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5 2006 254 - 255
6 . 2014 43 - 44
7 Deborah J Lockton *Employment Law* 103 Palgrave Macmillan 2006
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27 “ ” 2013 07324

28 “ ” 2015 01265

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30 Manfred Weiss & Marlene Schmidt *Labor Law and Industrial Relations in Germany* 45 Kluwer Law International 2008

31 “ ” 2015 4723

32		2009	2 3
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35	2	425	
36	Takashi Araki	<i>Labor and Employment Law in Japan</i> 154	the Japan Institute of Labor 2002

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55 Takashi Araki *supra* note 36 at 157 – 158

The Legal Basis and Regulation of the Employer 's Power to Discipline the Employee

Xie Zengyi

Abstract Most employers incorporate disciplinary grounds and measures into their internal rules and regulations. Although the disciplinary power is an inherent power of the employer and is based on contract, the discipline of employees by employers should be subject to the restriction by law. The grounds for disciplinary measures should be work – related acts in breach of the duties of the employee. The law may recognize such disciplinary measures as warning, wages decrease, demotion and discharge, but not “damages ” and “suspension ”. The disciplinary system should also follow the principles of clearness of rules, fairness and reasonableness, due process, etc. In the future revision of labor laws, China should provide for general rules on discipline and allow the employer to adopt and implement, in accordance with law, their own detailed rules on grounds for and types of disciplinary measures, which should however be subject to the review of the labor arbitration authorities and courts.

Keywords employer, discipline, disciplinary grounds, disciplinary measures

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- 7 Horst Tilch/Frank Arloth Hrsg Deutsches Rechts – Lexikon 3 Auflage Verlag C H Beck München 2001 S 282
8 Raimund Waltermann Rechtsetzung durch Betriebsvereinbarung zwischen Privatautonomie und Tarifautonomie J C B Mohr
Tübingen 1996 S 69
9 Raimund Waltermann Rechtsetzung durch Betriebsvereinbarung zwischen Privatautonomie und Tarifautonomie J C B Mohr
Tübingen 1996 S 70
10 Horst Tilch/Frank Arloth Hrsg Deutsches Rechts – Lexikon 3 Auflage Verlag C H Beck München 2001 S 282
11 Alfred Söllner/Raimund Waltermann Arbeitsrecht 15 Auflage Verlag Franz Vahlen München 2009 S 297
12 Preis Arbeitsrecht Kollektivarbeitsrecht 2 Auflage Verlag Dr Otto Schmidt 2009 S 573
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13 *Hiroo Mukooyama Kameo Akuzawa und Peter Hanau* Studien zum japanischen Arbeitsrecht Carl Heymanns Verlag KG K K

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33 *Satoshi Nishitani* Vergleichende Einführung in das japanische Arbeitsrecht Übersetzung von Monika und Hans – Peter Maurutschke
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39 Reinmund Waltermann Rechtssetzung durch Betriebsvereinbarung zwischen Privatautonomie und Tarifautonomie J C B Mohr 1996 Tübingen S 7

40 Hueck – Nipperdey Lehrbuch des Arbeitsrechts Band 2 erster halb Band 7 Auflage Verlag Franz Vahlen GmbH 1967 S 33

41 Hiroo Mukooyama Kameo Akuzawa und Peter Hanau Studien zum japanischen Arbeitsrecht Carl Heymanns Verlag KG Köln 1984 S 165

42 2007 382

43 135

44 Reinmund Waltermann Rechtssetzung durch Betriebsvereinbarung zwischen Privatautonomie und Tarifautonomie J C B Mohr 1996 Tübingen S 69

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The Enactive Models of the Employer 's Rules and Its Effect Control Comparative Analyses Based on German Japan and Taiwan Area of China

Shen Jianfeng

Abstract From the perspective of legal comparison there are three models of enacting the employer 's rules factory agreement enacting with workers ' limited participation and enacting by employers Corresponding with this there are three models for control over the effect of employers ' rules and three models to interpret the grounds of its validity The existence of those different models are derived from different ideals of workers ' participation in management different institutions of factory agreement different systems of trade union and different traditions of state intervention During the development of China 's labor law collective autonomy gets promotion but it can 't ensure the rationality of employers ' rules So it 's necessary to control the employer 's rules through the public power Now the enacting of the employer 's rules in China applies normative theory model but it should be developed to factory agreement model

Keywords the employer 's rules collective autonomy effect control factory agreement

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6 H L A Hart *The Concept of Law* 79 – 117 2d ed Oxford University Press 1994

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7 *Bateman & Ors. v Asda Stores Ltd* 2010 IRLR 370

8 *Malone v British Airways* 2010 EWHC 302

9 2003 381 – 382

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14 *Protectacoat Firthglow Ltd v Szilagyi* 2009 IRLR 365 at 57

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15 Directive 91/533 Art. 2(2) f. i

16 1978 57

17 1 2001 132

18 *Creswell v Inland Revenue* 1984 ICR 508 518–519

19 *Johnson v Unisys* 2003 1 AC 518

20 Subha Narasimhan *Of Expectations Incomplete Contracting and the Bargain Principle* 74 Cal. L. Rev. 1123 1185 1986

21 11 275–276

22 2004 45

23 *Lee v GEC* 1993 IRLR 383 389

24 Simon Deakin & Gillian S. Morris *Labor Law* 302–308 5th ed. Hart Publishing 2009

25 *Fish v Dresdner Bank* 2009 IRLR 1035

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- 26 Douglas Brodie *How Relational Is the Employment Contract* 40 Ind L.J. 232 241 2011
27 ERA 1996 s 1 4
28 See e.g. *Marriott v Oxford and District Cooperative Society Ltd* No. 2 1970 1 QB 186 1969 3 WLR 984 1969 3 All E.R. 1126
29 Alvin W. Gouldner *Wildcat Strike: A Study in Worker – Management Relationship* 152 Antioch Press 1954
30 Deakin & Morris *supra* note 24 at 218 – 219
31 2010 117 – 120
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34 劳 2007 387 – 388 “ ”
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51 31 124 – 125
52 Frederic Reynold QC & John Hendy QC *Reserving the Right to Change Terms and Conditions How Far Can the Employer Go* 41 Ind
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 65 “ ” 8700
 “ ” 66 “

