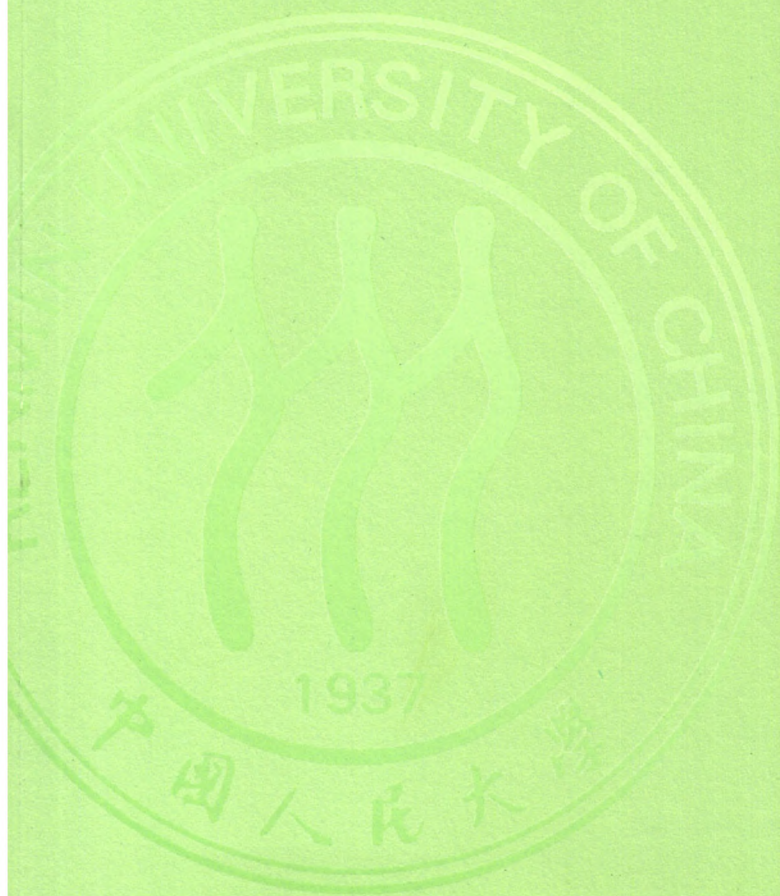


# 法学家

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## 专论

- 指标控制与依法行政：双重治理模式的实证研究 ..... 万江(1)
- “互联网+”的规制结构  
——以“网约车”规制为例 ..... 陈越峰(17)
- 民事诉权合同研究  
——兼论我国司法裁判经验对法学理论发展的影响 ..... 巢志雄(32)
- 行政犯违法性判断的从属性和独立性研究 ..... 孙国祥(48)
- 证明责任“规范说”理论重述 ..... 胡学军(63)
- 条件说的厘清与辩驳 ..... 邹兵建(77)
- 《大宪章》成因考 ..... 何勤华 王涛(92)

## 视点

- 程序性辩护的理论反思 ..... 陈瑞华(109)
- 论商品房预售合同的效力 ..... 耿林(123)
- 虚假陈述侵权责任之侵权行为认定 ..... 廖升(134)
- 论夫妻共同债务“时间”推定规则 ..... 孙若军(146)

## 争鸣

- 《合同法》第54条第1款第2项(显失公平制度)评注 ..... 贺剑(155)
- 英文提要(ABSTRACTS) ..... (175)

## ABSTRACTS

### *Administration According to Law and Governance by Index: Empirical Research*

*about the Double Model of Governance of Local Government in China*

WAN Jiang · 1 ·

As a part of governance system in China, the central-government uses double model of governance including rule of law and rule by index, to consolidate the authority and legitimacy of the government. Index-mechanism focuses on the result but ignores the standard procedures. In contrast, law-mechanism focuses on the standard procedures but lacks incentive being properly used. The double model of governance is an incentive compatibility constraint, for the rule of law can establish the bottom line of the government behavior, and the rule by index can stimulate the officials by performance measurement and political tournaments. Now, the central-government uses performance measurement to promote administration legally. However, the index-mechanism may undermine the authority of the rule of law. We need to coordinate the index-mechanism and the law-mechanism.

