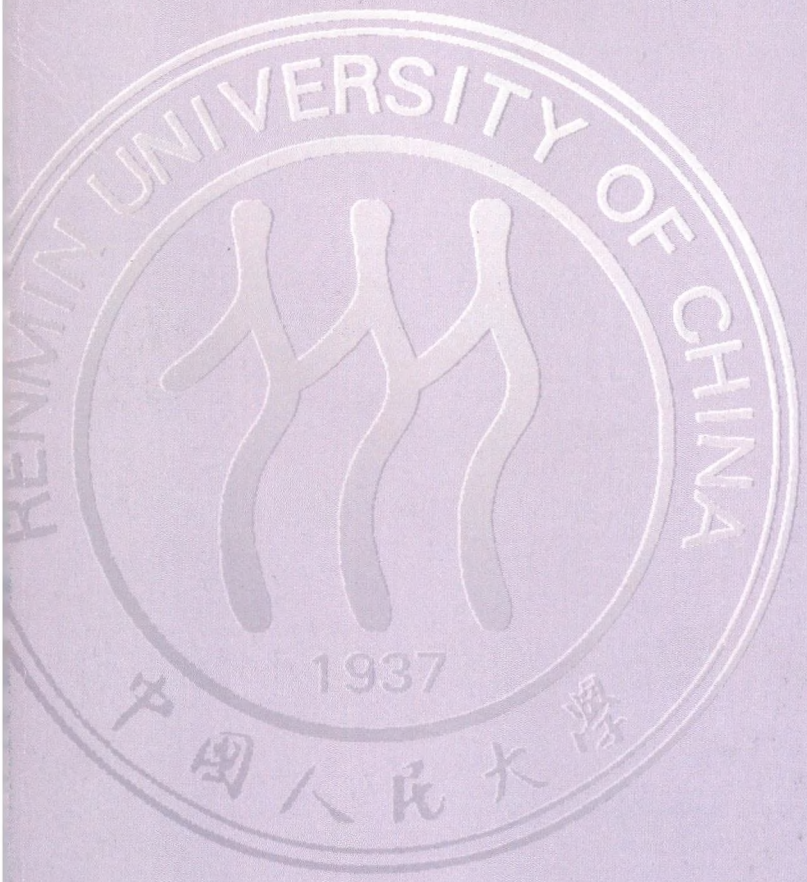
法学家

THE JURIST



1
2019
国家社科基金资助期刊

法学家

2019 年第 1 期（总第 172 期）　　2019 年 1 月出版

专　论

视　点

争　鸣

评　注

ABSTRACTS

The doctrine of combination of legislative and executive powers could not be simply and literally understood as the merge of the legislative and executive organs, or the merge of the legislative and executive powers. This doctrine is not opposed to be the proper allocation of national powers among the legislative branch, administrative branch and judicial branch. It simply maintains the supremacy of the legislative power in the system of national powers, which implies inseparability of the popular sovereignty, and stands opposed to the doctrine of separation of powers accordingly. Compared with the principle of democratic centralism, the doctrine of combination of legislative and executive powers could characteristically describe the horizontal allocation of national powers in China constitutional law.

Key Words Combination of Legislative and Executive Powers; Separation of Powers; Allocation of National Powers

Du Qiangqiang, Ph.D. in Law, Professor of Capital Normal University College of Political Science and Law.

Contemporary Chinese civil law codification does net pay much attention to the public dimension of discourse space between society and individuals, which restricts the social development of the civil code and the evaluation of its functional orientation. The thinking pattern of civil law rights is too rigid. It lacks the constructive power and explanatory power to the legal interests manifested in the form of public order, overestimates the inferential function of the right and the right of claim to the judgment, and neglects the public social foundation and the background of the obligation for the operation of the right. The significance of the social public dimension to the contemporary civil law lies in the realistic value of "public good" in the contemporary era; the contemporary in-depth display of the relativity between public and private law; the inevitability of the withdrawal of private law in the socialization of rights and interests; and the strengthening of the demand for the socialization of legislation in the information age. Based on the interaction between civil law and society, the civil law system of subjective rights and compulsory individual independence began to decline, and the trend of functional legislation of civil and commercial law was gradually established. The contemporary civil code has gradually become a normative group of traditional basic private law relations, such as real right, creditor's rights and so on, because of its insufficient political impetus, the decline of value guidance, the insufficient coverage and the weakening of predictability.