59 *Aviation & Airport Services v Bellfield* 14 March 2001 EAT

60 *Securities and Facilities Division v Hayes* 2001 IRLR 81 at 46

61 *Bateman* 2010 IRLR 370

62 *Malone* 2010 EWHC 302

63 Roseanne Russell *Malone and Others v British Airways Plc Protection of Managerial Prerogative* 40 Ind L J 207 213 2011

64 Reynold & Hendy *supra* note 52 Also see James Murphie *The Employers' Right to Rewrite the Contract* http://new.murraystable.com/assets/files/articles/Employers'_%20Right_%20to_Rewrite_the_Contract.pdf last visited on Mar 15 2015

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Deakin & Morris *supra* note

24 at 237

66 This content start at page 4 in a section of the Colleague Handbook headed “Your Contract” it provides A The letter you received offering you your job and any subsequent contract change letters together with the following sections in this handbook *form your main terms and conditions of employment Changes to the Colleague Handbook* Probationary Period References My Pay Sick Pay My Hours of Work Breaks Customary Holidays Holidays Notice Periods and Other Employment B They also constitute your statement of employment particulars which you are entitled to under the Employment Rights Act 1996 The handbook also contains lots of information about Asda policies which do not form part of your terms and conditions of employment Emphasis Added http://www.employmentappeals.gov.uk/Public/Upload/09_0221rjfhLBZT.doc last visited on Mar 15 2015

Asda “ changes to the Handbook ” “ ”⁶⁷

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⁶⁷ Changes to the Colleague Handbook The Company reserves the right to review revise amend or replace the content of this handbook and introduce new policies from time to time to reflect the changing needs of the business and to comply with new legislation A copy of the handbook is displayed on the colleague communication board in your store and on Pipeline and replacement copies are available from your People Manager You should keep yourself up to date with any changes by attending meetings huddles informal team meetings and by keeping an eye on the colleague communication board for any updates *Id.* at para 6

⁶⁸ *Autoclenz* 2010 IRLR 70

⁶⁹ *Bateman* 2010 IRLR 370 at 19 – 33

⁷⁰ *Malone* 2010 EWHC 302 at 1 – 22

· Sir Christopher Holland

BA “
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71 BA

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contra proferentem

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73 Autoclenz

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Kilburn Bellfield Bateman
the letter of engagement “ ” “ ”
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71 *Id.* at 23 – 29 also see *Malone & Ors v British Airways Plc* 2010 EWCA Civ 1225 2011 IRLR 32 at 63

72 *Id.*

73 *Reynold & Hendy supra* note 52 at 85 – 86

74 *Investors Compensation Scheme Ltd* 1998 1 WLR 896 912 – 913

75 *Protectacoat Firthglow Ltd* 2009 IRLR 365 at 57

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81 *National Coal Board v Galley* 1958 1 All ER 91

82 *Investors Compensation Scheme Ltd* 1998 1 WLR 896 at 912H

83 Russell *supra* note 63 at 210 – 212

84 Murphie *supra* note 64 at 340

85 *Malik v Bank of Credit and Commerce International SA In Liquidation* 1998 AC 20 1997 y b

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Figure 1 consists of two scatter plots, one for the year 2006 (top) and one for the year 2007 (bottom). Both plots show the relationship between the number of children in the household (x-axis) and the number of children in the family (y-axis). The x-axis ranges from 0 to 10, and the y-axis ranges from 0 to 10. In both years, there is a positive correlation, with a regression line and a circle indicating the mean. The data points are represented by small circles.

Year	Number of children in the household (x)	Number of children in the family (y)
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2007	1	1
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96	89	15									
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98	89	12									
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¹⁰¹ 2010 119

¹⁰² Deakin & Morris *supra* note 24 at 311

¹⁰³ Case C – 383/95 *Rutten v Cross Medical* 1997 ECR I – 57 at 26

¹⁰⁴ Louise Merrett *Employment Contracts in Private International Law* 118 Oxford University Press 2011

¹⁰⁵ A C L Davies *Judicial Self – Restraint in Labor Law* 38 Ind L J 278 287 – 291 2009

¹⁰⁶ 2011 321

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Judicial Interference on Employers ' Right to Change Terms and Conditions of Labor Contracts

Sun Guoping

Abstract The employers exercise the right to change terms and conditions of labor contract unilaterally is virtually the inherent need of managerial prerogative in response to the changes of the economy the key point lies in while exercising such right to change the main terms and conditions of labor contract whether the employers need to have the consensus of the labor In the practice of judicial interference on the aforesaid right the judging criterion and adjudicatory rules of some countries or extraterritorial region have their features Germany and France have rather strict public law interference model UK appeared to deregulate rules and Taiwan focuses on multi – standards Reflecting China 's current relevant provisions they have presented different judging criterions and have not formed some uniform judicial rules for gauging and suppressing the abuse of the right to change terms and conditions of labor contract unilaterally exercised by employers As a result the predictability and stability of the adjudication are hard to fulfill and need to be perfected

Keywords employers ' right to change the terms and conditions of labor contract unilaterally business necessity judicial interference adjudicatory rules

