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一张“实用主义思路”的立法路线图

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梁慧星教授序言

王竹博士是国内民法学界80后一代的佼佼者，在“中国法学创新网”上经常能够看到他的学术成果，可见其特别勤奋努力。每次我到川大法学院，王竹都会主动谈及他的最新研究成果及正在研究的课题。与他讨论共同关心的学术和社会问题，总能感受到年轻一代学者的蓬勃朝气和历史担当。

王竹主攻侵权法，对民法典编纂也特别关注，其研究视角有独到之处。他读过民法通则颁布之前出版的许多民法学著作和苏联东欧公有制国家的民法译著，并对一些民法学前辈做过访谈。他的研究往往将问题置于一定的历史背景之中，而不是简单地用某个外国法作为判断基准。他关于赔礼道歉的研究，曾编入我主编的《民商法论丛》，首先从1957年的社会主义爱国公约运动谈起，回溯全部刑法草案和全部民法典草案、民法通则草案，厘清赔礼道歉的源流，然后结合当下法律背景和裁判实践，提出自己的见解。其编纂民法典的“实用主义思路”，也是值得民法学界关注的立法模式。所附“民法典编纂路线图”，直观地展示了他的立法构想。书中提到的我国到底有多少部现行有效法律的问题，也是学界长期忽略的民法典编纂的法制背景。关于《两岸四地民法示范法》的编纂和“裁判文书民事习惯调查”计划的设想，值得学界重视。

从本书可以看到中国80后一代民法学者迅速提升的学术水准和更加开阔的研究视野。相信通过老、中、青三代民法学人的团结努力，百年中国民法典之梦一定能够实现。

是为序。

中国社会科学院学部委员　梁慧星

2015年6月24日

Preface by Prof. LIANG Huixing

Born in 1980s, Dr. WANG Zhu is one of the top young scholars in China's civil law community. His publications frequently updated on the website of Law Information Research Center of China Law Society are the best evidence for his diligence and devotion to academic research. Every time I visited Law School of Sichuan University, Zhu would share with me his latest findings and the subjects he was studying. Discussing with him the academic and social issues of common concern, I was always touched by the vigor and historical responsibility displayed by him as a young generation of scholars.

The focus of his study is tort law, but it is just a part of his interest. He has a unique insight into the legislation of the Civil Code. He is well informed of countless domestic works on civil law study before the promulgation of The General Principles of the Civil Law and the translated works of the former Soviet Union and countries of East Europe that pursued public ownership system, and has had many interviews with scholars of older generations on civil law study. Instead of choosing a law of a foreign country as the criteria for judgment, he intends to place the issues in question in a particular historic background. For example, his paper on the issue of apology, collected into the *Civil and Commercial Law Review* edited by me, starts from the Movement of Socialist Patriotic Convention in 1957, and moves all the way to all

the drafts of the Criminal Law, the Civil Code, the General Principles of the Civil Law since then. It is based on such historic investigation and the current legal and practical background that he has produced his own particular understanding about this issue. His "Pragmatic Method" to compile the Civil Code also represents a kind of legislative model that merits attention of the civil law community. "The Process Map for Compiling a Civil Code" attached to this book directly shows his legislative design. It is worth mentioning that he has successfully answered "how many existing valid laws are there in China?", the question that has been neglected for a long time but is of vital importance to the compilation of the Civil Code. His design to compile a Cross-Strait-Quad-Regions Model Civil Law and the plan to "Investigate Civil Customs Reflected in Judgment Documents" are both worth highly concerned by the academic community.

This book is the evidence for the rapid improvement of academic performance and even broader vision of research by the new generation of civil law scholars. I am convinced that with the joint efforts of generations of civil law scholars, the dream that has been obsessing the Chinese academic community for a century of making a civil code of our own will finally come true.

Prof. LIANG Huixing
Academician of Chinese Academy of Social Sciences
June 24, 2015

韩大元教授序言

王竹教授是80后一代民法学者。近年来他一直关注宪法与民法关系，特别是研究民法典编纂过程中的宪法问题，善于从民法实践中发现宪法问题，从宪法实践中发现民法问题。在宪法与民法价值相对分离的中国学术界，作为民法教授研究宪法问题，坚持客观的学术立场，并发出一些“另类的”声音是不容易的。他是有学术理想，并充满学术责任感的青年学者，对跨学科的学术命题保持着浓厚的学术兴趣。《编纂民法典的合宪性思考》一书记载了作者对宪法与民法关系的学术思考，是一项值得关注的研究成果。

