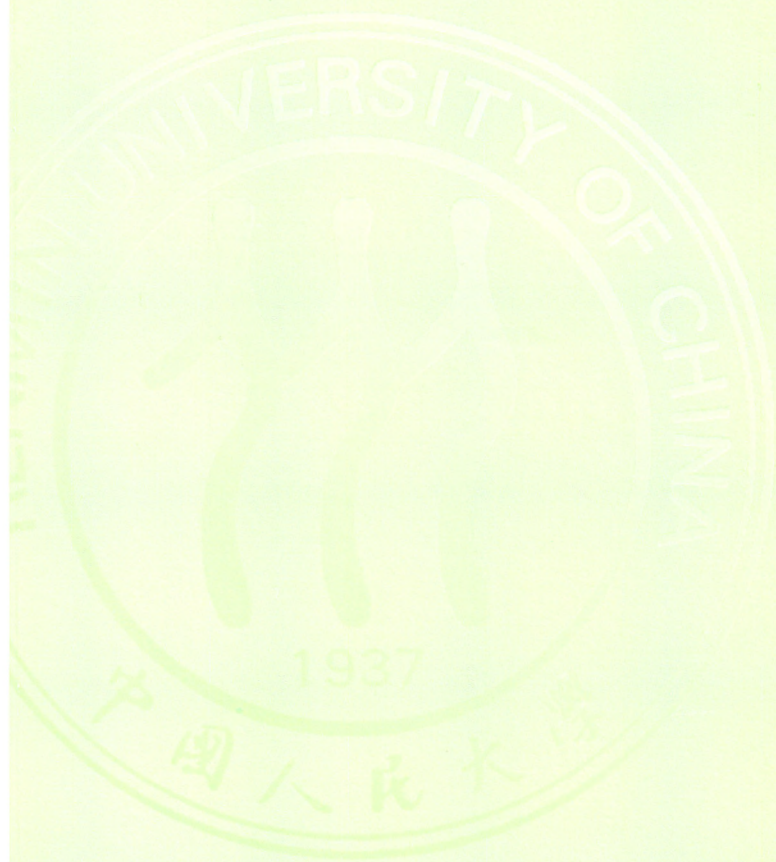




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ABSTRACTS

The Institutional Function of China's Supreme People's Circuit Court

FANG Le · 1 ·

As the judicial reform vanguard design and practice of the circuit court of the Supreme People's Court, the highest judicial power can "sink" to resolve social disputes, pass the highest judicial power in operation to promote the Tour District judicial for standardization, and help to establish authority through the distribution of local interests and the judicial mechanism of this allocation. This is not only caused by the exercise of local judicial power's further unification to the Supreme Court of the judicial action logic, but also ensures the possibility of national governance through local social justice. Therefore, the country will be improved through shaping the judicial authority to help enhance the authority of the state. Of course, for the further development of the circuit court, and the judicial world's political and social effect which may bring, we also have to be sensitive and predictable to the circuit court's judicial function and balance of judicial cost sharing, to ensure the healthy functioning of the circuit court at the same time, sound performance to its judicial rule of law and the social political function, so as to achieve the overall goal of judicial reform.

Key Words The Circuit Court of China's Supreme People's Court; National Governance; Judicial Authority; Judicial System Reform

Fang Le, Ph.D. in Law, Assistant Professor of Nanjing Normal University Law School, Research Fellow of Jiangsu Collaborative Innovation Center of Regional Legal Development and Institute for Chinese Legal Modernization Studies.

On the Principle of Full Review of Procedure for Review of Death Sentences in Supreme Court

GAO Tong · 17 ·

The purpose of the principle of full review is to review the judgements of the lower courts. In recent years, the principle of full review is strengthened to guarantee the quality of handling death sentence cases. However, based on the fact that the rate of disapproval declines and the reasons of disapproval focus on the application of death penalty, we can infer that this principle's function of guaranteeing is weakening. The functional weakening of the full review principle might result from the establishment of the principle of evidentiary adjudication and the participation of the accuser and defense counsel in the procedure for reviewing death sentences. The principle of full review would have its impact on the criminal procedure and criminal judicial system. For example, the core of the criminal trial procedure would be transformed into the procedure for reviewing death sentences, and the Supreme Court would be overloaded and suffer special political risks. Therefore, we can borrow the experience from the strict review, and reform the principle of full review to censored review.

Key Words Procedure for Review of Death Sentences; Full Review; Quality of Handling Death Sentence Cases; Censored Review

Gao Tong, Ph.D. in Law, Lecturer of Nankai University Law School.

