



# 法学家

THE JURIST



5

2018

国家社科基金资助期刊

# 法学家

2018年第5期(总第170期)

2018年9月出版

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## ABSTRACTS

*Reflections on the Study of the Socialist Jurisprudence Discourse System with Chinese Characteristics: From the Perspective of Chinese Communist Party Regulations* LIAO Yi · 1 ·

As far as the development of legal discourse theory is concerned, the study of jurisprudence discourse in the strict sense is extremely necessary. The jurisprudence discourse has the characteristics of multiple forms, decentralization, and sentimentalism. The study of its systematization should follow the logic of historical practice. This kind of logic can be empirically demonstrated in the evolution of the socialist legal discourse with Chinese characteristics, represented by “CCP Regulations”. The rise of “CCP Regulations” discourse reflects the overall deepening of the current ideology of the rule of law in China and the legal governance process. A large number of related studies have neglected the historical context and limitation factor of jurisprudence discourse, and it is difficult to play a true theoretical guiding function under the discipline system. The construction of the socialist jurisprudence discourse system with Chinese characteristics should be promoted in the broader vision of historical conditions, form a new analytical framework, and pay attention to the discussion of theoretical strategies.

**Key Words** Jurisprudence Discourse; CCP Regulations; Discourse of Politics and Law; Ideology of the Rule of Law; Historical Practice

Liao Yi, Ph.D. in Law, Professor of Wuhan University School of Law.

*Construction of A Society of Compliance: Meaning, Rationale and Approach* LI Na · 15 ·

“Full compliance” is an important goal as well as content in the construction of rule of law in China. Compliance however is not a sole outcome of application of legal norms, but a sort of logic of social actions. Construction of a society of compliance requires three major subjects: the individual, group and organization. And it refers to three principal levels: the society, government and the country. Construction of a society of compliance indicates a high level of rule of law construction as it contributes to national governance. With an comprehensive and processual perspective, compliance construction requires useful interrelation between law, society and the individual, interrelation between the rule, action and ideas, and interrelation between subjective and objective factors. In this sense, the core of a society of compliance includes three critical aspects: compliance awareness, compliance capacity, and compliance conditions. Such three aspects further develop seven basic elements: acceptance of legitimacy, ethical morality, knowledge, resource, legal system, legal deterrence, and social-cultural psychology. In general, the rule of law construction in China calls for new development in both compliance theory and compliance practice.

**Key Words** A Society of Compliance; Construction of Rule of Law; Compliance Awareness; Compliance Capacity; Legal Deterrence

Li Na, Ph.D. in Law, Assistant Professor of Yunnan University Law School.

*The Structure of Horizontal Separation of Powers* LIN Yan · 29 ·

There exist three common theoretical approaches in explaining the structure of horizontal separation of powers in China, namely the Article 3 approach, the democratic centralization principle approach, and the approach that is based on state organs and their authorities. All these approaches, however, fail to present a

comprehensive understanding of the horizontal separation of powers structure. To fill such an academic vacuum, this article tries to capture several identifiable patterns and normative structures of the horizontal separation of powers by sorting out common elements in constitutional norms and the studies of landmark cases and controversies. The quinary structure, the organizationally hierarchical order, the supremacy of People's Congresses, the integration of legislative and executive branches, and the principle of restrained oversight represent the common structure genes of China's horizontal separation of powers structure.

**Key Words** Quinary Structure; Organizationally Hierarchical Order; Supremacy of People's Congresses; Integration of Legislative and Executive Branches; Principle of Restrained Oversight

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### *Administrative Hearing as a Process of Communication*

SHI Xiaoxue · 44 ·

The traditional form of hearing is an adversary trial-type process, which meets some predicaments when it is transplanted to the administrative process. It makes a trap that the formal hearing is an adversary trial-type one, which cannot fit in with different kind of administrative tasks. This study finds two ideal pure types of hearing procedure: case-deciding and policy-making. It is a reciprocal communication in adjudication hearing process, while a communication with common aims in policy making hearing process. There are two sets of characteristics of these ideal types: simplicity and diversity, defensiveness and constructiveness. The different functions between case-deciding type of hearing and policy-making type of hearing lead to the divergence of their procedures.

**Key Words** Administrative Hearing; Ideal Type; Communication; Case-deciding; Policy-making  
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### *Regulation of Solicitation by Civil Law*

ZHANG Hong · 61 ·

Solicitation is a kind of agreement involving such questions as the validity of the contract, the attribution of fees and the culpa in contrahendo. Considering the lack of civil provisions concerned with this problem, the regulation should be adopted through civil judgment and thus the base of the society governed by rule of law can be strengthened. Solicitation can be classified into different categories including solicitation of official positions, school admission solicitation, solicitation of influencing judicial judgment or administrative procedures, solicitation of qualification, solicitation about assuming other's name, solicitation of taking advantage of media relations to influence the judicial or administrative procedures, solicitation of debt collection via violence, and solicitation of examination impostor. The solicitation should be defined as commission in civil law. The validity of solicitation which can violate the mandatory provisions or public order and fine custom should be determined according to the article 54 subparagraph 4 or 5 of the contract law and the article 153 of the General Provisions of the Civil Law of the People's Republic of China. Three models including return, not-return in case of illegal payment and seizure can be applied to the attribution of fees on the base of the validity of the contract and the evaluation of the particular characteristics of specific cases.

