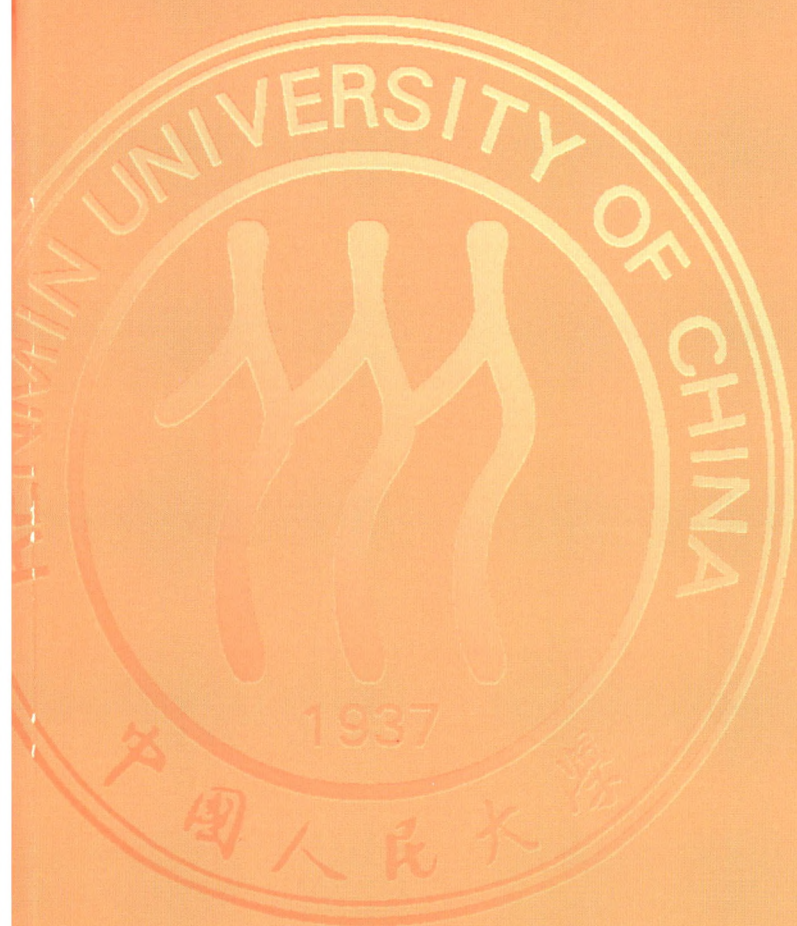




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ABSTRACTS

The Jurisprudential Positivism Road of China's Civil Law

TANG Wenping · 1 ·

A large number of problems with which China's civil law is faced can all be due to the matter of the choice of road. It is necessary for us to keep the jurisprudence from degenerating into "a worm of law" because of the trend of legal positivism which develops following the codification of civil law, and enables it to continue maintaining a vigorous momentum of development, to play an original mission for the world's civil law, and to produce new common law along with the conduct of the Belt and Road initiative. This is the very course of jurisprudential positivism. However, in the history of law, jurisprudential positivism was nothing but a foil to the terminologies like legal positivism. Therefore, in modern times, civil law in the post-code era has to trudge in such a long zigzag path to develop itself and consciously or unintentionally returned to the views of the previous wise scholars. From the three dimensions of legal history, legal philosophy, and methodology, we should understand that the fundamental pursuit of jurisprudential positivism is to open the shackles brought by legal positivism and codes, to ensure that the current law can freely evolve, to ensure case justice, and at the same time to ensure that the stability of current law is promoted. This choice of road will respond to the call of the era that once again transcends national borders, makes strict demand, and builds a new common law, so that the development path of Chinese civil law is deeply embedded in the development background of world civil law. And the many problems we face now are also expected to be properly solved.

Key Words Jurisprudential Positivism; Legal Positivism; Codification of Civil Law; System of Legal Dogmatics; New *ius commune*

Tang Wenping, Ph.D. in Law, Professor of Jinan University Law School.