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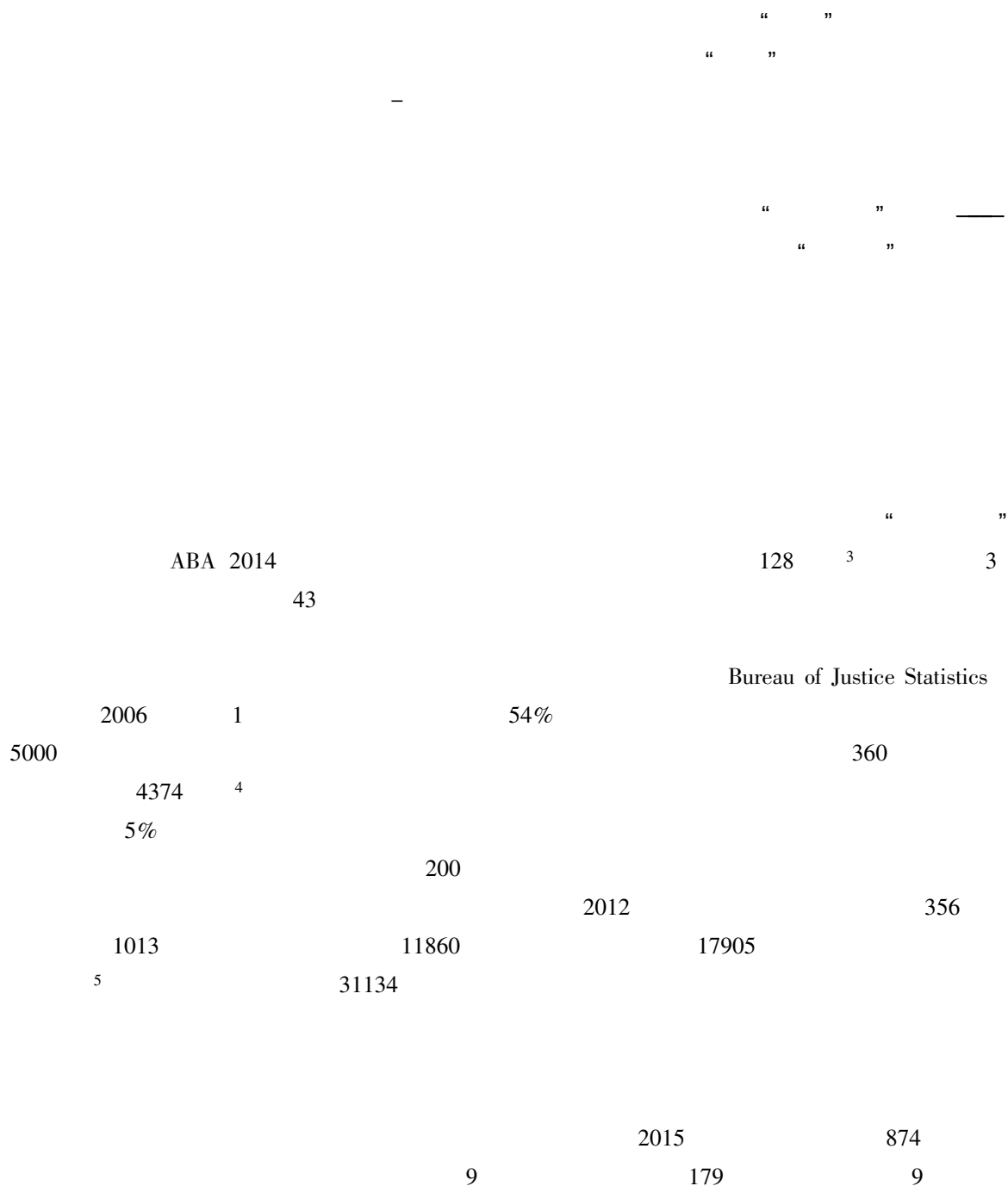
Johim Schwietzke

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3 http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_tables_2014_authcheckdam.pdf

4 <http://www.bjs.gov/index.cfm?ty=tp&tid=30>

5 Court Statistics Project National Center for State Courts 2012 http://www.courtstatistics.org/~media/Microsites/Files/CSP/SCCS/2010/Number_of_Authorized_Justices_and_Judges_in_State_Courts.ashx

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6 <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/06/30-3>

7 <http://www.uscourts.gov/judges-judgeships/authorized-judgeships>

8 <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/06/30-3>

9 <http://www.uscourts.gov/statistics/table/32/judicial-facts-and-figures/2013/09/30>

10 <http://www.census.gov/en.html>

11 J. Mark Ramseyer & Eric B. Rasmusen, *Comparative Litigation Rates*, http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_681.pdf

12 *Liebeck v. McDonald's Restaurants, P. T. S., Inc.*, No. D-202 CV-93-02419, 1995 WL 360309 (1994).

13 J Mark Ramseyer & Eric B Rasmusen *Comparative Litigation Rates* http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_681.pdf Table 1
14 http://www.courtstatistics.org/~media/Microsites/Files/CSP/SCCS/2010/Number_of_Authorized_Justices_and_Judges_in_State_Courts.ashx
15 http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC_CSP_2015.ashx
16 *Id.*
17 *Id.*

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18 <http://www.hcourt.gov.au/assets/corporate/annual-reports/HCA-Annual-Report-2013-14.pdf> http://www.fedcourt.gov.au/__data/assets/pdf_file/0004/25726/Annual-Report-2013-14.pdf <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/annual-reports/2013-14/2013-14-annual-report-part3> <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/annual-reports/2013-14/2013-14-annual-report-part3>

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20 <http://www.abs.gov.au/ausstats/abs@nsf/mf/3101.0>

21 <http://www.austbar.asn.au/member-information>

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34 http://www.legallyindia.com/wiki/Lawyers_in_India_by_state

35 Court News Vol IX No 2 pp 6 –8

36 Maria Dakolias *Court Performance around the World A Comparative Perspective* 2 Yale Human Rights and Development Law Journal 87 97 –98 1999 1300

37 *Id.*

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41 “ ” <http://www.chinalaw124.com/sifajujiao/20151205/13621.html>

42 fazhi1234 “ ” <http://www.haokoo.com/wmit/9363612.html>

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Designing Judiciary A Comparative Study of Judges Lawyers and Caseloads

Zhang Qianfan

Abstract This article is a comparative study of judicial post structures in major countries like the United States Germany Austria Japan and India It explores the general relationship between the numbers of litigations judges and lawyers and makes relevant comparison with China 's judicial structure Based on these comparisons it highlights the existing problems in the current judicial reform and proposes solutions to these problems More specifically the article points out that China 's judicial structure is characterized by relatively few litigations few lawyers low caseload and too many judges In reforming the judicial post structure China should not implement the policy of “one knife cuts all ” across the country and should decide the number of judges according to the local caseload In the mean time China should also regulate the scale of lawyers and allow them to play positive role in promoting rule of law

Keywords judicial posts per capita litigations caseload per judge judicial elites

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Thomas F. Hogan 2011 *Annual Report of the Director Judicial Business of the United States Courts* 32 – 34 Administrative Office of the U. S. Courts 2012

24 Gerald Lebovits *Judges ' Clerks Play Varied Roles in the Opinion Drafting Process* 76 N. Y. St. B. J. 34 34 2004

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33 https://oscar.uscourts.gov/qualifications_salary_benefits

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36 Thomas F. Hogan *The Federal System of the United States: An Introduction for Judges and Judicial Administrators in Other Countries* 41 3d ed. Administrative Office of the U.S. Courts 2012

