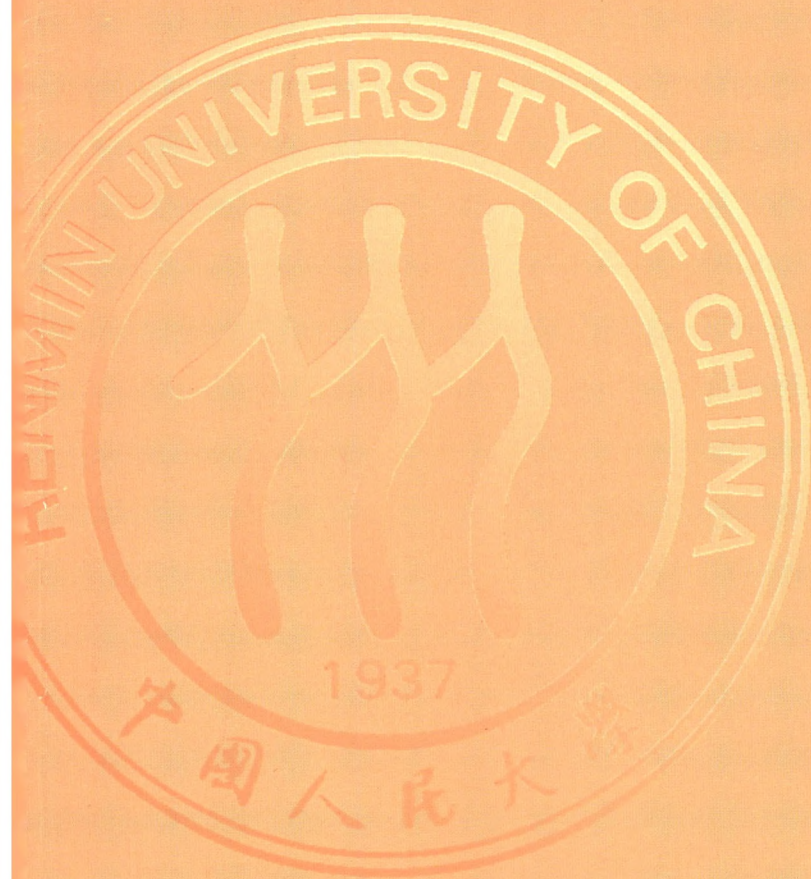




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ABSTRACTS

The Nature and Legislative Principle of Material Personality Right MENG Qinguo, NIU Binbin · 1 ·

Whether the material personality right has the attribute of active utilization is a major controversial issue in the theory of personality right. It must be that the material personality right also has the attribute of positive utilization. The negation says that Kant's purpose formula of "man is the purpose or the means" is negated, and then the material personality right is restricted to the defensive right. But the theory of negation misread Kant's purpose formula and failed to pay attention to Hegel's and Marx's viewpoints. The original meaning of Kant's purpose formula is "man is the unity of purpose and means". Hegel and Marx developed Kant's purpose formula, which does not exclude the positive use of material personality right. The positive use attribute of material personality right originates from the biological nature of human beings. With the progress of science and technology and the development of market economy, it has an important value and role in modern society, which should be highly valued by legislation. Material personality right has both defensive and active use. Legislation should fully affirm the active use of material personality right under the principle of giving priority to both interests and ethics. Colleagues should give legal restrictions to the active use of material personality right to ensure the active use of material personality right to achieve the unity of "purpose" and "means".

Key Words Personality Right; Defensive; Active Utilization; Kant's Purpose Formula

Meng Qinguo, Ph.D. in Law, Professor of Wuhan University Law School; Niu Binbin, Ph.D. Candidate of Wuhan University Law School.

The Negation of the Theory of Equation on the Relationship between

Voidable Legal Acts and Relatively Invalid Legal Acts:

Based on the Development of Chinese Civil Law

CHANG Peng'ao · 13 ·

In mainland China, both legal theory of civil laws and judicial practices think voidable legal acts are same as relative invalidate legal acts, which is named as the theory of equation, but this view is debatable. From the source, it is based on the theory that invalidation and defects of legal acts are treated equally; however this basic no longer exists since forms for defects of legal effect have been diversified due to the development from General Principles of the Civil Law the Civil Code. From the connotation of the theory of equation, effectiveness-pending should be one form of relative invalidation for its insufficient capacity, while there are no benefits for this expansion. This theory also does not consider full forms of invalidation from the perspective of utility. In this case, it is not only difficult to distinguish from invalidation, but it also abuses scarce

terminology resources, thus leads to confusions for concepts.

