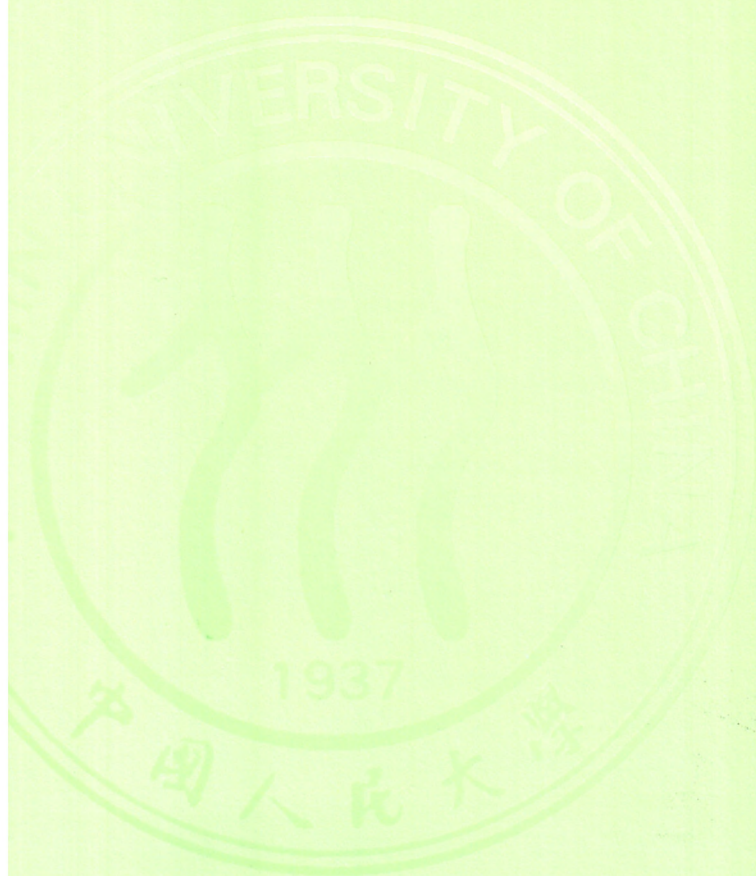




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# 法学家

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## 专 论

- 权利认定的利益判准 ..... 于柏华 (1)
- 地方立法适用中的上位法依赖与实用性考量 ..... 俞 祺 (14)
- 论法律行为对处分的限制
- 历史阐释与适用范围的教义学反思 ..... 冯洁语 (29)
- 沉默在民商事交往中的意义
- 私人自治的多层次平衡 ..... 石一峰 (43)
- 网络空间中犯罪预备行为的制裁思路与体系完善
- 截至《刑法修正案(九)》的网络预备行为规制体系的反思 ..... 于志刚 (58)
- “矜弱”的逻辑：清代儿童致毙人命案的法律谱系 ..... 景风华 (72)

## 视 点

- “行人非法进入高速公路”视域下经营者民事责任研究 ..... 陈广华 顾敏康 (87)
- 证据裁判视角下刑事错案的生成与防治 ..... 陈 敏 (97)
- 论确认之诉的程序价值 ..... 赵秀举 (108)
- 国际经贸投资规则对履行要求的规制 ..... 韩立余 (116)

## 争 鸣

- 中立的帮助行为与客观归责理论 ..... 姚万勤 (129)
- 版权法上的审美判断 ..... 梁志文 (143)

## 评 注

- 《合同法》第49条(表见代理规则)评注 ..... 杨 芳 (158)
- 英文提要 (ABSTRACTS) ..... (175)
- 《法学家》2017年总目录 ..... (181)

## ABSTRACTS

### *The Interest-based Test of Recognition of Rights*

YÜ Baihua · 1 ·

According to the interest theory of rights, a particular interest demand will turn into a right, when the interest has relative importance in balance of interests. The interest-based test of rights obtains its concrete content through the balance of interest in individual cases, including the judgment of importance of interest and the comparison of importance of interest. The principlization of interest-based test will enhance the efficiency and foreseeability of justification of rights. Among individual interests, only welfare interests and accumulating ulterior interests have possibility of turning into rights; in public interests, only consuming interests have possibility of turning into rights.

**Key Words** New Rights; Justification of Rights; Interest-based Test; Balance of Interests; Welfare Interests.

Yü Baihua, Ph.D. in Law, Assistant Professor Zhejiang Gongshang University Law School.

