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主题研讨：中央与地方关系视域下的当代中国法治实践

专　论

视　点

◎ 民法典编纂研究 ◎

评　注

ABSTRACTS

From the perspective of central-local relations, there is an obvious "Chinese characteristics" regarding the *de jure* allocation of legislative and judicial powers and their *de facto* practice. That is, while the national legislature and supreme court have an unchallengeably dominating position in the Chinese legal system on books, local practices are no less influential in action. The authors conceptualize this institutional phenomenon as "federalist spectrum in a unitary background" of the Chinese legal system and examine the concept with an empirical study on labor contract law. The empirical study finds that there are enormous local labor contract laws and rules, which are significantly different from or even conflicting with national laws. In particular, regression analysis on 4,175 cases adjudicated by courts in Beijing, Guangzhou, and Shanghai confirms that localities have different positions in protecting employee rights, which is statistically significant.

Key Words Relationship between Central and Local Governments; Unitary System; Federalism; Labor Contract Law; Empirical Legal Studies

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In the process of contemporary China's state governance, the status quo of ultra-large state governance, centralized unitary system and 'strong state, weak society' structure place China's state governance under a great pressure. In order to remedy the situation caused by the risk of rule, governance cost and quality pressure, administrative subcontract system as a feasible institutional arrangement has been introduced in actuality. Accordingly, determined by administrative subcontract system, the local rule of law in contemporary China belongs to a unique contracted managerial rule of law, lying between deputy rule of law and autonomous rule of law, manifesting its feature in the domain of incentive mechanism, central government control degree and dispute settlement system. The contracted managerial rule of law has double effects, i. e. on one hand, it stimulates local government to construct rule of law, go in for various kinds of local legal experiment and so on, and on the other hand, it brings about a series of problems such as selective rights protection, speculative local legal experiment, opportunistic index evaluation coping strategy and the like. Furthermore, the future transition of contracted managerial rule of law whose prospect and direction are uncertain depends on the possible change of administrative subcontract system.

Key Words Local Rule of Law; Relationship between Central and Local Governments; State Governance; Administrative Subcontract System; Contracted Managerial Rule of Law

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Due to the diversities of facts in our lives, the nature and openness of the fundamental rights, the

questions of concurrence of fundamental rights often arise. The theory of concurrence of fundamental rights intends not only to guarantee individual's fundamental rights but also to oblige the state to justify its interferences in such rights. It plays an important role in the doctrines of fundamental rights. However, the scholars do not pay enough attentions to it until the theoretical focus began to change recently. After inquiring into the German theories and practices, one might find that the principle of German approach to resolve such problems is open to consideration case by case, moreover, in the three-steps review framework of liberal rights, the resolution of such problem has been pushed forward, it means that the approach to reduce the number of fundamental rights involved has been replaced with the approach of weighting. In China, a theory of concurrence of fundamental rights might be improved by the development of constitutional doctrines.

Key Words Concurrence of Fundamental Rights; Most Relevant-doctrine; Strengthen of Fundamental Rights; Fundamental Rights Doctrine

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On the Fundamental Paradigm of Anti-unfair Competition Law *KONG Xiangjun · 50 ·*

The fundamental paradigm of anti-unfair competition law concerns the philosophies, values, patterns and criteria of defining what constitutes anti-unfair competition, which can be summarized as so-called "three perspectives", including competition perspective, impairment perspective, and right perspective. It can also be achieved by further weighing the interests concerning competitive behaviors. This "3 + 1" judgement pattern, namely "three perspectives" plus benefits measurement assessing the rationality of competitive behaviors, constitutes fundamental dimension of anti-competition law. Among "3 + 1" judgement pattern, "three perspectives" are philosophical footholds, and benefits measurement is the path to fulfillment, so "3 + 1" pattern constitutes the unique paradigm of assessing the rationality of competitive behaviors. The assessment of anti-unfair competition should adhere to dynamic competition perspective, neutrality of impairment and neutrality of rights. Further, the assessment also needs to concentrate on the rationality of behaviors rather than the protection of rights, and meanwhile, to do interests measurement by referring multi-factors to decide the rationality of competitive behaviors.

