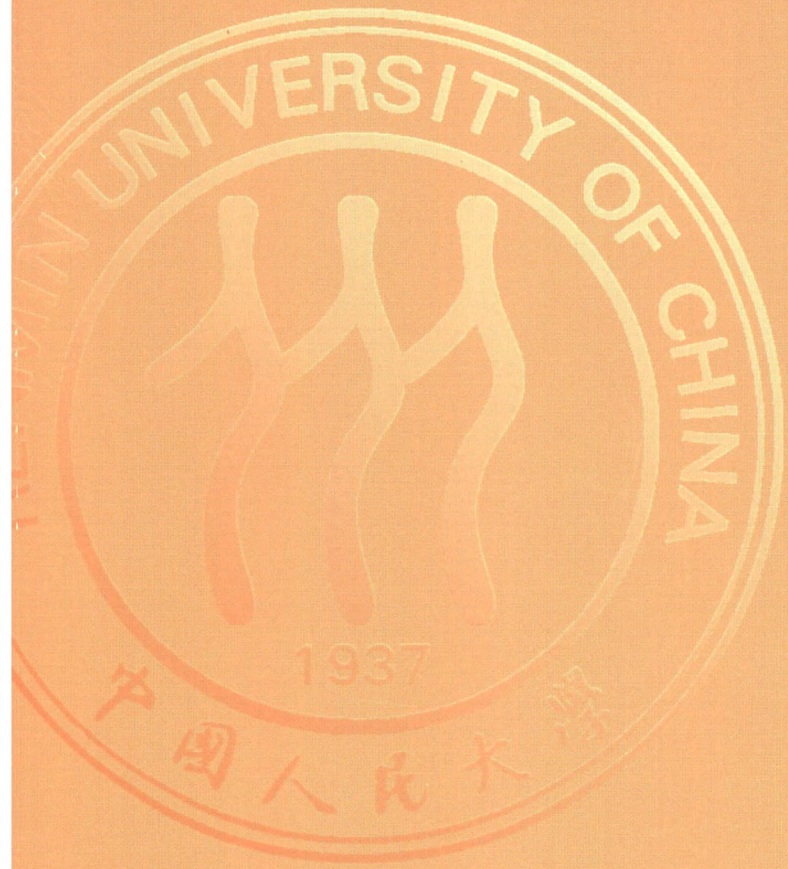


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ABSTRACTS

Legal Rhetoric as a Technology to Construct the Social Community

LI Sheng · 1 ·

The law is not a pure objective material force. The governance of law in the society, with the help of the consensus by the community, can be understood as an imaginary force. The law gains the strength from the imagination of the community, and at the same time it also produces the imagination of the community, which helps the construction of the community. There are some technologies of community construction in the legal practice. Legal rhetoric creates the imaginary consensus on the law in the society, becoming a technology to construct the social community. Legal rhetoric guides the imagination of the common life experience by the narratives, thus constructing the community through the common experience share by the history and reality. Legal rhetoric guides the imagination of the common values by the argumentation, so that the conflict values in the diverse society reach a certain degree of consensus, to construct the community through the identification of common values. As a construction technology of social community, legal rhetoric produces the more ambiguous rather than absolute consensus, which achieves the incompletely theorized agreements to respond to the divergence of value judgement in the modern society, and is more conducive to the construction of community.

Key Words Legal Rhetoric; Social Community; Narrative; Argument; Incompletely Theorized Agreements

Li Sheng, Ph.D. in Law, Professor of Law School, Ocean University of China.

The Idea of “General Person” and Its Judging Criteria in Civil Law and Criminal Law

CHEN Hang · 15 ·

Civil law and criminal law are based on certain assumptions of human nature. Although there are similarities and differences on these assumptions, the core point is based on “general person”. Therefore, the definition of “general person” stands on the basic position. In the civil law and criminal law, the standard of “general person” is the “last kilometer” in which the human nature hypothesis in the civil law and criminal law needs to be solved. In essence, it is the “knowledge and attitude” that general people should have, and it is also a methodology. The judging criteria has distinct value orientation and public policy attribute. According to the different natures of legal responsibility, the judging criteria of “general person” in the civil law and criminal law should be determined. In particular, the judging criteria of “general person” in criminal law should be distinguished from the different perspectives among judges, criminal suspects and victims.