- 1 聯邦政府人事管理局 (OPM) 布告《2014 年聯邦政府薪表》。
 - 2 聯邦政府薪表 <http://www.uscourts.gov/careers/compensation>。
 - 3 LCP “可比性”(Locality – Based Comparability Pay, LCP)。
- 聯邦政府。2014 年 3 月，LCP 14 16% 35 15%。就，

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45 Hogan *supra* note 36 at 37

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Research on the System and Mechanism Transition of Classified Management of Court Personnel

Wang Lusheng

Abstract The reforms of classified management of court personnel initiated from the end of the last century have not achieved the expected outcomes. The foresaid failure can be explained in the following three aspects: firstly, the reforms of classified management have encountered many predicaments in macro systems regarding personnel and finance. In addition, the reforms do not follow the professional rules of classified management. Last but not the least, the reforms have yielded to the executive character of the court internal administration. Therefore we have to transit the current system and mechanism of court personnel in three respects. First of all, we have to establish a unified judicial administrative system. Secondly, we have to abide by the professional rules of classified management. At last, we have to build a two – track inner administrative mechanism of court personnel.

Keywords court personnel classified management system mechanism transition

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- 1 Brandon L. Garrett *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 5 –6 Harvard University Press 2011
- 2 *Herrera v. Collins* 506 U. S. 390 420 1993 O'Connor J. concurring see also *id.* at 398 – 399 citing to “constitutional provisions that have the effect of ensuring against the risk of convicting an innocent person ”
- 3 “ ” 2008 5 14 6
- 4 “ ” <http://www.innocenceproject.org/> 2015 4 25
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20 <http://www.innocenceproject.org/faqs/what-is-the-innocence-project-how-did-it-get-started> 2015 4 26

21 Gitschier *supra* note 6 at 4

22 <http://www.innocenceproject.org/about-innocence-project/staff> 2015 4 25

23 <http://www.innocenceproject.org/about-innocence-project/directors> 2015 4 25

24 <http://www.innocenceproject.org/about-innocence-project/exoneree-speakers-bureau> 2015 4 26

25 <http://innocencenetwork.org/> 2015 8 8

26 <http://www.innocenceproject.org/about-innocence-project/innocence-network> 2015 5 1

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- 28 “ 2015 5 1 “ ” 69 “ ” 29 “ ” “ ” 18 “ ” 30 “ ” “ ” Amicus Brief Bank “ ” amicus curiae 31 Amicus Brief “ ” 14 32 “
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- 28 69 54 Actual Innocence Clinic at The University of Texas School of Law Alaska Innocence Project Arizona Innocence Project Arizona Justice Project California Innocence Project Center on Wrongful Convictions Committee for Public Counsel Services Innocence Program Connecticut Innocence Project Georgia Innocence Project Hawai'i Innocence Project Idaho Innocence Project Illinois Innocence Project Innocence & Justice Project at the University of New Mexico School of Law Innocence Project Innocence Project at UVA School of Law Innocence Project Northwest Clinic Innocence Project of Minnesota Innocence Project New Orleans Innocence Project of Florida Innocence Project of Iowa Innocence Project of Texas Kentucky Innocence Project Life After Innocence Loyola Law School Project for the Innocent Michigan Innocence Clinic Michigan State Appellate Defender Office – Wrongful Conviction Units Mid – Atlantic Innocence Project Midwest Innocence Project Mississippi Innocence Project Montana Innocence Project Nebraska Innocence Project New England Innocence Project New York Law School Post – Conviction Innocence Clinic North Carolina Center on Actual Innocence Northern California Innocence Project Office of the Ohio Public Defender – Wrongful Conviction Project Office of the Public Defender – State of Delaware Ohio Innocence Project Oklahoma Innocence Project Pennsylvania Innocence Project Reinvestigation Project Resurrection After Exoneration Rocky Mountain Innocence Center The Duke Center for Criminal Justice & Professional Responsibility The Exoneration Initiative Thomas M. Cooley Law School Innocence Project Thurgood Marshall School of Law Innocence Project University of Baltimore Innocence Project Clinic University of Miami Law Innocence Clinic Wake Forest University Law School Innocence and Justice Clinic West Virginia Innocence Project Wisconsin Innocence Project Witness to Innocence Wrongful Conviction Clinic 3 Association in Defense of the Wrongly Convicted AIDWYC Osgoode Hall Innocence Project University of British Columbia Law Innocence Project 2 Griffith University Innocence Project Sellenger Centre Criminal Justice Review Project 1 Innocence Project Argentina 1 Innocence Project of France 1 Innocence Project New Zealand Innocence Project South Africa 1 Irish Innocence Project at Griffith College 1 Italy Innocence Project 1 Justicia Reivindicada – Puerto Rico Innocence Project 1 Knoops' Innocence Project 1 Taiwan Association for Innocence 1 The Israeli Public Defender see <http://innocencenetwork.org/members/> 2015 5 1
- 29 <http://innocencenetwork.org/about/> 2015 5 1
- 30 <http://innocencenetwork.org/membership/> 2015 5 1
- 31 2013 69
- 32 <http://innocencenetwork.org/briefbank/> 2015 5 1

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33 Shaken Baby Syndrome See Deborah Tuerkheimer *The Next Innocence Project Shaken Baby Syndrome and the Criminal Courts* 87 Wash U L Rev 1 1 2009 – 2010

34 <http://innocencenetwork.org/briefbank/> 2015 5 1

35 <http://www.innocenceproject.org/faqs/how-many-people-write-to-you-each-year> 2015 5 1

36 Daniel S Medwed *Actual Innocents Considerations in Selecting Cases for a New Innocence Project* 81 Neb L Rev 1097 1115 2002 – 2003

37 Ellen Yankiver Suni *Ethical Issues for Innocence Projects An Initial Primer* 70 UMKC L Rev 921 921 2001 – 2002

38 Medwed *supra* note 36 at 1102

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39 *Id.* at 1105

40 <http://innocencenetwork.org/members/> 2015 5 2

41 See Jan Stiglitz et al. *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education* 38 Cal W L Rev 413 415 2002

42 <http://innocencenetwork.org/members/> 2015 5 2

43 *Id.*

44 *Id.*

45 Medwed *supra* note 36 at 1107

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46 <http://www.innocenceproject.org/faqs/how-much-does-dna-testing-cost> 2015 5 2

47 Medwed *supra* note 36 at 1107 – 1108

48 <http://innocencenetwork.org/members/>

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53 <http://www.ajsticproject.org/>

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81 <http://www.innocenceproject.org/faqs/what-is-the-innocence-projects-position-on-the-death-penalty>

82 Barbara J. Hayler, *Moratorium and Reform: Illinois' s Efforts to Make the Death Penalty Process "Fair, Just, and Accurate"* 29 Just Sys. J. 423-428 (2008).

