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主题研讨：构建中国特色法学知识体系、话语体系和法治体系（四）

专　论

视　点

◎ 民法典编纂研究 ◎

评　注

ABSTRACTS

Criminal law and criminal law theory are the products of the times, and their development is always of the nature of the era. The propositions of the 19th National Congress on "socialism with Chinese characteristics entering a new era" and "profound changes in major social contradictions in the new era" have brought about changes in social values. The new era is also the high-tech era of human society. Risk society, information society and globalization society are the common characteristics of the new era and the high-tech era. In order to meet the new needs of the people's better life in the new era, active and prudent should be the basic position of the development of criminal law in the new era. On the one hand, the criminal law should face up to the new changes brought by the new era to the connotation and extension of the protection of legal interests by the traditional criminal law, actively integrate into the process of modernization and legalization of social governance, timely adjust the scope and intensity of the regulation through criminal law; on the other hand, the development of criminal law cannot completely be free from the restraint of traditional liberal criminal law principles. Efforts should be made to achieve a new balance and sound development of the functions of criminal law in human right guarantee and the legal interest protection. Correspondingly, the new era provides a broader dimension for the innovation and development of criminal law theory. While adhering to the basic principles and concepts of criminal law, criminal law theory needs to open a new perspective and reshape the conception and system of criminal law theory.

Key Words New Era; Modest View of Criminal Law; Active View of Criminal Law; Active and Prudent Position of Criminal Law Development

Sun Guoxiang, Professor of Nanjing University Law School.

Guided by the legal idea of "standardizing government revenue and expenditure behavior and strengthening budget constraint", the budget laws show the normative style of public law characterized by emphasizing power control through their core mechanism and normative structure. However for responding to the increasingly complex social needs, there have been growing signs of functionalism trend in the administration process of the laws, whether from the perspective of legal idea or the implementation mechanism, in order to support performing public functions. Along with this new trend, the balanced systems established by legislations have been broken because of the public policy orientation and the result orientation, and then face with multiple risks such as the constant expansion of expenditure and the inadequacy of budget control, the preference for result of budget performance and the lack of reflection on the standardization systems, the fragmentation of reforms of normative structure and the lack of functional integration. It is necessary to pay attention to the foregoing limitations of the change and get rid of unilateral budgetary control thinking or pragmatism of the legal tool view, taking the fiscal sustainable legal guarantee as the goal to reconstruct the core regulatory mechanism of budgetary laws, build a comprehensive and multi – dimensional normative structure, and

achieve a new balance between budgetary control and responding to social and public needs.

Key Words Budgetary Law; Normativelism; Functionalism; Fiscal Sustainability

Chen Zhi, Ph.D. in Law, Professor of Southwest University of Political Science and Law.

***Between the Scientific Nature and Practicality*:**
On the Disciplinary Orientation and Nature of Legal Theory *PAN Weijiang · 30 ·*

Recently legal theory researches are under critiques as lack of scientific nature, lack of practicality and being of redundant compared to legal Dogmatic. People don't believe that legal theory can guide the development of legal dogmatic and the practice of law. Some theory is developed to save the legal theory. The theory of "use of uselessness" adheres to the scientific nature of legal theory and props up the practicality of legal theory. Practice participation mode divides legal theory into two parts, one is normative theory, the other is meta-legal theory; the former adheres to practicality of legal theory, and the latter adheres the scientific nature of legal theory. But it can't defend the practicality of meta-legal theory and the scientific nature of normative theory. A new theory views legal theory as structural couple between science system and legal system, which can explain the relation between scientific nature and practicality of legal theory. Legal theory is inside legal system as a subsystem of it, anatagous to the case system and legal dogmatic system. The task of legal theory is to work as self-describing and self-reflection of legal system, so to guide the legal system development in the course of co-evolution of legal system and society.

Key Words Legal Theory; Scientific Nature; Practicality; Legal System; Structural Couple

Pan Weijiang, Ph.D. in Law, Associate Professor of Beihang University Law School.