Key Words Civil-Criminal Relations; General Person Hypothesis; Judging Criteria

Chen Hang, Ph.D. in Law, Professor of Lanzhou University Law School.

Chinese Criminal law Dogmatics: Experience, Reflection and Construction

WANG Ying · 28 ·

The contemporary Chinese criminal law dogmatics has undergone the following development phases:

dogmatics as de-politization instrument, as interpretation instrument and as disciplinary refining instrument. Facing the deficient positive law in the legislation and the theoretical gaps during legal transplantation, the Chinese criminal law dogmatics has developed various characteristic aspects. There exists a lasting tension between the irrationality of regulations of the positive law and the extreme rationality of the dogmatics of criminal law. A sound dogmatics research in this tension should reflect the relationship between the premise of incontestability of positive law (Negationsverbot) and the scientific nature of dogmatics, the relationship between the legislation and hermeneutics, the relationship between the localization and the transplantation of German and Japanese criminal dogmatics.

Key Words Dogmatics of Criminal Law; Interpretation of Law; Negationsverbot; Dogmatic Professional Community; Localization of Dogmatics

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Criminal Procedure “in Action” : An Analysis of Apprehension of Criminal Suspects

LIU Zhong · 41 ·

Apprehension is a physical technique that commands from investigators competence and skills different from those of a judge. Such understanding casts a novel light on the study of internal organization of the police force and the relationship between police and prosecutorial authorities. In the wake of the structural transfer of anti-corruption authorities from the Procuratorate to the Supervisory Committee, suspects apprehended by the latter has seen major changes in number and composition. That in turn creates demands for new arrangements on a range of supporting mechanisms, such as allocating the authority to bear weapons and the marshal institutions. Because apprehension always takes place at concrete scenes and forceful apprehension depends heavily on the armed police force, the stature of the armed police force is poised to rise within the general judicial system. There are rich details in the actions involved in taking away and transporting an apprehended suspects from the crime scene, and these details are critical to the construction of a system of criminal procedure. Apprehension as an investigative technique therefore serves the basis of how the will of the state becomes manifested in criminal proceedings. Nonetheless, as ends alone do not justify means, it is important to study criminal procedures from both the action-oriented perspective and the meta-discourse based, axiomatic deductive perspective, which complement each other.

Key Words Criminal Procedure; Apprehension; Investigative Technique; Physical Technology; Armed Police Force

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Judicial Mediation and Social Governance : A Research Based on the

Local Judicial Archives in Shaanxi-Gansu-Ningxia Border Region

HAN Wei · 56 ·

Judicial mediation is one form of alternative dispute resolution (ADR). Mediation in Shaan-Gan-Ning Border Region is the main source of judicial mediation in contemporary China. Mediation in the Border Re-

gion was not only the judicial system or a part of a new judicial type, but also a model of governance. By reshaping the mediator through honor or identity, incorporating revolutionary ethics into mediation rules, the Chinese Communist Party changed the social governance model and reduced the tension between the revolutionary legal system and traditional customs. Mediation in the Border Region had some drawbacks, but also left a lot of important experiences: applying traditional customs into the local community, inviting the local elites to sever in social organizations, and letting values of community harmony to be embodied in the transform of legal governance. It also provides a valuable historical resource to the judicial system and social governance in contemporary China.

Key Words Mediation; Social Governance; Shaan-Gan-Ning Border Region; Judicial Archives; Dispute Resolution

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On the Holistic View and Designs of Administrative Reconsideration System

GAO Qinwei · 71 ·

As a methodology, the holistic view requires that the improvement of the administrative reconsideration system should be placed under the background of the rule of law, actively respond to the needs of economic and social development, and substantially resolve administrative disputes. At present, on one hand, with the opportunity of the revision of the Administrative Reconsideration Law, it is of certain positive significance to discuss the respective orientations and development directions of China's administrative reconsideration, administrative litigation and petition system from the perspective of holistic view. On the other hand, in the case that the disputes between "administration" and "judicialization" cannot provide theoretical support for the development and improvement of the administrative reconsideration system, the influence of various values on the administrative reconsideration system should be analyzed and overall thought of independence and specialization, unity and dispersion. By emphasizing the professional construction of the administrative reconsideration organization, we will give full play to the advantages of the rapid, convenient and comprehensive review of the administrative reconsideration system, and effectively improve the quality of administrative reconsideration.