83 <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide> (2015), 5-3.

84 WASP: White Anglo-Saxon Protestant — WASP WASP ”

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85 · L DNA 250

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86 Barbara K. Bucholtz, *Doing Well by Doing Good and Vice Versa: Self-Sustaining NGO/Nonprofit Organizations* 17 J. L. & Pol'y 403-407 (2009).

87

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20 60 70

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87 “ ” . <http://www.innocenceproject.org/about-innocence-project/artists-committee> 2015 5 4

88 <http://www.innocenceproject.org/get-involved> 2015 5 4

89 <http://www.innocenceproject.org/get-involved/10-things-anyone-can-do-to-help-exonerate-innocent-people-and-prevent-wrongful-convictions> 2015 5 4

90 Anthony G Amsterdam *Clinical Legal Education — A 21st Century Perspective* 34 Journal of Legal Education 612 615 1984 discussing the failure of the traditional law school curriculum with its emphasis on appellate case reading and interpretation to prepare

91

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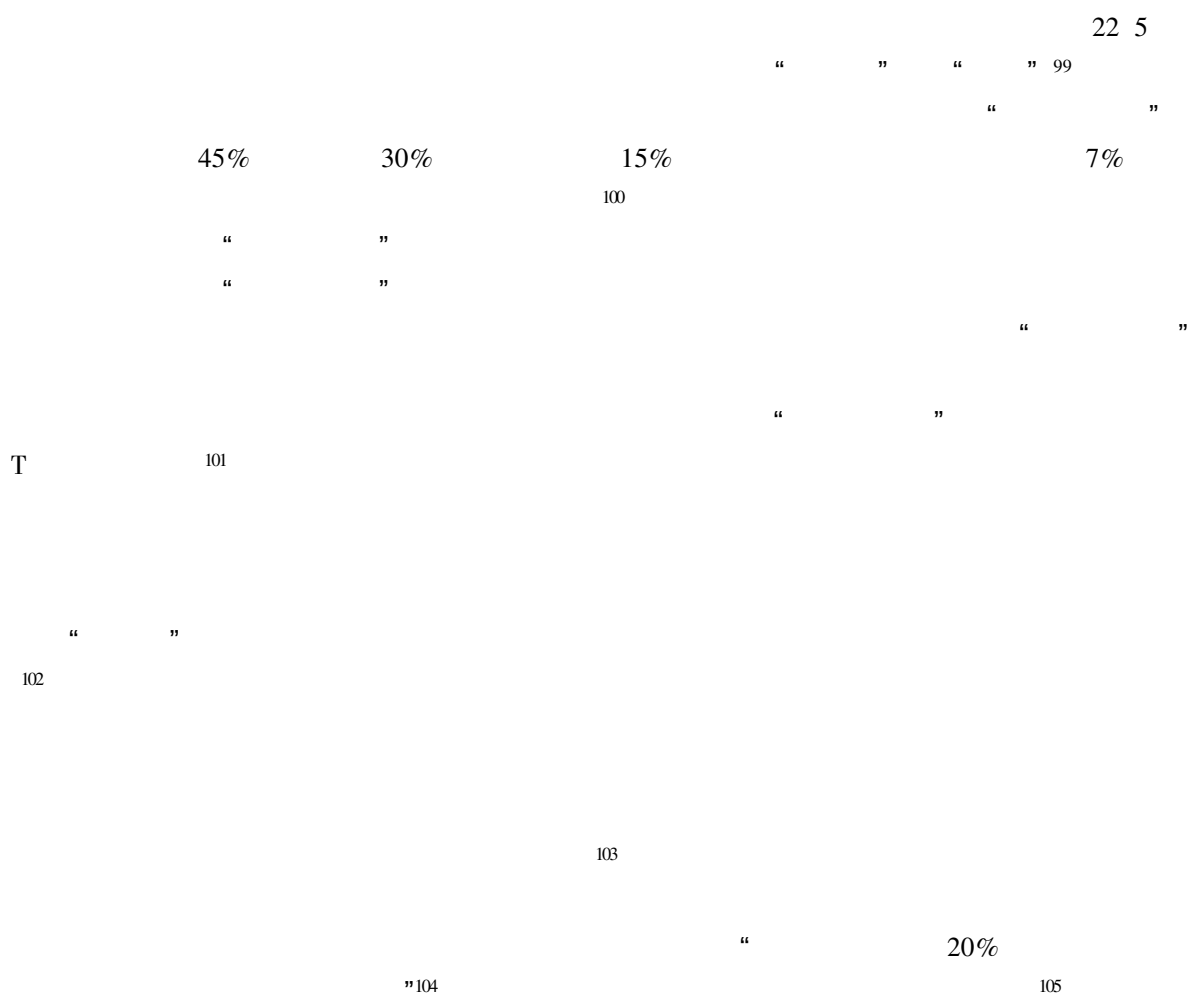
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97

98

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- 92 William P. Quigley *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor* 28 Akron L. Rev. 463-475 (1995)
- 93 Stiglitz *supra* note 41 at 415
- 94 *Id.*
- 95 Medwed *supra* note 36 at 1114
- 96 Ricciardelli, Bell & Clow *supra* note 77 at 1453-1457
- 97 Gitschier *supra* note 6 at 1
- 98 Krieger *supra* note 18 at 384



99 *Id.* at 362

100 <http://www.innocenceproject.org/faqs/how-is-the-innocence-project-funded> 2015 5 4

101 <http://shop.innocenceproject.org/> 2015 5 4

102 Krieger *supra* note 18 at 363

103 Ricciardelli Bell & Clow *supra* note 77 at 1453 – 1457

104 *Id.* Telephone interview with Dr. Robert Schehr, Executive Director, Northern Arizona Justice Project, Feb. 8, 2010.

