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1、Structure of Constitutional Right Norm and Its Reasoning Model …..…………………… …..……………………………………..……………… *Xu Jiqiang*（3）

Abstract: Since the constitutional rights clauses tend to be highly abstract and generalized, their meaning should be clearly articulated by either legislation drafting or the exercise of constitutional review so as to protect citizens' rights. The process of articulation should not be arbitrary and should be subject to objective reasoning.

The key issue is whether the constitutional rights can be restricted to accommodate other constitutional interests, public policy or other rights. There are two polarized theories concerning to this issue. One contends that constitutional rights are absolutely exclusive, while the other allows the flexibility for balancing. However, the constitutional rights tend to lay out a complicated structure with a combination of exclusiveness and flexibility, as is evident in both the text and application of the majority Constitutions in the world. Consequently, the constitutional right reasoning is a double-layer structure that includes both balancing and non-balancing features.

Thus the initial rights enjoyed by the citizens are not always superior to the public policy. And the restriction of constitutional rights is not always prohibited. The core of the constitutional rights implementation lies on the legitimization of the restriction. And the legal effect of constitutional right norms can not only be judged by the internal characters of rights, but by the balancing of other elements.

Given that in China the primary approach of implementing constitutional rights is through legislation, the structural characters and the reasoning process of those rights have not yet be demonstrated. But this fact relates to the fundamental problems of whether the government wants to protect constitutional rights and whether the citizens can actually enjoy those rights. International experiences tell us that the constitutional rights reasoning should accommodate democratic and rational values. The structure of constitutional right norms and its reasoning model above-mentioned are just the mechanism which can make it.

Key Words: norm, principle, the reasoning of constitutional rights, balancing

2、Infringement on Right or Interest: Reconstruction of Constituent Elements Theory of Tort by Interpretation .... *Long Jun*(24)

Abstract: With the enactment of the Tort Liability Law of PRC, the traditional constituent elements theory of tort has trapped into dilemma both in substance and in form. On the substantial level, the traditional theory does not distinguish interests from rights, so could merely solve simple and traditional cases of tort, and seems of less use when confronts complex and modern cases. On the formal level, there exists conflict between the traditional theory and the literal meaning of Paragraph 1, Article 6 of the Torts Liability Law. The traditional theory could not explain the relationship between Paragraph 1, Article 6 and Article 15 of the Tort Liability Law either.

Therefore, it is necessary to reconstruct the constituent elements theory of tort according to the literal meaning of Paragraph 1, Article 6. That is, "infringement on right or interest" as provided by this paragraph should be considered as an independent constituent element of tort. As a result, it replaces the element of illegality in function and the element of damage in position. Thus the general constituent elements of tort include act, infringement upon right or interest, causation of liability establishment, and fault. These four elements are the common constituent elements of all kinds of tort liabilities provided by Article 15 of the Tort Liability Law. Meanwhile, compensation for damage, with two additional elements of damage and causation of liability scope, is merely one sort of tort liabilities.

In order to apply the element of infringement on right or interest appropriately, it is suggested to introduce the theory of Interrelation which has been generally accepted in Japan. The theory aims to protect rights and interests distinctly, that is, rights and interests of different levels correspond to different standards of fault. To adapt to the function of this element, tort law should adopt a narrow view of right, in which right refers to absolute right with clear extension in the private law, while relative right, frame right and basic right should be classified as interests.

Key Words: tort, infringement on right or interest, constituent element

3、Compensation for Death from Social Perspectives .... *Gong Gu(*40)

Abstract: Compensation for death is a kind of civil compensation liability due to the illegal infringement on the right of life. According to our legislation, there is great disparity between the

damages for similar cases of death, which gives rise to a wide range of social controversy and has become one of the difficult problems for the Tort Liability Law of PRC to solve.

