

# GLOBAL LAW REVIEW

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### *THEME DISCUSSION:*

Introduction: Anti-discrimination and Protection of Labor Right..... *Yao Jia* (5 )

“Preferential” or “Unified” Approach: A Rational Choice of Legal Protection Mechanism of Labor Right ..... *Yuan Li* (8)

[Abstract] In China, our dual system and preferential treatment theory cannot protect labor right effectively. Theoretically, social stratification, pursuit of substantive justice, dual economic structure and labor market do not necessarily give rise to dual and preferential legal protection. Our existing legal protection theory based on preferential treatment and system have resulted in a number of problems, such as falling again into the “identity” trap, inducing moral risk, increasing social cost, intensifying social contradictions, infringing upon interests of employers and holding up economic development. The idealistic way to protect labor right should rely on the abolishment of protection based on dual and preferential treatment and implementation of an equal and unified legal mechanism. At theoretical level, efforts should be made to work out the theory covering from identity to contract to right, to improve cooperation and coordination between labor and capital and to establish a harmonious work relation. At institutional level, efforts should be made to strengthen the state’ s ability for protection of labor right, to define the boundary of intervene by public power and to establish unified employment and social security systems.

The Context and Dilemma of the Principle of Equal Pay for Equal Work.. ... *Yan Dong* (19)

[Abstract] Other countries’ experiences show that principle of equal pay for equal work emerged from anti discrimination movement and has been well received in the

context of anti discrimination ever since. However, as China used to try to promote principle of equal pay for equal work independent of source context of anti discrimination, our efforts bore little fruit due to lack of feasibility. Combining China's own legal resources with experiences of other countries, to place the principle of equal pay for equal work in the context of anti discrimination shall just be the major approach for Chinese labor law to carry out fair distribution in the present stage. Only by using the legal tool of anti discrimination effectively, can we practically realize equal pay for equal work.

#### **Legal Tests for Sex Discrimination in Employment: American Practice ....*Guo Yanjun* (29)**

[Abstract] In order to eliminate sex discrimination in employment, it is imperative to establish legal tests and determination method in this respect in China. American experiences may serve as reference for us. American federal legislation and cases have set out clear and fairly stringent tests and determination methods of sex discrimination in employment. Direct sex discrimination mainly include: classification of occupations that disadvantages one gender considerably more than another; discriminatory treatment that does not satisfy the bona fide occupational qualifications; and hiring practice directed under mixed motives involving sex discrimination. As for direct sex discrimination on the ground of legitimate non discriminative excuses, sex discrimination speech that has established causation with the result of employment is considered as direct evidence, while the legitimate non discriminative excuse made by the employer is regarded as indirect evidence, since the excuse has no credibility at all. With regard to indirect sex discrimination, the test of business necessity applied to determine indirect sex discrimination mainly focuses on the minimum job qualification necessary for successful accomplishment of the job.

#### **Tests of Reasonableness and Proportionality Provided in Administrative Law:**

**Their Application in Labor Law in UK..... *Sun Guoping* (43)**

[Abstract] British administrative law has greatly influenced its labor law, the tests of reasonableness and proportionality, in particular, have been widely applied in labor law cases. Being natively established tests, the application of test of reasonableness in employment law cases actually demonstrates the demands of mode of operation of the individualism oriented administrative law in the country. The test of reasonableness is mainly applied in areas involving unfair dismissals and implied terms of employment contracts. With regard to the application of the test of proportionality, it has been profoundly influenced by the EC public law and applied mainly in workplace discrimination law area and in HRA 1998 cases. The two

tests have their characteristics and functions respectively. In China, when dealing with issues such as the determination of reasonableness of dismissal, consideration of proportionality in relation to punishment measures imposed on employees, the excessive restraint by labor arbitration committee on employers' decisions and judicial self-restraint towards labor arbitration decisions in labor disputes, we can draw on experiences of UK in this respect.

### ***THEORETICAL FRONTS:***

#### **Global Perspective of Administrative Law: A New Methodology of Administrative Law Research..... *Jiang Guohua & Li Ying* (57)**

[Abstract] Based on transnational research projects, the global academic research network is undergoing a process of integration in the name of "global system of administrative law". As a result, "global administrative law", emerged from the development of "global governance" theory, has developed from an academic concept to a kind of perspective, a methodology and an appeal of global research of administrative law. This very perspective or methodology is both the product of the influence of globalization in field of science of administrative law and the intrinsic element that has promoted the globalization of administrative law research.

