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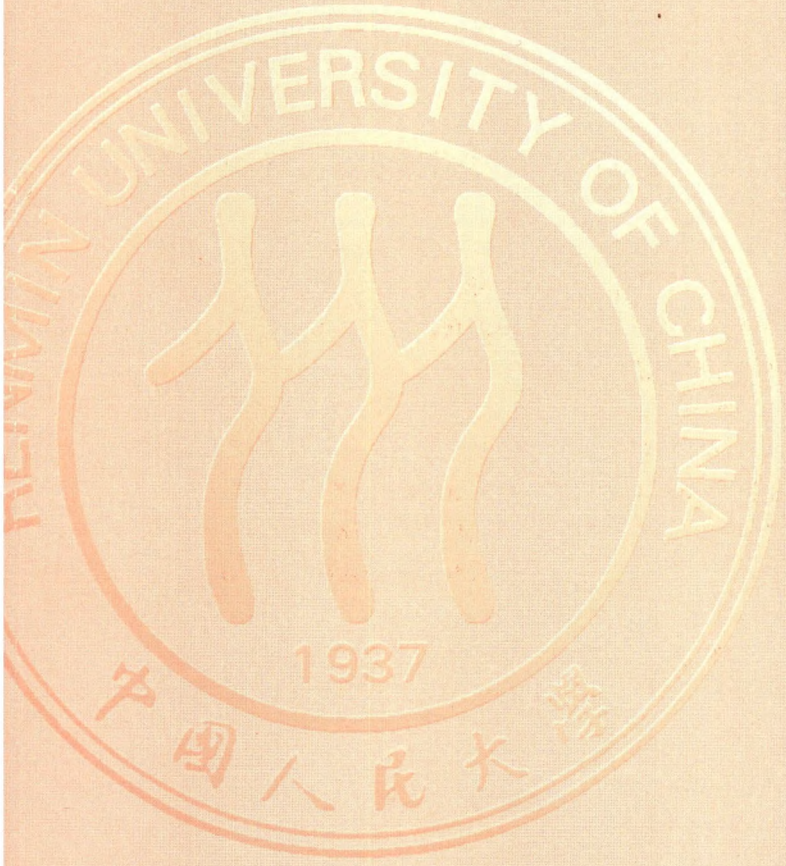

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主题研讨：构建中国特色法学知识体系和话语体系（二）

专　论

视　点

◎ 民法典编纂研究 ◎

评　注

ABSTRACTS

To analyse the structual charecteristics and problematic situation of the traditional discourse and legal argumentation in China, from the dual viewpoint of "conception of the good" and "conception of right or justice", it is possible to find the startpoint of comparability in reciprocal justice and the demonstration for mutual recognition, and to explore the possibility of dialogue between Chinese experience and the theories on legal argumentation. Doing researches on the legal interpretative strategies with Chinese style, the developmental trend of the mode of legal communication and the weak link for improvement, with the newly issued guidance opinion of the Supreme People's Court on strenthening legal interpretation and legal reasoning for the material, we can find many interesting things for theoretical explanation.

Key Words Legal Argumentation; Mutual Recognition; Legal Reasoning; Legal Interpretation; Interpretive Community

Ji Weidong, Ph.D. in Law, Chair Professor of Shanghai JiaoTong University KoGuan Law School.

The current criminal jurisprudence of China, which originates from the Soviet criminal jurisprudence and develops itself in the social transition period, has the distinct transition characteristic. Aiming at the development of dogmatics, the transitional criminal jurisprudence has achieved great progress in systematic thinking. Based on this, the situation of debate between legal schools has been taking shape preliminarily. The main contribution of transitional criminal jurisprudence is to put forward a variety of alternative theories about hierarchical crime theory, to propel the substantive thinking, to adopt the normative thinking widely, and to accept the methodology of objective imputation theory. The key factors that promote the formation of transitional criminal jurisprudence include the application of comparative research method, the school-consciousness of scholars, the concern of social reality, and so on. To put forward the concept of transitional criminal jurisprudence, on one hand, it is necessary to emphasize that theoretical research should never return to the old road of Soviet criminal jurisprudence, which regards the theory of four elements as the core. On the other hand, the limitation of transitional criminal jurisprudence itself should be brought out so that to urge scholars to remain modest and give up the illusion that they have controlled the truth. This also means that different academic views should be coexisted for a very long time. The "restarting" of transitional criminal jurisprudence cannot reject the problem consciousness and thinking method of legal philosophy, legal sociology and social science of law. The idea of "criminal integration" should be upheld to facilitate the integration of disciplines. We should look around the world to do a good job of comparative research. After the criminal jurisprudence has acquired a good academic foundation, scholars should maintain a more calm, relaxed and mature state of mind, being careful to prevent the absolutization of academic views, to prevent the simplistic

and diagrammatic opposition, to avoid impulsion and "choose sides" by intuition.

