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ABSTRACTS

The Value Shift of the Marital Property Law and Its Realization Path : Focusing on the Improvement of the Contractual Property System

SHEN Chen · 1 ·

“Family collectivity” value and “individual will” value constitute the basic value contradiction in the marital property law. The system reflection of the contradiction is the structural relationship between statutory property system and contractual property system. *The Marriage Law* has the tendency to marginalize contractual property system. The variation in family property, divorce rate and children amount have caused the value shift of marital property law, enhancing the status of “individual will” value. *The Third Judicial Interpretation of Marriage Law* attempted to amend this, but it was not successful. The defects of the statutory property system, the choice space for different communities, and the benefits of the pre-bargaining process all demonstrate the advantages of the contractual property system. The path of improving the contractual property system includes the elaboration of the contractual property system itself and the linkage reform of the statutory property system. The value shift of the marital property law and the goal of building a socialist harmonious family relationship constitute a dialectical unity.

Key Words Marital Property Law; Contractual Property System; Statutory Property System; “Family Collectivity” Value; “Individual Will” Value

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On the Community Debt of Spouses in the United States ——Focusing on the Community Property States

MIAO Yu · 15 ·

Among various states of the US recognizing community property regime, there are three different approaches to determining liabilities for debts incurred by married couples, namely the managerial system, the community debt system and the partition system. The consensus among those states is that the community property is liable for the premarital debt of either spouse as well as the debt incurred by either spouse during marriage for the benefit of the community. Divergence arises when the states face to the question, whether the community property is liable for the debt which is incurred by either spouse during marriage not for the benefit of the community. This reflects discrepancies among states with respect to the balance of interest between non-debtor spouse and creditor. To reform rules in Chinese law regarding community debt, it is necessary to acknowledge that the non-debtor spouse's own separate property is not liable for the community debt. The debt which is incurred by either spouse during marriage not for the benefit of the community can be satisfied by part of community property. The Interpretation of the Supreme People's Court on community debt calls for amendments.

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Key Words Community Debt of Spouses; Community Property Regime; Benefit for the Community; Informal Lending

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The Strength and Limitation of Rights Based on Common Good

ZHU Zhen · 32 ·

Raz's theory of rights based on common good tries to transcend the confrontation between Deontology and Utilitarianism so as to find a new way for the theory of rights. According to the view of rights from common good, the importance of rights is more important than the interests of the rightholder, and the rights can justify the duty of others to the rightholder, but the interests of the rightholder cannot do so. The ultimate aim of this view of rights is to point out that the value of the existence of right lies in its contribution to the common good, and the common good is the most important reason for the existence of the rights. But this theory of rights does not justify the existence of the rights of freedom available, is unable to reveal the implications of political philosophy of rightholder-centred theories of rights, and cannot explain the mismatch between the correctness of the exercise of rights and the stringency of the protection of rights. More importantly, the relationship between the rights of freedom and the common good is very complicated. Not only are a lot of common goods conflicting, but there is not a one-way and inevitable supportive relationship between the common good and rights. The stringency of the protection of rights does not come from the common good in the abstract, but from the balance of the different common goods in conflict. This provides a coherent explanation for understanding the meaning and function of "public interest" in the 185th article of *General Rules of the Civil Law of the People's Republic of China*, and this article just shows the strength and the limitation of the common good approach.

Key Words Rights; Common Good; Joseph Raz; Public Interest; Personality Right of Heroes and Martyrs

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The Idea of Rational Communication of Criminal Law :

Generation of Fusion Paradigm

MA Rongchun · 45 ·

In the period of deep development of social transformation, the idea of rational communication of criminal law consists of abandonment of the concept of criminal law previously formed. Relation rationality and communicative rationality constitute philosophical basis of the idea, and law of great number constitutes its sociological basis. Life rationality and fusion paradigmas practical characteristics and academic characteristics of herself separately. Fusion paradigm leads to fusion of protection of rights and protection of society that are ought values of criminal law. At last, the idea and its fusion paradigm have more reasonable meaning to contribute to social harmony and stability and sustainable development of our society.