#### **Analysis of Categorization of Crime of Homicide .....*Xu Li* (68)**

[Abstract] Provisions pertinent to crime of homicide in our criminal law are the product of conceptualism. It also serves as an example of lack of categorization, which in turn, gives rise to a series of problems owing to oversimplified charges in indictments, such as non-matching between a charge and the punishment, and piecemeal legislative patterns, etc.. All these have resulted in the confusion of sentencing criterion and consequently, have seriously undermined the principle of a legally prescribed punishment for a specified crime. That is why in judicial practice, the phenomenon of same crimes sentenced with different punishments is pervasive. To categorize homicide acts has both theoretical and practical basis. Categorization is differentiation, working as a complement for conceptual thinking. The significance of categorization of homicide acts lies in the fact that it can give detailed criteria for sentencing, make up for the inadequacy of evaluation of acts and effectively reduce provisions concerning the application of death penalty. The idea for categorization of acts of homicide is to distinguish them into two

categories: intentional homicide and manslaughter. On the basis of degrees of responsibility, intentional homicide can be divided further into three types: ordinary murder, aggravated murder and mitigated deliberate homicide. According to types of act, mitigated deliberate homicide can be further divided into provocative murder, killing on request, suicide help and forcing or soliciting others to commit suicide. Rules of determination of various killing acts are also discussed.

#### **The Concept of Interpretative Criminal Law and Its Value .....Zhou Xiang (79)**

[Abstract] From the perspective of academic history of criminal law, at present in China, there are two major theories upheld in criminal law studies, namely, the construction of school of criminal law and the construction of interpretative criminal law. With logic or academic nature being its fundamental attribute, interpretative criminal law refers to the knowledge system that, on the basis of criminal norms or taking them as the logic prerequisite, organizes mutually differentiated but related legal concepts, norms, principles and theoretical categories by means of logic reasoning. In this way, the logic of this knowledge system can be kept to the maximum. There exist differences between normative criminal law and interpretative criminal law. At the methodology level, the former mainly adopts the “method of annotation”, and the latter, “method of logic reasoning”. At the result level, the knowledge system emerged from normative criminal law emphasizes the approach of “taking the meanings of norms of criminal law as the core”; whereas interpretative criminal law stresses the maximization of the logic of the knowledge system of criminal law itself. Currently, criticism of interpretative criminal law within Chinese academic circles has three fatal deficiencies—the fundamental misunderstanding of the attribute of branch of learning in terms of special science of criminal law; cognitive confusion over the specific functions of various branches of learning and their relations within general criminal jurisprudence; and a basic misjudgment of the general conditions of research on branch law, which leads to the disregard for differences of characteristics of various branches of law and the imbalance of development of specific branch of learning. The author notes that Chinese criminal law circle should stick to the approach of “interpretative criminal law”.

#### **Life Insurance of Minors: With Focus on Death Insurance ..Wen Shiyang & Wu Yiwen (89)**

[Abstract] Within the system of safeguard of insurance of minors and their interested persons, life insurance is the most important for minors, yet it lacks clear classification. Life insurance of minors can be divided into personal insurance with minors as the insured and death insurance. For the former, only a general readjustment will do and for the latter, the control of moral risk takes

precedence over the need of safeguard of insurance when balancing legal interests. Death insurance of minors, intrinsically, should be further divided into indemnity insurance covering funeral expense and sum insurance against death. The sum insurance against death of minors needs to be specially restricted and the restriction shall be placed on the basis of the restriction of the rule of the consent of the insured, while taking into account restrictions on amount of insurance, the age of the insured, the policy holder and insurer. However, such restriction can not be applied in group accidental injury insurance and standardized short term accidental injury insurance.