Juridical Act and Public Order and Good Morals

DAI Mengyong · 17 ·

When the causes, contents, conditions or charges of juridical acts and motives of the parties violate public order and good morals, there are not only differences in their respective manifestations, but also different effects on the invalidity of juridical acts. If the causes or contents of a juridical act violate public order and good morals, the juridical act is void in whole or in part. If the suspensive condition of a juridical act violates public order and good morals, the entire juridical act is void. If the resolutive condition of a juridical act violates public order and good morals, generally only the resolutive condition alone is void. If the charge of a generous juridical act violates public order and good morals, only the charge alone is void. If the common motives of two or more parties of a bilateral juridical act or the motive of the party of a unilateral juridical act violate public order and good morals, the juridical act is void in whole. During the process of making Civil Code in China, the Code should stipulate separately those respective manifestations for contents, conditions and charges of juridical acts and motives of the parties which violate public order and good morals, and should also stipulate their corresponding legal effects separately.

Key Words Juridical Act; Public Order and Good Morals; Void; Generous Juridical Act; Civil Code

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**Reference Application of Contract Section of Civil Code on
Agreements Concerning Personal Relationships**

WANG Lei · 32 ·

Agreements concerning personal relationships such as marriage, adoption and guardianship, etc., may refer to Contract Section of Civil Code. The nature of agreements concerning personal relationships is the identity community characteristic which can be reflected by identity legal act and corresponding identity rights and obligations. It is also the judgment criterion and interpretation basis of restricting or amending the cited articles during “reference application”. The nature of the agreements concerning personal relationships includes the pursuit of encouraging marriage, maintaining the harmony and stability of the identity relationship between husband and wife, realizing the common interests of husband and wife and even the family, providing for the aged and raising minor children, and best interests of the children. We should distinguish different types of agreements concerning personal relationships, the different contents of the same agreements concerning personal relationships, the internal and external effects of agreements concerning personal relationships, so as to discuss the space of reference application relatively. The so-called “gift clause” in loyalty agreement, divorce property division settlement or marital property agreement can not be separated from the “whole” of agreements concerning personal relationships. Agreements concerning personal relationships should in principle be regarded as a whole, which forms continuing civil legal relationship.

Key Words Agreements Concerning Personal Relationships/Agreements Defining Status Relationships/Identity Relationship Agreements; Divorce Property Division Settlement; Marital Property Agreement; Reference Application; Contract Section of Civil Code

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

Allocation of Powers between Legislation and Administration

HUANG Yuxiao · 47 ·

The so-called allocation of powers between legislation and administration is to straighten out the upstream and downstream relationship between the formulation of law and the enforcement of law, which is essentially a question of power hierarchy. It is not the same as the supervision and restriction relationship between organs in the context of the separation of powers. All modes of allocation of legislative and administrative powers can be summarized as two models: separated model and declined model. The separated model can be subdivided into double separated model, separated model of legislation and administration model and separated model of legislation. “Separation” means either restricting the downstream or restricting the upstream. A thorough analysis of doctrine, practice and norms shows that the distribution of powers between legislation and administration in China should be a legislative separation structure. Legislative power itself is separated from the legislature and the executive organ, but this separation restricts the downstream, which restricts the administrative legislation rather than the law; on the contrary, the executive power is the decline of legislative power, which should neither exist autonomous administrative acts nor restrict legislation to take specific measures.

Key Words Legislation and Administration; Legal Norms; Legal Reservation; Generality of Law; Autonomous Administrative Act

Huang Yuxiao, Ph.D. Candidate of Peking University Law School.

The Dual Attributes of Personal Information and Behaviorism Regulation

DING Xiaodong · 64 ·

The legal protection of personal information depends on the nature of personal information in public law. There are two approaches to personal information in public law and public law theory. The first approach views personal information right as basic right and personal information should be protected by law; the second approach views personal information as the object of other people's freedom of speech, and the free access and use of personal information should be protected by law. But these two approaches can not construe personal information as a whole. The approach of personal information rights ignores the free circulation and public attributes of personal information, while the approach of personal information as the object of freedom of speech ignores the multiple rights and interests behind personal information. Personal information has both individual attributes and social circulation attributes. Starting from the dual attributes of personal information, the protection of personal information should adopt context-based behaviorism regulation, that is, to establish a reasonable boundary for the collection and utilization of personal information in specific context. Context-based behaviorist regulation is more in line with the fundamental characteristics of personal information protection, and will also provide a Chinese road beyond Europe and the United States for personal information protection in China.

