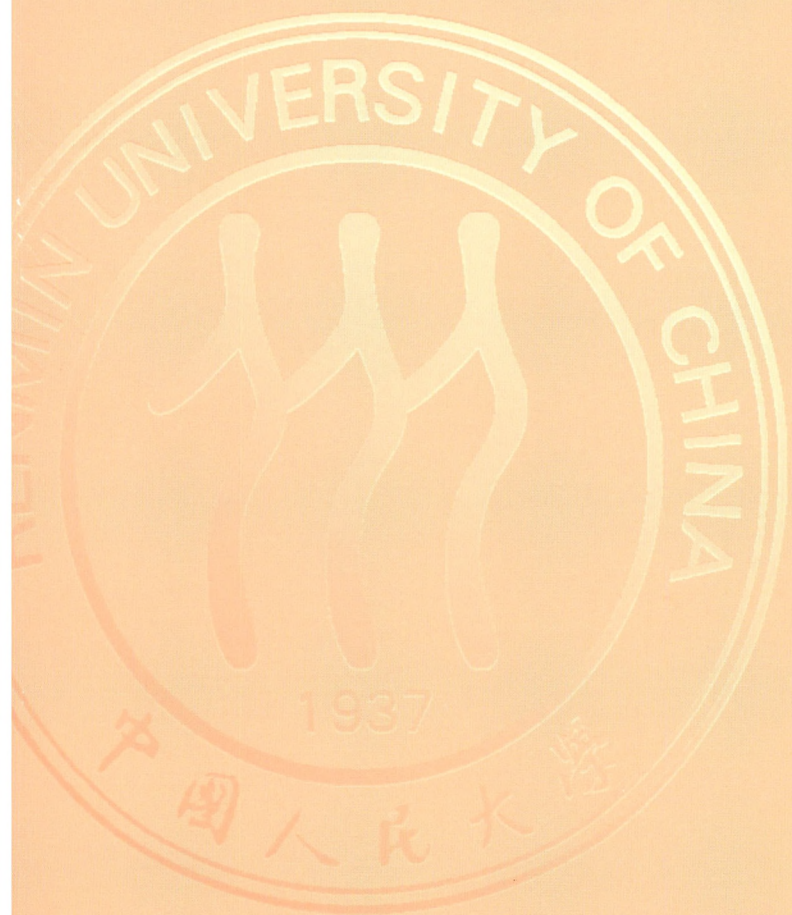




# 法学家

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## ABSTRACTS

*On the Adoption and Application of Dynamic System Theory in the  
Compilation of Personality Rights in Civil Code*

WANG Liming · 1 ·

The dynamic system theory breaks through the deficiency of “all or none” in the system of constitutive elements by stipulating the different factors and the intensity differences of each factor in the legal norms, which is the trend of the development of law. Based on the differences of rank, frequent conflicts of interest, different degrees of protection and different ways of relief in the protection of personality rights, the dynamic system theory is adopted in the Compilation of Personality Rights in Civil Code. In the application of dynamic system theory, we should distinguish the material personality right and other personality rights. In the establishment of the latter’s civil liability, we should adopt dynamic system theory, considering the occupation of the actor and the victim, the influence scope, the degree of fault, the behavior purpose, the behavior mode, the behavior consequence and other factors, and arranging their weights according to the order in the law. The explanation of “reasonable”, “proper” and “necessary” also needs the help of dynamic system. In the liability establishment in personality right infringement, we should judge according to the legal factors and their order, through the comprehensive consideration of the interaction between the factors, and abandon the “all-or-none” mode. The determination of liability form and compensation scope should also use the dynamic system. The dynamic system theory can enhance the judge’s obligation in argumentation and promote the case classification.

**Key Words** Chinese Civil Code; Part of Personality Rights; Personality Rights; Dynamic System Theory

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*The Protection of Assignee’s Status in the Assignment of Claims :*

*The System Integration of the Rules in the Civil Code*

ZHU Hu · 13 ·

In the civil code, the rules of protecting the status of the assignee of creditor’s rights involve many aspects. In principle, when the contract of assignment of creditor’s rights comes into effect, the assignee obtains the creditor’s rights. The scope of acquired rights also includes the subordinate rights in a broad sense. The acquisition of the security right does not need other publicity. When judging whether the assignee has the right of rescission, it is necessary to consider whether the assignee has the interest of rescission. In the relationship between the assignee and the assignor, the assignee has the auxiliary claim right to the assignor; the liability for warranty of the assignor to the assignee does not include the commitment of the debtor’s ability to perform; the assignor’s behavior that causes the value of the creditor’s rights to be lost or impaired without the consent of the assignee has no effect on the assignee, with reasonable exceptions. In the relationship between the assignee and other third parties, the ultimate order of the creditor’s right interest should be determined according to the registration sequence and the time sequence of registration, distraint and acceptance of bankruptcy cases. The sequential interest should also be reasonably extended to the proceeds from the debtor’s

performing.

