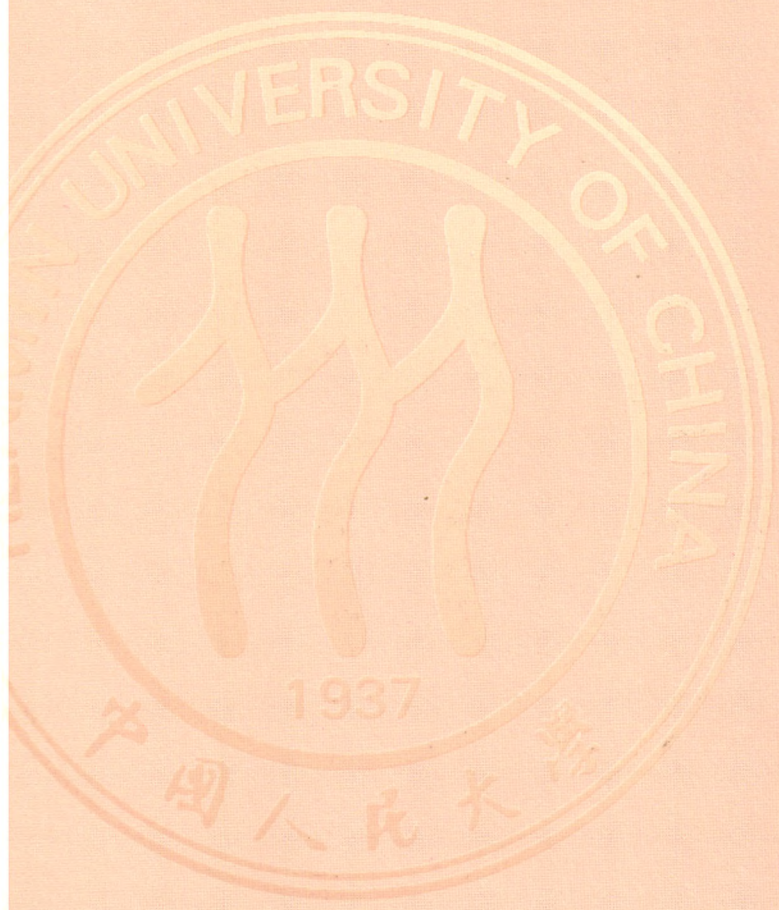




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ABSTRACTS

Reflections on the Legislation System of Guardianship of Juveniles in Civil Code XIA Yinlan · 1 ·

The *General Principles of Civil Law of the People's Republic of China* stipulates clearly the basic framework and main contents of the guardianship system. The principle of the best interests of children and the principle of the autonomy of children are regarded as the basic principles of guardianship of juveniles and are embodied in the specific provisions of the guardianship system for juveniles which have enriched the system of guardianship of juveniles in China. The marriage and family legislation should adhere to the principle of the best interests of children, list parent—child relationship chapter and guardianship chapter separately, define “parental responsibility” clearly and further distinguish the three legal terms “guardianship, parental powers, and parental custody”. In the chapter of parent—child relationship, the rights and obligations between parents and children should be better clarified and the role of parents as the primary responsibility of the juveniles should be highlighted in order to inherit the excellent family culture tradition and carry forward the socialist core values of the marriage and family. The guardianship chapter should focus on improving and refining the guardianship system; clearly stipulate the supervision system; strengthen the national guardianship responsibility in order to give the maximum priority to protect the juveniles' rights. The improvement of the legislation system of juveniles' guardianship embodies the harmony and unity of the logical system and the value system of the Civil Code, so that the Civil Code can form the organic combination, the orderly complementary and coordinated juveniles protection system.

Key Words Guardianship; Parental Powers; Parental Responsibility; Legislation; the Best Interests of Children

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The Shift and Modification of Adult Guardianship Reform in Context of Civil Code