105 “ ” 2004 2010

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<http://www.innocenceproject.org/faqs/what-are-your-largest-hurdles-in-bringing-about-an-exoneration> 2015 5 4

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109 “ DNA ”
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106 Krieger *supra* note 18 at 353

107 *Id.* at 354

108 Krieger *supra* note 18 at 356

109 *Id.*

110 <http://www.innocenceproject.org/faqs/how-often-do-dna-tests-prove-innocence-in-your-cases-does-testing-ever-prove-guilt> 2015 5 4

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112 Medwed *supra* note 36 at 1114

113 “ ” 329 DNA 195 20 80 99
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1 Nemo tenetur seipsum accusare No one shall be required to accuse himself Nemo tenetur prodere seipsum No one shall be required to betray himself

2 Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625-2639 (1996).

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3 Richard H. Helmholz, *Origins of the Privilege against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. Rev. 962, 982 (1990).

4 David Fellman, *Defendants Rights Today* 304–306 (University of Wisconsin Press 1979).

5 Andrew E. Taslitz & Margaret L. Paris, *Constitutional Criminal Procedure* 618 (Foundation Press 2003).

6 . 17

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8 Nathan Dorn, *John Lilburne: Oaths and the Cruel Trilemma*, <http://blogs.loc.gov/law/2013/04/john-lilburne-oaths-and-the-cruel-trilemma/>

9 *Miranda v. Arizona*, 384 U.S. 436, 459 (1966).

10 Nathan Dorn, *John Lilburne: Oaths and the Cruel Trilemma*, <http://blogs.loc.gov/law/2013/04/john-lilburne-oaths-and-the-cruel-trilemma/>

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¹³ Peter Richards John Lilburne *The First English Libertarian* Mises Daily Mar 29 2008

¹⁴ John Lilburne William Walwyn Thomas Prince & Richard Overton *An Agreement of the Free People of England* May 1 1649

¹⁵ R Carter Pittman *The Colonial and Constitutional History of the Privilege against Self – Incrimination in America* 21 Va L Rev 763 774 1935

¹⁶ *Miranda v. Arizona* 384 U S 436 459 1966

¹⁷ Albert W Alschuler *A Peculiar Privilege in Historical Perspective The Right to Remain Silent* 94 Mich L Rev 2625 2643 1996

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18 Richard H. Helmholz, *Origins of the Privilege against Self-Incrimination: The Role of the European Ius Commune*, 65 N. Y. U. L. Rev. 962, 975-976 (1990).

19 Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2645 (1996).

20 John H. Langbein, *The Historical Origins of the Privilege against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1079-1080 (1994).

21 Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2651 (1996).

22 N

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- 27 John H. Langbein *The Historical Origins of the Privilege against Self-Incrimination at Common Law* 92 Mich. L. Rev. 1047-1048 (1994)
- 28 Albert W. Alschuler *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent* 94 Mich. L. Rev. 2625-2654 (1996)
- 29 Leonard W. Levy *Origins of the Fifth Amendment: The Right against Self-Incrimination* 168-170 Macmillan Publishing Company (1986)
- 30 John H. Langbein *The Historical Origins of the Privilege Against Self-Incrimination at Common Law* 92 Mich. L. Rev. 1047-1060 (1994)
- 31 Albert W. Alschuler *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent* 94 Mich. L. Rev. 2625-2656 (1996)
- 32 J. M. Beattie *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries* 9 Law & History Rev. 221-227 (1991)

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59 *Murphy v. Waterfront Comm'n* 378 U.S. 52 (1964)

60 Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857 (1995)

61 1946 38 1 “ ” 1982 11
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David Dolinko *Is There a Rational for the Privilege against Self-Incrimination* 33 UCLA L Rev 1063 1986

Richard A. Leo *Inside the Interrogation Room* 86 J Crim L & Criminol 266 300-301 1996

Federal Sentencing Guidelines Manual 1995

Bureau of Justice Statistics *Sourcebook of Criminal Justice Statistics* at 486 1994

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4 2003 358 – 359

5 4 358 – 359

6 2007 59 – 61

7 Cfr. Renato Scognamiglio *Contributo alla teoria del negozio giuridico* Napoli 2008 pp. 31 – 32

8 Cfr. Massimo Brutti *La sovranità del volere nel sistema di Savigny* in *Quaderni fiorentini per la storia del pensiero giuridico moderno* vol.

9 Milano 1980 pp. 265 – 268

9 Cfr. Savigny *Sistema del diritto romano attuale III* tradotto da V. Scialoja Torino 1889 pp. 5 – 10



10 Cfr Renato Scognamiglio *Contributo alla teoria del negozio giuridico* Napoli 2008 p 34
11 Cfr Gerg Friedrich Puchta *Pandekten* 9 Leipzig 1863 S 74
12 Cfr Bernhard Windscheid *Lehrbuch des Pandektenrechts* Band I Düsseldorf 1862 S 144
13 Cfr Heinrich Dernburg *Pandekten* I Berlin 1884 SS 207 – 208
14 Cfr Zitelmann *Irrthum und Rechtsgeschäft* Leipzig 1879 S 41 ff 240 ff
15 14 243 – 248

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63 Cfr. *Hans Kelsen* Allgemeine Theorie der Normen Wien 1979 SS 197 228 ff 239

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Reconsideration of the Concept of Legal Transaction

Dou Haiyang

Abstract Understanding the concept of legal transaction should consider two aspects *declaration of intent* and *legal effect according to declaration of intent*. *Declaration of intent* puts emphasis on the composition and operation of legal transaction. It disassembles the concept into the intent and declaration and reveals the course that the inner intent is declared openly. On the other hand *legal effect according to declaration of intent* puts emphasis on the relationship between private autonomy and state law and reveals the legal transaction's nature of individual norm. In general, legal transaction should be defined as behavior with the nature of individual norm under the regulation of law to deal with civil subjects' own interests in the legal relationship through declaration of intent.

Keywords legal transaction declaration of intent private autonomy individual norm

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10 Seely v. White Motor Co. 63 Cal 2d 9 18 45 Cal Rptr 17 23 403 P 2d 145 151 Cal 1965

11 East River S. S. Corp. v. Transamerica Delavel 106 S Ct 2295 2302 1986

REM Coal Co. Inc. v. Clark Equip. Co. & Anderson Equipment Company¹²

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Industrial Uniform Rental Co. Inc. v. International Harvester Co.