Key Words Anti-unfair Competition; Dynamic Competition Perspective; Neutrality of Rights; Neutrality of Impairment Interests Measurement

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On the Basic Definition of the Right to Sue or Be Sued *HUANG Zhongshun · 68 ·*

The mainstream regions of the world all protect citizens' right to access to justice on the constitutional level and right to sue or be sued on the civil procedure law level. On the basis of distinguishing between the right to access to justice and right to sue or be sued, standing of the litigants, litigation interest, substantive right and dispute management right, this paper defines right to sue or be sued as the right for the subject of dispute management right who has the necessity and the actual effect in lawsuit to sue or be sued in his own name with the protection on his own substantive rights and interests or others' in a realistic manner or in preparation.

Key Words Right to Sue or Be Sued; Litigation Right; Standing; Litigation Interest; Disputes Administration Right

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Three authorities competing for law enforcement of Anti-monopoly law is the outcome of existing bureaucratic structure. Given the concerns of conflict and slack of enforcement, both academy and practice societies suggest establishing an unified anti-monopoly law enforcement institute. The competition of anti-monopoly authorities changed the key factors of achieving a goal in a bureaucratic organization. The competition among authorities generates more comparable information and distinguishes the monopoly authority from passive supervision and active enforcement. Based on the analysis of anti-monopoly law enforcement, the competition of law enforcement solves the certain issues of current law enforcement, e. g. low level in the bureaucratic system and limited resources. It performs well in terms of explicit and implicit indicators. Different from theoretic hypothesis, the impacts of competition in law enforcement are mainly caused by rigid authoritativeness. Competition in law enforcement under relatively loose system constraints and press caused by changing conclusion by a court, it may lead to recession of enforcement or compelling enforcement. In order to deal with it, it is important to promote the transparency of law enforcement and enhance civil procedure law of anti-monopoly.

Key Words Competition for Law Enforcement Authorities; Information; Incentive; Rigid Authoritativeness; Institution Design

Li Jian, Ph.D. in Law, Associate Professor of Shanghai Jiaotong Koguan Law School.

French legal sociology has been developed greatly after World War II, and plays an important role in the academic world with its distinctive features. Comparing to the Law and Society movement in the US, its theoretical paradigms and methodologies are more complex and more diverse. On the other hand, it also shows some certain assimilation tendencies. Especially, more and more researches pay attention to the relations between law and politics. On the basis of analysis on these characteristics, this article argues that, as an external perspective of law, the development of legal sociology is highly contextualist; its distance to law often depends on the perfection degree of legal system and the closure degree of legal studies in one country of specific period. Compared with the American tradition, French legal sociology is closer to and more suitable for the Chinese circumstance. Therefore, the study on French legal sociology can be a beneficial reference to the hot academic topics in recent years-the paradigm disputes of legal studies, as well as the disciplinary orientation of legal sociology in China.

Key Words French Legal Sociology; Legal Formalism; Law and Society Movement; Political Sociology of Law; External Perspective of Law

Yang Fan, Ph.D., Assistant Professor of Jilin University Law School.

The legal rules of *obligatio civilis* such as unjust enrichment and *negotiorum gestio*, were briefly provided in General Principles of Civil Law, and need to be further refined, supplemented and perfected in Specific Parts of Civil Code. As Specific Parts of Civil Codeof China will not include General Provisions of Obli-

gations, it shall be considered to make quasi-contracts stipulated in Part of Contracts as a separate chapter, in which to regulate centrally *negotiorum gestio*, unjust enrichment and other *obligatio civilis*, in order to realize the scientific nature of the civilrules. When the concept of quasi-contractsis introduced, it's necessary to further clarify its connotation, determine its system arrangement in Part of Contracts and its types which shall be contained, and stipulate the rules of Contract Law referring to quasi-contracts and other related issues.

Key Words Civil Code; Quasi-contracts; Unjust Enrichment; *Negotiorum Gestio*; General Provisions of Obligations

Wang Liming, Ph.D. in Law, Research Fellow of Civil and Commercial Law Institute of Renmin University of China, Professor Renmin University of China of Law School.

On the Trace Effect of a Hypotheca and its Mitigation *ZOU Hailin · 128 ·*

The institutional logic of Article 191 of Property Law is to mitigate the trace effect of a hypotheca by restricting the transfer of collateral. The transfer of collateral is limited so as to protect the interests of the holder of a hypotheca, which gives rise to the objective effect of deterioration of the the provider of a hypotheca (the acquirer of the collateral) on the system structure. This is difficult to connect with the system of mitigating the trace effect of a hypotheca in favor of the provider of a hypotheca. In theory and institutional structure, it is also difficult to find the balance between restricting the transfer of collateral and mitigatingthe trace effect of a hypotheca. In Chinese civil code, it should realize to mitigate the trace effect of a hypotheca by the creation of the claim to remove the hypotheca of the provider of a hypotheca, the claim to subrogate of the holder of a hypotheca by paying off debts, and the claim to remove the hypotheca of the acquirer of the collateral by subrogated payment, based on the free transfer of the collateraland the trace effect of a hypotheca.