On the Argument of Case Facts in Judicial Process *WU Fei · 45 ·*

The case facts are not only the description of the existence of facts, but also the evaluation of the existence of facts. The fact-affirming in judicial process can be theoretically divided into fact-finding and fact-argument. The process of fact-finding is deductive and judgmental, which helps the judge to get the result of fact-affirming. The context of fact-argument is retrospective, during which the judge should form inner confidence with careful review of the process of finding facts and inspection of either the facts upon evidence or adjudicative facts. As to the justification of case facts, the fact-affirming is based on the real reasons. The argument of case facts should be undoubted, economical, narrative coherence and be effectively justified. There are different kinds of model in the arguments of case fact which is defeasible. With effective argumentation, the adjudicative facts can be as close to the objective authenticity and the Truth as possible.

Key Words Judicial Judgment; Case Facts; Fact-argument; Narrative Coherence; Argument Model

Wu Fei, Ph.D. in Law, Associate Professor of Shandong University (Weihai) Law School.

Critique on the Theory of Relativity of Capacity for Rights *ZHENG Xiaojian · 60 ·*

The German scholar Fabricius has made a substantial reform of the traditional concept of capacity for rights, and has systematically constructed the theory of relativity theory of capacity for rights. The main point of this theory is that the capacity for rights should be specific and relative, rather than abstract and absolute. What's more, the content and range of this capacity depends on the personal qualities of subject and the spe-

cific legal provisions. In this way, capacity for rights takes on different features in different legal relationships, which gives rise to some concepts such as part of capacity for rights and limited capacity for rights. The theory of relativity of capacity for rights, however, has blurred the distinction capacity for rights and general capacity for civil conduct, has confused the difference between capacity for rights and specific rights and has distorted the relationship between formal equality and essential equality, so there are many difficult to justify.

People in civil law have the characteristics of "secular", and the fetus and the deceased do not have part of capacity for rights. The purpose of protecting the fetus and the deceased in traditional civil law is to adjust the interpersonal relationships in the present-day society and to safeguard the value and dignity of people who living in the present world, so can we achieve complete protection in civil law. Whether in theory or in practice, there is no need to introduce the theory of relativity of capacity for rights and concepts of part of capacity for rights and limited capacity for rights, because of both of them are controversy and valueless.

Key Words Capacity for Rights; Part of Capacity for Rights; General Capacity for Civil Conduct; Subject of Right; Legal Personality.

Zheng Xiaojian, Ph.D. in Law, Associate Professor of Xiamen University Law School.

On the Government's Management-Based Regulation of Enterprises *TAN Binglin · 74 ·*

Based on the reflection of the traditional regulation mode, a new type of management-based regulation is developed in the practice of administrative law. It does not prescribe specific technical requirements or performance goals for enterprises, but requires them to implement appropriate internal business plans, management processes and decision-making rules within the legal management framework to achieve regulatory goals. The rise of management-based regulation has a profound historical background and legal basis. The system should be constructed from the four levels of standard formulation, organizational structure, law-abiding supervision and implementationfeedback, and the necessary legal control should be carried out.

Key Words Government Regulation; Internal Management; Reflexive Law; Legal Control

Tan Binglin, Ph. D. in Law, Associate Professor of Modern Administrative Law Research Center, Zhongnan University of Economics and Law.

On the Independent Compilation of the Guarantee System in the Civil Code *ZHANG Suhua · 88 ·*

The guarantee systemhas been divided into property law and contract law in the Civil Code, which has caused the separation of the personal guarantee system and the property guarantee system, increasing the difficulty of applying the law. "Guarantee property rights" itself is a historical misunderstanding. It prohibits the development and self-improvement of guarantee methods. Mortgage rights, pledges, and liens do not possess the essential attributes of property rights. Regardless of the historical evolution and the function of the guarantee system, as well as its development in the contemporary era, dominance is not the essential nature of the guarantee, and it does not belong to the category of priority, either. The guarantee system is only an institutional tool for determining the order in which claims are implemented. Judging from the historical evolution of the guarantee system and the process of system formation, the guarantee method is constantly being updated, which is the embodiment of social transaction demand. The guarantee method itself has the inherent motive force and demand for continuous development and change. The design of the contemporary guarantee system

must meet the requirements of market diversification. The independent formation of the guarantee system can not only maintain the openness of the guarantee system, but also facilitate the unification of the guarantee system as well as the practice of the legislative concept of the unity of civil and commercial. The independence of the guarantee system in the Civil Code can be an innovative choice in the context of the new era.