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David A. Sherman et al. v. Johnson & Towers Baltimore Inc. and
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McNamee v. American Honda Motor Co. Inc.¹⁶

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¹² REM Coal Co. Inc. v. Clark Equip. Co. and Anderson Equipment Company 386 Pa. Super. 401, 563 A.2d 128 (1989).

¹³ Industrial Uniform Rental Co. Inc. v. International Harvester Co. 317 Pa. Super. 65, 79–80, 463 A.2d 1085, 1093 (1983).

¹⁴ National Steel Corporation v. Stephens – Adamson Page Engineering Company and the American Ship Building Company 1989 U.S. Dist. LEXIS 6128 (1989).

¹⁵ David A. Sherman et al. v. Johnson & Towers Baltimore Inc. and Ocean Yachts Inc. et al. 760 F. Supp. 499 (1990).

¹⁶ McNamee v. American Honda Motor Co. Inc. 11 Pa. D. & C. 4th 633 (1991).

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³³ *Transco Syndicate Ltd. and Barnacle Marine Management Inc. v. Bollinger Shipyards Inc. and Diesel Engine and Parts Co.* 1 F Supp 2d 608 1998

³⁴ *Sea – land Service Inc. v. General Electric Company Sea – Land Service Inc.* 134 F 3d 149 1998

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Lincoln General
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37 *McNamee v. American Honda Motor Co., Inc.*, 11 Pa. D. & C. 4th 633 (1991).

38 *The Washington Water Power Company v. Graybar Electric Company and A. B. Chance Company*, 112 Wn. 2d 847, 774 P. 2d 1199 (1989).

39 *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Construction, Inc. et al.*, 119 Wn. 2d 334, 831 P. 2d 724 (1992).

40 2 “ ”

41 *Staton Hills Wintery Company, Limited v. Lester L. Collons et al.*, 96 Wn. App. 590, 980 P. 2d 784 (1999).

42 *Lincoln General Insurance Company v. Detroit Diesel Corporation et al.*, 293 S. W. 3d 487 (2009).

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Comparative Study on the Compensation of Damage to Product Itself between China and America

Dong Chunhua

Abstract The comparison between Chinese 34 damage to the product cases and American 49 damage to the product itself cases indicates that the commercial relationship rule pure economic loss rule and “causing damages to the product itself in dangerous way ” rule are the most important factors which affect whether the damage to the product itself could get remedy through tort law Chinese courts usually don ’t exclude the claims of the commercial parties and are reluctant to apply the pure economic rule but would like to confirm the existence of unreasonably dangerous defect and permit the damage to the product itself to get tort remedy American court excludes commercial relationship litigation first and the majority courts would apply the pure economic loss rule to bar the tort remedy the t e p p r o a c h c

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2 See G Palombolla *The Abuse of Rights and the Rule of Law* in *Abuse The Dark Side of Fundamental Rights* 16 – 24 Andras Sajo ed
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4 “ ” “ ” 2015 5 1 [http //www chinacourt org/](http://www.chinacourt.org/law/detail/2015/04/id/148116.shtml)

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14 See *Jersild v. Denmark* European Court of Human Rights Application No 15890/89 Judgement of 23 September 1994 *Lehideux and Isorni v. France* Application No 24662/94 Judgement of 23 September 1998 *Refah Partisi the Welfare Party and Others v. Turkey* Applications nos 41340/98 41342/98 41343/98 and 41344/98 Judgement 13 February 2003

15 *Abuse The Dark Side of Fundamental Rights* 77 – 81 Andras Sajó ed Eleven International Publishing 2006

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21 ture of basic rights 226 prohibition of chicanery 18 forfei-

22 Karl Loewenstein *Militant Democracy and Fundamental Rights I* 31 3 The American Political Science Review 1937 Karl Loe-

23 *The 'Militant Democracy' Principle in Modern Democracies* 109 Markus Thiel ed Ashgate Publishing 2009

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40	Irina Petrova	“Stepping on the Shoulders of a Drowning Man ”	<i>The Doctrine of Abuse of Right as a Tool for Reducing Damages for Lost Profits Troubling Lessons from the Patuha and Himpurna Arbitrations</i>	35 Geo J Int ’l L 455 Winter 2004
41		“	”	
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42	Andr�s Saj�	Andr�s Saj�	<i>Abuse of Fundamental Rights or the Difficulties of Purposiveness</i>	in <i>Abuse The Dark Side of Fundamental Rights</i> 42 Andr�s Saj� ed Eleven International Publishing 2006

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On the Standard of the Abuse of Fundamental Rights

Gao Huiming

Abstract It is the pivotal issue to define the criteria of right abuse for the theory of the Prohibition fundamental rights abuse. There are three types of criteria used in Japan, Germany and the European Union respectively. The standard of fundamental rights abuse consistent with our national circumstances will be more strict than the other three, which violate or deviate from the goal of the fundamental right obviously and maliciously, and the action has demolished the legal order in view of existing experience and because of our constitutional norm, background of establishing constitution, fundamental rights guarantee system and guarantee extent as well as reasons of fundamental rights abuse. Based on the standard, it will form more exercisable constitutive requirement from precondition, character, subjective essential and consequence of the action.

Keywords fundamental rights abuse standard legal order

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5 Juraj Kotrusz *Gap-Filling of the CISG by the UNIDROIT Principles of International Commercial Contracts* 14 Unif. L. Rev. 119 (2009)
6 Phanesh Koneru *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles* 6 Minnesota Journal of Global Trade 105-152 (1997)
7 ICC International Court of Arbitration Award No. 7331 of 1994
8 *Decision of the Tribunal of Vigevano* 20 Journal of Law and Commerce 209-224 (2001)
9 Award No. 10 Ob 22/05S of Oberster Gerichtshof of Austria 26 April 2005
10 Award No. 1 Ob 74/99 K of Oberster Gerichtshof of Austria 29 June 1999

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11 M J Bonell *The UNIDROIT Principles of International Commercial Contracts and CISG — Alternatives or Complementary Instruments* 1
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on the Interplay between the Principles and the CISG 69 Tul L Rev 1149 1153 1995

12	2008	72
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13 Juraj Kotrusz *Gap-Filling of the CISG by the UNIDROIT Principles of International Commercial Contracts* 14 Unif. L. Rev. 119
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24 Mhael Joachim Bonell *The CISC and the Unidroit Principles of International Commercial Contracts Two Complementary Instruments* 10
International Law Review of Wuhan University 100 117 2008-2009