从学说史的角度看，宪法与民法关系在中国的演变经过了三个不同的阶段，即“陌生”阶段、“母子”阶段与“分化”阶段。

从清末至1949年以前，两者关系属于“陌生”阶段，没有成为基本的学术命题。在近代化过程中，中国古代法律主要受罗马法系的影响，学术界大多承认公法与私法的二元划分，较少论述宪法与民法关系。如民国时期史尚宽教授所著《民法总论》在解释民法法源时没有提及宪法。在当时的宪法学著作中，也不讨论有关宪法与民法关系的问题。

从1949年至20世纪80年代，两者关系处于“母子”阶段。这一时期，公法与私法的划分被完全否定，二者之间并不存在严格意义上的界限。宪法作为“母法”，民法作为“子法”

的关系得到学界的基本共识。

20世纪90年代以后，宪法与民法关系逐渐进入“分化”阶段。随着市场经济的发展，学界普遍强调保障私权，重新提出公法与私法的划分问题。在私权价值得到肯定以后，民法学界寻求重新论证民法的自主地位，并试图将民法从宪法的“统治”下摆脱出来，有时与宪法保持一定的距离。从20世纪90年代开始，民法学界形成了代表性的学术主张，如“私法优位论”、“民法、宪法同位论”、“缔造市民社会论”等。这些观点对于学界研究宪法与民法关系提供了有益的思路或方法，但从宪法学角度看，其基本命题中存在着值得商榷的内容。应当承认，两个学科对学科范畴、社会功能的理解是有所不同的，如何把宪法理念体现在民法体系中，让民法接近宪法、以实现宪法价值是值得思考的问题。2005年《物权法（草案）》是否合宪的争论将宪法与民法关系的讨论推向高潮，引发宪法学者和民法学者的广泛关注，同时也留下了许多新的学术命题。

作者作为民法学者，在学术命题的选择和论证上，坚持宪法的视野，强调宪法思维、宪法意识、宪法文化在民法体系中的意义。《编纂民法典的合宪性思考》分四编，每部分的内容都涉及相关宪法与民法关系的论证，特别是民法典编纂过程中涉及的宪法程序问题。从本书可以看到，在两种知识体系的交叉与转型中，作者既坚持民法学专业的立场，也追求宪政理想，力求在事实与价值的二元结构中审视宪法体系中的民法问题，在规范上区分两者的不同功能，在价值体系上优先宪法价值。从一般意义上讲，宪法与法律功能是有区别的，由此形成了宪法问题与法律问题的不同逻辑。宪法对一般法律的控制主要体现在制定依据与实施过程。也就是说，所有的法律、法规和规范性文件不得与宪法相抵触。面对

民事立法的合宪性基础，作者并没有回避问题，而是从实践出发合理解释相关问题，试图从宪法上找到民法解释学的依据。

作者在民法典的解释论上引入了合宪性概念，以合宪论为基础分析民事立法、民法价值与宪法价值之间的相互关系，要跳出民法去谈立法活动合宪性基础。基于对合宪性价值的维护，作者将整体民法置于立法机关的宏观视野之中，更加现实地推动民法典的编纂。这是具有新意的研究思路与论证方法，在一定程度上拓展了传统民法学的方法论体系。其学术价值表现在：首先，作为民法学的一种规范与思想体系，合宪性的诠释与运用，对民法规范的实践过程产生重要影响，可以成为一个指导性的宪法原则，为民法解释学提供合理的方法论基础；其次，合宪性理念在民法实践中的具体运用，有助于挖掘和阐释丰富的民法资源；同时，将宪法价值引入民法实践过程，有助于深化对现代民法体系的理解，解决风险社会出现的一些新的民法问题。

作者在本书中，结合学术命题，积极回应实践中提出的新问题，保持学术立场，对有争议的问题提出了独立的学术见解。在讨论《物权法》的私人财产权条款是否违宪的问题时，作者的学术判断是比较客观而理性的。作者认为，法律的合宪性基础的判断虽表现为制定过程，但主要是在法律实施过程中进行的。判断一部法律是否“根据宪法”时，要考虑法律理念、基本原则和具体内容是否符合宪法规范、宪法原则与宪法精神。这里既有实质意义上的合宪性，同时也有形式意义上的合宪性。在具体判断时，也存在实质意义宪法与形式意义宪法的区别问题。如以形式意义的宪法为尺度，判断者既要考虑宪法典结构内部的含义，同时也要考虑宪法典之外的价值问题。以形式意义的宪法为尺度的情况下，判断者只能以宪法典所确定的规范作为判断标准，不宜随意