Key Words Administrative Reconsideration; Holistic View; Specialization; Administrative Dispute Resolution; Departmental Characteristics

Gao Qinwei, Ph.D. in Law, Professor of Sun Yat-sen University Law School.

The Empty Basket Structure of Individual Income Tax Law and the Standard Renewal

HOU Zhuo · 85 ·

The personal income tax law presents the appearance of "empty baskets". The implementation regulations and the fiscal and taxation normative documents are followed by the interpretation of the upper-level law, the establishment of rules based on authorization, the addition of loopholes, and the creation of rules. The right to create rules within the local people's congress and the government's system is extremely limited. The technical nature of tax matters is often used as a justification for the remaining legislative power, but this

is not a necessary and sufficient condition. In addition to the traditional goal of organizing fiscal revenue, the imposition of regulatory functions appeals to the flexibility of individual tax rules. Inter-regional differences should make the “net income” -oriented tax rules different, and the localized governance practices should also resolve the rationality of tax concentration on the level of responsibility. China should distinguish between fiscal purpose norms and regulatory inductive norms, and impose different degrees of statutory requirements; while appropriate authorization in the vertical direction, in the horizontal dimension, select the two types of norms in the four normative renewal paths. For the renewal of various norms, it is necessary to strengthen the entity and program control, and construct a review mechanism.

Key Words Personal Income Tax Law; Tax Dynamic Statutory; Fiscal Purpose Norms; Regulation Inducing Norms; Tax Distribution

Hou Zhuo, Ph.D. in Law, Associate Professor of Zhongnan University of Economics and Law.

Fake Seal and the Responsibility of Principal

LOU Aihua · 100 ·

The circumstance of fake seal could not exclude the liability of principal. In the cases of “*duldungsvollmacht*” and “*anscheinsvollmacht*”, the circumstance of fake seal is meaningful for the apparent authorization. The apparent authorization and the imputability of the principal jointly induce the principal to assume an authorized agency responsibility secondary to the the principle of “auto-responsibility”. In the three cases of “with no power of agency”, “beyond the scope of the power of agency” and “after the power of the agency has expired” stipulated in Article 172 of the General Provisions of Civil Law, there already exists the relationship of authorization between the principal and the third part. By virtue of this relationship of authorization, the principal should assume an authorized agency responsibility, while the circumstance of fake seal should not be taken into consideration. Cases concerning fake seal has become hard cases, originating from the theoretical choice of Chinese agency law system.

Key Words Fake Seal; Agency; *Duldungsvollmacht*; *Anscheinsvollmacht*

Lou Aihua, Ph.D. in Law, Associate Professor of Kenneth Wang School of Law of Soochow University.

Jurisdictional Errors in Criminal Procedure and Their Handling

ZHANG Shu · 114 ·

As an abnormal phenomenon in the operation of criminal procedure jurisdiction, jurisdictional errors not only destroy the order of jurisdiction, but also infringe on the legal jurisdiction rights of the accused. The current review mechanism of jurisdictional errors in our country mainly aims at solving the jurisdiction of judicial organs themselves, regards procedural remedy as its functional basis, and neglects the effect of jurisdiction as an important element of procedural legitimacy. The review mechanism of jurisdiction should change from “singleness” to “complexity”, and make a reasonable judgment on the procedural effectiveness in the case of jurisdictional errors through the rule of “obvious errors”. On the basis of distinguishing the category of jurisdiction, the nature of the case and the stage of litigation, different normative constructions should be made to deal with the follow-up procedure of jurisdictional errors.

Key Words Jurisdictional Errors; Jurisdiction; Review mechanism; Procedureeffectiveness; Code of

Procedure

Zhang Shu, Ph.D. in Law, Associate Professor of Zhejiang University of Technology.

***On the Representative Enforcement (Vollstreckungsstandschaft) : Centering on
Typical regulation of Formal Parties in Chinese Civil Enforcement***

