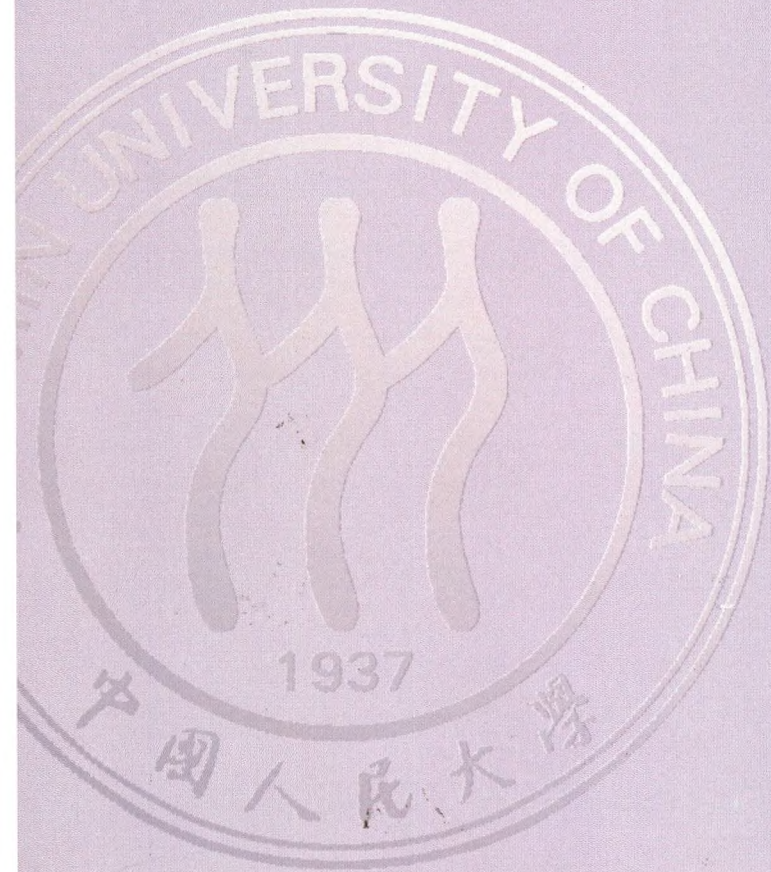




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ABSTRACTS

***How and Why the Legal Doctrine is Possible :
An Consequentialism Approach***

SANG Benqian · 1 ·

Describing the creation process of doctrine can reveal the practical logic behind the doctrine, and then grasp the working principle of the doctrine creation. In this process, we can find that “the principle of unity of subjectivity and objectivity” must be manifested as “objectivity unifying subjectivity” at the operational level because the subjective aspect of crime is unobservable. Furthermore, since all substantive law judgments must finally go deeper into the level of evidence law, the “presumption-counterevidence model” can replace the elemental identification on the substantive law. In short, adhering to the normative stance of consequentialism and replacing moral interpretation with functional interpretation is the only way to deepen and expand the study of criminal law and even the entire legal study.

Key Words Homicide; Intentional Injury to Death; Abortive Homicide; Legal Doctrine; Consequentialism

Sang Benqian, Ph.D. in Law, Professor of Law School, Ocean University of China.

Reflection on the Consideration about Consequence in Adjudication

LEI Lei · 17 ·

Consideration about consequence appears to be more and more normal in adjudication, especially in China’s transitional society. However, researchers at present have given no clear consideration about consequence in the system of judicial methods. “Consequence” of adjudication refers mainly to general social consequence it may bring about, and “consideration about consequence” can be divided into two dimensions, i. e., “consequentialism” and “consequence-based arguments”. It can be found through analysis that, on both levels of law-finding and legal justification consequentialism can not be established generally; consequence-based arguments can be covered by given legal methods, which at most own a limited independence in the framework of objective teleological argumentation. In short, consideration about consequence neither has a position of “meta-method” nor is completely a new method, though it is worth to be taken seriously.