Key Words Public Dimension; Right Thinking; Legal Interest; Expected Mandatory; Positive Law

Mei Xiaying, Ph.D. in Law, Professor of Law School of University of International Business and Economics.

Security law not only has a function of ensuring the satisfaction of claims, but also has a social function

that facilitates the efficient use of funds. The legal act which has the purpose of guaranteeing creditor's rights and can directly dominate the value of the security subject, regardless of the structure of its rights and its name, should be a guarantee. The security subject varies from land to buildings, real estate to movable assets, tangible assets to intangible assets, existing assets to assets acquired in the future, single items to collections, fixed assets to current assets. Secured claims develop from specific ones to unspecified ones, and the dependent character of security interest and the principle of specific secured claim has loosed. The character of the freedom of contract in the content of security rights is particularly prominent, and the principle of freedom of contract continues to infiltrate the numerus clausus principle. The value of income stands out from the value of use and becomes an independent type of value. Filing system and control as publicity method emerge. The private implementation process has risen up, and value of income has been used for enforcement. The legislative trends show that the specificity of the subject of real rights has eased, the dependent character of security interest has presented a phenomenon of minimization, the numerus clausus principle has softened, registered content has become flexible, the management function of security rights is becoming increasingly important, legislative emphasis on protecting the interests of consumers, implementation methods of security rights become diversified, security rights in movable assets become unitary and its legislative become uniform.

Key Words Numerus Clausus; The Principle of Specific Secured Claim; Value of Income; Private Implementation Process; Filing System

Xie Zaiquan, President Twanmoh Chair Professor of Law School of Soochow University.

Consideration of the Ability-to-pay of Taxation among Making Real Estate Tax Law *YE Shan · 57 ·*

The real estate tax law belongs to the category of distribution law in nature, and its system should always follow the principle of quantity and taxation. The property tax belongs to the category of assets noumenon tax in nature: it is set in the real estate sector, and the income of real estate should be tax based, and its economic tax and legal tax are negotiable. The legitimacy of the establishment of the real estate tax is rooted in the social obligation of the property right in the constitution. Its economic source may be the income of the taxable real estate or the income of the property, or the property and other income of the taxpayer. The tax burden of real estate tax is determined by the assessable value, tax rate, exemption tax and tax preferences. If the price of the income is beyond the reasonable range, and the taxpayer is not willing to deal with the taxable real estate in order to pay the real estate tax, the tax authorities have the right to set the right of tax protection on the real estate. When the taxpayer fails to pay the real estate tax in full and in time and is not paid after the time limit is paid, the tax authorities can set the tax guarantee right in the taxable real estate according to law. If a taxpayer deals with taxable real estate, the tax authorities shall have the right to give priority to compensation from their disposal proceeds.

Key Words Ability-to-Pay Principle of Taxation; Asset Ontology Tax; Earning Capacity; Social Obligation of Property Right; Right of Compensation for Securing Taxation

Ye Shan, Ph.D. in Law, Professor of Peiking University Law School.