Key Words Idea of Rational Communication of Criminal law; Relationship Rationality; Law of Great Number; Life Rationality; Fusion Paradigm

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Judicial Construction of Normative Documents Incidental Review

Approach in Administrative Litigation

LI Cheng · 61 ·

Analysis of 200 administrative cases after the implementation of the new Administrative Procedure Law indicates that incidental review on normative documents is carried out from three aspects: the verifiability, the relevance and the legitimacy of the document. The verifiability of administrative normative documents is determined on the basis of the “concrete-abstract” dual framework of administrative action and influenced by the specific formulation bodies. The relevance standard emphasizes that the court must verify whether the normative documents appealed to be examined are exactly the direct basis of the administrative action and dispose of them separately. The standard of legitimacy requires the court to review the formulation authority, procedure and content of normative documents to determine whether they are legitimate and appropriate or not. The connotation of incidental review system of normative documents is thus enriched. Meanwhile, the relationship between executive power and judicial power also needs to be further studied.

Key Words Normative Document; Administrative Litigation; Incidental Review

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Civil Enforcement Models in Comparative Perspective:

Focus on Solving the Problem of “Civil Enforcement Difficulty”

CHEN Hangping · 73 ·

From the comparative study on five European countries' civil enforcement models, this paper finds that the model of allocation of civil enforcement power has various influences on the operation of civil enforcement system and the solution of the problem of “civil enforcement difficulty”. Except Sweden, the model of separation of power inside and outside court dominates the other four countries. Meanwhile, the enforcement officer of all the five countries is divided into two types: one is public officer and the other is professional officer who exercises his power of private law but also enjoys public authority status. According to the conclusion of this paper, the author proposes that Chinese court should take more measures to fulfill the political promise solving the problem of “civil enforcement difficulty” mainly in next two to three years. In addition to enhancing the infrastructure construction of state identification and civil enforcement informatization, China should also employ some kind of separation model of civil enforcement power. The specific design is not set yet. However, the author believes that all the roads are towards market.

Key Words Model of Allocation of Civil Enforcement Power; “Civil Enforcement Difficulty”; Separation of Civil Enforcement Power; Civil Enforcement Case Undertaking System

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Political Theories in Justice: French Republican Laicity and Equality in

Jurisprudence Concerning Religious Symbols

ZHU Mingzhe · 88 ·

Recent case laws on religious symbols in public space from various European jurisdictions have put

French laicity and the principle of equality into debates. These cases seemingly endorse discriminatory treatments against Muslim women under veils and favour the catholic presentations in governmental locations, therefore being compatible neither with equality nor with laicity. These controversial judgements, however, are only comprehensible in the context of French Republicanism—an ideology that underlines the direct relationship between the powerful State and its individual citizens who has no other identity than a unified, universal and secular identity as other fellows. Equality is therefore a principle of denial rather than recognition, and laicity of exclusion rather than integration. Together they forge a unified and unique national identity that renounces any pretention of religious, ethnic, or linguistic communities and that imposes a particular version of State-Church relationship according to which convictional affairs shall be remained in private sphere and not known in public debates. Also, after years of being disciplined by the State, Christianity in France acquired the secular languages to express. For this reason, Christian symbols are considered as cultural, not religious. Symbols of other religions, on the contrary, are firmly described as religious in public discourses.

Key Words Laicity; Equality; French Republicanism; Case Laws on Religious Symbols; Civil Identity

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Reflection on the Object and Path of Judicial Reform:

From the Perspective of Judicial Power Reform

LI Minshen · 106 ·

The main researches of judicial reform today are judicial system and judicial proceedings, which is almost wholly confined to realm of jurisprudence, especially procedural law, and the issues of what and how to reform have not been yet discussed. Thus the judicial administrative management, such as the management of human, financial, material resources and personnel treatment has been ignored to some extent throughout the judicial reformation, which brings about lack of incentive structure, deficient ontogenetic impetus, weak external support and inadequate local initiative. In fact, not only the judicial functions (judicial system and judicial proceedings) but also the management power (judicial administrative management) is the object of judicial reformation, and they should not be confused as one. In order to give full play to judicial power, the judicial functions and management power are supposed to develop at the same time, which will keep judicial reformation towards the right path.

Key Words Judicial Reform; Object of Reform; Routes of Reform; Judicial Functions; Management Power

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Research on the Fair Competition Review of Industrial Policy

MENG Yanbei · 118 ·

The reform trend of China's industrial policy is the competition-friendly industrial policy. Fair competition review, which is in line with the goal of China's industrial policy reform, can make competition evaluation of the policy measures, strive to minimize the damage to competition by the policy measures, and be-

come one of the most important ways of industrial policy reform. On the basis that China clarified the road map of the fair competition review of industrial policy, and by means of impetus from the effective implementation of China's anti-monopoly law, the fair competition review of China's industrial policy will follow analytical framework from the proportionality principle, namely analyze whether the purpose of industrial policy is justified, analyze whether policy measures can achieve the industrial policy purpose, analyze whether the policy measure is the "least harmful" to market competition, analyze whether the industry policy purpose and competition damage can realize the balance of interests. The fair competition review of industrial policy can prevent and reduce the emergence of administrative monopoly behaviors, effectively restrain the negative effects of China's industrial policy, and keep the influence of industrial policy on market competition within necessary, reasonable and appropriate boundary.