According to the theory of "loss of inheritance", death compensation is the remedy to the close relatives and stakeholders of the deceased whose prospective property interest is damaged by the death. Such theory claims to estimate the loss and pay the compensation according to the earning capacity and life expectancy of the deceased. The existing provisions in China have taken a compromise of this theory and determine the damages mainly on the household register. This is the root of social blame for "similar lives but with different values".In recognition of the shortcomings of the "loss of inheritance" theory, some scholars put forward the theory of "loss of life", which claims that the death compensation is the compensation for the loss of "life interest" of the deceased. It is a reflective theory, but full of logical deficiency and hard to carry out, so cannot solve the fundamental problem.

Essentially speaking, the theories of "loss of inheritance" and "loss of life" are both the product of traditional civil law thinking of filling up the damage, in other words, they regard the death as the loss of individual interests which need to be filled up. But from the social perspectives, in addition to fill up the dependents' individual interests, compensation for death bears a variety of functions of relief, punishment, promotion, prevention and so on. The theory of "loss of inheritance", which emphasizes on compensating for personal property loss of the dependent and advocates individualized compensation model, can not give full play of the multiple functions of death compensation, can not embody the respect for the value of life, and is contrary to the spirit of equality. From the ideal angle, and taken social realities into account, China's death compensation system should develop in the direction of "relative fixed amount", tilt to the weaker and play comprehensive functions of relief, promotion, prevention, punishment and so on.

Key Words: compensation for death, filling up the damage, multiple balancing, society

4、Categorization of the Principle of Substantial Change of Circumstances … *Han Qiang*(57)

Abstract: How to apply the principle of substantial change of circumstances is an inevitable problem of the contract law practice in every jurisdiction. The legislations, judicial precedents,

theories and even international law are exploring, in various degrees, on the topics of whether or not to admit this principle, and how to define the conditions for applying it and its legal consequence. Our contract law has no clear provisions about this principle, but it is always deemed as an important legal problem in the realms of judicial practice and theoretical study. In 2009, the Supreme People's Court put in place the second crucial judicial interpretation concerning to the contract law, within which the principle of substantial change of circumstances is definitely listed as a specific legal institution applicable by the courts.

The principle of substantial change of circumstances aims at rectifying the various negative effects of legal formalism and pursuing substantive justice in individual cases. Because the superordinate concept of this principle is the principles of justice and good faith, it is abstract in connotation, unclear in standard and easily abused, and has aroused much controversy theoretically and practically. In order to grasp the applicable requirements precisely, set up the applicable mechanism strictly and realize the safe application of this principle as far as possible, it is undoubtedly the most efficient research method to analyze, organize and summarize the precedents other than referencing to the diverse legislative patterns and theories of various countries.

There are a great deal of precedents and case materials available on the judicial application of this principle home and abroad. What's more, our people's courts in different levels have formed abundant judgments on the application of this principle during the past 20 years. By applying the categorization method, we can promote the essences and inevitable mistakes abstracted from these judgments into theoretical model with intrinsic logic system, thus provide beneficial references to further research and judicial application of this principle.

Key Words: the principle of substantial change of circumstances, categorization, law interpretation, law making by judicature

5、Value Orientation and System Construction of Antitrust Litigation …..……….*Liu Shuilin*(70)

Abstract: Being one of the important mechanisms to implement the antitrust law, antitrust litigation is an important issue in both theoretical research and judicial practice. There are two

research approaches on this issue. One is the individualist idea and thinking paradigm, which takes individual rights as the center and looks the litigation as a dispute resolution mechanism. The other is the holistic view and thinking paradigm, which takes order construction as the center and looks the litigation as an important mechanism for building the ideal order.

This article is of the holistic point of view as to the value orientation and system construction of the mechanism of antitrust litigation. The history of antitrust law and social development shows that the formation and development of antitrust law is synchronous with the formation of organic society, and as a result, the damage caused by monopolization is mainly to the society as a whole, that is, to the condition of competition formed by the interaction of market subjects under certain market concept and system, not just to particular competitors or consumers. Differing from the harm to the individual, the harm to the whole is of uncertainty as regards to the specific subjects harmed, is dynamic as regards to the objects harmed, and is extensible and difficulty to calculate, restore and remedy as regards to the consequence of damage. These characteristics make the monopolization one kinds of risk behaviors, and the antitrust law falls into the category of modern social regulation law.