The Role and Function of Legislative History in Statutory Interpretation
——The Experience of Common Law and Its Implication for China *WANG Yunqing · 72 ·*

In Anglo-American law, the use of legislative history has undergone Pattern of Never to Patterns of Limited Usage. As a kind of genetic argument, there are complex relations between legislative history and literal

interpretation, systematic interpretation, intentional interpretation and purposive interpretation. In practice, the judicial application of legislative history should base on the priority of semantic meaning principle, standards of evidence, order of authority, and the duration of statute. As a kind of non-official legal source, and due to the problems such as non-existence of legislative intent, selective application bias, and judicial error, legislative history should be the starting point, not the end point, for ascertaining the meaning of word(s) at issue. Although Chinese judges have some reflection on the function and status of legislative history, there are still some problems, such as single interpretation function and overemphasis on semantic intuition, unformed form of comprehensive model and selective bias, ignorance of evaluative choice and discretion abuse.

Key Words Original Legislative Intent; Ppost-enactment Legislative History; Statutory Interpretation; Legislative History; Heuristic

Wang Yunqing, Ph.D. in Law, Associate Professor of Xiamen University Law School.

Guarding against Over-Instrumentalism of Criminal Law *XIE Wangyuan · 87 ·*

This paper argues although legal instrumentalism is rational, absolute instrumentalism is not. Similarly, criminal law instrumentalism likewise is legitimate, but over-instrumentalism of criminal law is bound to cause a cancerous growth of the penal power of the state and the severe shrink of civil right and liberty. In legislation, over-instrumentalism of Criminal Law which is represented as overcriminalization, and in criminal justice, is symbolized by judicial discretion and power of over-extensive interpretation. The basic strategy of being vigilant against it is: stand the "criminal law as last resort" ground in legislation, while criminal justice system thoroughly implements the legality principle and strict interpretation.

Key Words Legal Instrumentalism and Non-Instrumentalism; Over-Instrumentalism of Criminal Law; Overcriminalization; Criminal Judicial Discretion; Legality

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

A Perspective Study of the Phenomenon of "Mediation with Judgment Factors"——Also A Study of the Pluralistic Positioning of "Clear Facts and Clarified Responsibilities" in Lawsuit Mediation *LU Xiaoyan · 101 ·*

In recent years, the "Mediation with Judgment Factors" mainly characterized by "Clear Facts and Clarified Responsibilities" comes into the judicial field. On the one hand, as a standard of mediation, "Clear Facts and Clarified Responsibilities" returns under the influence of "Mediation with Judgment Factors" after experiencing "negation" in the "mediation fever" period and "negation of negation" in the reflection of "improper mediation"; on the other hand, in the practical form of "Mediation with Judgment Factors", the "Clear Facts and Clarified Responsibilities" as the mediation standard is different from that as the judgment standard in content, procedure and carrier. It's because that, under the background of a newly built society with rule of law, the increased rationality of the dispute subjects, the intensified aggregation of dispute mode, and the pluralistic development of dispute categories have determined the effectiveness of rule guidance, the demonstration of rule-based governance, and the necessity of rule innovation, so that the return of "Clear Facts and Clarified Responsibilities" as the mediation standard becomes an inevitable requirement for the parties to deal with disputes under the statutory rules; however, the effect degrees of statutory rules in the mediation of different cases, their participation degrees in different mediation procedures and their publication degrees in dif-

ferent forms of carriers are all different, so that the clarification degrees of "facts and responsibilities" required by the mediation of different cases, achievable in different mediation procedures and revealed in different forms of carriers are also different. Therefore, the pluralistic standard of "Clear Facts and Clarified Responsibilities" shall be adopted to make the procedure division of lawsuit mediation, and the required clarification degree of "facts and responsibilities" shall be determined based on the case type, then the division procedure determined based on the selected clarification degree and the carrier of "facts and responsibilities" determined based on the selected division procedure.

Key Words Mediation with Judgment Factors; Clear Facts and Clarified Responsibilities; Judicial Authority of Judges; Disposal Right of the Party; Procedure Division

Lu Xiaoyan, Doctor of Law Candidate of Nanjing Normal University School of Law, Invited Researcher of the Institute of Legal Development Strategy of China Law and Modernization Academy, Presiding Judge of the Financial Court of Wuxi Intermediate People's Court, Jiangsu Province.