Key Words Personal Information; Privacy; Basic Rights; Public Law; Behaviorism Regulation; Context

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From Informal Imperialism to Legal Imperialism: Taking the Encounter of Modern China as An Example

LI Yang · 77 ·

Informal imperialism of modern international law system has endured a meaning transformation from free trade to political or judicial control indirectly. During the formation of informal empire, the treaty which is followed by modern international law, does have deconstruction and constructiveness meaning to deterritorialized and reterritorialized, which means to break down formal empire's forts and rebuild informal empire's barriers. In this process, law was the indispensable and fundamental element to turn the informal imperialism into reality, furthermore, it was achieved to be legal imperialism, a mode of informal imperialism. Taking modern China as an example, we would find that, by relying on the policy's guidance, basing on the Sino-foreign treaties' regulations, resorting to the extraterritorial rights' application methods, the cross-fields' construction of judicial institutions and the legal professions' physical practices, legal imperialism finished the dissemination of western law in modern China.

Key Words Informal Imperialism; Legal Imperialism; Extraterritorial Rights; Modern China; Modern International Law

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The Role of Socialist Core Values in the Formation of Guiding Cases
—From the Perspective of Criminal Guiding Cases

LIU Yanhong LIU Hao · 90 ·

The socialist core values have a guiding role in the formation of the guiding case. The direct reference or

indirect expression of the core values in the guiding case has guiding significance for the judicial case judgment in the early stage of the case formation. The inclusion of core values in judicial application should be embodied as a judicial value and the specific boundaries of its application should be clarified to reduce the subjectivity, ethics, non-normativeness and uncertainty of application. According to the general content requirements of judicial values, we should choose the content of core values, and take into account the moral leadership of the core values and the theoretical proof of the law, paying attention to the relevance of each content element. The core values have a classification effect on the formed guiding cases. Attention should be paid to the formation of case groups in different values and the main purpose of guiding the formation of the guiding cases.

Key Words Socialist Core Values; Judicial Values; Guiding Cases; Case-guiding System; Case Referee

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***Research on Basic Topics of Civil Judicial Application of
Administrative Normative Documents***

WANG Jun · 105 ·

Administrative normative documents play an important role in the reasoning of civil judgments. There are three bases for administrative normative documents to be taken into consideration in civil judicial. One is that administrative normative documents are part of our legal system, another is that administrative normative documents are informal sources of civil law. What is more, it is necessary to accept administrative normative documents under the background of integration of public law and private law. Administrative normative documents could be accepted in civil judicial both as sources of civil law and no-sources of civil law. No-sources of civil law means that administrative normative documents are treated as the basis for ascertaining the facts. Application as sources of civil law should also abide to specific rules in form, essence, and procedure.

Key Words Administrative Normative Documents; Source of Civil Law; Transform Between Public Law and Civil Law

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***On the Litigation Mechanism of the Overlapping Case: From the Perspective of
Substantive Judgment between Criminal Law and Civil Law***

JIAN Ai · 116 ·

The way how to deal with the relationship between the criminal law and the civil law has a direct effect on the trial sequence of the overlapping case in the juridical practice. For the overlapping case, the dual perspective of both substantive law and proceeding law should be insisted. For the substantive judgment of the overlapping case, the unity of the legal order is not based on the consistence between the illegality conception and the illegality judgment, but the conformity with the legitimacy judgment. Regarding civil illegality as the premise of criminal illegality, which, on the contrary, will lead to the “distortion” of criminal illegal judgment, since it is very possible to enhance the inconclusive civil illegality with the contractual invalidity, fault, etc. In the trial of the overlapping case, the unity of the judgment is the maximum unity of the objective fact, not the complete accordance between the objective fact and the legal evaluation. The parallel application

mode of the criminal law and the civil law implements the relative independence of the illegality judgment. The mode not only respects the independence of the trial, but also avoids different judgment results on account of different acceptance sequence. It is the more reasonable and efficient litigation mechanism. The exception trial mode of the overlapping case that “firstly the criminal law, then the civil law” and “firstly the civil law, then the criminal law” is reasonable in certain degree, when there is prerequisite in the criminal trial and the civil trial.