**Key Words** Assignment of Claims; Assignee; Security Right; Priority Sequence

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***Protection of Personal Information in Tort Law from the Perspective of Civil Code :***

***Focus on Factual Uncertainty and Its Resolution***

RUAN Shenyu · 29 ·

The collection and processing of personal data in the era of big data has caused obvious information asymmetry between individuals and information controllers, so that individuals in civil actions could not obtain compensations due to the uncertainty of causation and other elements. To this end, some courts adopt methods such as conversion of responsibility of proof or reduction of proof standards. However, none of these methods can provide a reasonable solution to the above problems. A reasonable solution path is to reinterpret the theoretical basis of alternative liabilities, to focus on the evidence damage caused by these behaviors. In this way could cases of data breaches, in which the fact of leakages, causation and fault is uncertain, be resolved by analogy applying the alternative liabilities. In the future, China's personal information protection law should make corresponding provisions.

**Key Words** Data Breach; Causation; Alternative Liabilities; Factual Uncertainty; the Case of Pangli-peng

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***On the Local Government in Building the Rule of Law in A Socialist Country***

YU Wenhao · 40 ·

To achieve the aim of "building the rule of law in a socialist country", local governments play a crucial role. In practice, local governments take the main responsibility to implement the law and at the same time present some problems, which lie in the dual role of local governments in the structure of governmental regulation. The goal of building the rule of law requires the rule of law in the whole country. To this end, it is necessary to attach importance to the unique function of local governments and shape the local institutional autonomy. As the relationship between central and local in the process of dynamic balance, we should take the construction of rules-based and more stable legal order as the starting point and evaluation standard. From the normative system of the Chinese Constitution, the meaning of "central unified leadership" should be clearly defined. At the local level, institutional guarantees should be provided for local initiatives.

**Key Words** the Rule of Law; the Fulfilment of the Rule of Law; the Rule of Law at Local Level; Central-Local Relationship

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***Discover Invisible Facts : The Application of Social Science Knowledge in Judicial Practice***

ZHANG Jianyuan · 54 ·

In addition to "visible" case facts, there are often some "invisible" facts that are not easy to be discovered directly but exist objectively, which will affect and constrain people's actions, even have a key impact

on the outcome of the case. To discover these “invisible facts” effectively, Judges need scientific knowledge, especially social science. Social science knowledge enters judicial practice helping judges discover “invisible facts” in several ways: people with specialized knowledge appear in court to explain or make comments using social survey reports and assessment scales; judges actively use social science knowledge to determine facts and reason, and so on. In judicial practice, social science knowledge has been used as evidence, which also leads to certain risks and blind spots that need to be further improved in legislation. To overcome risks of abuse, it can be regulated and applied strictly in terms of access qualification, reliability, degree of proof, stakeholder avoidance, prevention of abuse, etc. The “invisible facts” discovered through social science knowledge helps judges to find out the facts of the whole case and make reasonable judgment, which address the last mile between judicial access and substantive justice.

**Key Words** Justice; Fact Finding; Social Science Knowledge; Invisible Facts; Law and Social Sciences

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### *The Judicial Expression of “Financial Security”*

HUANG Tao · 68 ·

Although “financial security” is not a legal concept in the strict sense, it has been widely used in judicial documents and judicial adjudications of Chinese courts. The reasons are as follows: First, the courts need to confirm that they are in the overall political (power) structure of the country. Secondly, the court justifies the exercise of discretion; thirdly, it provides external conditions for creating financial legal rules. As a result, the discourse expression of “financial security” has become a judicial “lubricant”, and it has also demonstrated the main characteristics of China’s financial judiciary to a certain extent. First, the “financial security” discourse in some scenarios may weaken the external constraints on judicial discretion; secondly, except for cases involving the disposition of non-performing financial claims, the discourse of “financial security” does not actually constitute the basis of “discrimination of ownership” throughout the judiciary; finally, “financial security” discourse continues to play the role of “bridge” in the transition from public policy to judicial policy, but it also lays hidden concerns at the expense of judicial stability.