According to the property of antitrust law, antitrust litigation should be the litigation of order construction. Such litigation, in value, lays stress on the safeguard of competition order instead of the protection of individual rights. In function, it advocates judicial activism and positive response to common values formed among competition in the society. In the system construction, it is in favor of the relaxation of qualifications of the plaintiff and the establishment of a litigation mechanism of multiple participations.

Key Words: antitrust litigation, organic society, risk regulation, order construction litigation

6、Structure of Right: Taking Business Law as an Example………………*Chen Chun*（86）

Abstract： Combination, decomposition and simple structural change of right are common phenomena in business law. These phenomena call for a new theory concerning to the structure of right, which has been ignored by both Structuralism and traditional right theories. Structure is an important parameter of right with the characteristics of infinity, independence, integrity, and so on. It is possible and necessary for us to design and select appropriate right structures.

Combination and decomposition of right include quantitative and ordinal changes which may further induce qualitative change in the right. Simple structural change of right just includes ordinal change which may also induce qualitative change in the right. Right is scarce, but structural models of rights are unlimited in the theory and we can form sorts of rights with different qualities by structural design.

Structural change of right may also induce functional change of the right. Combination and decomposition of right may produce new rights with new functions. For example, some new rights may have the mandatory, dominant and expansionary functions of the state power, or have the proliferation function of the capital property rights, or even have the strong transferrable function of credit derivatives and form a large financial derivatives market by this function. Simple structural change of right may also make certain rights have functions in promoting democracy, enhancing efficiency, protecting commercial safety and commercial fairness. We can also procure some expected functions of certain right system by structural design of right.

Changing the nature or function of right by structural design have been widely used as two efficient methods in business law and a large number of structural models of rights have formed. Structural design of right should be a basic issue of business law or even the whole private law. The private law and business law in particular should not ignore such issue and should make great efforts to apply excellent structural models, optimize existing structural models, and create new models of right structure. A right structure theory should be added to right theories of the private law henceforth.

Key Words: right, structure of right, combination, decomposition, simple structural change

7、Ranking Nature of Criminal System ……………………………… *Chen Xingliang*(100)

Abstract: The constitutive elements of a crime are stipulated by the provisions of criminal law. At this point, there is no difference between the four-element constitutive theory and the three-tier criminal system. The sole difference lying between the two theories is whether there is any ranking relationship among the constitutive elements of a crime. The ranking nature of various elements refers that the prior element should not be established after the existence of the posterior one but should act as the prerequisite of the posterior one, thus forms the progressive logical relationship between various elements of a crime. In the three-tier criminal system, the

ranking relationship exists in the three tiers of Tatbestandmaessigkeit, Rechtswidrigkeit and Schuld.

The three tiers of criminal system correspond to three principles and embody the protection of three kinds of value respectively. Tatbestandmaessigkeit corresponds to the principle of a legally prescribed punishment for a special crime, thus safeguards human rights. Rechtswidrigkeit corresponds to the principle of protecting legal interests, and incarnates the value of criminal law to protect the society. And the tier of schuld corresponds to the doctrine of responsibility, and accords with the ethnic or equal value of criminal law. Meanwhile, the ranking relationship among the three tiers functions as the logical guide in the course of conviction in judicature and can ensure its correction. Thus the three-tier criminal system is with scientific nature and should be adopted in China.

However, under the four-element constitutive theory, there exists no ranking relationship among the object, objective aspects, subject and subjective aspects of a crime, but only a sort of order which can be changed freely. As for their logical relationship, the four elements are in an interdependent relationship. When determining cases according to the four-element theory, the order from objective judgments to subjective ones is reversed from time to time, and the fact judgments are sometimes confused with the value ones, which would cause practical defects and affect the corrective conviction eventually.

Key Words: ranking nature, the three-tier criminal system, the four-element constitutive theory

8、From Objective Attribution to Subjective Imputation……………*Feng Yadong,* etc.(123)

Abstract: Causation is one of the most complicated issues in the field of criminal law. In foreign criminal law theories, causation is evaluated by referring both to factual and normative aspects. For the former, purely objective condition theory is popular and for the latter, the leading views focus on the objective evaluation of the normative rules so that the criminal responsibility can be properly imputed.