## ***INTRODUCTION AND COMMENTS***

**On the Regulatory Reform to OTC Energy Derivatives under Dodd-Frank Wall Street Reform and Consumer Protection Act.....*Chen Jiulin* (100)**

[Abstract] In July 2010, the US promulgated Dodd Frank Wall Street Reform and Consumer Protection Act (Dodd Frank Act), thus abolished and exempted the arrangement of over the counter (OTC) energy derivatives from regulation by the Commodity Exchange Act. A new framework of regulation of the OTC derivatives including energy has been established accordingly. Dodd Frank Act is the result of reflection on the double crises of petroleum and finance, made by the US government as well as Senate and House of Representatives. The principal aim is to guard against systematic risk, protect financial consumers and put an end to the situation in which the Wall Street financial institutions remain “big and not going bankrupt”. The key purpose is to safeguard financial safety and to restore financial order and confidence in the US. Although promulgated in the gameplay for the interests of various parties, yet the result of the implementation and future of Dodd Frank Act remain to be seen, owing to its vague definition of concepts and lack of workable way to its enforcement.

**Democratic Republic and National Unity: the Secession Movement in the North in Early Constitutionalism in the US .....*Liu Han* (110)**

[Abstract] The United States is the first country that justified its secession movement by the modern idea of self determination. However, after its independence and the founding of a new country, the US was haunted by the problem of secession. This article shows that in the history of American constitutionalism, the first secession movement was not the well known Southern one launched around the Civil

War in the middle of the 19th century. Rather, it took place in the North and was launched by the New England Federalists. Through examining and studying the history of this secession movement and political and constitutional debates over the secession in the early American Republic, the article analyzes the special place of secession in American political tradition and the complexity of the national unity issue in modern republican regime.

**Doctrine of Academic Deference Established by American Courts..... Liu Jinjing (124)**

[Abstract] During the past two hundred years, in dealing with disputes related to universities, American courts have established doctrine of academic deference. As a result, preferential protection for academic autonomy of universities has been provided all along. At present, against the background of the system of higher education riddled with a bundle of problems, difficulties faced by the court when handling administrative cases involving institutions of higher learning actually come from two aspects: the particular academic nature of universities acting as academic and educational institutions; and the conflict between “universities with power to make their own decisions” and administrative control. Learning from doctrine of academic deference, the author notes that courts in China should put into effect the legal principle of “universities with power to make their own decisions” from the perspective of academic nature, and provide universities with preferential protection when handling such cases. In promoting academic freedom and the building up of a better administration on the basis of rule of law in universities, courts should play a proper role.

***INTERNATIONAL LAW ISSUES***

**The Exception on Exhaustible Natural Resources under the WTO Context..... Hu Jiaxiang & Peng Delei (135)**

[Abstract] Contained in GATT Article 20 (g), the exception on the conservation of exhaustible natural resources relates to conflicts and coordination between international trade and sustainable economic development. The 2010 World Trade Report, for the first time, has highlighted this issue, thus indicating the very significance of natural resources in international trade. In July 2011, the WTO panel ruled that China failed to meet the requirements of the exception on the conservation of exhaustible natural resources and violated both WTO rules and China’s WTO commitment in a case lodged by US, EU and Mexico against China’s restrictions on some industrial raw materials export. The ruling has compelled China to rethink WTO

general exceptions. Meanwhile, it has also called our attention that in the process of appeal, we should not only use general exceptions as the main defense, but also need to justify that invoking exceptions does not violate the MFN, NT requirements and the preamble of GATT Article 20.

## ***BOOK REVIEW***

Thoughts after Reading of *Going to Extremes: How like Minds Unite and Divide* by  
Cass R. Sustein..... *Cheng Yan* (145)

[Abstract] Group Polarization, created through separation of members from the rest of society and self belief and self acknowledgement, is a social phenomenon. It means that after group discussions, like minded people tend to maintain their original views and become more extreme than they were before. The very cause of social psychology that has led to group polarization lies in the exchange of new information, and other factors including sense of reputation, dominant position in debates, biased arguments, secession mechanism, social pressure, power structure, concrete circumstances and group thinking have further intensified trend of group polarization. As like minded people can be found in both social and political spheres, they do not act rashly, rather, they act on the basis of rational self choice and self strengthening induced by social isolation mechanism. Taking this fact into account, prevention of group polarization cannot rely on an oversimplified and rude method. Instead, efforts should be made to establish a set of effective institutional arrangements, with the introduction of diversity of thought within a group and among groups. An open space for social debates and free exchange of information should be encouraged and supported, thus forming an effective system of check and balance.