25 ICC International Court of Arbitration Award No 8502 of November 1996

26 Foreign Trade Court of Arbitration Attached to the Serbian Chamber of Commerce Award No T-9/07 of 23 January 2008

27 " " 2009 5 210

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28 ICC International Court of Arbitration Award No 11638 of 2002

29 Alejandro M Garro *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law Some Comments on the Interplay between the Principles and the CISG* 69 Tulane Law Review 1149 1995

30 . 2004 73

31 . 2004 247

32 Michael Joachim Bonell *The CISG and the Unidroit Principles of International Commercial Contracts Two Complementary Instruments* 10 International Law Review of Wuhan University 100 117 2008-2009

33 ICC International Court of Arbitration Award No 12460 of 2004

34 ICC International Court of Arbitration Award No 8817 of December 1997

35 Michael Joachim Bonell *The UNIDROIT Principles of International Contracts and CISG Alternative or Complementary Instrument* Uniform Law Review 29 39 1996

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44 Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien Arbitral Award No SCH – 4318 of 15 June 1994

45 Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense System Inc ICC International Court of Arbitration Award No 7365/FMS of 5 May 1997

46 Germany 14 June 1994 Lower Court Nordhorn <http://cisgw3.law.pace.edu/cases/940614g1.html> Germany 5 April 1995 District Court Landshut <http://cisgw3.law.pace.edu/cases/950405g1.html> Switzerland 21 October 1999 District Court Zug <http://cisgw3.law.pace.edu/cases/991021s1.html>47 John Y Gotanda *Recovering Lost Profits in International Disputes* 36 Georgetown Journal of International Law 61 112 2004

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Study on Interpretive and Supplementary Functions of PICC to CISG Taking the Damages System as Examples

Zuo Haicong & Yang Mengsha

Abstract PICC has interpretive and supplementary functions to CISG. The juristic basis is that PICC can be the auxiliary legal source of CISG, which helps to explain the general principles of CISG better. Taking the theory and practice about damages as examples, this approach complies with the uniform approach obligations under Article 7 of CISG, and has advantages of ensuring the international and uniformity characters of CISG comparing with other interpretation and supplementary methods. But the preconditions are its counterpart provisions to CISG do not violate the general principles and outrun the scope of CISG.

Keywords CISG PICC interpretation and supplementation damages

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52 International Arbitral Court of the Chamber of Commerce and Industry of the Russian Federation Award No 134/2002 of
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Codification of a Civil Code of Commercial Character

Liu Jingwei

Abstract The codification of a Civil Code faces the problem of how to deal with the relationship between civil and commercial matters. From China's actual situation, we should adhere to the combination system of Civil and Commercial Codes; moreover, the Civil Code should adequately reflect the essential requirements of market-oriented reforms and provide spiritual support and institutional basis for commercial law system. Codifying such a Civil Code of commercial character reflecting the requirements of market economy is suitable to the actual situation of civil and commercial legislation since the reform and opening up also is suitable to the future target of comprehensively deepening reform under the new situation. Therefore, in addition to such codification, there are no alternatives to realize civil and commercial legal systemization.

Keywords Civil Code; relationship between civil and commercial matters; protection of property rights; maintenance of contracts

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- 2 Paul A Samuelson *Pure Theory of Public Expenditure* 36 4 The Review of Economics and Statistics 387 1954
- 3 H Demsetz *The Private Production of Public Goods* 13 2 Journal of Law and Economics 293 1970
- 4 See Musgrave *Provision for Social Goods* in *Public Economics* 124 – 145 J Margoli & H Guitton eds St Martin 's Press 1969
- 5 . 2011 248
- 6 1993 20
- 7 . 2000 68
- 8 See W Ver Eekee *Public Goods An Ideal Concept* 28 3 Journal of Socio – Economics 139 1999
- 9 “ ” 2011 3
- 10 See Kenneth D Goldin *Equal Access vs. Selective Access A Critique of Public Goods Theory* 29 1 Public Choice 53 1977
- 11 “ ” *Goldberg v. Kelly* 397 U S 254 1970 1947

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- 15 See N. Johnson, *Problem for the Mixed Economy of Welfare State* in *Need and Welfare* 174, Alan Ware & Robert E. Goodin eds., Sage, 1990.
- 16 2013 41777 3549 216
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49 See George Stigler *Tenable Range of Functions of Local Government* in *Federal Expenditure Policy for Economic Growth and Stability* Washington D C Joint Economic Committee Subcommittee on Fiscal Policy 1957 pp 213 – 219

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Legislation Safeguard of Implementation of Environmental Law

Lin Canling

Abstract Environmental legislation must face up to the particularity and public welfare of environmental issues at the same time of seeking environmental fairness and justice with scientific environment legal liability system. The implementation of the environmental law shall first ensure that the law itself is a good one. Apart from establishing the legislative idea in response to time, it shall clarify the environmental obligations of the subject and the relationship between rights and obligations concerning public participation and environmental public interest litigation. This is the only way to guarantee the implementation of the environmental law effectively and to regulate people's environmental behavior.

Keywords environmental law environmental obligation implementation of the law legislative idea legislation safeguard

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23 Smith *supra* note 13 at 247

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The Decline and Revival of the American Community Hearing

Huang Fenglan

Abstract Under the context of local autonomy American community hearing made a significant contribution to community 's participation and development However with the transformation of the whole social environment the public show sharp – declined enthusiasm in participation as a result the functions of community hearing begin to face a series of challenges Through renewing the public enthusiasm for participating community hearing and endowing community people with real dominant force in the community decision – making to build a harmonious community with prolonged community autonomy culture US attempts to revive the local autonomous culture and make specific changes in the system of community hearings There is no doubt that these meaningful explorations have an important reference value for the burgeoning community governance of China The Fourth Plenary Session for Eighteenth National Congress of the CPC emphasized to promote grassroots governance under the rule of law deepen the basic – level organization governance according to law and support all kinds of social main body self – management These measures give us a clear direction for our country to increase citizen participation in grassroots management Learning experience from other countries and consummating the community hearing system in our country are the important approaches to achieve the strategic goals

Keywords community hearing local autonomy hearing procedure legal services

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