Key Words Adjudication; Consideration about Consequence; Consequentialism; Consequence-based Arguments; Objective Teleological Argumentation

Lei Lei, Ph.D. in Law, Professor of Law School, China University of Political Science and Law.

***Judicial Review of Openness of Public Enterprises and Institution :
Survey of 108 Judgments***

PENG Chun · 33 ·

A survey of 108 judgements on openness of public enterprises and institutions between 2011 and 2018 yields the following findings: in the course of applying Article 37 of the Open Government Information Regulations, the Chinese courts have developed rather systematic and nuanced jurisprudence on the identification of public enterprises and institutions and the determination of disclosure and non-disclosure. Such practical jurisprudence has to a large extent overturned a series of theories proposed by previous research, including the principle of maximalist application. Nevertheless, the current judicial approach is not immune to further

improvement. A better approach is that when identifying public enterprises and institutions we shall consult more broadly for formalistic legal basis, and make reference to the ongoing reforms of these organizations for substantial categorization; when determining whether certain information shall be disclosed, we shall not expect such information to be listed as items for disclosure, but shall check if it falls in the exception to the rule of transparency.

Key Words Public Institutions and Enterprises; Information Disclosure; Judicial Review
Peng Chun, Ph.D. in Law, Assistant Professor, Peking University Law School.

Research on the Nature of Police's Defense Behavior

WANG Gang · 48 ·

There are four main positions on whether police can invoke the provision of self-defense in criminal law to legalize their own behavior: duty behave theory, distinction theory, personal behave theory and justified defense theory. The duty behave theory denies in principle the possibility of applying self-defense to police actions; it is affirmed by distinction theory that the action of police can constitute self-defense, however it is believed that self-defense can only legalize police behavior in criminal law yet cannot exclude its illegality in administrative law; it is claimed by personal behave theory that police defense can only be regarded as a defense act carried out by police in their personal capacity; according to the justified defense theory, police acts constituting self-defense are not only legalized in criminal law, but also in administrative law. Compared with the above three other theories, this article explores that the justified defense theory is more convincing.

Key Words Police Defense; Self-defense; The Unity of Legal Order; Reservation of Law
Wang Gang, Ph.D. in Law, Associate Professor, Tsinghua University Law School.

A Research on the Loss of Chance Compensation in Medical Malpractice

MAN Hongjie · 64 ·

Present research is generally in favor of the introduction of proportional compensation model of loss of chance in medical malpractice liability. Comparative study shows that the fundamental difference between proportional compensation mode and other legal solutions is whether the causation requirement to establish liability is satisfied by the loss of chance theory. The nature of proportional compensation is the tool to evade the causal ment require. The right basis of indeterministic chance is patient's right of determination, including non-pecuniary damages and pure economic loss caused by the patient's loss of chance to better medical results, which is independent from the patient's ultimate damage. The patient's right to self-determination can be better protected by the loss of chance compensation along side with informed consent compensation.

Key Words Loss of Chance; Causation; Proportional Compensation; Right to Determination; Real Chance

Man Hongjie, Ph.D. in Law, Associate Professor of Law School of Shandong University.

On the Registration Confrontation Effect of Special Movable Property

ZHENG Yongkuan · 80 ·

According to Article 24 of the Real Right Law, the ownership change of special movables takes effect through delivery, but may not challenge any bona fide third party if it is not registered. "Bona fide third party" refers to a person who does not know or should not be aware of the change in ownership between the parties and who claims the real right to the same subject matter. That the unregistered owner of special movables may not challenge any bona fide third party means that the owner does not have legal status to exclude the

right of the third party or have precedence over its realization. Whether the third party is a bona fide one or not, should be specifically judged combined with possession and registration appearance of the special movables. Thus, the effectiveness of registration confrontation in Article 24 can be transformed into the problem concerning the bona fide acquisition of the assignee in the unauthorized disposition. According to such interpretation, the unregistered ownership of special movables, which should be subject to the protection of trade security by law when it is in conflict with reliance interest, is still the full ownership. Accordingly, many problems in the law application under the registration confrontation can be easily explained or solved.