Key Words Industrial Policy; Competition-Friendly; Fair Competition Review; Proportionality Principle; Anti-Monopoly Law

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Legislative Future of the Community Penalties in China

ZHAI Zhongdong · 135 ·

With the number of the short-term prisoners increasing, the issues for the short-term prisoners make prison management sluggish. The issues for the short-term prisoners not only aggravate the prison management efficiency, but also make recidivism ascending. It's successful exploration to solve the problems for short-term prisoners through enacting the community penalties. Considering the functional deficiency of the penalties system that are short of capabilities to face challenges from the short-term prisoners, China should enact the community penalties to improve our punishment system. We could enact the community service, then make the semi-custodial penaty.

Key Words Short-Term Custodial Penalty; Recidivism; Community Penalties

Zhǎi Zhongdong, Ph.D. in Law, Professor of the National Police University for Criminal Justice.

The Aggregation of Claims in the Context of the Same Occurrence

YUAN Lin · 150 ·

According to the theory of traditional substantial law, several claims resulting from the same occurrence constitute several independent suits. The diverse relationships among the claims determine various forms of aggregation of subject matter of claims in the procedure. Firstly, the procedural construction of concurrence of claims should be preliminary aggregation when there is a lawyer or selective aggregation when there is not. Current regulations ignore the consistency between the procedural construction and substantial nature when concurrence happens, which leads to an outcome of rejecting aggregation of claims. Secondly, taking into consideration that the preliminary aggregation has already occurred in practice, and Article 247 of Judicial Interpretation of the Civil Procedure Law has proved its legitimate basis, we should make effort to encourage the application of preliminary aggregation. Thirdly, as to the aggregation of claims which have a tight factual relation, a simple aggregation might turn to a compulsory one because of choosing "one occurrence" test, so we should confine the use of such test only when traditional test cannot tell real repeti-

tive litigations.

Key Words Aggregation of Subject Matter of Claims; Same Occurrence; Concurrence of Claims; Preliminary Aggregation; Compulsory Aggregation

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On the Functions of Documentary Transcript

WANG Jinglong · 161 ·

In a way of “unfinished listing”, the Criminal Procedure Law revised in 2012 stipulates a new kind of evidence: documentary transcript. Documentary transcript is a type of written records through which the process of collecting evidence is presented, and it is also a basic method for fixing and preservation of the evidence. On one hand, we should recognize its auxiliary function which can demonstrate legality of evidence collection and credibility or relevance of a certain evidence. As for testimonial evidence, on the other hand, we need to be aware that documentary transcript has the material function to establish the facts of crime at issue, that's because records of the evidence and evidence per se are merged into one. Once documentary transcript has some defects, the legality of collecting evidence will be questioned, also credibility or relevance of the evidence itself will be influenced. A flaw of evidence may cause a remedy for it, different defects of documentary transcript will to different remedies. To realize its function of proof entirely and definitely, it will depend on some restrictions on its admissibility and its weight, also it's necessary to increase guaranteeing measures of due process in collecting evidence.

Key Words Documentary Transcript; Function of Proof; Legality; Credibility; Identity

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The Commentary on Article 84 of Contract Law: Assumption of Other Debts

XIAO Jun · 175 ·

Article 84 of the Contract Law provides for the contract of assumption of debts concluded between the debtor and the assumer, which is different from the way in which the creditors are directly involved from the aspect of logical structure and trading habits. For the foundation of doctrine of Article 84, it is necessary to integrate the different systems including unauthorized disposition and contract in favor of the third party. On this basis, the various factors involved in the operation of Article 84 could be researched profoundly, including the agreement of assumption of debts, the creditor's consent, the cause of assumption, the rights to defense of the assumer, the continuation of the guarantee, and so on to make the application of law precise.

Key Words Assumption of Debts; Delegation of Payment; Unauthorized Disposition; Contract in Favor of the Third Party

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