SUN Ximing · 16 ·

The core issues of adult guardianship studies are the excludability of Legal Capacity and categorization of Legal Adult Guardianship. The former focuses on independent study of decision-making capacity. According to different building model, the latter is divided into monadic doctrine and pluralistic doctrine. Nevertheless, The General Provisions of Civil Code continues adopting the abstract model on Decision-Making Capacity judgment and a single type of guardianship. The study of Adult Guardianship faces an unprecedented plight. The real cause of legal system reform is not the self-examination on its scientific thoughts, but the scientific self-reshaping on adult guardianship system. Old guardianship legal system cannot fit the Recursive Rule of Concept Application. Significant distinguish ment among concept elements in system will consequently cut off the connection between legal system and reality. At this point, the study should turn from solo legislative theory level into the combination of legislative theory and interpretation theory level. Therefore, a systematic investigation among Legal Capacity, Legal behavior and Adult Guardianship is necessary. Given that,

inspection on intention elements in Legal Capacity judgment through law interpretation is necessary which can distinguish the criterion of Decision-Making Capacity judgment between Legal Incapacity and Legal Limited Capacity. By using article 67 of The Supreme People's Court's Opinion on Carrying out Several Issues in General Principles of the Civil Law can make decision-making capacity as the functional element of legal act. On the construction of guardianship system, by referencing Beistandschaft system of Swiss Civil Code, a gradational structure on adult guardianship can be designed to coordinate guardianship, deputy guardianship and substitutive guardianship.

Key Words Adult Guardianship; Legal Capacity; Decision-Making Capacity; Intention Element; Gradational Structure

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On the Value and Orientation of Consequentialism in the Legal Adjudication

CHEN Hui · 35 ·

With the increasement of hard cases, consequentialism argument recently seems to be more important than legal dogmatic argument in judicial adjudication. Although the method of legal dogmatics may bring the consequential problems, it can legitimize the trial and avoid "comprehensive consideration". The consequentialism argument can solve the consequence problems but will be inundated with "comprehensive consideration" at the same time. Hence it is necessary to distinguish first order and second order between legal dogmatics and consequentialism. The method of legal dogmatics will be applied in simple cases and consequentialism in hard cases. It is very hard to give a line objectively between simple cases and hard cases, and we can solve the problems through interpretive stand, which begins with the public opinion and popular will.

Key Words Consequentialism; Legal Dogmatics; Law and Social Sciences; Hard Case; Interpretive Stand

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On the Definition of Factual Administrative Act

WANG Kai · 51 ·

In 2014, the administrative litigation law changed the scope of administrative litigation from "concrete administrative act" to "administrative act", which resulted in the fact that factual administrative act belongs to the scope of administrative litigation. Judging from our current theory and practice, the judgment criterion of factual administrative act is still controversial and vague. Through the investigation of German law, the birthplace of factual administrative act, it can be found that factual administrative act does produce legal effect, but does not directly produce legal effect. That is to say, factual administrative act may affect the rights and obligations of the parties, but this is not the intention of the executive authorities. It is the characteristics of factual administrative act that directly produces the factual effect. The German law is mainly based on "whether there is an adjustment or not (that is, whether it has legal validity and whether it directly produces the legal effect or not) as a standard to distinguish the concrete administrative acts and factual administrative acts, which is worthy of our reference. The definition of factual administrative act will help us to recognize the nature of administrative coercion, public information, mediation, administrative guidance, procedur-

al act and quasi concrete administrative act.

Key Words Factual Administrative Act; Concrete Administrative Act; Informal Administrative Act; Declaration of Intention in Administrative Law; Quasi Concrete Administrative Act

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“Safe Harbor” for Majority Stockholder’s Significant Conflicts of Interest Transactions :

The General Exploration Based on Judicial Adjustment for Listed Company

Privatization of Delisting

SHEN Zhaohui · 66 ·

Through the theoretical controversy and case correction over thirty years, the Supreme Court of the State of Delaware of United States, finally endorsed the “safe harbor” for listed company privatization of delisting in *v. MFW* in 2014. Through double cleaning of major interest conflicts of majority stockholders by the internal company governance, which is decided by the Special Committee of board of directors and a majority of the minority shareholders, standard of commercial referee will fairly transform into business judgment rule. However, the functioning of American double-cleaning system depends on several premises, leading to higher overall operation costs and especial difficulties in legal transplantation. At present, Chinese securities regulators have compulsively introduced partial cleaning system to force majority stockholders to disclose the information to the public shareholders so as to endow public shareholders with certain negotiating power and have also led to the “hold-up” issue and efficiency loss predicted by the property rule theory of legal right protection. The institutional perfection for conflicts of interest in A shares listed company privatization of delisting in China should be conducted from two perspectives, external regulations and internal governance mechanism.