Key Words Legal Acts; Defects of Legal Effect; Voidable Legal Acts; Relative Invalidation; Absolute Invalidation

Chang Peng'ao, Ph.D. in Law, Professor of Peking University Law School.

Interpretation of the Cooling-off Period for the Registration of

Divorce in the Civil Code

XIA Qin · 24 ·

The Civil Code has a historical and empirical basis for establishing the cooling-off period for registered divorce, which is in line with the legislative intent of reducing the registered divorce rate, preventing inadvertent registered divorce, balancing the freedom of registered divorce and the strict concept of litigation divorce. Proceeding from the text, Article 1077 constitutes two complete laws: the cooling-off period for registration of divorce in paragraph 1 and the possibility of withdrawal and the cooling-off period for registration of divorce in paragraph 2 and deemed withdrawal, shall be interpreted separately. The parties can apply for divorce and withdraw within 30 days (the cooling-off period of paragraph 1), or do not apply for the issuance of a divorce certificate within 30 days (the cooling-off period of paragraph 2), which can achieve the cooling effect. However, due to the influence of ethical value, freedom of divorce and order value, there are conflicts of interest between parties, families and society. It is still necessary to judge and choose the value of the divorce cooling-off period. According to the different value concepts dominated in the specific application situation, the cooling-off period clause can be classified into three basic types: basic types, differentiated types, and excluded types, in order to explain the value of the text.

Key Words Registered Divorce; Cooling-off Period; Legislative Intention; Interpretation of Text; Interpretation Based on Value

Xia Qin, Ph.D. in Law, Postdoctoral fellow of Law School of Renmin University of China.

Inspecting the “Trap Loan” with the Legal Dogmatic Theory:

Focusing on the Crime Against Property

DENG Yicheng · 39 ·

“Trap loan” are characterized by “false claims and debts”. If the victim knows the payment amount but continue to borrow money, the act of setting the trap on loan cannot be judged as the real “trap loan”. “False claim and debt” are not the property protected by criminal law, so “fakement on signing of false loan certificates” does not have direct property infringement and does not constitute a conviction for fraud. If the falsely paid property is not the proceeds of crime, “fooling back falsely paid property” is impossible to make the victim loss property, thus it cannot constitute the crime of fraud. And, “fraud of security rights” are directly invasive to the victim’s property and can constitute fraud. When dealing with specific cases of “trap loan”, the following special issues should be noted: 1. In cases where the trap-related behavior and the illegal debt col-

lection activities are in conflict, the principle is one crime; 2. The loan principal paid by the actor cannot be included in the amount of fraud and theft. 3. The joint crime of “trap loan” should be analyzed from two levels: joint behavior and intention of accomplice.

Key Words Trap Loan; Crime Against Property; Concurrence of Crimes; Amount of Crime; Joint Crime

Deng Yicheng, Ph.D. in Law, Associate Professor of South China Normal University Law School.

The Boundary Between a Civil Act and A Crime and Problems in the Identification of Crimes of “Trick Loan”

PENG Wenhua · 54 ·

The factor of victim is one of the dividing lines between illegal acts and crimes of “Trick Loan”. The victim has the expectability of self-protection or the duty of care to prevent being “trapped”, and the crime of “Trick Loan” is not established. In addition to the name of private loans to defraud other people’s real money and property, “Trick Loan” should not be identified as fraud. “Trick Loan” generally do not have the characteristics of illegal control, and should not be identified as an underworld organization. In the “Trick Loan” crime, and the previous fraud and the subsequent racketeering behavior can be established to absorption crime, should be punished as racketeering crime. The previous fraudulent act and the subsequent false lawsuit should be set up as the crime of fraud. The relationship between the two frauds of the direct equalizer and the “Trick Loan” criminal actor belongs to the competition and cooperation of laws and regulations. When calculating the illegal loan amount, the agreed interest shall be used as the basis for calculating the actual annual interest rate.

Key Words Crime of “Trick Loan”; Victim Factor; Crime of Fraud; Organized Crime of Underworld Nature; One Crime and Several Crimes

Peng Wenhua, Ph.D. in Law, Professor of School of Criminal Justice, Shanghai University of Political Science and Law.