Key Words Guarantee System; Independent Editing; Guarantee Function; Property Rights; Combination of Civil and Commercial

Zhang Suhua, Ph.D. in Law, Professor of Wuhan University Law School.

Identification of Cumulative Assumption of Debt and Surety:
Based on the Analysis and Development of the Inconsistent Judgments *XIA Haohan · 102 ·*

In the case of judging, whether the third party's commitment to perform the debt constitutes cumulative assumption of debt or surety, in principle it should be characterized according to the explicit wording of "cumulative assumption of debt" or "surety" unless there are special circumstances, such as contradiction between the promised content and the wording, ambiguity of the wording, which are sufficient to support the interpretation deviating from the meaning of the text. In the case where a proper conclusion is unable to draw, the promise of performance order can exclude the cumulative assumption of debt, and the surety can be excluded if a third party should perform even without the debtor's failure to perform. Whether the third party has direct and actual economic interests and whether the third party's performance of the debt is certain are not enough to completely distinguish between the two. Thereafter it is advisable to make a comprehensive judgment on all the circumstances of the case. In order to enhance the convenience of the application of the law and the predictability of the judgment results, to avoid the circumvention of the surety laws protecting the surety, and to strengthen the protection of the third party who is obligated to unilaterally undertake the obligation, it should be presumed to be a surety when doubts arise. The presumption of cumulative assumption of debt established by the Supreme People's Court lacks legitimacy.

Key Words Cumulative Assumption of Debt; Surety; Criterion of Interests; Performance Order; Presumption of Surety

Xia Haohan, Ph.D. in Law, Lecturer of Law School of Zhongnan University of Economics and Law.

Reconstruction of the Rules on the Internet Service
Providers' Copyright Indirect Infringement *ZHU Kaixin · 114 ·*

As the situation of online copyright infringement is increasingly severe, the copyright indirect infringement rules of the Internet Service Provider came into being for breaking the predicament of accountability produced by the principle of copyright legality. In order to maintain the scientificity and integrity of our Internet Service Provider copyright indirect infringement rules system, we should: on one hand, adhere to the unified system design path of the imputation principle and abandon the application of the exemption principle such as the "safe harbor rules"; and on the other hand, clarify the difference between copyright contributory infringement and inducement infringement, and clarify the independent value of copyright vicarious liability on the basis of the rule of "obligation of safety guarantee" in tort law.

Key Words Copyright Indirect Infringement; Internet Service Provider; Safe Harbor Rules; Joint-torts

Liability; Vicarious Liability

Zhu Kaixin, Ph.D. in Law, Postdoctoral Fellow of Institute of Law of Chinese Academy of Social Sciences.

The Exclusionary Rule of Repeated Confessions *MOU Lüye · 127 ·*

The UK, US and Germany all adopt the case-based analysis model to review the admissibility of repeated confessions. By contrast, China has established the "principle plus exception" model, which bespeaks a fixed and closed analytic approach. My empirical study of 47 cases released on China Judgment Online indicates a gap between China's model in law and in practice. We must therefore adopt the case-based analysis model and ask the court to examine repeated confessions in consideration of relevant factors, including the initial violation and its impacts, contents of confessions, the change of interrogators, the obligation of notifying, and other factors that are yet included in the law, such as counsel's interventions, the time and environment of initial and subsequent interrogations, consistency of confessions. Factors and their evaluation can guide and supervise judges' discretion in the case-based analysis model. Besides, repeated confessions cannot be presumed to the products of the initial violation, rather, they must be proved in accordance with the "inference relationship".