Key Words Conflict of Interest; Listed Company Privatization of Delisting; the Special Committee of Board of Directors; Majority of the Minority Shareholders; Self-Enforcing

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Parties to the Action of Rescinding Shareholder Meeting Resolution :

Rules , Legal Norms and Practice

—From the perspectives of the Corporate Law and Procedural Law

LI Zhigang · 80 ·

Articles 2 and 3 of Judicial Interpretation by the Supreme Court on Certain Issues Concerning the Application of the “Corporate Law of the People’s Republic of China”(IV) (hereinafter referred to as “Judicial Interpretation of Corporate Law (IV)”) clarify the parties who can initiate the action to rescind the shareholder meeting resolution. Its purpose is to solve the standing and range problem of the parties who can initiate the specific action to cure defects in shareholder meeting resolutions. These two provisions have their basis both in corporate law and procedure law. The intention of the corporation is formed by its internal governance organs of the corporation by way of holding meetings, which is typical in the organization law. Shareholder meeting resolution represents the relationship between its shareholder as the company’s member and the company as a whole organization, rather than the relationship between the shareholders. This essential nature determines the range of the plaintiffs who have the standing to bring a lawsuit to rescind a shareholder meeting resolution, the defendants and third parties in such lawsuits is significantly different from the adversary ac-

tions between the parties with equal standing. Using the action of rescinding a shareholder meeting resolution of the limited liability company as an example and from the perspectives of the corporate law and procedural law, this article makes a further analysis on the application, legal basis and practice of the Article 2 and Article 3 of the Judicial Interpretation of Corporate Law (IV).

Key Words Company Resolution; Party; Join Action Author

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The Legal Solution of the Land Use Regulatory Reform in China :

***Thinking on the Strategy of “Ensuring National Food Security”
for the Nineteenth Congress***

ZHANG Xiangui · 96 ·

Land use control presents a state of operational failure in our country. It is necessary to make a rational review of it and propose reforms and improvements of practical and feasible from the two dimensions of world outlook and methodology. Looking at existing theories and practices, based on the normative context of “right-power” balance, China’s current land-use control reform should implement the following “package” program: in terms of conception, we should establish a system of patterns which balanced realization of multiple interests appeal; in terms of logical premise, we should actively promote the transformation of China’s land planning model from “incremental” to “inventory”; in terms of the key content, we should break through the closed operating structure of agricultural land transfer approval; in terms of the technical route, we should innovate the realization of the “two aggregate indicator controls”; in terms of supporting follow-up, we should effectively promote the construction of a legal system for the redevelopment of stock construction land. Only in this way can it help to break through failure and contribute to the major strategic goal of ensuring the national food security and putting firmly the Chinese people’s rice bowls in their hands as set out in the report of the 19th National Congress of CPC.

Key Words Land Use Control; Failure; Land Planning; Approval of Conversion of Agricultural Land; Total Indicators

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On the Application of the Hong Kong Basic Law in the Courts

YANG Xiaonan · 108 ·

The unique character of the mechanism of the interpretation of Hong Kong Basic Law is that according to Article 158 of the Basic Law, the judiciary of the HKSAR enjoys the judicial power, but not the final power of interpreting the Basic Law; while the NPCSC, with this final power, does not apply the Basic Law in the cases in daily life. In practice, there were some controversies around the interaction between the two interpreters. Some scholars thought the distinction between civil law and common law as the main reason for the controversies. However, this observation may ignore the complexity and diversity of the application of the Basic Law. In some cases, the courts adjudicated the cases without interpreting the Basic Law, and thus the NPCSC had the least influence on the result. In some cases, the courts applied the Basic Law in connection with the ICCPR and BORO, and thus the NPCSC’s influence was also limited. In the other cases, the courts merely applied the Basic Law and thus the interpretation by the NPCSC had the strongest and direct effects

on the results. This paper separated the application from the interpretation appropriately and suggested an attitude of deference for all the parties, in order to solve the controversies around the Basic Law.

Key Words Hong Kong Basic Law; Judicial Application; Common Law; the Court of Final Appeal; the Interpretation of the Basic Law

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On Objective Imputation of Environmental Pollution Offenses and Its Practice in China

LI Guanyu · 122 ·

Although causality of epidemiology and indirect reduction to absurdity were two main theories to solve the problems of identifying causality of environmental offenses, they had methodological faults. The theoretical circle supports to introduce theory of objective imputation in order to correct them, while the practical field use methodology of objective imputation to hear cases occurred by environmental pollution offenses in various ways. Forwarding imputation port, expanding imputation object and simplifying imputation process are three main ways, but the degree of normalization and systematization remain to be raised. As an analytical tool, methodology of objective imputation hasn't obvious systematical preference and absolute path dependence. Its recommendation is mainly reflected by priority of objective judgment, emphasis of normative evaluation, rank of imputation standards as well as orientation of criminal policy. The judgement of perpetrating act, harmful consequence and causality of the offenses will be perfected through the above approaches.