**Key Words** Solicitation; Regulation by Civil Law; Validity; Take over

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### *The Alienation of Justifiable Defense in China and the Function of Criminal Law System*

LAO Dongyan · 76 ·

In the judicial practice of China, the constitutive requirements of justifiable defense have always been

interpreted in the direction of denying its claim, which makes it nearly impossible to raise such a defense for the defendant successfully. There is an unbridgeable gap between the legislative provision of justifiable defense and its judicial application. The alienation of justifiable defense in the judicial practice derives not from the poor construction of its dogmatic theory, but mainly from a mistaken self-orientation of conflict resolution for the judicial adjudication in its function. Through the invalidity problem of the statutory provision of justifiable defense in China, we need to consider seriously a shift of the judicial adjudication in its basic function from conflict resolution to evaluating its lawfulness for a conduct. On this basis, the primary function of criminal law system should be redefined correspondingly. In a risk society of high indeterminacy, the primary function of criminal law system lies in making the normative expectation stable among the people. In view of this, it is especially necessary to rethink and reconstruct the dogmatic theory of criminal law on the whole, and to manage to finish the shift of its theoretical framework.

**Key Words** Justifiable Defense; Functionalism; Normative Expectation; Dogmatic System of Criminal Law; Confirmation of Norm's Validity

Lao Dongyan, Ph.D. in Law, Professor of Tsinghua University Law School.

***The Internal Logic of the Chinese-Style Burden of Proof:***

***An Analysis of the Guiding-Cases by the Chinese Supreme Court***

HU Xuejun · 91 ·

In Chinese current judicial practice, the general reason or common sense of “who claims, who proves the evidence” is still followed to distribute the “burden of proof” of the facts to be proved. It is especially popular to change the burden of proof when the lack of evidence leads to difficult judgment of facts. The consequence of this burden of proof is that the facts of the case are unfavorable to the party concerned. In the context of our country, the name of “non liquet” and its judgment method are different from the modern theory of burden of proof in continental law system. This Chinese-style burden of proof conflicts with the classical theory of burden of proof and the current legal norms of our country, but it is highly consistent with the foundation of Chinese cultural concept and has its own internal logic and practical rationality. In order to solve the contradiction between theory and practice, on the one hand, it is advisable to recognize and try to construct this kind of Chinese-style burden of proof in the field of fact recognition, on the other hand. The emphasis of the modern system of burden of proof should be put on the function of justifying the result of “burden of proof” as the burden of failure when the truth is not known in the past. The Shift to “burden of proof distribution” should be the adjustment of the civil trial process of the adjudication methodology function.

**Key Words** Burden of Proof; Chinese-Style Burden of Proof; Non Liquet; The Burden of Proof Shift; Burden of Proof-Judgment

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***Deconstruction of Rights to Suspend Prior to Performance***

LI Jianxing · 106 ·

Rights to suspend prior to performance lack sufficient theoretical basis, and can also be replaced by an existing right to suspend. The first payment obligation must be divided into fixed and non-fixed two types. Fixed first payment obligation has not been fulfilled, after the payment of obligations continued without period. Debt is not the debtor's right of defense and will exclude rights to suspend prior to performance and the implementation of the right of defense. In the non-fixed first payment obligations, after the payment of obligations of the period, the two sides to fulfill the order of performance at the same time. The first payment of the obligor is due to breach of contract, breach of contract loyalty, loss of right of defense, after the payment of the obligation to enjoy the implementation of the right of defense. The legislator should abolish the perform-

ance of the right to pleadings; scholars and practitioners should explain the unified structure of rights to suspend of non-performance centering on Article 66 of Contract Law.

**Key Words** Rights to Suspend Prior to Performance; Implementation of the Right of Defense; Fixed First Payment Obligation; Debt of No Period; Loyal to the Contract

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### *The Ownership of Creditor's Rights in Double Assignment*

PAN Yunhua · 120 ·

With respect to the final ownership of creditor's rights in double assignment, the provisions of article 80 of China's contract law is not clear to define it. There are three kinds of viewpoints in Chinese academic and judicial practice. The first takes it for granted that the sequence of contracts of assignment of creditor's rights determines the final ownership of creditor's rights. As a result, the prior assignee acquires the creditor's rights. The second considers that the sequence of notice of assignment determines the final ownership of creditor's rights. On account of this, the prior-notified assignee acquires the creditor's rights. The third thinks that the sequence of registration of assignment determines the final ownership of creditor's rights, therefore, the prior-registered assignee acquires the creditor's rights. In comparison, the first viewpoint is more reasonable than the other two viewpoints, and it conforms to the normative pattern and legal logic of assignment of creditor's rights so that it should be stipulated in China's future civil code.