Documents, which belong to documentary evidence, play an important role in revealing facts in civil proceedings. But according to the principle of the party producing evidence and proving facts, while documents are in possession of the opposite party, the possessor is unwilling to put forward them and let the certifier get them because these documents may be detrimental to the possessor or the cost of producing documents is high. Thus evidence can not be discovered in debate procedure and judgment can not be made on the basis of enough facts. On the other hand, although the party possessing documents can be compelled to put forward documents by law from the idea of finding truth and achieving equity in litigation information, this method without restriction may damage many rights of the possessor, affect normal operation related to the processor's affairs, and deny the parties' burden of producing evidence. Therefore, the duty of producing documents must be limited and case specific in principle. Even though there are legal provisions about the duty of producing documentary evidence in the Interpretations on the Application of the Civil Procedure Law at present, express restrictive provisions are missing, and there also lacks corresponding procedure of application, trial, adjudication and relief, which influences the legitimacy and effectiveness of this institution's operation. This thesis carries out relatively detailed and in-depth research on the basic framework, the scope of documents and procedural problems of the duty of producing documents. The research of this thesis is believed to have great reference value for the institutional construction and practice of the party's duty of producing documents in our country's civil action.

Key Words Civil Procedure; Burden of Producing Evidence; Documentary Evidence; Duty of Producing Documents; Disclosure Obligation of Case

Zhang Weiping, Professor of Tianjin University Law School, Professor of Tsinghua University Law School.

Under the background that the administrative procedure code is absent, the types of administrative procedure defect are regulated by the new Administrative Litigation Law of the People's Republic of China. The new Administrative Litigation Law divides administrative procedure defects into "the violation of legal procedures" and "procedural minor illegality", but seriously ignores the third type which has a large number in the judicial practice: the claims pointed out and dismissed by the court instead of being revoked or confirmed as illegality. After introducing "the narrow procedural defect" so as to form trichotomy, it is necessary to add the legal consequence of "negligible (as lawful as regarded)" at the institutional level. Meanwhile, in order to optimize the decisions for administrative procedure defect, besides excluding the application of part-cancellation judgment, querying the legitimacy of unlimited remaking judgment and opposing to add supplement judgment as the auxiliary judgment of illegal affirmation judgment, we should prevent the court from frequently making claim-dismissed judgment based on recognizing "the narrow procedural defect" widely. Therefore, we should make the prerequisite of applying claim-dismissed judgment as both following ones: the degree of violation is minor; the administrative organ implements a meaningful correction actively.

Key Words Administrative Procedure Defect; Trichotomy; The Narrow Procedural Defects; As Lawful As Regarded; Claim-Dismissed Judgment

Liang Junyu, Doctoral Candidate of Wuhan University Law School.

On the Relationship between the Ownership and the Prescriptions

JIN Yin · 59 ·

The separation between the possession and the ownership can be regulated both by the acquisition prescription and by the limitation periods. The possession can be promoted to the ownership by the acquisition prescription. By limiting the action of vindication through limitation periods, the later can regulate the separation between the possession and the ownership indirectly. Further clarification is necessary for the justification of limitation periods on the action of vindication. The limitation period on the action of vindication cannot allocate the real interests between related participants after the completion of limitation periods. Therefore, the limitation period isn't suitable to limit the ownership from the time level. Both the traditional acquisitive prescription and the bridge model are based on the benefit balancing mechanism of limitation periods. It depends on the legislator's preference to select. The bridge model focuses on the omission of the owner, the model of acquisitive prescription on the quality of the possession. The former can completely eliminate the separation of ownership and possession within a certain period. The goal of the latter, especially the good faith acquisitive prescription, is only to reduce them.

Key Words Separation between Possession and Ownership; Acquisitive Prescription; Limitation Periods; Model of Parallel Running of two Limitations; Bridge Model

Jin Yin, Ph.D. in Law, Research Fellow of Max Planck Institute Luxembourg for Procedural Law.