Nevertheless, such reasoning adopted by the foreign theories of criminal law may not be suitable to China as different states have different legal norms and different constitutive theories of a crime. German theory on causation may be a good example in this regard. The reason why the

theory emphasizes that the criminal responsibility issue should be completely determined in the factual aspects lies not only in the view of taking the criminal punishment as a consequence of "imputable responsibility" but also in the "attributable unlawfulness" which leads to security punishment and may serve to exclude the evaluation of issues such as criminal culpability and faults of criminal perpetrators. By this reasoning, some crimes may be categorized as Objective Crimes. Under the Chinese law, the criminal responsibility must be attributed to both subjective and objective aspects of the crime and the connection between the subjective and objective aspects of the crime must be established.

Therefore, under China's Four Elements Theory, the evaluation of causation may follow the reasoning of "objective cause" and "subjective responsibility"."Objective cause" means that the evaluation of causation is merely the factual basis upon which the criminal responsibility may be determined, thus excludes the debatable arguments of various normative theories. The possibility of criminal responsibility expansion which may be incurred by the condition theory can be properly restrained or excluded by the accurate evaluation of the fault of criminal perpetrators. Thus the criminal responsibility may be correctly imputed by the evaluation of both the objective and subjective aspects of a crime in question.

Key Words: causation, objective attribution, subjective imputation

9、Protective Scope of Rule and Establishment of Negligent Traffic Crime…*Liu Yanhong*(133)

Abstract: Negligent traffic crime refers to the crime conducted by persons with foreseeing capacity who breach the duty of care and infringe the legal interest during transportation. According to the new theory of negligence, the essence of negligent traffic crime is the duty of result avoidance. Whether the duty of result avoidance is violated or not relies on whether there is causation between the conduct and result of the traffic accident. That is how the concept of the protective scope of rule gets into our view.

According to the old theory of negligence, whether causal process complies with the protective scope or not is a problem related to the possibility of factual result avoidance. While pursuant to the new theory however, it should be considered as an issue with regard to whether there is a duty of result avoidance or an increasing danger, which are determined by the possibility of normative result avoidance. By analyzing the mechanism of result foreseeing possibility, the

principle of criminal responsibility, and burden of proof in negligent traffic crime cases, it can be concluded that the new theory should be adopted.

The protective scope of rule as we discuss here includes not only criminal law and its duty of care but also traffic regulations and their duty of care. Traffic regulations are the sub-laws and the basis of duty of care in criminal law. The theory of the protective scope of rule does not need to be used under the objective imputation theory, because it relates to the problem of whether the development of causal process in negligent traffic crime complies with legal order. It is not an element of liability, but an element of illegality. For its judiciary application, the theory of the protective scope of rule must be applied case by case and the protective purpose of both criminal law and traffic regulations should be taken into account.

In Chinese criminal theory, it is unclear whether the essence of negligent traffic crime is the duty of result foreseeing or the duty of result avoidance, which has resulted in expanded conviction of negligent traffic crime in practice by directly relying on the administrative decisions about responsibilities for traffic accidents without considering the criminal essence from legal perspectives. This negative reality can be changed with the theory of the protective scope of rule in which the conviction of negligent traffic crime relies on the analysis of causal relation.

Key Words: negligent traffic crime, duty of result avoidance, protective scope of the rule, possibility of foreseeing the result

10、Sentencing Procedure Reform in China: Mistakes and Way Out ……*Zuo Weimin*(149)

Abstract: In practice, those experimental programs of adversarial sentencing procedure reform have not proved successful. Empirical study has revealed that compared with previous practice, the reformed sentencing procedure does not lead to apparent differences in presenting sentencing evidence and facts, nor does it result in significant changes with respect to sentencing outcomes. The reformed procedure also consumes more judicial resources and impedes court efficiency. In general, within the current criminal penalty structure, although some progress has been achieved in the adversarial sentencing procedure reform, it has not yet met the expectation to produce reasonable and fair sentencing.