**Key Words** Financial Security; Financial Regulation; Financial Dispute; Judicial Behavior; Judicial Reform

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### *The Framework of Equal Protection Analysis in America*

LIU Jianlong · 83 ·

Though the Constitution and the laws of China offers comprehensive normative system for the realization of right to equality, such right has frequently violated. The highlighted rationale review is unable to realize the goal of the Constitution. Accordingly, it is necessary to strengthen the guaranteeing of right to equality by introducing with a framework of analysis. In this regard, the American framework of equal protection scrutiny should be considered a model. The equal protection clause and its meanings was formulated after the Civil War in the United States and have experienced an long and rough progress. The framework of equal protection analysis is an vital part of the doctrine of equal protection. It is a complicated multi-tier framework consisted of rational scrutiny, intermediate scrutiny and strict scrutiny. It attributes a classification to a scrutiny in ac-

cordance with the criterion and importance of the right involved and scrutinizes whether the means adopted is substantially related to the end pursued. It helps to protect the rights and control the powers. However, it has been criticized of being impracticable, subjective and too formal, which might be cured by shifting the weight on the means scrutiny, consolidating the classification criterions and highlighting a more comprehensive consideration while attributing the level of scrutiny.

**Key Words** Equal protection; Discrimination; Suspect Classification; Standard of Review

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***On Procuratorial Organs in National Governance System :***

***Environment of Organization and Structure of Jurisprudence***

LIANG Hongfei · 100 ·

China is an activist state which has great vision and uniform theory system to reform society. The administrative subcontract is an inevitable choice for national governance due to vast territory, regional difference and social transformation. However, this pattern of policy-implementing gives rise to deviation from spirits of our central government. This problem administrative internal check and evaluation and campaign-style governance are invalid for leads to predicament of local governance. Therefore, it is necessary to start external supervision up. As national legal supervision organization regulated by constitution, procuratorial organs ought to implement the supervisory duty to bring about uniform implementation of national policy through restoration of legal order in the functional context of policy-implementing judiciary. But procuratorial organs adopts non-competitive strategy to administrative organ as binding of organization environment and imbalance between powers and functions. In this regard, remolding legal supervision is not only to fulfill constitutional promise, but also to satisfy demand of national governance.

**Key Words** Administrative Subcontract; Policy-implementing Judiciary; Procuratorial Organs; Legal Supervision; National Governance

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***Distinguishing Perpetrator from Accomplice in Inaction-joint Offense :***

***Judicial Practice and Theoretical Model***

YAO Shi · 114 ·

According to three dimensions of basic position, core concept and basic holding, the doctrines of distinguishing perpetrator from accomplice in inaction-joint offense fall into three types, the general-accomplice theory, the general-perpetrator theory and the duty-oriented theory. In these three theory schools, all the doctrines bear obvious defects. By applying the theoretical dimensions to domestic judicial practice, this paper finds it fits into the duty-oriented category. This paper upholds a legal interest-decided, duty-oriented doctrine, which means the way and degree the legal interest and the duty related is the key point to distinguish perpetrator from accomplice in inaction-joint offense. The general rule is that the roles different types of duties played in the causal process determine the contribution the subject of the legal duty makes to legal interest infringement, so that perpetrator and accomplice can be distinguished. When it comes to the duty derived from "prior act", an exceptional rule takes place, which considers the infringement the prior act made in the

causal process as the criterion.

**Key Words** Inaction; Perpetrator and Accomplice; Duty-oriented; Legal interest

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***The Difficult Problems and Theoretical Deepening of the Intention of Using for the Purpose of Illegal Possession***

ZHANG Kaijun · 128 ·

The intention of using for the purpose of illegal possession refers to that using or disposing the property according to the purpose it may have, and enjoying the utility or benefit it may generate. The identification of the intention of using shows a trend of continuous easing, so its connotation and scope should be defined. Although the intention of using is the subjective idea of the actor, it should be evaluated by criminology. The intention of using need not be single or pure. If the actor contains both the idea of using and destroying, the intention of using can also be identified. The intention of using also includes the one that the actor lets others in his stand acquire and use the property. It doesn't matter that the actor has the definite intention of using or has the possible intention of using. The intention of using can be for specific property, but also for general property. The utility and benefit of the property is varied but should be limited and based on its nature and character. Enjoying the utility or benefit of the property means that the utility or benefit is generated from the property itself, the actor can directly enjoy the utility or benefit by using the property, rather than the property is just a means, the property infringement indirectly brings the benefit or effect. It doesn't matter that the intention of using is realized at or after the acquisition of the property. The property object of the intention of using should be correctly identified.