Effect and Reflection: The Empirical Study on Effective Evaluating System of the Criminal Law Enforcement by the Public Security Agency

HE Xiaojun · 74 ·

Empirical studies indicate that some basic features, such as: results ranking, the internality and the extensiveness of the subject, diversity of assessment methods, mainly quantitative study, qualitative as complementary and the administration and limitation of procedure, showed in effective evaluating system of the criminal Law enforcement by the public security agency. The analysis from the effect level shows that the system can largely reveal the the issue of universality in criminal enforcement, which has considerable economicability and operability. But the weakness is purposely "competition" evaluation, and lack of legalization in the overall degree. The formation of this system is under the background of comprehensively promoting the rule of law, with the requirement of strict enforcement of law and judicial justice; with the requirement of standardization and routing management in law enforcement in the digital age; with the requirement of the response to public demands in democracy and legislation age. In the long run, the system should transfer from "competition" to "legalization", that is the externalities of the subject, the scientization of evaluation indicators, and the materialization of evaluating problem. Due to the low level of scientization of evaluation indicators and the limitation of indicators' function, the system is not the sole criterion of evaluation, but it can be facilitated, which need combine with other methods to evaluate the effectiveness of the criminal law enforcement.

Key Words Public Security Agency; Effectiveness of Criminal Law Enforcement; Evaluation System; Competitive Mode; Legalization

He Xiaojun, Ph.D. in Law, Associate Professor at the Public Security School of Gansu Political Science and Law Institute, Executive Deputy Director of the Research Center for Investigative Theory and Practice in Northwest Ethnic Minority Areas.

On the Possibility of the Professionalization of Lawyers: Analysis Based on the Historic Texts of Ancient Greek and Ancient Rome

HUANG Meiling · 87 ·

Ancient Greek period is characterized by the direct democracy trial pattern, where the orators, who worked as the the “λογόγραφοζ” and “συνόγοροζ”, failed to form a fixed and specialized profession in the court defense, and the lawyer profession was killed in the cradle. During the period of the Roman Republic and the early years of the Empire, the increasing development of the legal procedure, successively, produced *cognitor*, *procurator* and *juris consulti*, who assisted litigants during the litigation. They were collectively referred to as “*patroni causarum*”. During the middle and the late stage of the Roman Empire, the public power intervention on the judicial proceeding was increasingly strengthened, and the specialization of the magistrates determined the rapid growth of the forensic orators. They studied professional legal knowledge, and supported the jurist’s legal advisory function, and they also set up their own professional groups with the main function of providing a public service. The lawyer officially became a profession. And this historical product is the consequence of the following three elements: the national state power recognition of the rule of law, the development of the judicial litigation system, and the unceasingly day by day growth of the legal system.

Key Words Lawyer; Professional Orator; Court Defense; Legal Process; Ancient Rome

Huang Meiling, Ph.D. in Law, Associate Professor of Law School of Zhongnan University of Economics and Law.

Proper Foundation and Boundary of Competitive Sports Act

QIAN Yeliu · 99 ·

Injured actions of competitive sports, if conducted within rules, is lack of illegality or could be justified. Its proper foundation is the theory of justifiable business, acceptance of risk (quasi-consensus of the victim) and superior interests. As to the serious injury caused by violating the rules of competitive sports, it is usually handled according to the internal autonomy of sports industry, based on the idea of “noninvolvement of judiciary”. However, internal autonomy should not reject the application of the law. When the lawbreaking behaviors cause serious infringement to the legal interests, it is necessary to apply The Criminal Law. According to the protective goal of the related regulations, when certain act violating the competition rules or using the rules for revenge or from spite to cause serious injury or death, the perpetrator shall take criminal responsibility in line with his subjectivity.

Key Words Competitive Sports; Risky Behavior Based on Consensus; Legitimate Profession; Theory of Acceptance of Risk; Theory of Superior Interests

Qian Yeliu, Professor of Kenneth Wang Law School of Soochow University, Invited Researcher of Institute for Chinese Legal Modernization Studies (ICLMS) in Nanjing Normal University.

*Systematic Status of “Securing Benefits for Another Person” in the Crime
of Acceptance of Bribes: Advocating Mixed Element of Illegality*

FU Liqing · 113 ·

On the systematic status of “securing benefits for another” in the passive acceptance of bribe, there are the fundamental opposition between objective element theory and subjective element theory. And the so-called new objective element theory, which demands at least the existence of promise, belongs to the subjective theory in essence. Traditional objective theory has obvious drawbacks like tending to lead penal loopholes, while the subjective theory is impotent to deal with the circumstances like post factum bribery. Compared with the formalized question whether “securing benefits for another” belongs to the objective element or subjective element, it is more reasonable to make a detailed inquiry about whether “securing benefits for another” has an influence on the harmed legal interests and imputability of bribery crime. “Securing benefits for another” should be regarded as an illegal element of the crime of acceptance of bribes, on the premise that defines the relation and distinction between party and administrative discipline and law as well as the legal interest of the crime of acceptance of bribes is un-purchasing rather than the integrity of public service of state functionaries. Meanwhile, in terms of tacit acceptance of bribes and partly acceptance of gifts and payments, “securing benefits for another person” is expressed in implied specific or general commitment, which belongs to subjective element of illegality; in terms of post factum bribery, “securing benefits for another person” is a purely objective element of illegality. Both theoretical precedent and legislative evidence can be quoted to prove mixed elements of illegality, which can also be explained by interpretation of Article 385 of the Criminal Law. Mixed elements of illegality can provide a reasonable explanation for relevant provisions of the latest judicial interpretation in 2016, and provide guidance for handling of some complex issues in practice.