Key Words Transitional Criminal Jurisprudence; Systematic Thinking; Normative Thinking; Dogmatics; Comparative Research

Zhou Guangquan, Ph.D. in Law, Professor of Tsinghua University Law School.

Political, National, Systematic and Chinese Civil Code *XU Zhongyuan · 32 ·*

The system constitutes the life of the Civil Code, and the political nature is the inevitable way to achieve the systematization of the Civil Code. Nationality constitutes the essence of the Civil Code, and the essence of politics is to realize the nationality of the Civil Code. It requires the systematic method to construct the national content, in the same way, the national content determines the form that the system should take. The policy is the implementation factor of the national and political code, but it dissolves the systemic nature of the Civil Code. As a policy of political content of the Civil Code, it is necessary to follow the internal and external systems of the Civil Code. The "General Principles of Civil Law" as the general principle of China's future civil code, based on political advancement constituted the mandatory system of civil law and commercial law, and all the Civil Code's subtitles. The political nature of the compilation of the Civil Code guarantees the unification of the path and political correctness; the systematic nature guarantees the scientific system and rigorous structure, while the nationality realizes the "localization" of the regulation and the "Chineseness" of the system. Political, systematic, and national practice pave the path and norm setting of the Civil Code, guarantee the "Road Confidence, Theoretical Self-confidence, Institutional Self-confidence, and Cultural Self-confidence", and meanwhile establish directions for the implementation of the Chinese civil law system and the theoretical system of civil law. This is the direction of the political nature of the compilation of the Chinese Civil Code, and is the purpose of the systematic and also is the inevitable manifestation of the nationality, at the same time, it should be the basic direction of Chinese scholars' efforts in their exploring processes of relevant theoretical.

Key Words Civil Code; Political; Nationality; Systematic

Xu Zhongyuan, Ph.D. in Law, Professor of Law School of Central South University.

Systematic Launch of the Precedent System with Chinese Characteristics *TANG Wenping · 49 ·*

The guiding cases system has descended to a vassal of the judicial interpretation system, so that it's unable to play a systematic role which the substantial precedent system should have played in the process of building China into a Rule of Law State. Substantial precedent system could have shouldered the responsibility to make the basic construction valuable for the system of building the country into a Rule of Law State on the ' human' and ' legal' level. It's in an immense communication scene with a space-time tunnel pattern, and becomes the carrier of local living law, which is the basis of the precedenttheory—' double general theory of mutual competition and mutual aid mechanism' , in which political authority and intelligence—knowledge authority can be compatible, promoting ' the unity of human and law' of the legal professional community. In addition, it connects the interest claims and legal mentality of the parties in pending cases with those of the people in ancient and modern times. It not only provides ' front sight' for the behaviors of legal community on the human level, but also put the ' ballast stone' into the gradual development of law on the legal level. Be-

sides, it realizes the dialectical unity of the stability and evolutionary power of the law by making use of the precedent sequence whose form is: ' ordinary precedent-deterministic precedent-persistent precedent-Custom' . However, at least, the guiding cases system has advantages of avoiding ' randomness and slowness' , etc. It can be the starting point for the systematic launch of the precedent system with Chinese characteristics. At the time when a series of institutional "energy" is temporarily lacking, the academically-led construction of case bank can still launch a system, forcing the re-presence of legal trials and the consciousness of precedent.

Key Words Case-guiding System; Judicial Interpretation System; Precedent System with Chinese Characteristics; Double General Theory of Mutual Competition and Mutual Aid Mechanism; Systematic Theory

Tang Wenping, Ph.D. in Law, Professor of Jinan University Law School.

Internal Administrative Law as a Guarantee of the Legality of Administrative Acts *ZHANG Jiansheng* · 66 ·

Since the 20th century, there have been two major changes in the administrative law-from the judicial-oriented to the administrative-oriented, from the administrative law that faces the exterior to the administrative law that also faces the interior. Internal administrative law is a supporting system for the executive authorities to exercise their powers. Internal administrative law, which guarantees the legality of administrative acts, is the same as the external administrative law, which aims at controlling power. The institutional basis of the internal administrative law guarantee structure is constituted by three major administrative legal relationships, namely, the administrative organs-administrative agencies, administrative organs-administrative organs and administrative organs-staff members of administrative organs. The type structure of the internal administrative law guarantee structure is divided into internalization and externalization of the internal act law effect. The ways in which internal administrative law guarantees the legality of administrative acts mainly include unfavorable decisions, obligations and control measures.