On the Circumstances Leading to the Invalidity of Judicial Compulsory Auction *LU Zhengmin · 112 ·*

The circumstances leading to the invalidity of judicial compulsory auction have yet to be clearly stipulated in current law of China. In legal practice, the tendency is to extend the scope of invalidity in compulsory enforcement. There is a wide divergence in opinions of scholars with regards to the matter. Considering the nature of compulsory auction and the consequences of deciding such auction as invalid, we shall reflect on three aspects in order to specify circumstances leading to the invalidity. Firstly, the criteria of whether civil juristic acts are effective shall not be applied to compulsory auction; secondly, the circumstances leading to the invalidity shall be strictly limited; thirdly, the defect which can be corrected by executive remedy system shall be excluded from the circumstances leading to the invalidity. "Significant and obvious defect" shall be the standard of establishing the invalidity of compulsory auction. In accordance with the reality of China, the legal circumstances leading to invalidity of compulsory auction shall be confined to four conditions as follows: where basis of enforcement is inexistent; where items of auction are not seized or the seizure is invalid; where bidders are not legally qualified for auction; where items of auction are forbidden to circulate.

Key Words Compulsory Auction; Invalidity; Circumstance; Standard

Lu Zhengmin, Ph.D. in Law, Professor of Xiamen University Law School.

The Typification of the Express Delivery Service Contract: from the Perspective of Legislative Expression and Implementation Method *ZHENG Jianing · 124 ·*

The express delivery service contract vitally sustains the development of express delivery service in China. With the expansion of China's express delivery service in scale and the constant perfection of relevant legal norms, the express delivery service contract has yet been equipped with the feature of social universality, thus has possessed the objective basis to be standardized by legislation. Therefore, the typification legislation of express delivery service is of practical significance. Additionally, the express delivery service contract can hardly be involved into other types of contracts, for which it bears feasibility in typification in the normative view. The typification legislative process of express delivery service contract should focus on three aspects, namely clarifying relative parties in the contract, constructing the group of contractual obligations as well as setting up remedial measures after the breach of contracts, so as to construct the fundamental normative sys-

tem of express delivery service, then to incorporate the express delivery contract into the Contract Law division in process of codifying civil laws. Thus, the typification of the express delivery service contract can be truly achieved.

Key Words Civil Code; Specific Provisions of Contract Law; Express Delivery Service Contract; E-Commerce Law of the People's Republic of China

Zheng Jianing, Ph.D. in Law, Professor of Civil, Commercial and Economic Law School of China University of Political Science and Law.

On the Claim for Exemption from Liability of the Insured in Liability Insurance
——Comment on the Relevant Provisions of Liability Insurance in the Forth Judicial Interpretation of Insurance Law *SHEN Xiaojun · 135 ·*

The claim for insurance of the insured conferred by the twelfth article of the insurance law has many adverse effects on the victims, so the sixty-fifth article empowers the victims the claim for insurance under certain conditions. This would not harm the interests of the insured. For the insured, the function of liability insurance lies in the exemption of compensation liability. The insurer should not only undertake the joint and several liability for compensation, but also necessarily to bear the expenses of the insured participating in the compensation action. On the contrary, the reasonable scope of insurance liability is determined by the scope of the claim of the insured. In addition to denying the effect of the insured to the victims without compensation and recognition, the insurer should also give active participation to the insurer. The claim of the insured is feasible after the effective determination of the liability for damages. Therefore, the limitation of action should start from this time. In a word, in the liability insurance, the main purpose of the insured is to avoid the liability of compensation for the injured party through the insurer's payment, but not to get insurance money. Therefore, the claim of the insured is in nature the right of claim for exemption from liability.

Key Words Liability Insurance; the Insured; Claim for Insurance; Claim for Exemption from Liability

Shen Xiaojun, Ph.D. in Law, Assistant Professor of Law School of Shanghai University of International Business and Economics.