Such result can be attributed to the underlying theory upon which the reform is established. The theory argues that the major problem in current sentencing system is the unfairness of

sentencing procedure. In particular, criminal trials focus only on conviction, judges care only for conviction facts, and the current law does not provide a sentencing procedure in an adjudication model. So the theory suggests to learn from the common law model and to establish an adversarial sentencing procedure. However, it is a mistake that traditional common law sentencing practice employs an adversarial procedure.

In contemporary China, those sentencing issues that draw public attention and criticisms are not whether the sentencing procedure is fair, but the unevenness and rigidness of sentencing, although both are substantive issues. Rigid sentencing reflects the lack of flexibility in sentencing and the failure to take into consideration detailed facts and individual circumstances of a specific defendant. Therefore, the main problem is not a procedural one, but the mistake of addressing a substantive issue in a procedural manner. Future sentencing reform should firstly center on substantive reform supplemented by procedural reform. Specifically, the first step should be the standardization of sentence criteria, and then move to the reform of sentencing procedure and use procedural reform to fertilize substantive reform. Secondly, only small changes, instead of a thorough one, should be taken in sentencing procedure reform. Future reform should also standardize sentencing procedure in accordance with principles of efficiency and rationale, develop a sentence reasoning system, and establish remedial procedure for sentencing.

Key Words: sentencing procedure, sentencing model, substantive reform, procedural reform

11、Formal Structure of the Concept of Legal Liability…………………*Yu Jun*, etc.(159)

Abstract: From the viewpoint of legal phenomenon, an ideal legal normative concept includes three levels, that is, its value element (due content), its normative element (validity) and its fact element (social effect). Thus the foundation of liability (imputation), the redress relationship and the compulsion by public power embody the three elements of legal liability as a normative concept. The essence of legal liability is the specified redress relationship due to the specified legal fact which infringes right or interest. Therefore the comprehension of legal liability should centers attention on its redress relationship.

In Hans Kelsen's theory, delict is a sufficient and necessary condition of its normative effect (ought to be sanctioned). That is, the result of sanction can be inferred from delict, and delict can also be inferred from sanction. When analyzed from the view of legal relationship, such formal

structure of legal liability can change its expression into the redress relationship, thus the normative effect of sanction due to delict can be expressed as the specific redress relationship.

In the four categories of redress relationship, the relationship between right and duty and the relationship between privilege and no right as in summary compulsion not only contain the content of sanction, but also can be realized by actual compulsion. These two categories of redress relationship can be the normative element of legal liability. The relationship between right and duty exists widely in civil law, administrative law and criminal law, and is the most common and universal form, while the relationship between privilege and no right exists only in summary compulsion, thus only a special form of the normative element of legal liability.

The analysis of this article deepens Hans Kelsen's legal liability theory in the analytical frame of basic legal relationship, and may provide a kind of explanation for the legitimacy of legal liability mechanism and safeguard effectively the purity and veracity of legal liability as a normative concept.

Key Words: legal liability, delict, redress relationship

12、Preventive Administrative Litigation ………………… ………………… *Xie Zhiyong*(172)

Abstract: Administrative litigation provided by the current Administrative Procedural Law is of the nature of ex post facto. It is unable to exclude or restore the severe damage resulted from administrative activities and cannot protect the legal rights and interests of the counterparts effectively, which directly threatens the effectiveness of administrative remedies as well as the steadiness and harmony of the society. The loophole in legislation should be filled up by constructing the new preventive administrative litigation with the nature of ex ante remedy.

The preventive administrative litigation conforms to the tenet, purpose and development discipline of administrative litigation system. It can protect the rights and interests of administrative counterparts timely and effectively, realize the ultimate thought and logic of law, and demonstrate the truth of rule of law. From the aspects of enforcement environment, experience accumulation and actual requirements, it is of great urgency for our country to construct the preventive administrative litigation institution and perfect the system of administrative litigations.