Key Words Special Movables; Taking Effect through Delivery; Registration Confrontation; Bona Fide Acquisition

Zheng Yongkuan, Ph.D. in Law, Associate Professor of Law School of Xiamen University.

The Distinguishing Technique in the Practice of Guiding Case and its Improvement: Taking Guiding Case NO. 24 as An Example

SUN Guangning · 91 ·

The distinguishing technique is essential to the common law, which means to confirm if the precedents and case in hand are substantially similar. This technique is very meaningful to the application of guiding case in China. Based on the statistics of adjudicative documents that cite guiding case No. 24, we can see that the judges can make different decisions with chaotic use of distinguishing technique. Even in the confirmation of similarity, the expanded use of guiding case No. 24 is very questionable, which contains some potential danger. With all the analysis mentioned above, we should improve the distinguishing technique in the practice of guiding case system, such as more guiding cases published, more detailed rules, more procedural operations and more cooperation among judicial institutions. The improve of distinguishing technique of guiding case can make the best of guiding case system as expected.

Key Words Distinguishing Technique; Guiding Case; Causation; Judgment Point; Judgment Reason
Sun Guangning, Ph.D. in Law, Professor of Law School, Shandong University, Weihai.

On the Optimal Allocation of Internal Relations of Judicial Functions and Powers

ZHANG Zhihui · 107 ·

In every round of the judicial reform, the optimal allocation of judicial powers has always been mentioned as an important task. However, in order to find the way to optimize the allocation of judicial powers, we need to analyze the real problems in judicial practice deeply. Power itself is a kind of relationship. The core problem of optimizing the allocation of judicial powers is how to deal with the power relationship between judicial powers and other state powers, as well as the power relationship among different subjects within judicial authority. Based on the in-depth research of the internal relationship of judicial powers, we analyze from the aspects of 1) the allocation of powers between the superior and subordinate levels of the courts and the procuratorates, 2) the allocation of powers among different subjects in the same court and procuratorate, 3) the power relationship between judicial powers and judicial affairs, 4) the power relationship between judicial powers and judicial management power, and 5) the power relationship between judicial powers and judicial supervision power to expound the issue of the optimization of the internal allocation of judicial powers in this article.

Key Words Judicial Powers; Power Relationship; Judicial Reform

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***Research on the Administrative Joint Punishment of Dishonesty
and the Legal Control Over It***

SHEN Yilong · 120 ·

The administrative joint punishment of dishonesty is one of the most invasive and deterrent means of China's social honesty system construction, and it is a unique system design in China. The administrative joint punishment of dishonesty sets up obstacles or restrictions on the dishonest person in economic and social activities once again after the person have been sanctioned according to the law he violates. Thus it is different from the enforcement measures in order to promote obligors to perform obligations established in the legal instruments in force. As a preventive mode, administrative joint punishment of dishonesty can effectively make up for the shortcomings of the traditional post-penal punishment model and effectively improve the level of social integrity. In the legal nature, the administrative joint punishment of dishonesty is a system that is composed of multiple administrative actions. In practice, it may be presented as administrative inspections, administrative guidance and other administrative factual action, and may also be presented as administrative punishment, administrative licenses, administrative contracts, administrative subsidies and other administrative legal action. Since the administrative joint punishment of dishonesty can have a major impact on the social subject, it is necessary to strictly control it from the legality, relevance, proportionality and due process within the framework of administrative rule of law.

Key Words Honesty; Preventive; Joint Punishment of Dishonesty; Legal Control

Shen Yilong, Ph.D. Candidate of Shanghai University of Finance and Economics Law School.