Key Words Internal Administrative Law; External Administrative Law; Internal Act; the Legality of Administrative Act

Zhang Jiansheng, Ph.D. in Law, Professor of Zhejiang University Guanghua Law School.

The Criminal Interpretation Conclusion of the Crime of Duty Encroachment and the Jurisprudence Explanation *WEI Dong* · 81 ·

The criminal interpretation of the crime of duty encroachment should adhere to the position of "comprehensive means theory" and "the affirmative theory of duty convenience". The crime of duty encroachment means unit personnel illegally possess unit's property by means of embezzle, steal, defraud and other similar methods, taking the advantage of occupation or duty convenience. Some behaviors of duty encroachmenst and corruption are not convictable, due to the high standards of incrimination and punishment stipulated in the text of Interpretation of the Supreme People's Court. However, the objective existence of this situation cannot be the reason of denying "the comprehensive means theory" and converting to the theory of "the sole means of encroachment" and "the substantive interpretation of the crime". While some scholars adopt the theory of "comprehensive means", they advocate that theft (or fraud) type of duty embezzlement constitutesconcurrence

of articles of law betweenduty embezzlement crime and theft (or fraud) crime, and conclude that the act should be regarded as theft (or fraud) crime on the basis of "the great concurrence theory", "absolute treatment rules of the strict law superior to the gentle law" and "relative treatment rules of the strict law superior to the gentle law". These views have faults on the treatment rules of concurrence theory, which are difficult to obtain legitimacy.

Key Words Crime of Duty Cncroachment; Comprehensive Means Theory; Concurrence of Articles of Law; Judicial Justice

Wei Dong, Ph.D. in Law, Professor of Sichuan University Law School.

On Kang Youwei's Constitutional View before the 1898 Coup and His Status in the Constitutional History *ZHOU Wei · 96 ·*

Kang Youwei's initial use of constitutional words in the Japanese Political Reform Examination and the Japanese Bibliographic Records in 1897 indicates that his use of constitutional words originated directly from Japan and he understood constitutional concepts in a modern sense. However, Kang Youwei regarded the Spring and Autumn Period as the ancient Chinese constitution, and pays attention to integrating the imported "constitution" into traditional culture, giving consideration to the openness and subjectivity of culture. Kang Youwei actively advocated the concept of constitution, passed it on to his disciples, disseminated it to the society and presented it to the court. Kang Youwei surpassed contemporary scholars and newspapers interms of the frequency of use of constitutional words, the level of research on constitutional issues, the scope of dissemination of constitutional concepts and the Sinicization of constitutional science. However, he could not possibly put forward the idea of establishing a Constitution during the Reform Movement of 1898.

Key Words *Kang Youwei*; the 1898 Coup; Constitution; Chinization; *Chun Qiu*

Zhou Wei, Lecturer of Zhengzhou University Law School, Doctoral Candidate of Renmin University of China Law School.

Explanation and Application of Evidence in General Provisions of Civil Law *WANG Lei · 111 ·*

There are large number of presumptions of civil legal facts in the general provisions of civil law, which is the distinctive characteristic of the evidence in this law. Presumptions of civil legal facts about the time of birth, death and declaration of death are prescribed in general provisions of civil law. Fictitious provision of residence is prescribed in this law. The general provisions of civil Law emphasizes the appearance of the legal person and the protection of the person in good faith. Legal person's residence, representative and other matters cannot against good will counterparts when they are inconsistent with the registration matters. He who proposes the presence of defects of juridical acts, shall bear the burden of proof of the existence of the corresponding defects. When resolving consumer fraud disputes, we should explain appropriate evidence to properly reduce the consumer's responsibility for the factsof the burden of fraud. The facts that resulting in the occurrence, alteration, elimination or restriction of civil rights should be borne by the proposer, which is the general civil right norm of the burden of proof. The presumption and burden of inversion of civil rights are the statutory exceptions to the distribution of burden of proof.

Key Words Presumptions of Civil Legal Facts; Burden of Proof; General Provisions of Civil Law

Wang Lei, Ph.D. in Law, Associate Professor of China University of Political Science and Law.