**Key Words** Purpose of Illegal Possession; Intention of Using; Intention of Destroying; Utility of Property

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***The Basic Principles of Police Defense and Its Rules***

JIA Jian · 142 ·

The nature of police defense is not a proper defense system in criminal law, but a duty behavior. The justification principle of police defense needs to be able to coordinate the relationship between the protection of human rights and legal rights. The legitimacy principle of police defense cannot be derived from the classical social contract theory, the police task lack justification argument, or Hegel's legal theory. The foundation of this principle cannot be based on the definition of state theory in the absolute and abstract form, but should be brought back to the background of a concrete and realistic social community. Police defense is actually a formal communication between the police on behalf of the country and the offender in an emergency, in order to encourage the offender to reflect and prevent the offender from further deviating from the community norms to achieve the special prevention purpose. According to this, police defense cannot be used to acquit the defendant according to the lawful defense clauses in criminal law. The defense limits should be moderately relaxed. Meanwhile, lenient punishment clauses for police deficiencies should be set.

**Key Words** Police defense; Proper principle; Rule expansion

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*Research on Cross-border Data Collection in Criminal Justice*

TANG Binbin · 156 ·

In criminal justice era, based on the principle of maximizing our own interests, China takes an active and relaxed attitude toward overseas data collection legislation. In data outflow, in order to restrict the access of domestic data from other countries, we establish the data localization storage mode, exit security evaluation mechanism and segmented review mode in judicial assistance. Based on the multi-interest structure of data, it is legitimate to clarify data sovereignty and emphasize data localization storage. However, due to the virtual and mass characters of data, it is difficult to achieve the expected purpose of protecting domestic data. Based on the multi-interest structure of data, it is legitimate to clarify data sovereignty and emphasize data localization storage. but it will lead to the difficulty of ‘slow and low efficiency’ in cross-border data collection. In order to speed up the cross-border transfer of data in criminal justice, after comparing the long arm jurisdiction mode of the United States, and the data classification management system of the European Union, we should in China’s domestic legislation adhere to the local data storage as the basis to improve the data classification management. At the same time, in order to achieve the goal of ‘respecting data sovereignty’ and ‘speedy and efficient’ in cross-border data collection, China should act as an active rule promoter to construct an international unified scheme for cross-border data collection.

**Key Words** Criminal Justice; Cross-border Data; Collection; Data Sovereignty

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*Comments on Art. 598 of the Civil Code of People’s Republic of China**(Seller’s Typical Contractual Duties)*

WU Xiangxiang · 171 ·

As the provision of the seller’s typical contractual duties (legal bases of buyer’s claim), Article 598 of Civil Code provides that the seller is obliged to deliver the thing to the buyer and to procure ownership of the thing for the buyer. The obligation of the seller to deliver the thing is different from the delivery requirement under the creation or transferring of the real right of a movable property, and is not necessarily related with the transfer of price risk. The obligation of the seller to deliver is arbitrary thus can be excluded or replaced by conceptual delivery if the parties reach consent. The existence of the obligation of the seller to procure ownership for the buyer shows that sales contract itself cannot automatically result in the transfer of the ownership, and that the seller’s lack of right to disposal does not affect the validity of the sales contract. The performance of obligation to transfer ownership must satisfy the requirements of ownership transfer under Property Law, and there also must be mutual assent to performance. The obligations to deliver and to transfer ownership are two separate duties, and there could be a lag between the performance of these two obligations. On the premise of equality of rights in personam, the judicial interpretation rules regarding sequence of performance of the contractual duties arising from multiple sales could be treated as interpretation rules for declaration of intent.

**Key Words** Sales Contract; Obligation to Deliver; Obligation to Procure Ownership for the Buyer; Multiple Sales

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