**Key Words** Local Government; Political Transaction Cost; Administration under Law; Performance Measurement; Double Model of Governance

Wan Jiang, Ph.D. in Law, Associate Professor, Economic Law School, Southwest University of Political Science and Law.

### *The Regulatory Structure of “Internet Plus”:*

*A Case Study on “App-Based Ride and Taxi Services”*

CHEN Yuefeng · 17 ·

“Internet Plus” may amplify risk while it improves efficiency. It is a priority to research the regulatory structure. There are controversies on the issue of regulation of “App-Based Ride and Taxi Services”, especially the issues of whether, how and who to regulate. We need a clear government-market boundary to determine whether to regulate. “App-Based Ride and Taxi Services” may lead to negative externalities, information asymmetry and monopolistic structure. Regulation is essential for it is supported and controlled by “The Administrative Licensing Law”. The regulation program should be equitable, appropriate and dynamic. It should be equal to ensure fair competition. The proper measures should be chosen to achieve the purposes of regulation. It also should be adjusted dynamically. In order to achieve effective regulation, the central legislation should establish a fundamental regulatory structure followed by the local regulatory measures. Eventually, a layered and classified regulatory structure could be constructed in a systematic and cooperative framework.

**Key Words** “App-Based Ride and Taxi Services” Regulation; “Internet Plus” Regulation; Administrative Regulation; Administrative Rule of Law

Chen Yuefeng, Ph.D. in Law, Associate Professor of Law School of ECUPL.

***Research on the Contract of Civil Right of Action: The Influences of  
Judicial Experience on the Development of Legal Theory***

CHAO Zhixiong · 32 ·

The right of action is the subjective right in procedural law. Under the premise of not violating the procedure law, the parties have the right to freely dispose of the right of action according to the principle of autonomy of will. The contract is an expression form of the parties to dispose of the right of action. The civil judicial practice of our country has recognized the legitimacy of the contract of right of action, and has formed some mature judicial experience. It is clear that the theories such as the constitutional right of action and the human rights of action are not in conformity with the empirical knowledge. The legal theory and judicial practice of France, Germany, Japan and other civil law countries are consistent with the judicial experience in China. Our civil action theory has failed to meet the requirements of judicial practice. In the civil procedure research, the problem of “theory divorced from practice” needs to be changed.

**Key Words** Civil Procedure; Right of action; Contract of Civil Right of Action

Chao Zhixiong, Ph.D. in Law, Associate Professor of Law School of Sun Yat-sen University.

***The Dependence and Independence of the Unlawfulness Judgement in  
Administrative Crime***

SUN Guoxiang · 48 ·

For the administrative crime, the criminal and the administrative unlawfulness are overlapping with each other. The distinction is too vague to connect the criminal and administrative law enforcement fluently. The previous studies in this area are either too abstract or too detailed, which are not able to draw a clear boundary between the criminal and the administrative unlawfulness. In light of the protection of legal interest, the theory of qualitative difference and the theory of quantitative difference are not totally incompatible. The administrative unlawfulness is although necessary for the administrative crime. However, the administrative and the criminal law have different purpose and range of regulation, which means that the practice should use both the theory of qualitative and quantitative difference to distinguish the criminal and the administrative unlawfulness according to the infringed legal interest in concrete situations. The theory of qualitative difference will distinguish the crime and the non-crime, when the threatened legal interest by a criminal offence are different from the threatened legal interest by an administrative offence. It is compatible with the theory of quantitative difference to distinguish and connect the administrative and the criminal offence, when both of them threaten the same legal interest.

**Key Words** Administrative Crime; Mala Prohibita; Wrongfulness; Administrative Unlawfulness; Criminal Unlawfulness

Sun Guoxiang, Professor of Nanjing University Law School.

*“Norm Theory” on the Burden of Proof: A Restatement*

HU Xuejun · 63 ·

The burden of proof consists of three levels methodology: the referee method to non-liquet, the burden of proof allocation method and specific and legitimate method to this allocation rule. The essence of the burden of proof is about legal application, and the interpretation of the law is the basic operations of legal application. The Article 79 of CHinese Fort Law does not constitute the essential defect of the Norm Theory. Animals' Injuring case in “Chinese Tort Law” of legal interpretation is a case in point, rather than counter-examples on the burden of proof allocation according to Norm Theory. In many ways the difference between Norm Theory and Modified Norm Theory is about form and substance. And in the allocation of the burden of proof of the results, according to the two theories it is basically the same. To respect the legislative purpose and object of the substantive law to allocate the burden of proof is the core idea that two theories always insisted on, which is also the essential difference between this theory and other competitive theory.