Key Words Intention; Commitment; Personal Obligations can't be Bought off; Mixed Element of Illegality; Mixed Element

Fu Liqing, Ph.D. in Law, Professor of Renmin University Law School and Researcher at the Criminal Law Science Study Center of Renmin University.

The Effect of Payment of Unlawful Cause on Determination of Property Crime:

A Discussion Based on the Concept of Property and “Illegal” Possession WANG Gang · 131 ·

In civil law, the rule of payment of unlawful cause is aimed at preventing unlawful payment generally. Limited by the standard of finality, the concept of payment of unlawful cause is different from that of trust of unlawful cause. When dealing with property crimes involving payment or trust of unlawful cause, a prudent judgment should be based on the civil legal consequences of payment or trust of unlawful cause, in order to determine whether the perpetrator acts out of the intent of “illegal” possession and whether the perpetrator acting out of that intent infringes others person's “property”. While unentitled possession and property intended for unlawful purpose remain within the concept of property in criminal law sense, illegal labor and invalid right of civil claims are not within the protection of property crime legislation. When determining the intent of “illegal” possession, it is necessary to focus on whether the state of the property the perpetrator intended to achieve is in line with the principle of property ascription established on the rule of payment of un-

lawful cause.

Key Words Payment of Unlawful Cause; Trust of Unlawful Cause; Legal-economic Assets Theory; Intent of Illegal Possession

Wang Gang, Ph.D. in Law, Associate Professor of Tsinghua University Law School.

Analysis on the Internal Recourse among Security Providers in Mixed Joint Guarantee

—*Based on the Right of Subrogation*

ZHANG Yao · 146 ·

According to the judicial practice in China, the right of recourse in the mixed joint guarantee has been recognized based on Article 38 of Judicial Interpretation on Security Law. The conclusion, only based on the principle of justice, is not convincing. Thus, the viewpoint on the right of internal recourse among security providers was proposed. In other words, regulations on the right of recourse among solidary debtors should be applied to relationships among security providers by analogy. Such an interpretation still focused on internal relationships among security providers although they didn't mean to provide security for each other. However, considering the doctrinal errors existing in the viewpoint, it couldn't be treated as the solution to disputes over Article 176 of Property Law. Therefore, as to the interpretation of Article 38 of Judicial Interpretation on Security Law, arguments in the judgment made by supreme court should be persisted. And the recourse among security providers should be based on the right of subrogation.

Key Words Mixed Joint Guarantee; Internal Recourse; Solidary Debt; Assignment of Right to Performance; Right of Subrogation

Zhang Yao, Ph.D. in Law of Renmin University of China, Ph.D. Candidate of WASEDA University Law Institute.

Comments on Art. 79 of Contract Law of People's Republic of China (Assignment of Claims)

ZHUANG Jiayuan · 157 ·

Claims can be freely ceded, because it becomes an important asset. Assignment is a disposal transaction, so the assignor should be entitled to the claims. Furthermore, the assigned claims must meet the specific requirements. As the claims are derived from the relationship between the particular subjects, due to the nature of contract or regulation of law, claims still cannot be assigned. The reasons for non-transfer may arise from claims or underlying relationships, or social policies. The parties often agree to prohibit the assignment of claims. It is stated that the exclusion or limitation of the assignment of claims is a limitation of the content of the claim, which makes the claim lose its ability to transfer. The doctrines of relative effectiveness and distinction will also hinder the liquidity of the claims to a certain extent. If the Anti-Assignments clauses are only binding between the parties to the contract, the liquidity of the claims can be maximized. Although the assignment leads to the transfer of claims to the assignee, the assignor still holds the status of the contract party. The assignee obtains the rights associated with the exercise of the claim and assumes the corresponding obligations.

Key Words Assignment; Free Assignment; Specification; Anti-Assignments Clauses

Zhuang Jiayuan, Ph.D. in Law, Associate Professor of Koguan Law School of Shanghai Jiao Tong University.

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