**Key Words** Double Assignment of Creditor's Rights; Consensus of Assignment; Notice of Assignment; Registration of Assignment; Ownership of Rights

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### *A Theory of Loss Allocation for Forged Bank Card Transactions*

WANG Chengtang · 131 ·

The common way of quasi-possession creditor paid off is to pretend the true creditor to withdraw deposits. The bank card issuers, who can't identify the forged bank card with identification duty. Paying to forged bank cardholders wouldn't be regarded as paying the quasi creditor off without exemptions from civil liabilities. This means that cardholders can still perform claims according to deposit contracts, while bank card issuers must bear all the losses of forged bank card transactions. Judicial departments of China and the legislations of other countries have chosen the strict liability imputation principle with defense of contributory negligence of loss allocation system, the reason is that only claims of tort law can cognize subjective faults. Bank card issuers, however, are the least cost avoiders in the accidents of pretending the true creditor to withdraw deposits, and it will be the most effective choice if bank card issuers bear the losses of forged bank card transactions based on the strict liability imputation principle. The difference of loss allocation of forged bank card transactions caused by the choice of claim basis thus also will be eliminated.

**Key Words** Forged Bank Card; Quasi-possession; Contributory Negligence; Strict Liability

Wang Chengtang, Ph.D. in Law, Professor of Yangzhou University Law School.

### *On "The illegitimate interests" in Bribery Crime of Legal Dogmatics*

WANG Zhengxun · 144 ·

"The illegitimate interests" in Bribery Crime shall be explained according to context and through stereotypical reasoning in the semantic domain of symmetrical and paradigmatic relationships. In the symmetrical relationship, the benefits that the grafter obtains for the other party include both legitimate and illegitimate substantive interests. Briber's "illegitimate Interests" refer to typically substantively improper interests or substantively legitimate interests in specific cases, but "not seeking illegitimate interests" in third paragraph of Article 389 of the criminal law means not having obtained substantively illegitimate interests. In the paradigmatic

matic relationship, "the illegitimate interests" in the other bribery crimes have the same meaning as in the first paragraph of Article 389.

**Key Words** Bribery Crime; Illegitimate Interests; Semantic Field; Substantive Justice; Procedural Justice

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***On the Functional Orientation of Audio-video Recording of Interrogation:  
from Self-discipline Tool to Best Evidence***

QIN Zongwen · 156 ·

The function of audio-visual records system of interrogation in China has been restricted artificially, which is essentially regarded as a self-discipline tool for the investigation organ. The ostensible purpose of audio-video recording is to prevent torture, while the deep purpose aims at preventing misjudged cases caused by false confession. The orientation as self-discipline tool makes audio-video recording weak in regulation on various factors which may cause misjudged case; in the meantime, its function dissimilate from "power control" to "power guarantee" in practice, which forms logical paradox. Audio-video recording has the potential of becoming the best evidence to prove interrogation matters. We should treat the prevention of false confession as its core purpose and transform its function to litigation evidence. To make audio-video recording become best evidence, the following problems should be solved: moderate legalization of collecting the defendant's states by seducing or cheating; treating the synchronized audio-video recordings differently in different types of cases; differentiation in transferring with the cases; ensuring that the defense can use the audios and videos conveniently; promoting the synchronized audio-video recording and transferring with the cases by advancing system.

**Key Words** Audio-video Recording of Interrogation; Interrogation; Confession; Audio-video Recording

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***Commentary to Article 45 of Contract Law (Conditional Contract)***

ZHAI Yuanjian · 170 ·

The first paragraph of Article 45 of Contract Law provides that the parties have the freedom to agree to attach conditions on the validity of the contract. Conditions are characterized by intentionality, futurity, probability and legality. Conditions on the entry into effect and conditions on dissolution are two types of conditions stipulated by positive law in our country. A contract with collateral conditions on its entry into effect shall become effective upon the fulfillment of the conditions. A contract with collateral conditions on its dissolution shall lose its validity upon the fulfillment of the conditions. However, for the protection of public welfare or private benefits, the family law on non-property legal acts, bill behavior, consensus on transfer of real estate and other legal acts shall not be conditional. During the pending period, the parties shall act in good faith in order to respect the expectant right of the relative person. Based on the principle of honesty and good faith, the second paragraph of Article 45 of Contract Law establishes the fictitious rules on conditional achievement or non achievement; however, this provision is slightly rigid. In accordance with the provisions of positive law, the achievement of conditions has no retroactive effect; the provision is arbitrary norm.

**Key Words** Conditions on the Entry into Effect; Conditions on Dissolution; Pending Period; Fictitious Rules

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THE JURIST

（双月刊）

2018/5 总第170期

国际标准刊号：ISSN1005-0221  
国内统一刊号：CN11-3212/D  
定价：40.00元



微信公众号  
faxuejiazz

ISSN 1005-0221