MA Jiayi · 126 ·

Formal Parties in Civil Enforcement, when Claimants without material rights apply for Civil Enforcement to others' benefit, face opposition to material-related rightness (Sachlegitimation) and then need restriction through Typical regulation to avoid double Enforcement, although Parties in Civil Enforcement are primarily related to formal representation of Enforceability. Referring to the Representative Enforcement (Vollstreckungsstandschaft) theory, jurisdiction in civil law system as well as Chinese current legislation, two essential elements (parties and tenor) could be used in our judgments: Parties from representative action by assignment or by statutory assignment permissible are usually permissible, however, such as Shareholders from shareholders Representative Action could initiate enforcement as Formal Parties on one hand, but Payment shall be made to the company on the other hand. Parties from Representative Action or Group Litigation is at present not suitable for initiating Enforcement beyond their own interest. When the Transfer does not take place in litigation, on the contrary, Formal Parties may lost material-related rightness, so opposition by Obligor will be supported, unless Debt Collection Agreement (Einziehungsermächtigung) was done between new and previous Creditor (assignee and assignor) and then Formal Parties (assignor) could also be regarded as proper parties with Sachlegitimation. At last, when collision between claimed Creditor occurs, limited proof in Enforcement for assignee and litigation relief should be guaranteed.

Key Words Proper Parties; Representative Enforcement; Representative Action; Change of Enforcement Parties

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Deconstruction and Reconstruction of Neutral Help Behavior

WANG Huawei · 141 ·

The boundary of the unpunishable neutral help behavior has always been a difficult problem. However, the existing theories, whether focused on subjective or objective aspects, do not provide a truly convincing solution. The neutrality and daily character do not have substantive and independent meanings for the neutral help behavior. The core feature of neutral help behavior is professionalism, and its connotation is actually the help behavior under professional conditions. The type analysis of neutral help behaviors based on the professional field has only limited meaning, and professionalism cannot be a reliable reason for decriminalization. Neutral help behavior is only a factual description of helping behavior under professional conditions, and cannot be an independent reason for decriminalization in normative evaluation. Focusing on the generalization, hybridity and uncertainty of the neutral help behavior, we should abandon the research for a unified justification basis, and instead seek multiple standards, which comprehensively considerate the creation of risk, the influence of time and space, the industry norms and the possibility for expectation, in order to find out the specific and individualized solutions for the evaluation of neutral help behaviors.

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Key Words Neutral Help; Daily Character; Professionality; Basis of Justification; Multiple Standards
Wang Huawei, Ph.D. in Law, Post-Doc Researcher of Peking University Law School.

Review and Reconstruction of the Term Standard of Copyright Protection

YU Ling · 156 ·

The justifications for the protection of two types of copyright subjects (natural authors and non-natural rightsowner) are different. Correspondingly, the determination of protection terms should also be based on different standards. However, these two different types have not been distinguished clearly in the history of copyright law. In most countries, the “care theory” developed on the premise of protection natural persons as authors is used to justify the current time standards adopted in these countries. In the information society, both the scope of protection and the institutional design of copyright law have undergone profound changes. To achieve the cause of justice, the term of copyright protection should be reconstructed. On one hand, the current term designed for natural persons as authors should not be directly applicable for non-natural persons. A fixed protection term for the latter should be determined based on the “incentive theory” similar to the approach adopted in the patent law. On the other hand, we should examine the rationality of “care theory” in the current status quo and redefine the term standard for natural persons, which is in principle limited by author’s life combined with the minimum protection standards. The current protection period should be shortened. Under the current situation that this target is hard to be reached in the short term, the best way to correct the negative impact of the long protection period is to adjust the breadth of copyright protection and adopt relatively lenient Rules for the fair use system.

Key Words Protection Duration; Right Subject; Care Theory; Incentive Theory; Copyright Breadth
Yu Ling, Ph.D. in Law, Professor of Hunan University Law School.

Comments on Article 113 Paragraph 1 of the Contract Law

(The Scope of Damages for Breach of Contract)

YAO Mingbin · 171 ·

Article 113 Paragraph 1 of the Contract Law (1999) has established the principle of full compensation and the limit of foreseeability about monetary damages for breach of contract, and also applies to a variety of damages for breach of non-contractual obligation. Damages involving expectation interest or other interest may be manifested as either actual losses or loss of profit. The compensation for breach of contract, which is subject to the scope of reliance interest, is essentially damages for expectation interest of the breached contract. Actual loss and loss of profit each have their own characteristics in determining the actual causation. The relevant point in time of the limitation of foreseeability should be more concretized. The degree of foreseeability varies depending on the trading situation. In-depth review on the judicial practice about Article 113 Paragraph 1 of the Contract Law contributes to clarify misunderstandings, refines insights and promotes the systematic integration of norms, academics, and judicial practice.

Key Words Actual Loss; Loss of Profit; Expectation Interest; Actual Causation; Foreseeability
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