扩大判断尺度的外延。民法典的宪法依据要坚持整体性原则。尽管存在宪法典之外的判断标准，但为了保证宪法尺度的客观性与现实性，判断其根据时需要以宪法规范所包含的涵义作为基础。

在研究方法上，作者将宪法与民法关系置于社会生活的具体场域中，以综合的视角与框架，力图形成体系化的范畴，既增加了论证的说服力，也增加了理论的深度和广度。特别是作者设计的“民法典编纂立法路线图”对于未来民法典的相关工作会产生一定的学术影响。

总之，该书强调了学术的问题意识与实践理性，突出了问题导向，是一部具有新意的学术著作。当然，书中的有些命题及论述，如基本法律的结构与效力、合宪性与合法性价值对于民事立法产生的影响以及宪法解释与民法解释的内在联系等问题，仍有进一步深入探讨的空间。另外，在论证民法的宪政基础时，如何保持研究方法的专业性与知识体系的相对独立性也是值得深入论证的命题。

该书的出版对于我们了解民法典编纂与宪法价值、厘清宪法与民法之间的关系具有重要的参考价值和借鉴意义。望王竹博士继续挖掘民法的宪政因素，继续拓展民法学的研究领域，为繁荣民法学研究做出贡献。

是为序。

中国人民大学法学院教授、院长
中国宪法学研究会会长
韩大元

2015 年 6 月 24 日

Preface by Prof. HAN Dayuan

Professor WANG Zhu is a scholar of civil law born in the 1980s. In recent years, he has been showing a particular interest in the relationship between the constitutional law and civil law, especially the constitutional concerns that may occur in the process of compiling the Civil Code. He is good at detect constitutional issues from the legal practices of civil law and civil law issues from the constitutional practices. In the Chinese academic community which pursues a way that treats the constitutional law and civil law values separately, it is really rare for a civil law scholar to study constitutional issues and voice an "offbeat" idea based on objective stance. He represents a younger generation of scholars who are empowered with dreams and sense of responsibility for academic pursuit, and at the same time, persist their interest in interdisciplinary academic topics. Thought on Constitutionality of Compiling Civil Code is not only a record of his academic thought on the relationship between constitutional law and civil law, but also an important achievement that merits attention of the academic community.

Historically, the relationship between the constitutional law and civil law has gone through three stages, namely, "estrangement", "superior-subordinate", and "splitting-up".

From the end of Qing Dynasty to the year 1949, the constitutional law and civil law were estranged from each other, and there

was no research that studied the relationship between the two. During the process of modernization at that time, the Chinese legal system was severely influenced by the Roman Law that focused on dichotomy between the public law and the private law, leaving the relationship between the constitutional law and civil law untouched by the academia. For example, Professor SHI Shangkuan during the reign of the Republic of China didn't mention the Constitution when exploring the origin of civil law in his General Principles of Civil Law. In return, the works study on the constitutional law didn't say anything about the relationship between the two.

From 1949 to 1980s, the relationship between constitutional law and civil law became superior-subordinate. During this period, the differentiation between the public law and the private law was practically denied. It had become a universal acceptance of the academia that the Constitution was the "mother law", or superior law, and the civil laws the "son law", or subordinate law, and there was no strict borderline between the public and private laws.

Since 1990s, the constitutional law and civil law have been splitting up with each other. With the development of market economy, the academia has put a new emphasis on the protection of private rights, and therefore, the separation between the public and private laws has been put back on the table. After affirming the value of private rights, the civil law community began to seek the autonomous position of civil law and try to detach it from the Constitution. Their idea is that it would be better for civil law to keep a certain distance from the Constitution. Since 1990s, many theoretical propositions have be produced, represented by "superiority of private laws", "apposition of civil laws and the Constitution", "the building of civil society", etc. . Although these theories have provided useful ideas or

methods for the study of relationship between the Constitution and civil laws, from the perspective of constitutional law, they are still questionable in terms of their fundamental propositions. It cannot be denied that since civil law and constitutional law fall into different disciplines, they have different scope of studies and social functions. In this sense, efforts should be made to implant the idea of constitution into the system of civil law, so as to make a constitution-friendly civil law that reflects the value of the Constitution. In 2005, the concern about unconstitutionality of Property Right Law (Draft) pushed the discussion on the relationship between the Constitution and civil law to a new high. Many scholars of both constitution and civil law proposed their own ideas on this issue, many of which have become new subjects for further studies.

