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专　论

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ABSTRACTS

Metaphors of criminal procedures as "assembly line" or "relay race," as often invoked by academics, have resulted in considerable misunderstandings about the realistic relations among the public security authorities, the procuratorate system and the court system. The structural characteristics of criminal procedures, as summarized more accurately by Peng Zhen, is the "division of responsibilities, mutual collaboration and two-way checking." This policy narrative was formally devised first in 1954 and was meant to reform the previous structure where the public security authorities occupied the central place. Approximately in 1979 the nation's decision making authorities formed a different view on the nature of crimes taking place in the society as well as the proper mission of the judicial system. Relevant thoughts were subsequently incorporated into the constitution of 1982 and implemented through institutional changes to the judicial system in 1983. The new structure through rules and practices resulted in unintended consequences. Judicial reforms started in 2014 have sought to address deviations of the previous era by "returning to Peng Zhen."

Key Words The Structure of Criminal Procedures; Relations among the Public Security Authorities, the Procuratorate System and the Court System; Two-way Checking; Judicial Reform in 1983; Peng Zhen

Liu Zhong, Ph.D. in Law, Professor of Sun Yat-sen University Law School.

Innovation is the eternal theme of the human society, which means that the application of new knowledge to the development of the industry, and leads to major changes in the structure of market and society. At present, the practice of innovation represented by sharing economy has been widely concerned by the public. While bringing lot of benefits, the innovation also has brought lots of challenges to government regulation. On the basis of fully understanding the characteristic of innovation, the government should address the issues about whether and when to regulate, the choice of the mode of regulation, the selection of the regulation time as well as the evaluation of regulatory enforcement, so as to realize the good interaction between innovation and regulation. Viewing from the pespective of regulation, in addition to industry self-regulation, the government should develop the practice of experimental regulation. Only in this way can we find the balance between promoting innovation and protecting public safety, and form a pluralistic participation, cooperative orderly regulatory and governance system.

Key Words Sharing Economy; Innovation; Government Regulation; Self Regulation; Experimental Regulation

Gao Qinwei, Ph.D. in Law, Professor of Central University of Finance and Economics Law School.

Trust, consisting of both rational and emotional elements, plays a special role in the society, which is concerned with culture, morality, psychology and biology issues, and thus the research about trust embodies multi-discipline and multi-dimension. According to different standards, there are various classifications of trust. The trust of law can be defined as an important one of them Besides, from an abstract perspective, trust and law can be seen as formal and informal system respectively, to enhance the social integration and interaction, and they can work together well. In law, especially in private law, there are some mechanisms aiming at protecting trust, such as fiduciary duty in common law and *bona fides* in continental law. The former can be thought as a standard of conduct, while the latter is kind of blanket clause, and they can be studied via comparative way.

Key Words Trust; Private Law; Fiduciary Duty; *Bona fides*; Trust of Law

Xu Huageng, Ph.D. in Law, Assistant Professor of Law School, Capital University of Economics and Business.

The virtual property is a kind of property interest, which belongs to the category of valuable articles in criminal law. However, the offense against the virtual property cannot be necessarily convicted as the crime against property according to the positive Chinese Penal Code. The conception of valuable article in criminal law is not the only relevant element to decide, whether the offense against virtual property should be punished. The most important is the way of act, which cause the property damage of the victim. In light of the positive Chinese Penal Code transforming the virtual property into another account represent the most usual pattern of offending against the virtual property, which is hard to be explained as theft nor fraud. The expansive explanation of theft are against the principle *nullapoena sine lege*. The explanation of fraud runs counter to the current fraud doctrine. The conviction as the crime against the computer system is only an expedient measure in positive Penal Code. Therefore it is necessary to set up a new crime in Penal Code in order to deal with the case of causing property damage through misuse of the personal information of the other. However there is also some behavior pattern against virtual property, which can be convicted of the traditional crime against property such as fraud.

Key Words Virtual Property; Public or Private Valuable Articles; Theft; Fraud; Computer Fraud

Xu Lingbo, Ph.D. in Law, Associate Researcher of Nanjing University Law School and Member of Deutsch-Chinesisches Institut für Rechtswissenschaft.

In the case of pure economic loss or tortious performance of contract, no matter according to which type

of claim or liability, the judge should apply an unified set of criteria for foreseeability on the ground of the same nature of the infringed rights. The unified Foreseeability Rule can be concluded as: the degree and timing of foreseeability should be determined in line with the nature of the injured right; the injured party's ability to foresee can be invoked by judges to tune the intensity of the protection to the rights with the same nature; the principle of fair proportionality shall be recognized as the mutual base of allrules of foreseeability. The proximate cause in the tort law and the limitations in the contract law can be integrated so as to furnish the base and scope of the unified Foreseeability Rule.