Legal Realization of "Separation of Three Rights" in Homestead

GAO Hai · 132 ·

Based on the analysis of the Yiwu regulations, the essence of the "separation of three rights" of the homestead is that after the collective members have transferred rural housing across the collective, the right to use the homestead following the transfer within the limits of the homestead, which is equivalent to the area, has no fixed term limit, and does not have to pay the user fee to the collective. At the same time, the right to use the homestead is transferred as a whole according to the "integration of housing and land". The reconfiguration is updated to the right of use. Qualification right is mainly limited to the transfer right, priority transfer right, grant right and inheritance right of the right to use the homestead, even the right to apply for resettlement such as public rental housing, which is caused by the specific reason of cross-collective transfer of rural housing. Qualification right is different from homestead allocation claim right, but both belong to sub-rights of membership right. The subjects of the right of qualification and the right of use are members of the collective and non-members of the collective within a certain range. The right to use is similar to the right to use the construction land of state-owned residential buildings after the system structure of subject definition, time limit, fee payment, power enrichment and real right registration. It is the usufructuary right of real estate, not the new usufructuary right of the right to use residential land.

Key Words Homestead; Collective Members; Separation of Three Rights; Qualification Rights; Right to Use

Gao Hai, Ph.D. in Law, Professor of Law School of Anhui University of Finance & Economics.

Research on the Defensible Validity of Commercial Registration

—*In the Case of Shareholding Registration in Limited Company*

LI Jianwei, LUO Jingrong · 145 ·

Despite the fact that the defensible validity of shareholding registration in limited company has been es-

established under paragraph 3 of Article 32 in *Corporation Law*, there still exist many theoretical disputes and certain misunderstandings in the trial practice on “who”, based on “what kind of appearance facts”, against “whom”. By studying the general principle of defensible validity of commercial registration and making normative analysis of the basic provisions of defensible validity of shareholding registration, it becomes quite necessary to clarify the differences between several couples of categories such as the defensible validity and credibility of commercial registration, the commercial registration and credit information disclosure and the dormant investment and registration confrontation. The applicable premise of the registration confrontation is the discrepancy between the real right and the exoteric right. With the help of typology analysis, the scope of corresponding “third party” and the applicable situations of shareholding registration confrontation on the occasion of shareholding dispose, dormant investment, protection of corporate creditors and the enforcement of registered shareholders’ debts, will be precisely determined and thus formed the theoretical system of defensible validity of commercial registration.

Key Words Commercial Registration; Information Disclosure; Defensible Validity; Shareholding; Bona Fides Third Party

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Resolving the Problem of Proving Child Sexual Abuse Cases: A Transition from the Corroboration Mode to the Multifold Criminal Proof Mode

XIANG Yan · 160 ·

In child sexual abuse cases, the main evidence is often the child victim’s testimony. When applying the corroboration mode of our criminal evidence law, the absence of the defendant’s confession would easily lead to the failure of the prosecution. The difficulty in proving the fact in child sexual abuse case is a world-wide problem. By learning from the common law countries’ proof path, it is advisable to establish the “trustworthiness standard” of victim’s testimony in child sexual abuse cases, and improve the procedural rules of obtaining and examining the victim’s testimony to prevent wrongful convictions. By solving this proof problem of this special type of crime, it is argued that we should take the opportunity to promote the transition from the corroboration mode to the multifold criminal proof mode.

Key Words Child Sexual Abuse Crime; Corroboration; Categories of Evidences; Trustworthiness of the Victim’s Testimony

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A Commentary on Article 94 of Contract Law (Termination)

ZHAO Wenjie · 175 ·

Article 94 of contract law is the most important norm of termination. The purpose of this article is to free the obligee from its primary contractual obligation. This article is a mixture of the abstract model of fundamental breach of contract and the concrete model of non-performance. The exact meaning of the failure of contractual purpose is the deprivation of the obligee’s expectation interest under a contract, which depends on the type of non-performance and the its seriousness.

Key Words Right of Termination; Failure of Contractual Purpose; Non-performance

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