### *Upper Laws Dependence and Practicability Consideration*

YU Qi · 14 ·

Legal practice shows that China's local legislations fail to substitute upper laws, instead, they are in an embarrassing situation of being marginalized. According to interviews with law enforcement officials and judges, the reasons why local legislations are abandoned include three aspects of factors, which demonstrate the tendency of "upper laws dependence": 1) risk aversion under the regional application of local legislations and levels of trial in court system; 2) function defects of local law-making system; and 3) communication cost and oversimplified understanding of legislations. Meanwhile, some other local rules are quite active in practice. After sampling analysis of cases which contain those rules, we can find that the active local legislations can be ascribed into categories such as interpreting upper law concepts, setting local criteria, confirming the legal status of administrative bodies, clarifying administrative penalty or administrative coercion, providing rights and obligations of interested parties and filling legal loopholes. These categories can be further summarized into three types as "specification and operation type", "empowerment and confirmation type" and "loopholes filling type", which demonstrate "consideration of practicability" in application of law. According to experiences on both sides of a coin, to make local legislations more effective, the following need to be done: 1) supplying legislation based on requirement; 2) strengthening the certainty of rules; 3) balancing "safe legislation" with "useful legislation"; and 4) bringing down the cost of communicating or learning new laws.

**Key Words** Local Legislation; Central-local Relations; Efficacy of Law; Application of Law

Yu Qi, Post-Doctoral Researcher of Tsinghua University Law School.

***On the Limit of Disposition through legal Action: the Perspective of***

***History and the Restructure of the Application Scope***

FENG Jieyu · 29 ·

Freedom of disposition is an important principle in the civil law, but the parties may limit the disposition of the right through legal act. According to the type of restricted rights, it can be divided into the sales prohibition and the restriction of the contractual term. This distinction is based on the division of the obligation and the real right. But the distinction itself is not absolute, the prohibition of special real right is the destruction of the flow of debt, and should be limited. The application of the sales prohibition and the restriction of the contractual term is not limited to the relationship between general law and special law. The application scope of the prohibition is not limited to the real right, and the application scope of the prohibition is limited to the creditor's rights. If the parties to limit the agreement if the penalty disposition caused the behavior of the instability, then the same should be applied to the sales prohibition. In this regard, in accordance with its regulatory purposes, the parties to the contract to be given to different types of effectiveness.

**Key Words** Sales Prohibition; Restriction of the Contractual Term; Division of the Obligation and the Real Right; Property Right

Feng Jieyu, Ph.D. in Law, Research Fellow of Nanjing University Law School, German-Sino Institute for Legal Studies.

***The Meaning of Silence in Civil and Commercial Interactions:***

***Multi-level Balance of Private Autonomy***

SHI Yifeng · 43 ·

Because of the lack of any value of declaration, generally silence does not in itself have any legal meaning. The silence of the feisor is also the expression of private autonomy. However, in exceptional cases, silence can also have legal meaning, which displays in a certain type hierarchy and behind this, it embodies the multi-level balance of private autonomy. Hereinto, no matter what is the real private will, under legal or conventional cases silence can be the fiction of declaration of will. This is the strongest balance of private autonomy. When the feisor has certain obligation but keeps silent, which causes the loss of the other party, he needs to bear the liability of compensation for damages of negative interest. This is the moderate balance of private autonomy. When the feisor imputably causes the reliance of other party by silence and the other party is in good faith, the reliance of other party is reasonable, the feisor needs to bear the reliance-based liability by fulfilling for protecting the positive interest. This is the weakest balance of private autonomy. This multi-level structure constitutes a fundamental paradigm of the balance of private autonomy.

**Key Words** Silence; Fiction of Declaration of Will; Performance of Breach of Duty; Basis of Reliance-based Liability; Balance of Private Autonomy

Shi Yifeng, Ph.D. in Law, Lecturer of Law School of Zhongnan University of Economics and Law.

***The Sanction System of the Criminal Preparation in the Network Space and the the Ways to Improve It  
——The Reflection on the Regulation System of Cybercrime Preparation up to  
“Amendment VI to the Criminal Law”*** YU Zhigang · 58 ·

The behaviour of the preparation for crimes are transforming to the dependent act of perpetrator transforming to the dependent crimes, which is the crucial idea and technology of the crime prevention. The behaviour of the preparation for the crimes in the network space always implements a variety of “one to many” status, which has threatened the legal interests and been the key of completing crimes, so that it has a high possibility of completing damage that needs to be punished. Current sanction system of criminal legislation and the criminal justice on the behaviour of the preparation for network crimes is transforming to the act of perpetrating of specific provision of criminal law which also means transforming to the dependent accusation. However, the implement of the sanction system of the behaviour of the preparation in the general provisions of criminal law encounters many difficulties in the entity and the procedure. Therefore, focusing on deficiencies of the criminal sanctions system of the behaviour of the preparation for the network crimes, the criminal law should solve three core problems, which includes the high standard of transforming to the act of perpetrating but low range of the penalty, the justice’s failing of dealing with the responsibility of the preparative crime and the aborted crime, and the imbalanced crime scope of the network crime of illegal use of information. It is the inevitable direction to realize the scientization of the criminal sanctions system.