Key Words Environmental Pollution Offenses; Methodology of Objective Imputation; Theoretical Predicament; Judicial Practice; Future Prospects

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The Logic And Limits Of Secured Credit in Bankruptcy

LI Zhongxian · 135 ·

In corporate reorganization, secured claim is subject to the automatic stay for the purpose of maintaining the operation of the distressed company and therefore becomes vulnerable in the bargaining process. However, not only did the current bankruptcy law fails to provide the secured creditor the right of relief from stay, lacking the institutional supply of negotiation, but it also has not set the bottom line of the negotiation outcome. Although the bankruptcy law often takes public policy into account to balance the interest of the creditors, the debtor or even the society, based on the consensus between the objectives of reorganization and the function of secured transaction, needs relatively effective and reasonable legislative amendments to be made. Hence, bankruptcy law should provide a platform where the creditors could cooperate with each other to achieve better results and distribute the assets in an orderly manner on the basis of maximizing the value of bankruptcy estate. To be specific, for the sake of order and effectiveness, it is imperative to subject the automatic stay to the necessity test, to determine the minimum protection of the secured credit when it is crammed-down by court and to admit the distribution results of the creditors' bargaining.

Key Words Secured Credit; Objectives of Reorganization; Distribution of Assets; Group Autonomy; Neutrality

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The Irregular Causations and the Critics against the Objective Imputation

CAI Guisheng · 152 ·

According to the theory of objective imputation, the irregular causations should be precluded through the objective criterion of “permitted risk”. The criterion of “permitted risk” has preinstalled a perspective of a fictive “objective-standard person”. Therefore, in the criminal theory that the judge should first carry out a step of objective imputation, and then that of subjective imputation, the first step is unnecessary. In the case that the perpetrator realizes his special knowledge, the theory of objective imputation can lead to a wrong conclusion. With the introduction of the so-called “special knowledge” into the theory of objective imputation, this imputation will be not objective any longer. It is not suitable to adopt the theory of objective imputation, which is based on a “fictive person”. The proper way is to understand and interpret the legal elements, such as result, action and intent(or negligence), normatively and basing on all the facts that ex-post found out. The imputation of criminal results is a subjective imputation that aims at the real perpetrator rather than an objective imputation towards a “fictive person”.

Key Words Irregular Causations; Objective Imputation; Special Knowledge; Normalization of Elements; Subjective Imputation

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The Misreading and Clarifying of the Principle of “Trademark Case-by-case Review”

XIONG Wencong · 168 ·

In most trademark cases, the normative issues such as distinctiveness, popularity, similarity and the likelihood of confusion are very complicated and comprise very uncertain judgement of subjectivity. For dealing with these issues, the courts developed the “multifactor test” and resulted in inevitably an extrusive phenomenon, which called “case-by-case review”. Without Understanding its rationale, the “case-by-case review” is easily misread be conflicting with the doctrines of “like cases alike” or “stare decisis” and should be excluded by the principle of so-called “the consistency of review standard”. Only by clarifying the boundary between “case-by-case review” and “like cases alike”, we can defuse the contradiction and ensure the fairness of judicial judgement.

Key Words Case-by-case Review; Like Cases Alike; Trademark Law; Multifactor Test

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Commentary on Article 14 of Contract Law: Composition of an Offer

YANG Daixiong · 177 ·

According to Article 14 of Contract Law, an offer should meet three requirements. Firstly, it should be a declaration. Secondly, in principle, offeree must be specific person; only in exceptional case can numerous unspecific people be offeree. Thirdly, the declaration should express definite meaning concerning effect. This meaning acts as criteria to distinguish offer from invitation to offer, declaration based on friendship, declaration in gentleman’s agreement, letter of intent, declaration in memorandum. The burden of proof rests on the party who claims the existence of an offer with certain content.

Key Words Offer; Invitation to Offer; Act Based on Friendship; Declaration of Will; Burden of Proof

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