On the one hand, we should make sure that they are covered by customs enforcement, while on the other hand, goods with special statuses should be distinguished from ordinary imports and exports, and exempted from such compulsory measures as detention. Only through such special measures can we achieve a balance between IP protection and promotion of openness in pilot FTZs.

China’s existing legal system lacks consideration of the special characteristics of pilot FTZs, as well as detailed rules on customs enforcement relating to goods with special status. The relevant customs regulations on IP protection should be modified to include the above-mentioned special measures, so as to enable them to better adapt to the special functions and goals of pilot FTZs.

The Subjective Elements of International Commercial Usages (Customs)

…… Song Yang

Abstract: The constituent elements of international commercial usages (customs) are important basic theoretical issues of international commercial law. It is generally believed that, in order to bind the relevant persons, usages (customs) need consistent and repetitive behavior as their objective element, and juris opinios as the subjective element. Scholars of international law, however, have insufficient understanding of the subjective elements of usages (customs) and vague definition of standards. This situation leads to the trend towards "de-subjectivization" in the identification of usages (customs). This misunderstanding blurs the boundaries between international commercial usages (customs) and non-binding general practice, gives too much discretion to judges, undermines the uniform effect of the application of legal rules, the reasonable expectations of the parties, and the predictability of judicial decisions. In view of this situation, China, while adhering to the theory of subjective elements of international commercial usages (customs), should introduce critical reflective attitude (CRA) into the litigation system by taking expert testimony as a standard tool of recognition of the binding force international commercial usages (customs). For these reasons, we need to construct an accurate theoretical system of international commercial usages (customs) with legal certainty.