Key Words Tortious Performance of Contract; Pure Economic Loss; Degree of Foreseeability; Timing of Foreseeability; Principle of Fair Proportionality

Pan Weilin, Ph.D. in Law, Judge Assistant of the NO. 1 Civil Division of the High People's Court of Guangxi Zhuang Autonomous Region.

Transboundary Pollution Disputes Resolution Based on Regional Cooperation Thinking *YE Bifeng* · 67 ·

Under the background of separation of central and local authority and financial power, local administrative organ is the subject of territorial interests. It must follow due process when making administrative actions and reach consensus with neighboring organs. To investigate pollution or damages or entrust identification unilaterally is suspected of being the judge in his own case. In civil procedures, courts shall strictly examine whether relevant administrative actions and investigations have followed regional consulting cooperation process. Except for being bound by regional cooperation rules, courts need to further strengthen judicial independence, gradually improve jurisdictional system under current judicial regime and equally treat both parties in litigation.

Key Words Rransboundary Pollution Disputes; Regional Cooperation; Judicial Independence; Due Process

Ye Bifeng, Ph.D. in Law, Director of Institute of Law of Shanghai Academy of Social Sciences; Professor of Law School, Shanghai Jiaotong University.

Discussion on the Execution Option of Secured Creditors *LIU Baoyu* · 77 ·

In the case of a creditor with a secured property, his creditor's rights must first be compensated by the secured property or be free to choose the debtor's unsecured property. There is a dispute between the theory and the legislation on the "First Doctrine" and "Alternative Doctrine". From the jurisprudence and existing regulations and judicial practice, we should adopt the stand of "Restrictive Alternative Doctrine": unless otherwise agreed by the parties, a secured creditor is free to exercise the option if no other creditor or the debtor's assets are sufficient to liquidate the whole debt. In the "special procedures for the realization of security interest cases" and the mere occurrence of "the parties agreed to the realization of security interests" should be limited to claim on the secured property. In the case of insolvency of the debtor, the insolvency liquidation procedure or participation in the distribution procedure shall be applied, and the right of option

shall be subject to strict conditions and shall not be freely exercised. When the guarantor is a third party other than the debtor, the creditor has no right to choose to execute the unsecured property of the third party.

Key Words Security Right; Secured Property; Liability Property; First Doctrine; Alternative Doctrine

Liu Baoyu, Ph.D. in Law, Professor of Beihang University Law School.

Discussion on the Execution Option of Secured Creditors *WU Xiaowen · 93 ·*

"Double-Fraud" refers to the phenomena where the perpetrator who had defrauded property by the first act, commits the second fraud with the property defrauded previously. Both the former and latter acts in "Double-Fraud" constitute crime of fraud. For instance, when the perpetrator had firstly swindled real estate guaranty and then swindled loans from the bank, the first act constitutes the crime of (contract) fraud because it swindled the property interests and caused losses in property to the guarantor; the second act constitutes the crime of loan fraud because it also belongs to the act of fraud and caused losses in loans to the bank. It should be contended that these two offenses do not fall into the categories of imaginative concurrent offenses, successive offenses. The latter act cannot be deemed as unpunishable behavior afterwards. But if these two crimes be punished jointly, it will lead to abnormal heavy punishment, so it is inappropriate. In fact, in the case of "Double-Fraud", the perpetrator aims to swindle loans from the bank and to swindle the real estate guaranty from the victim is just the means of the objective behavior. There is implicated relationshipbetween the means and the purpose, so the "Double-Fraud" should be punished as implicated offenses according to the felony punishment.

Key Words "Double-Fraud"; Object of Acts; Losses in Property; Account

Wu Xiaowen, Ph.D. in Law, Lecturer of Chinese Academy of Governance.

On the Application of International Civil and Commercial Treaties *LI Wang · 107 ·*

International treaties normally become legally effective in a domestic legal system through the approaches of "transformation" and "incorporation". Under the approach of "transformation", the international treaties concerning substantive law are transformed into parts of domestic law, which can be applied under the guidance of private international law. Under the approach of "incorporation", the application of the international treaties concerning substantive law could be divided into two models: "the mode of excluding private international law" and "the mode under the guidance of private international law". Both article142 (2) of the General Principles of the Civil Law of PRC and article 1.1 (b) of the CISG are "private inter-legal law", rules dealing with the application of different laws in a country, and these two can only be applied under the guidance of private international law.