Key Words Hypotheca; Trace Effect; Transfer of Collateral; Claim to Remove the Hypotheca

Zou Hailin, Ph.D. in Law, Research Fellow of Institute of Law of Chinese Academy of Social Sciences.

Institutional Setup and Functions in Procuratorates *LONG Zongzhi · 141 ·*

The institutional setup in procuratorates has two goals: one is to improve efficiency through division of functions; the other one is for better direction and supervision by procuratorates at higher levels. In institutional setup, factors such as judicial accountability, amount of cases and number of prosecutors, quality of work, daily management and coordination between different levels of procuratorates should be considered. In addition, we need to pay attention to the stability and uniformity of institutions. The "giant department" reform suits procuratorates which have small amount of cases and less prosecutors, especially those of the lowest level. The separation of prosecution from is better form implementation of supervision, but actually it's hard to completely separate the two functions. Moreover, after the transfer of investigative power, the supervisory function needs to be supported by the power of arrest approval and the power of prosecution. The combination of arrest approval department and the prosecution department can streamline institutions and improve efficiency, and strengthen the direction and supervision on investigation. However, since arrest approval and prosecution have different qualities, the combination of the two departments will break the balance between different departments. Except in juvenile cases, we should be cautious in the combination of arrest approval and prosecution in other cases. The internal institutional setup of procuratorates should be adjusted according to the reform of our national supervisory organs.

Key Words Procuratorates; Internal Institutions; Integrated System; Judicial Accountability; Uniformity

Long Zongzhi, Ph.D. in Law, Professor of Sichuan University Law School.

Criminal law provides for conviction and punishment in accordance with intentional injury and intentional homicide if the perpetrators are injured, killed and illegally detained using violence, torture, violence, evidence, non-legal fiduciary, nor does it pay attention to the provisions, but to reduce the burden of proof of the prosecution of the legal presumption, resulting in the presumption that the perpetrators causing serious injury (disability) have intentional intentions and the perpetrators causing death have intentional intentions. Respectively, constitute a crime of intentional assault, intentional homicide; other members of the crime involved in the act of aggravating the effect of the work, presumably to set up intentional injury, intentional homicide. Presumption of proof of the effect of the burden of proof, the defender refuses to assume the full sense of the burden of proof, and its rebuttal proof should be convincing.

Key Words Crime of Intentional Injury; Crime of Intentional Homicide; Legal Provisions; Legal Fiction; Attention Regulation; Transitional Form of Crimes

Liu Zhixiong, Ph.D. in Law, Professor of Law School of Zhongnan Minzu University.

In June, 2014, the 12th National People's Congress authorized the Supreme People's Court and the Supreme People's Procuratorate to implement the pilot project on fast-track sentencing in criminal procedure in 18 cities. The pilot project plays a critical role in formulating multiple criminal processes and enhancing the reform of criminal procedure centered on trial. The questionnaire collected from the pilot cities reveals that the fast-track sentencing process is greatly efficient and has been acknowledged by the overwhelming majority of participants in the process. Meanwhile, the questionnaire shows that there are weaknesses in ruling on the field of cases, the guilty plea hearing process, defense counsel, and sentencing negotiation. In the legislation on the fast-track sentencing process in the future, the lawmaker should consider to enlarge the field of the cases entered the process, constructing the checking proceedings in the voluntariness of guilty plea, and making guidelines of detail rules in evidence and so on.

Key Words Fast-track Sentencing Process; Questionnaire; Empirical Research

Li Bensen, Ph.D. in Law, Professor of Procedural Law Research Institute of China University of Law and Political Scierile.

The recognition of obligor's responsibility for assistant's wrong in Chinese civil law is the key for independence of Liability for *Culpa in Contrahendo* from tort liability. Article 42 of Contract Law is applicable to contract subject to approval and valid contract, but not to precontract. The core characteristic of liability for *Culpa in Contrahendo* is that breach of duty takes place *in Contrahendo*. In practice inherent interest is not, expectant interest is sometimes, protected through article 42 of Contract Law.

Key Words Culpa in Contrahendo; Precontract; Contract Subject to Approval; Breach of Duty in Contrahendo

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