**Key Words** Network Crimes; The Preparation for Crimes; Transforming to the Act of Perpetrating of the Behaviour of the Preparation; The Network Crime of Illegal Use of Information; Criminal Policies

Yu Zhigang, Ph.D. in Law, Professor at Center of Cooperative Innovation for Judicial Civilization of China University of Political Science and Law.

***“Compassion for the Weak”: Juvenile Offenders in the Qing Dynasty  
Legal System*** JING Fenghua · 72 ·

When children committed homicides during the Qing dynasty, their cases were handled by the same justice system used for adult offenders. But from a very early time, Chinese law endorsed the notion that children and other vulnerable groups were worthy of the law’s compassion. This article explores legal avenues to that compassion, from the law’s efforts to clarify and define what marked a perpetrator as “weak” to the various legal provisions permitting such “weak” offenders to memorialize for mercy or request reduction and redemption of punishment. It finds that compassion for the weak was woven into both the letter of the law and the law in practice, resulting in a justice system that balanced the needs of victims and offenders alike.

**Key Words** Cases of Children that Committed Homicide; Compassion for the Children and the Weak; Autumn Assizes; Substantive Rationality; Juvenile Law

Jing Fenghua, Ph.D. in Law, Research Assistant of Law in Sichuan University.



***Study on the Civil Liability of Operators Under the Vision of***

***“Pedestrian Illegally Entering the Expressway”***

CHEN Guanghua GU Minkang · 87 ·

The empirical research done by this paper shows that there is a big confusion in the application of law when adjudicating the highway trespass of pedestrians who have suffered damages by vehicles of third-party. Some decisions were based on Article 123 of the Civil Law; some were based on Article 37 or Article 76 of the Tort Liability Act; while other were based on Article 9 of Judicial Interpretation of Traffic Accident Damages. There is a lack of unified practice. Highways will be considered as highly hazardous areas only when there is a highway trespass of pedestrians. Highway operators will bear liability based on an aggravated presumption of fault. This paper holds a view that, in such accidents, the highway operators and the third party perpetrators should bear proportionate responsibility, non-true joint and several liability or supplementary liability according to their respective fault or by taking into account the ability of the third party perpetrators to compensate.

**Key Words** Tort Liability Act; Highway Operators; Highly Hazardous Area; Increased Liability Based on Presumed Fault; Forms of Liability

Chen Guanghua, Ph.D. in Law, Professor of Hohai University Law School; Gu Minkang, Ph.D. in Law, Professor of City University of HongKong School of Law.

***Analysis on Prevention of Criminal Misjudged Cases from the Perspective of***

***Evidence-governing Principle***

CHEN Min · 97 ·

The prevention of misjudged cases has become a common consensus in criminal procedural legislation and judicial practice of all countries in modern times. The key cause of criminal misjudged cases lies in the evidentiary matters, namely many misjudged cases begin with violating and ignoring the evidence-governing principle and related evidentiary rules in the criminal proceedings. This paper is based on 30 typical criminal misjudged cases on a national scale as its research sample, all of which had been given judgments of acquittal. It conducts the quantitative analysis of evidence, identifies the intrinsic formation mechanism of criminal misjudged cases and proposes the measures for preventing such misjudgment. In addition, it argues to break the traditional notion of “*investigation centrism*”, to actively develop a “*trial-centred* litigation system” and to regulate relevant evidentiary rules and systems in the light of the evidence-governing principle in the criminal procedure for the purpose of advancing the normalized, systematic and substantiated prevention mechanism of misjudged cases in China.

**Key Words** Criminal Misjudged Cases; Evidence-governing Principle; Exclusion of Illegal Evidence; Beyond Reasonable Doubt

Chen Min, Ph.D. in Law, Associate Professor of the Department of Law, Xi'an University of Technology, Postdoctoral Fellow of Wuhan University Law School.

***Research on the Procedural Value of Declaratory Action***

ZHAO Xiuju · 108 ·

Declaratory action becomes completely a fundamental type of litigations because of the interest in declaratory relief, in other words, the necessity of the declaratory relief. In return, however, interest in declaratory relief becomes to be the weakness of the declaratory action, and makes it subsidiary to the action for performance. The latter is superior to the former. All of this results in the tension between the both types of action and therefore the independency of the declaratory action is undermined by the action for performance. This problem can only partially be resolved through the *res judicata*. There are several resolution plans, such as suspension of the secondly filed suit, joint trial of both actions, termination of the first action etc.