Key Words International Civil and Commercial Treaties; Application of Treaties; Private International Law; Private Inter-legal Law

Li Wang, Professor of Tsinghua University Law School.

The rule of law practices in Jiangsu, Zhejiang and Guangdong provinces arouse scholars' disputes on the concept of the local rule of law. Scholars holding opposing views believe that sovereignty is the foundation of the modern rule of law concept, and the local is not an independent unit for the rule of law. Thus, the concept of local rule of law is disconfirmed. Scholars supporting the view put forward rule of law in advance theory, regional culture theory, regional competition theory and national trial and error theory from the subjective and objective motivating factors in the local rule of law development. But due to the absence of pointing out the power basis of local rule of law, these theories do not effectively justify the local rule of law concept. The governing power of the local is the legal basis of the concept of rule of law; the provisions of the local governing power in the constitution and legislation are institutional basis of the local rule of law; and the local governing autonomy dominated by the central is the social practical basis of the local rule of law. Governing autonomy theory helps to make sure the subject level of local rule of law concept, evaluate the local rule of law practices and reasonably define the relationship between the national rule of law and the local rule of law.

Key Words Local Rule of Law; Governing Autonomy; Relation between the Central and the Local; Power Basis; Justification of Concept

Ni Fei, Ph.D. in Law, Associate Professor of Law School of Nanjing Normal University, Research Fellow of Institute for Chinese Legal Modernization Studies.

According to the theory of system concurrence, there is an evaluation contradiction between fault in contracting and fraud, which should be resolved by recognizing "negligent fraud". This judgment and its solution should be re-examined in our country. For the relationship between withdrawal on ground of fraud and repeal on ground of fault in contracting, the three theories, namely competing claims, priority of fraud provision and compromise proposal, fail to provide complete solution, so that evaluation contradiction has not be eliminated fundamentally. As a response, the way of "negligent fraud" has obstacles on provision and neglects the applicability of the mistake theory, so it does not have enough persuasion. Under the background of interpretation theory, provision on significant misunderstanding can replace "negligent fraud" functionally to regulate negligent breach of information obligation. In order to achieve functional docking with provisions on fraud and significant misunderstanding, liability for fault in contracting should be perfected to damages for money in China. Relationship between fault in contracting and fraud should be function undertaking on effect. So the evaluation contradiction in the perspective of system concurrence can be eliminated.

Key Words Fault in Contracting; Fraud; Mistake; Significant Misunderstanding; Concurrence

Shang Lianjie, Ph.D. in Law, Research Fellow of Nanjing University Law School.

There are many different opinions about whether the necessary accomplice of necessary joint crime is punishable, such as the theory of lawmaker's concept and the theory of law's essence. And the judicial practice in our country has also different positions. Behind the practice and theory about necessary accomplice is actually a formal or an essential understanding of necessary joint crime clause. Even though in many occasions we can reasonably come to the answer by formal understanding of lawmaker's concept, but the punishability should not be just a question of formal logic reasoning. Most part of the theory of law's essence immersed in unlawfulness and guilt and ignored to study the punishability of necessary accomplice from the perspective of the degree of unlawfulness and guilt. The punishability of necessary accomplice shall be under the control of proportional principle, based on the constitutive elements of crime, divided into centrifugal crime and centripetal crime and so on, and concretely analysed.

Key Words Necessary Accomplice; Theory of Lawmaker's Concept; Theory of Law's Essence; Purpose of Norm

He Qingren, Ph.D. in Law, Associate Professor of Law School of China Youth University of Political Science.

The article comprehensively comments Article 48 of Contract law as well as the relevant provisions of "General Principles of Civil Law" and "General Provisions of Civil Code" regarding falsus procurator. In case of apparent authority, the counter party is not entitled to apply the relevant provisions regarding unauthorized agency. The ratification is not a subsequent authorization but a subsequent approval to the legal transaction conducted by the falsus procurator. The retroactive effect of ratification is subject to several exceptions. The liability of the falsus procuratoris a kind of guaranty liability the prerequisite and content of which is independent on the fault of the falsus procurator. The content of the liability is the performance, or compensation of expectation damages or reliance damages, subject to the choice by the counter party. Should the counter party knew or should have known the unauthorized agency the liability of the falsus procuratoris reduced or released accordingly.

Key Words Unauthorized Agency; Ratification; Liability of the Falsus Procurator; Right of Demanding for Declaration; Right of Withdrawal

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