Key Words Repeated Confession; Derivative Evidence; Fruits of Poisonous Tree; Principle Plus Exception Model; Case-based Analysis

Mou Lüye, Ph.D. in Law, Lecturer of Zhejiang University Guanghua Law School.

***Exceptional Pattern of Exclusion of Illegal Evidence*:**
Dogmatics Analysis of Exclusion Rules for Repeated Confessions *KONG Lingyong · 142 ·*

Exceptional pattern is a theoretical induction of the phenomenon that exceptional factors affect the exclusion of illegal evidence, which is evident in the exclusion rule of repeated confessions. Although the current exclusion rule of repeated confession has the structure of "exclude in principle-unexclude in exception", it has defects in the process of judicial application, which is related to the unclear theoretical basis of the rule and the unclear procedure and standard of exclusion of confession. Therefore, the dogmatics of repetitive confession exclusion rule should be based on the theory of setting exceptional factors, including voluntary correction theory, relevance interruption theory and reliability assurance theory. At the same time, we should construct the procedure and standard of excluding repeated confessions around exceptional factors. After confirming the nature of previous confessions, we should comprehensively review the rationality of the intervention of exceptional factors and the legitimacy of repeated confessions, and judge whether the prosecution can prove this to be a specific standard, and finally decide whether to exclude repeated confessions. After confirming the evidence ability of repeated confession, the authenticity of the statement can be strengthened to evaluate its weight of proof as a reference condition for eliminating repeated confession.

Key Words Repeated Confessions; Exclusion of Illegal Evidence; Exceptional pattern; Dogmatics of law

Kong Lingyong, Ph.D. in Law, Lecturer of Anhui University Law School, Researcher of Anhui Rule of Law and Social Security Research Center.

After empirical investigation, there are different standards for evaluating defense limit in judicial practice, which mainly adopts the two constitutions based on "obviously exceed the necessary limit" and "cause significant damage" and the one constitution based on "obviously exceed the necessary limit". When defining significant damage, only personal injury is used as an evaluation index, and "equivalent to one person seriously injured" is generally regarded as the starting point. When evaluating necessary limit, it tends to focus on individual elements and emphasizes that the defender should keep the damage result to a minimum, lacking overall consideration and situational judgment. In order to correct the cognitive deviation in judicial practice, it should adopt the two constitutions based on "coordinate theory". According to that, defense limit can be decomposed into behavior limit and result limit, and excessive defense must negate both of them at the same time. When evaluating the result limit, property loss should be taken into consideration, and "slight injury" maybe establish significant damage under certain conditions. In judging the behavior limit, it should adopt "necessary theory" and adhere the principle of overall consideration, with the standpoint of "the general person to whom the defender belongs" for a prejudgment.

Key Words Defense Limit; Necessary Limit; Significant Damage; Necessary Theory; Quantitative Analysis

Wang Xuecheng, Doctoral Student in Criminal Law of Renmin University of China Law School.

In the positive law of our country, according to the effect standard, the agency is divided into direct agency and indirect agency, and the former can produce the attribution effect. According to the nominal standard, direct agency can be divided into named principal agency and unnamed principal agency, and the former acts in the name of principal and the latter acts in the name of agent. According to the rule of unnamed principal agency stipulated by article 402 of Contract Law, if the agent concludes a contract in his own name with a third party, and the elements of agency power and agency publicity are satisfied, the attribution effect may also occur. The judge should identify strictly unnamed principal agency's requirements. The agent shall conclude a contract with a third party within the scope of power granted by the principal, and the third party must be aware of the specific principal at the time of conclusion of the contract. If the contract is not binding the principal according to the will of parties, the commission relationship, and the situations of transaction etc., it may exclude the establishment of unnamed principal agency. The direct binding effect of unnamed principal agency refers to the attribution effect of agency. The distribution of burden of proof about this article applies the rule that the claimant bear the burden of proof.

Key Words Unnamed Principal Agency; Attribution Effect of Agency; Publicity Principle; In Agent's Name; Third Person Knows

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