There are solid theoretical foundations, unequivocal constitutional law grounds and mature experiences from other countries and areas for our country to construct the preventive

administrative litigation institution. The substantial principles of human rights and administration by law, the procedural requirements of effective right protection and remedy and the principle of ultimate judgment by judicature, and other legal values and ethnics, constitute its theoretical foundations. According to our constitutional law, our country should respect and protect human rights, should protect the basic rights of citizens such as personal rights and property rights. And citizens can charge against the illegal or delinquent act of administrative organs and their staff. Our constitutional law also provides in several places the supervision upon administration. These all provide it with constitutional law grounds. Moreover, there are many systems of administrative litigation or judicial review with the function of prevention in other countries and areas which can be taken as examples.

Key Words: administrative litigation, preventive administrative litigation, right protection

13、Studies on the Paper Documents of Jinlv Annotation from Yumenhuahai … …………………………………… ……………… *Cao Lvning,* etc.(181)

Abstract: The paper documents of Jinlv Annotation unearthed in Yumenhuahai are major discoveries in China legal history of this century, which are of great importance to look into the true visage of Jinlv.

The studies of this article have shown that the writing age of the paper documents of Jinlv Annotation is most likely the late period of West Jin. And the author of Jinlv Annotation unearthed from Yumenhuahai may be Du Yu according to its language style. Moreover, Du Yu's annotation of Jinlv was then an official edition promulgated throughout the whole country with great influence, which also supports the above posit. Jinlv Annotation from Yumenhuahai shows that Jinlv has twenty sections, which proves that the record of Jinshu is correct.

Through the discussion about the two examples of law on arrest in Jinlv Annotation, this article tries to clarify that some articles and terms of this law inherited from the law of Qin and Han, which were also inherited by the law of Sui and Tang. Meanwhile, through the textual research on the law governing dukes and emperors in Jinlv Annotation, this article finds that most of the regulations were also originated from the systems of Qin and Han, and had no direct relationship with Zhouli. Moreover, the legislative inspirit of these regulations had no inclination to expanse the strength of dukes and emperors, and had nothing to do with the Rebellion of Eight Emperors in the late period of West Jin. Lastly, the unearth of Jinlv Annotation provides new

historical evidence to prove that as one of the sources of the law of Latter Wei, the legal study in Corridor District of Hexi included not only the law of Han, but also the element of the law of Jin.

Key Words: the paper documents of Jinlv Annotation from Yumenhuahai, law on arrest, law governing duke and emperor, legal study in Corridor District of Hexi

14、International Monetary System: Difficulties and Way Out………………*Liao Fan*(193)

Abstract: The current international monetary system with the International Monetary Fund (IMF) at the core historically originated from the political compromise between major powers, more specifically, between the U.S.and the U.K.This has left the system with inborn deficiencies in terms of effectiveness and enforceability. Moreover, with the evolution of the world economy, developing countries, especially those dynamic emerging markets such as the BRICs, have come to challenge the representativeness of this system dominated by wealthy developed countries. The unexpected global financial crisis further disclosed the underlying problems of the existing system.

From the viewpoint of China as an unique actor in the IMF, the author summarizes the major problems IMF faces today, i.e., strayed institutional role, one-sided policy supervision, imbalanced governance structure, and paralyzed dispute resolution. To cope with these problems, some reform measures have already been taken or on the way, but they are inadequate for a meaningful change of the status quo. The author argues that further efforts should be made in terms of reshaping the institutional role, strengthening bilateral supervision, improving governance structure and promoting dispute resolution. The dual goal of the reform should be on the one hand to readjust the functions of the IMF, in order to enhance the effectiveness of its operation, and on the other hand to rebalance its power structure, so as to promote the democratization of its governance.

Given that any reform can only be realized by means of revising the relevant legal instruments, and given that the revision of the Articles of Agreement themselves is extremely difficult, the author suggests to begin with lower instruments such as Rules, Regulations and Decisions, and make fuller use of the interpretation power conferred on the Board of Governors and the Executive Board by the Articles of Agreement.

Key Words: international monetary system, IMF, reform, effectiveness, democratization