**Key Words** Burden of Proof; Norm Theory; Modified Norm Theory; Legal Interpretation; Legal Loophole

Hu Xuejun, Ph.D. in Law, Professor of Nanchang University Law School, Research Fellow of The Legislative Research Center of Nanchang University.

*Analysis on the Conditions Theory*

ZOU Bingjian · 77 ·

As the most influential theory in the field of causality in criminal law, the conditions theory is subject to three typical criticisms. Firstly, it is criticized as worthless because it can not provide any help in the identification of causal relationships. Secondly, it is considered to be a wrong theory because it will draw erroneous conclusions on specific occasions. Thirdly, it is accused for leading to an overly broad scope of criminal responsibility. After a detailed analysis, we can know that the three criticisms can not be established.

**Key Words** Conditions Theory; CSQN Formula; Formula of the Conditions theory; Hypothetical Causation; Alternative Causation

Zou Bingjian, Ph.D. in Law, Lecturer of Tianjin Finance University Law School.

*Analysis on the Contributing Causes of Magna Carta*

HE Qinhua, WANG Tao · 92 ·

Magna Carta, since its birth in 1215, has induced extraordinary enchantment as well as controver-

sies. While laudators extol Magna Carta as the genesis of western constitution, democracy, rule of law and human rights, critics consider it a mere old feudal law. Analyzing the crisis of 1215 and the political, religious, financial and judicial factors which result in the signing of Magna Carta, this article demonstrates that Magna Carta is the outcome of interactions between various accidents and inevitable social developments in medieval England. Contrasting medieval England with medieval China, Russia and France, the article displays the unique national character, good timing, social roots and irreproducibility of Magna Carta. The myth of Magna Carta lies in the potential of its 63 clauses as well as in the unique national character of medieval England. The essence of Magna Carta embodies the checks and balances in state-governing, which is the reason that Magna Carta receives tremendous ovation in bourgeois revolution and the eternal value of Magna Carta.

**Key Words** Magna Carta; Medieval England; Kings; Church; Checks and Balances

He Qinhua, Ph.D. in Law, Professor of East China University of Political Science and Law;

Wang Tao, Ph.D. Candidate of East China University of Political Science and Law, Judge of Shanghai No. 1 Intermediate People's Court.

#### *Theoretical Reflection on the Procedural Defense*

CHEN Ruihua · 109 ·

With the advancement of the criminal reform in China, lawyer's procedural defense has a unique operation mode, and also has an independent goal different from other forms of defense. However, this form of defense has also been caught in a dilemma in the judicial practice. Many reasons lead to the fact that it is difficult for procedural defense to achieve the desired results, such as, the unclear definition of illegal evidence, subordinate position of procedural justice, the monopoly of procurator in evidence resource and the lack of relevant evidence rules. Although lawyers have been actively exploring the system, they still live in the cracks of the system and hardly get rid of difficulties. Only when we carry out the comprehensive criminal judicial reform, can we provide the basic space of system for procedural defense.

**Key Words** Procedural Defense; Exclusion of Illegal Evidence; Legitimacy of Investigation Procedure; Pretrial Conference; Formal Investigation Procedure

Chen Ruihua, Professor of Law School of Peking University, The Yangtze River Scholar Professor.

#### *On the Effectiveness of Advance Sale Contract for Commercial Houses*

GENG Lin · 123 ·

When the parties conclude an advance sale contract for commercial house without an administrative license for the sale, it concerns with the issue of whether the violation against the license system for the advance sale of commercial house, which is regulated respectively by *The Urban Real Estate Administration*