On the Functional Orientation of Different Subjects in China’s Constitutional

Review Mechanism

HU Jinguang · 69 ·

The subject of constitutional review is the core issue of the constitutional review system, and it is also a primary issue in promoting the development of constitutional review in our country. To carry out constitutional review in a positive and safe manner, it is necessary to follow the requirements provided by the current Constitution on the different subjects’ natures, status, functions and powers as well as their relationships with other state organs, in order to identify their respective functional orientations and their interaction in the constitutional review mechanism. It includes the subjects as follows. The National People’s Congress(NPC) is the independent and supreme subject with complete constitutional review authority. The NPC Standing Committee is

the independent and routine subject for constitutional review. The NPC Constitution and Law Committee assists the NPC and the NPC Standing Committee in carrying out constitutional review and thus should have certain independent constitutional review powers. The Commission of Legislative Affairs of the NPC Standing Committee is playing a filtering role for constitutional review and responsible for receiving the filing of legal documents, reviewing “requirements” and “recommendations” and conducting legality review and appropriateness review while transferring them to the Constitution and Law Committee after legality review is completed. Other subjects who also receive the filing of normative documents are obliged to transfer the documents to the Constitution and Law Committee when they are also subjected to constitutional review.

Key Words Constitutional Review; Record and Review; the Subject of Constitutional Review; Constitutional and Legal Committee; NPCSC Legal Affairs Committee

Hu Jinguang, Ph.D. in Law, Professor of Renmin University Law School.

Change of Power between China and America and the Trend of International Economic

Law-making Model: Institutional Choice in the Pedigree of “Rule-Contract” XU Chongli · 84 ·

America and China, as the existing and the emerging powers respectively, will exert great influence on the evolution of the future international economic legal governance system by choosing international economic law-making models. To focus on the change of power between China and America, follow the rationalism and cognitivism international relations theory, and use the pedigree of ‘Rule-Contract’ as the analysis tool, we can exploit the tracts and causes of China and America to choose the international economic law-making models, the international economic law-making model chosen by America to suppress China, and the competition between two countries for choice of the international economic law-making models.

Key Words Change of Power between China and America; International Economic Law-making; Regime; Rule; Contract

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On the Identification of Terrorism in Criminal Law

JIAN Kunyi · 101 ·

Data and history have produced an existing and direct experience of terrorism. This perceptual cognition drives the criminal law to aggravate the sanctions against terrorist activities, thus creating the risk of legal instrumentalism. If we want to control this kind of risk, we need to reveal the concept of terrorism on a rational level. Terrorism is essentially a kind of thinking, formed in the historical and cultural environment of the country, and shows a system of thinking that combines separatism with religious extreme thought in China. Thus, in the practice level of the will, a reality of performing violence is embodied. This kind of reality is the key to revealing the thinking of terrorism, so it needs to be expressed in the constituent elements of crimes. Because the purpose is to set the mind, it is necessary to reveal the purpose in the constituent elements to

characterize the criminal thinking. Only through the legislative model of verkuemmert zweiaktige delikte, the rational identification method of terrorism can be implemented in judicial practice.

Key Words Terrorism; Nature of Terrorism; Terrorism Purpose; Verkuemmert Zweiaktige Delikte
Jian Kunyi, Ph.D. in Law, Lecturer of Yunnan University of Finance and Economics Law School.

***The Formation and Development of the System that the Court Reports on its
Work to the People's Congress: Taking the Annual Report of Supreme
People's Court as an Example***

HOU Xinyi · 115 ·

The practice that the court reports on its work to the People's Congress is a political and legal system with Chinese characteristics. For a long time, most legal scholars mainly examine the cause and influence of this system from the People's Congress system or the court system itself. To understand this system deeply, we should realize that it is the result of the joint roles of the Communist Party of China, the National People's Congress and the Supreme Court. The system that the court reports on its work to the People's Congress is a characteristic one that, under the leadership of the Communist Party of China, gives full play to the leading role of the People's Congress System, integrates the public's views on judicial work through deputies to the People's Congresses, and makes the courts to consciously combine their own work with the focus of the Party and the state. In order to adapt to the developments of the new age, on the premise of adhering to this system, we should also respect the law of judicial activities, develop and perfect it constantly, and thus make it play a more effective role in social integration.

Key Words the System that the Court Reports on its Work to the People's Congress; The Communist Party of China; The People's Congress; The Court; Chinese Political and Legal System

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***The Principle of Defense Counsel's Independent Opinion of Resolving the
Disagreements between Counsel and the Defendant: from the
Perspective of the Cases of Pleading Guilty and Accepting Penalty***

YAN Zhaohua · 133 ·

China's defense system itself implies the principle of defense counsel's independent opinion of resolving the disagreements between counsel and the defendant, that is, a defense counsel may insist on different defense opinions when he could not reach an understanding with the defendant after communication. The principle can also be applied to the cases of pleading guilty and accepting penalty. A defense counsel has the right to put forward different opinions on issues such as pleading guilty and accepting penalty, which not only does not violate the criminal defendant's right to control the case, but also promotes the realization of effective defense in the cases of pleading guilty and accepting penalty. The principle of defense counsel's independent opinion has different implementation mechanisms and legal effects for different issues. Currently, the imple-

mentation of the principle also faces some potential risks such as improper persuasion, position alienation of defense counsel, deterioration of defense effect and so on. So it is urgent to perfect the related basic rules and construct the prevention and control mechanism.