Key Words Overlap Between the Criminal Law and the Civil Law; Judgment of the Illegality; Relative Independence; Parallel Application of the Criminal Law and the Civil Law

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Clarification and Application of Necessity Impeding Liabilities: From the Perspective of Murder Committed by Women Victims of Domestic Violence

KUI Jia · 130 ·

In most current judicial cases, in which women victims of domestic violence killed their abusive husbands, the judges were costumed to considering about sentencing at the first stage, which results in a negligence of the possibility of innocence. In such cases, notwithstanding the impossibility of application of justifiable defense due to the absence of “in-progress” illegal invasion, other right of necessity resources, i. e. the necessity, can be taken into account in the case of defense against the risk-origin. Having been driven to kill the husband by a victim of domestic violence meets the legal requirements of defensive necessity. We shall not adopt the utilitarian theory justifying the homicide purely through calculating the legal interests. Instead, it should be justified based on the “social joint liability”, meaning that the illegality can only be excused when the disadvantage caused by the risk avoiding action to the other person lies within the limit of social joint responsibility which would be voluntarily borne by a rational person. The risk avoiding action disposing of lives cannot be excused from illegality because it lies beyond the aforesaid limit. It could trigger, however, the exclusion of criminal liabilities based on its absence of possibility of anticipation, which does not conflict with the provisions of Article 21 of the Criminal Law in China. Therefore, notwithstanding that the homicide committed by battered women remains illegal because it exceeds the necessary limit, the victims in the domestic violence could still be treated as not guilty for the reason that they could not be anticipated to exercise lawfully in those extreme situations.

Key Words Necessity Impeding Liabilities; Defensive Necessity; Justifiable Defense; Theory of the Anticipated Possibility; Domestic Violence

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On Legislation Evolution and the Culpability Form of the Environmental Pollution Crime
——Centering on the Essence of Administrative Crime

TIAN Hongjie · 146 ·

Restricting the culpability form of the environmental pollution crime to “intentional” is a consequential result of abiding by the purpose of the criminal law amendment and insisting the literal rule of law interpretation, respectfully sticking to the administrative-crime nature and the systemic positioning of the environmental pollution crime, also a reasonable awareness of accessing distributive justice through the sanction configuration up to the requirement of the proportionality principle of crime-punishment equilibrium. As to the negli-

gent offenses of environment pollution, the slight ones shall be sentenced solely according to prepositioning laws and the serious ones according to the combination of prepositioning laws with the criminal regulations on public security. Thus, neither “the theory of negligence” nor “the theory of compound culpability-form” could be considered the dogma that administrative criminal law shall stick to in the perspective of the uniformity of legal orders. With regard to the implementation of “the theory of intention” in legal practice, the specific affirmation of behavioral offenses conducted with direct intent and consequential offenses conducted with indirect intent among environmental pollution crimes shall be differentiated.

Key Words the Environmental Pollution Crime; Administrative Crime; the Theory of Intention; Behavioral Offense; Consequential Offense

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“Intentional Purchase of Defective Goods”: A Functionalist Test and Its Application

GE Jiangqiu · 160 ·

On “whether one who intentionally purchases defective goods or services can be granted punitive damages”, most discussion by far focuses on the formality of law, but lacking persuasiveness, precision and reasonableness. This article purposes a functionalist test. From the perspective of law and economics, it can be observed that the two functions of Article 55(1) of the Consumer Protection Law are deterrence and punishment, and the purchasers who intentionally consume defective goods or services are the actual enforcers. Nevertheless, granting them punitive damages in all circumstances cannot be justified. The function of deterrence focuses on whether these purchasers can truly help increasing the claim-damage-rate, which looks into whether the fraudulent act is ulterior and whether an ordinary consumer will pay high cost if it seeks for damage. The function of punishment emphasises on whether the fraudulent act brings huge negative externality, which examines whether it will cause mass health damages and whether it will demolish the market’s order. Through applying this test, fraudulent acts can be divided into three categories and be handled differently, which will bring more appropriate and reasonable conclusions.

Key Words Intentional Purchase of Defective Goods; Fraudulent Acts; Consumer Protection Law; Punitive Damages

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A Commentary on the Art. 158 of the Contract Law: Buyer’s Duty of Notification JIN Jing · 173 ·

The buyer’s duty of notification is Obliegenheit. This article applies to B2B, B2C and C2C contracts, and may not be used for Rechtsmangel. The notice is the only constituent element of this article. The form of notification is free and the content must be specific. Under the premise of acknowledging the(real) independent function of the warranty period, the quality assurance period of this article is not a true warranty period, that is, the longest objective inspection period agreed upon. This article should be understood as a defense article.

Key Words Duty to Notify; Notification Period; Hidden Defects; Reasonable Period

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