As a scholar of civil law, Zhu has demonstrated his constitutional vision in choosing and arguing academic propositions. He attaches a special importance to the constitutional way of thinking, constitutional ideas and constitutional culture in the overall system of civil law. There are four parts in this book, each of which discusses different relationships between the Constitution and civil law, in particular, whether the compilation of civil code will breach the legal procedure provided by the Constitution. The book reflects Zhu's pursuit that in this time of disciplinary crossover and transformation, the adherence to basic principles of civil law and pursuit of constitutionalism will help to review, in terms of facts and value, the issues of civil law in the system of constitutional law, distinguish the different functions of the two in terms of norms, and give a priority to the Constitution in the system of values. Generally, the Constitution and other laws are different functionally, leading to the different logics of constitutional and other legal issues. The dominance of the Constitution over other laws

is obvious when it comes to the ground of legislation and process of implementation of these laws. In other words, all the laws, regulations and regulatory documents shall not be in conflict with the Constitution. To seek the constitutional ground for legislating civil law, based on actual practices, Zhu gives reasonable explanations to the issues concerned. His attempt is to find a hermeneutical basis for civil law from the Constitution.

Hermeneutically, Zhu has introduced the concept of constitutionality in explaining the legislative process of civil code. He tries to analyze the legislation of civil law on the basis of constitutionality, and the relationship between the value of civil law and that of the Constitution, which means we need to jump out of the civil law to discuss the constitutional basis for the legislation. In order to safeguard the constitutional value, he has staged the civil law in the macro vision of the legislature, with the purpose to promote the compilation of civil code in a more pragmatic manner. Such an innovative way of thinking and arguments will expand, to some extent, the traditional methodological system of civil law study. His contributions are as follows: first, as a kind of norm and ideological system, the interpretation and application of the concept of constitutionality will exert an important influence on the practice of civil law, act as a constitutionally guiding principle and provide reasonable methodology for the hermeneutics of civil law. Second, the actual application of the concept of constitutionality in the practice of civil law will help to further explore and interpret the rich resources of civil law. Third, introducing constitutional value into the practice of civil law will deepen people's understanding of the modern system of civil law, and help to solve the newly emerging civil issues in the risk society.

Proceeding from the academic propositions, Zhu has actively

answered the newly emerging issues in practice. While keeping his theoretical stance, he has produced many unique insights into these controversial issues. In discussing whether the clauses concerning private property prescribed in Property Right Law breaches the Constitution, Zhu's academic judgment is objective and rational. He is of the opinion that although to judge whether a law conforms to the Constitution depends on its legislative process, it is actually reflected in the process of its implementation. To judge whether a law "has a constitutional ground" is to see if its concepts, basic principles and specific contents conform to the norms, principles and spirit of the Constitution. It means that the law has to be in agreement with the Constitution not only in substance but also in form. In practice, it is really necessary to distinguish substantial constitutionality from formal constitutionality. If the substantial constitutionality is the judgment criterion, people have to consider not only the interior meaning of structural significance of the Constitution, but also its exterior value. This criterion means that people can only take the norms regulated by the Constitution as the standard to judgment, and they cannot arbitrarily expand the extension of that criterion. It is important that the civil code should have an overall constitutional ground. Although there exist some other non-constitutional judgment criteria, in order to guarantee the objectivity and actuality of the constitutional ground, the judgment of civil code should still be confined to the connotation regulated by the norms of the Constitution.

In terms of research methods, Zhu sets the relationship between the Constitution and civil law in the background of specific social life. A systematic domain formed under such comprehensive vision and framework helps to boost the persuasiveness of the argument and add depth and breadth of the theories. In particular, the "The Process

Map for Compiling a Civil Code" designed by him will have a positive influence on the future preparatory work of civil code.

In sum, by giving highlight to sensitivity to academic issues and practical rationality, oriented by problems and concerns, this book is a good academic work of innovation and creativity. Its glow cannot be overshadowed by some minor failures, such as the problems of structures and validity of basic laws, the influence of value of constitutionality and legitimacy on civil law legislation, and the inner relationship between constitutional law and civil law interpretations, all of which needs further study and investigation. In addition, it would be more appropriate if Zhu, when studying constitutional ground of civil law, probed further into propositions such as how to maintain the expertise of research methodology and the comparative independence of knowledge system.

The publication of this book is of important significance in classifying the relationship between civil code compilation and constitutional value, and between the constitutional law and civil law. I hope Zhu will continue his efforts in exploring the constitutional elements of civil law, expanding the scope of study of civil law, and making further contribution to the prosperity of civil law studies.

Prof. HAN Dayuan
Dean of Law School of Renmin University of China
Chairman of Chinese Research Association of
Constitutional Law
June 24, 2015