A Systematic Rethink on Imaginary Defense *YANG Xufeng · 149 ·*

The current research of imaginary defense should complete the transformation of methodology. It is easy to create "distorted doctrines" when all kinds of doctrines are spliced mechanically. The essence of the limited liability theory is to establish "intentional objects include the basic facts of the constructive conditions and illegality" and it is a misreading to consider "analogy" as the "tag" of the theory. It is not feasible to achieve a "unified solution" through the review of specific doctrines in the past. Systematic thinking take into account position and starting point, the three main lines of error theory, intention theory and hierarchy theory are important clues. The so-called dominant theories still face the handicaps in system and deserve further thinking. If the stand of Handlungsunwert doesn't admit the dual functions of intention, the intention of illegitimacy should play the essential judgment role fully to deny the conclusion of intention. In the determination of negligence, it is possible to judge the existence or not of the negligence of illegitimacy directly, or to start from the beginning, but it is necessary to bring forward the time of judgment to the moment when the error take place.

Key Words Imaginary Defense; Systematic Thinking; Factual Error Theory; Limited Liability Theory; Intention

Yang Xufeng, Ph.D. Candidate of Tsinghua University Law School.

Reflection on the Relationship between Statutory Retirement Age and Labor Contract *DONG Wenjun · 164 ·*

"Regulations on the Implementation of the Labor Contract Law" stipulate that the labor contract will be terminated when the laborers have reached the legal retirement age. The application of this clause has substantially modified the provisions of the labor contract law which it explains. It not only damages the authority of "Labor Contract Law", but also unreasonably restricts the freedom of contract between the parties of the labor contract. Therefore, the regulation of the relationship between the statutory retirement age and the labor contract is not reasonable. Based on the consideration of the social situation and the labor law system in China, the circumstance that the workers and employers should end the labor contract relationship as the workers reach the legal retirement age should be changed from compulsory application to conditional application, that is to say, the law should allow both parties to choose not to apply this circumstance. From the angle of legislative technology, the independent rules of the retirement system should be designed in "Labor Contract Law" in order to relocate the relationship between the legal retirement age and the labor contract. The relationship between the legal retirement age and the labor contract, as well as the basic pension insurance treatment after the workers retire according to law, should be included in the retirement rules, so as to achieve the smooth docking of the pension insurance system and the labor contract system.

Key Words Statutory Retirement Age; Labor Contract Termination; Basic Pension Insurance; Retirement

Dong Wenjun, Ph.D. in Law, Associate Professor of Law School of Jilin University.

Comments on Article 80 of the Contract Law (Notice of Assignment) *XU Diyu · 175 ·*

The normative purpose of Article 80 of the Contract Law is to protect the interest of obligor where the obligee assigns his rights to a third party assignee. As a notional notice, the notice of assignment is a type of quasi-juridical act and shall follow civil law rules on the expression of intention. In principle, the obligee shall be the person to make the notice. The lawsuit brought by the assignee can only be regarded as a special form of de facto notice. The public notice of assigning the debt by the obligee to the assignee as such shall not be regarded as the notice or a replacement of the notice. The first half sentence of this provision regulates the internal relationship of the assignor and the assignee, the second half sentence regulates the external relationship. The notice becomes effective when the notice reaches the obligor. After that, the discharge of obligation by the obligor is effective even if the obligation was discharged towards a person previously not entitled to this right. The legal effect of discharging the obligation before the notice and the apparent assignment are also to protect the interests of the obligor. The handling of double assignment shall follow the rule of "first come, first served", and shall achieve the normative purpose of protecting the obligor.

Key Words Notice of Assignment; Protection of Obligor; the External Effect of the Assignment; Apparent Assignment; Double Assignment

Xu Diyu, Ph.D. in Law, Professor of Law School of Zhongnan University of Economics and Law.

法学家

THE JURIST

（双月刊）

2019/1 总第172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
9 771005 022199 01>