Key Words Disagreements between Counsel and the Defendant over the Defense; the Principle of Defense Counsel's Independent Opinion; Pleading Guilty and Accepting Penalty; Independent defense; Effective Defense

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Prosecutorial Lead or Trial Center: the Power Conflict and Blending in the System of

Leniency on Admission of Guilty and Acceptance of Punishment

MIN Fengjin · 148 ·

During the operation of the system of leniency on admission of guilty and acceptance of punishment, the prosecutorial lead conflicts with trial center, especially when the sentencing proposal must be accepted generally according to the criminal procedure law. Based on the data of the prosecutorial plea of the cases that the sentencing proposals are denied by the court in the system of leniency on admission of guilty and acceptance of punishment, there exist the conflicts between the content and procedure of sentencing proposal power and sentencing power. Seemingly, the conflicts result in the expansion of prosecutorial sentencing proposal power and reduction of judicial sentencing power, but practically, the inner cause is the impact of prosecutorial lead to trial center. In order to resolve the conflict, the prosecutorial organ and judicial organ must start with mutual respect and enhance the mutual communication of conviction and sentencing in the system of leniency on admission of guilty and acceptance of punishment, so that the prosecutorial lead and trial center can be effectively blended.

Key Words Prosecutorial Lead; Trial Center; Power Conflict; Sentencing Proposal; Leniency on Admission of Guilty and Acceptance of Punishment

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The Construction of Insurer's Liability for Bad-faith and

Unfair Claim Settlement

HUANG Lijuan · 163 ·

Due to the increasingly prominent difficulty in insurance claims settlement, setting up the liability regulation for bad faith breach of contract by insurers should be an important option to deal with this problem. The purpose of most insurance consumers to buy insurance is to obtain economic security and peace of mind

through insurance payment after an insurance accident occurs. What the insurer undertakes is not just a consequential obligation of simple payment, but a procedural obligation that has both the characteristics of subjective and objective good faith. Therefore, the core of insurer's liability for bad-faith and unfair claim settlement should be defined from both subjective and objective aspects. In the subjective aspect, we should match the opportunistic tendency and subjective imputation of the insurer with the current subjective fault pattern in our country so as to clarify the basic scope of insurer's subjective bad faith; in the objective aspect, we need to define the unreasonableness according to the actual types of the insurer's unjust claims settlement. The present liability for breach of contract is difficult to achieve the two goals of liability regulation: full compensation and effective punishment. It is necessary to place insurer's liability for bad-faith and unfair claim settlement in the overlapping area between liability for breach of contract and liability for tort, and adopt the approach of integration of liabilities centered on the regulation effect. Under this path, the claimant will be able to obtain full compensation for its performance and inherent benefits, and punitive damages can also serve as a punishment and deterrence.

Key Words Difficulty in Insurance Claims Settlement; the Duty to Settle Claims in Good Faith; Bad-faith and Unfair Claims Settlement; Concurrence of Liabilities; Integration of Liabilities

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Commentary to Article 160 of the Civil Code (Juristic act Subject to Terms) ZHAI Yuanjian · 176 ·

Article 160 of the Civil Code provides that parties have the freedom to add a term as to the effectiveness of the juristic act. The term has two features: it has to be in the future, and it should be certain to happen. The positive law of our country regulates two kinds of terms: initial term and final term. Based on whether the time on which the fact the term refers to is certain or not, the term itself can be classified as a certain term or an uncertain term. Terms cannot be added to some kind of juristic acts because of their peculiar nature, such as to the exercise of the right to offset, the right to revoke, the right of cancellation and so on, as well as to juristic acts such as the will to designate a heir, and juristic acts related the personal rights in the area of family law, etc. Parties have the right of legitimate expectation until when the term expires. A juristic act subject to an initial term is producing its effect since when the term expires. A juristic act bearing a final term will be effective until when the term expires. The will of the parties cannot provide the expiration of the term with retrospective effect.

Key Words Term; Juristic Act; Expectation

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