Premature Death of the Right of Alteration in China General Provisions of Civil Law
——On the Autonomous of China Law Development *NIE Weifeng · 122 ·*

The right of alteration was suddenly abolished without reason in China General Provisions of the Civil Law, which has long existed in China law system since general principles of civil law to contract law. There are very serious shortages in the institution system of this right, and only a few scholar have paid attention to this right in its own history. The different parties have different interest requisitions when there are defects in the declaration of will or imbalance in the effect of juristic act, and only the right of revocation could not replace the right of alteration to achieve its own aims. In Chinese civil law system the right of alteration has been justifiably located, and the correct choice of China Civil Law is to deploy the right of revocation based on the different types of interest requisitions, which also is the demand of the autonomy of Chinese legal development. In the view of legislation, the right of alteration should be maintained and perfected in the contract law part of China Civil Law, even to revise directly the corresponding rules. In the view of explanation, the right of alteration could continue to exist in future judicial practice by means of judicial explanation or legal dogmatics.

Key Words Right of Alteration; Right of Revocation; Declaration of Will; Juristic Act; Interest Requisitions

Nie Weifeng, Ph.D. in Manangement, Associate Professor of Xi'an Jiaotong University Law School.

On the Unification of Rules of Party Disciplinary and Procuratorial Investigations *DENG Jinting · 135 ·*

The establishment of the standard of handling cases by the supervisory commission is faced with the selection and unification of the two sets of apparently conflicting standards. There are four possible schemes. This article argues for Scheme 2 from the nature of the power of supervision and investigation, the requirements of China's construction under the rule of law, the efficiency of the program, the necessity of reform and the realistic possibility, which is that in the initial investigation and case filing stage, the former procuratorial organ's case handling standards should be the basis for new standards, and the places that conflict with the discipline commission's case handling standards should be coordinated through intentional gap and limited exceptions. In the specific implementation of plan 2, the formal extension interpretation of legal gap should not be used to evade the original legal norms, but should adhere to the principle of the original legal norms, unless there is a clear special provision by the state authority. The value and meaning behind the conflict rules should be taken into account comprehensively to find a new balance point and establish a standard for supervision and handling cases.

Key Words Supervisory Investigation; Anticorruption Reform; Party Disciplinary Investigation; Duty Crime Investigation

Deng Jinting, Ph.D. in Law, Associate Professor of Criminal Jurisprudence Research Center of Renmin University of China.

The sequence of intercross of criminal and civil cases are not dependent on how the civil and criminal cases are related. Type division on intercross of penal and civil cases can not help to solve the problem but just add confusion. We should solve the problem under the civil procedure rule of suspension, make a clear definition of the "necessity" to suspension and limit the scope of priority of penal cases. In order to make a clear definition of the "necessity", the effect of criminal judgements, the different aims of civil and criminal cases, and the different rules on proof should be taken into account.

Key Words Intercross of Penal and Civil Cases; Priority of Criminal Cases; Paralell of Penal and Civil Cases; Effect of Criminal Judgements

Ji Gefei, Ph.D. in Law, Prefessor of Civil, Commercial and Economic Law School, CUPL.

The divorce relief system refers to remedies provided by the law to the party who got damaged from divorce or whose life became difficult in divorce. In order to solve the problem of narrow scope and difficult applying of the current law relief, Marriage and Family Copy in Civil Code should be based on the continuation of the existing relief framework, relying on the reform of the family trial system. The divorce relief system should be reconstructedwith the mainstay of division of marital property, the supplement of economic compensation for divorce and fallback provisions of economic assistance.

Key Words Divorce Relief; Division of Property; Economic Compensation; Economic Assistance

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The latter part of Article 40 of the *Contract Law* stipulates the criteria for examining the validity of standard terms. The way to conclude a contract using standard terms is common and widespread, and the evaluation criteria for its effectiveness should be determined by the legislator in advance, rather than judges. Such legislative value guidance is embodied in specific norms (dispositive rules). The important criterion for the judgment of whether "to follow the principle of fairness to determine the rights and obligations between the parties" lies in the extent to which the standard terms and the dispositive rules and the inherent justice are differed. In addition, the standard terms have an important role to supplement the format contract. In the absence of a dispositive rule, the evaluation criteria for its effectiveness are factors such as the principle of equal value, risk control factors, insurance protection factors, and direct third party benefits. These are important factors to determine whether the terms limit the important rights or obligations in accordance with the nature of the contract, so that the purpose of the contract cannot be achieved. In this case, the standard terms in question will than be found to be invalid.

Key Words Standard Terms; Effectiveness Review; Fairness Principle; Dispositive Rules; Balance of Rights and Obligations

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