**Key Words** Declaratory Action; Parallel Litigation; Interest in Declaratory Relief

Zhao Xiuju, Associate Professor of Koguan School of Law of Shanghai Jiao Tong University.

***Regulation of Performance Requirements in the context of International Trade and******Investment Treaties***

HAN Liyu · 116 ·

Performance Requirements (PRs) are in essence measures host country governments take exercising right to regulate on foreign investors and their investments, promoting the benefits of foreign investments to sustainable development in host country. There is controversy on whether or not and to what extent PRs should be prohibited owing to the dual feature of PRs and non-conclusive result of the empirical effectiveness assessment of PRs. Regulation of PRs by International investment treaties should take into account right of the host country to regulate, and general prohibition with various exceptions balancing rights and obligations between the host country and home country may be the best approach to tackle the issue. The WTO commitments concerning PRs China made may it difficult for China to develop its PRs policy.

**Key Words** Right to Regulate; Performance Requirements; International Trade and Investment Treaties; Regulation; China's WTO Commitments

Han Liyu, Ph.D. in Law, Professor of Renmin University of China Law School.

***Neutral Help Behavior and Objective Imputation Theory***

YAO Wanqin · 129 ·

The punishment basis of the neutral help behavior has changed from full punishment to limited punishment. Because of the free market awareness and increasingly depressed comprehensive punishment contradictions, few scholars continue to support it. At present, there are many limitations in the limitation of punishment and the birth of a variety of restrictions on the path does not provide a better solution to the problem. The latest theoretical trend of the academic circles is to introduce the objective imputation theory to study the problem, and gradually become a powerful theory to solve the problem of the punishment and punishment of neutral help behavior. Although the introduction of objective imputation theory to deal with the problem will be specific, it will meet the standard of punishment according to the punishment of the accomplice, but in reference to the theory, it should be carried out according to the theory of combining the content itself. The behavior of people not only created a danger of "not allowed", but also realized the danger is to

commit crime to help families.

**Key Words** Neutral Help; Objective Imputation; Danger; Criminal Penalty

Yao Wanqin, Ph.D. in Law, Lecturer of Law School of Southwest University of Political Science and Law, Distinguished Research Fellow of Institute of Higher Learning in Southwest University of Political Science and Law.

### ***Aesthetic Determinations in Copyright Law***

LIANG Zhiwen · 143 ·

Aesthetic Non-discrimination theory holds that judges evaluating issues of copyrightability should not take into account the aesthetic quality of the works because of the subjectivity of aesthetic opinions and incompetent judges for aesthetics. However, judges, being aware of it or not, have little choice but do aesthetic determinations because such judgement is required by copyright law for “art” or “aesthetic meaning”, and under some circumstance, assess the artistic contributions belong in the useful article, determining authorship and originality, and making aesthetic judgement to evaluate the substantial similarity between works of plaintiff and defendant. Aesthetic judgement assess the overall character of the work to determine whether it is eligible for copyright protection or industrial property protection, and harmonize the different protection between the author’s right and related rights. Thus, the critical issue is not to eliminate the subjectivity of aesthetic determinations, but to provide guides for judges making choice among different aesthetic theories. The “artistic commonwealth” standard, which can make an objective and consistent aesthetic determinations through forms of works, authors’ intent and reader’s response, is a relatively desirable solution for judges. Meanwhile, judges must realize that the aesthetic biases would hinder the artistic innovation.

**Key Words** Aesthetic Non-discrimination Principle; Aesthetic Determinations; Artistic Commonwealth; the Subjectivity of Aesthetic Judgement; Artistic Works

Liang Zhiwen, Ph.D. in Law, professor of Nanjing Normal University Law School.

### ***Commentary to Article 49 of Contract Law***

YANG Fang · 158 ·

Article 49 of the Contract Law is the full norm of the agency by estoppel. In Chinese empirical law system, other than the article 49, there are many articles about the legal effect of someone’s conduct attributable to the name of the person who has not authorized the corresponding authority to the one. In the application of the law, the relationship between such norms and article 49 can be interpreted as the following: the norms of job conduct are just the non-full norm only with reference function; the representative norm is not different from the agency by estoppel in the structure, so the former can be replaced by the latter. In the constituent elements, attributable elements can be derived from the the fact “relative person has reason to believe”. In the legal effect, Article 49 is not the determinative norms of effectiveness of legal action, but the attributable one. In addition, the relative person has no right of withdrawal under Article 48 (1).

**Key Words** Agency by Estoppel; Job Conduct; Accountability; Right to Choose of Relative Person

Yang Fang, Ph.D. in Law, Assistant Professor of Hainan University Law School.



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