*Law of the People's Republic of China (UREAL)* and *The Measures for the Management of Advance Sale of Urban Commercial Houses (MMAS)*, has any effect upon the sale contract concerned. To answer this question, the logic in the construction of legal norms should combine the general clause of *ius cogens* in Art. 52 (5) of Chinese Contract Law (1999) with the concrete mandatory regulation rules which require the qualified license. Considering in perspective of interests balancing, albeit the goal of Art. 6 (2) of MMAS is to protect the interest of buyer and secure the completion of the building, this interest cannot be compared to the interests between contractual parties, that is to say the former is anterior to the latter. On the other hand, to give the violence a void effect will even not conform to the *ratio legis* of MMAS. Therefore, the violation against Art. 6 (2) of MMAS does not suffice the *ratio legis* of Art. 52 (5) of Chinese Contract Law, and the contract concluded without the administrative license should be treated as effective. That the *Interpretation of the Supreme People's Court on the Relevant Issues concerning the Application of Law for Trying Cases on Dispute over Contract for the Sale of Commodity Houses* (2003) stipulates in its Art. 2 the contract as void, does not conform to the *ratio legis* of the object of interpretation, i. e. of UREAL and MMAS, although it mitigates somehow its sharp effect.

**Key Words** Advance Sale Contract for Commercial Houses; Administrative License for the Advance Sale of Commercial Houses; Contractual Effectiveness; Void of the Contract

Geng Lin, Ph.D. in Law, Associate Professor of Tsinghua University Law School.

### ***The Identification of Misrepresentation in Tort Liability***

LIAO Sheng · 134 ·

The misrepresentation not only disturbs economic order, but also damages the majority of investor's legitimate interests. From my perspective, we should adopt stratified method to solve the problem. Firstly, in regard to unification, several common elements relate to misrepresentation, deeming "reasonable investor" theory as the criteria of importance, referring to "effective market" theory as the standard of identifying and emphasizing on objective. Secondly, in terms of categorization, standard of identifying according to specific types of misrepresentation should be stipulated. For example, false representation lays stress on authenticity and reasonable and misguides representation emphasizes accuracy. In addition, significant prepermission aims at completeness and improper disclosure relates to timeliness and legal form. What's more, identification criteria of misrepresentation in OTC market should be regarded same as it in inside market.

**Key Words** The Misrepresentation; Reasonable Investor; Standard of Identifying; OTC Market

Liao Sheng, Ph.D. in Law, Research Fellow of The Institute of Civil Code of Zhongnan University of Economics and Law.

***On the “Time” Presumption Rule of Joint Debt of Husband and Wife:***

***Analysis of Article 24 of the “Marriage Law Interpretation II”***

SUN Ruojun · 146 ·

The legal basis of applying the “time” presumption rule on the joint debt of husband and wife is the theory of joint ownership in civil law. During the existence of the marriage, if either the husband or wife files a claim for a personal debt in the name of one party, the debt shall be treated as a joint debt of the husband and wife if the creditor has reasons to believe that the debt is for common life or is incurred under the consensus of husband and wife, unless either the husband or wife is able to prove that the creditor and debtor have clearly stipulated it as a personal debt or to show they come to an agreement that the property incurred during the existence of marriage to be owned by each party if the creditor has the knowledge of the said agreement.

**Key Words** Joint Debt of Husband and Wife; Presumption Rule; Agent Power of Family Affairs; Agency by Estoppel

Sun Ruojun, Ph.D. in Law, Associate Professor of Renmin University Law School, Research Fellow of Civil and Commercial Law Research Center at Renmin University of China.

***A Commentary on Art. 54 I 2 of the Contract Law: The Doctrine of***

***Unconscionability***

HE Jian · 155 ·

It is widely accepted in the case law that unconscionability, in spite of the dispute among scholars, has a substantial and a procedural element. The ignorance of the latter would cause conceptual problems and negative results. The unconscionability doctrine is a materialization of the principle of public policy. It can be applied to bilateral contracts and some unilateral contracts, and to civil contracts as well as (limitedly) to business contracts. More exactly, either a contract or a contract term could be unconscionable. In some special circumstances, unconscionability can be established based on the so-called “bewegliches system” theory, which allows a “compensation” between the substantial and the procedural element. A modification is always better than a revocation. In case of modifying a contract the court should in principle try to imitate the bargaining between the parties. A modification according to the default rules should be exceptional. The rules on the unconscionability doctrine in the draft of the General Part of Chinese Civil Code is to be improved.

**Key Words** Unconscionability; Public Policy; Principle of Fairness; Exploitation of the Other Party’s Danger; Chinese Civil Code

He Jian, Ph.D. in Law, Assistant Professor of Peking University Law School.



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