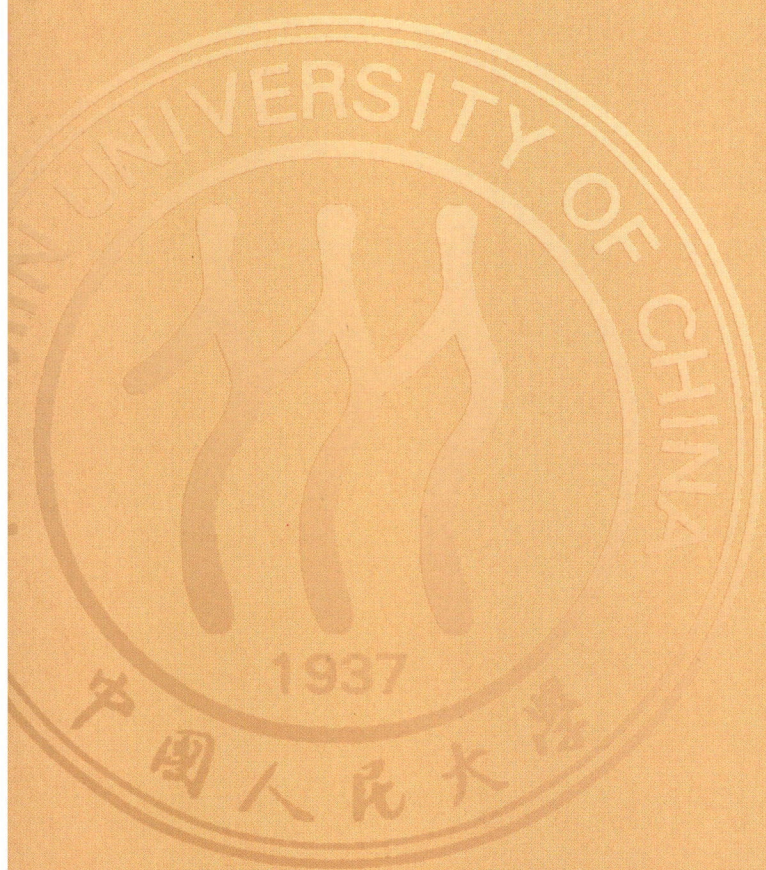




QK2106968

法学家

THE JURIST



2

2021

国家社科基金资助期刊

法学家

2021年第2期(总第185期)

2021年3月出版

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ABSTRACTS

On the Spirit of Human Rights in the Civil Code of the People's Republic of China:

Focusing on Its Compilation of Personality Rights

WANG Xigen · 1 ·

The functions that the value of human rights brings in the Civil Code of the People's Republic of China shall be interpreted again and exerted fully. The outlook of human rights in the socialism with Chinese characteristics for a new era brings theoretical value for the Civil Code in five respects, including spiritual essence, value, purposes of legislation, basic principles and right construction. The Compilation of Personality Rights in the Civil Code has reflected the basic value of human rights, including its full coverage of human rights protection in breadth, intensification for human rights protection in depth, innovation of human rights protection in height, and consolidation of human rights protection in essence. The Civil Code guarantees the primary human right that everyone enjoys a better and happy life in the new era, which can be demonstrated in ensuring that everyone enjoys a healthy, decent, harmonious and happy life.

Key Words Civil Code; Rule of Law; Human Rights; Right of Personality; Better and Happy Life

Wang Xigen, Ph.D. in Law, Professor of Law School / Institute of Human Rights Law of Huazhong University of Science and Technology.

On the Normative Nature and systemic Protection of Posthumous "Personality" CAO Xiangjian · 13 ·

The mode of protection for posthumous personality is either direct or indirect, and there is no unified position in China or comparative law. However, the rule of legal capacity "begins at birth and annihilates when dead" constitutes the mechanism of life-and-death for civil rights, and the protection of fetus, author's personality right, inheritance of property and "posthumous autonomy right" are not exceptions. The dead cannot enjoy any rights and interests, but his living image as a part of the symbolic world constitutes the dual public welfare under cognitive theory and practical theory. At the same time, the deceased relatives and future generations have their interests for remembrance. The scope of protection of posthumous "personality" should be limited to maintaining the "reputation" of the image of the deceased, and the basis of the right of claim can be solved within the civil law system: Article 994 of the Civil Code has a basic status, while Article 185 complements the provisions aimed at protecting heroic martyrs without close relatives through public interest litigation. The Civil Code should include historical figures who have made significant contributions to the protection of article 185 by filling loopholes.

Key Words Posthumous Personality; Legal Capacity; Public Interest; Martyrs and Heroic Martyrs; Historical Figures

Cao Xiangjian, Ph.D. in Law, Associate Professor of Jilin University Law School.

On the Unified Leadership of the Central in the Constitution

ZHENG Yi · 26 ·

The unified leadership of the central in the Paragraph 4 Article 3 of the Constitution is the total principle of the relationship between the central and local in China, but the relative hermeneutics research is seriously scarce. Base on the historical development investigation of “lead” and “unified lead” in constitutions, we should discriminate the terms such as “lead”, “unified lead” and “lead and manage”. It will establish the extensive interpretation of the “lead”, which will help us to distinguish this term’s multiple meaning and relative contexts. The institutional basis of the unified central leadership contains 6 aspects: the leadership of the CCP as the external factor, the unitary state system as the premise factor, the system of people’s congresses as the formative factor, the democratic centralism as the logical factor, initiative and activeness of the local as the structure factor, and the fundamentality of the central administrative power as the implemented factor. The implementation of the unified central leadership contains 4 segments: the leadership of unified thoughts; the unified implementation of the constitution, laws and administrative rules; the central control via human affairs, finance and administrative powers; final guarantee of the central military power.

Key Words The Unified Leadership of the Central; Relationship Between the Central and Local Governments; Paragraph 4 Article 3 of the Constitution of China; The Principle of Democratic Centralism; Direct and Administer

Zheng Yi, Ph.D. in Law, Associate Professor of Minzu University of China Law School.

Shua Lian: Identity System, Personal Information and Regulation

HU Ling · 41 ·

Facial Recognition (“shua lian”) technology has been used in more and more contexts, both public facilities and private services. It’s necessary to go beyond the simple facial recognition issue itself and go deeply into the concrete context in which this technology embedded and applied, so as to provide research question and theoretical framework for other bio-information in the future. Firstly, facial recognition is a kind of identity system that has the function of identity authentication, and is able to open an account directly to cyberspace. This function extends the social function of human face as general identifier. Secondly, facial recognition means the evolution for power of authentication from decentralized to centralized model, separation of information and media. Thirdly, we have to pay attention to its potential risks, especially the automatic integration of personal information and possible discrimination. Finally, grid/network framework provides helpful perspective to observe facial recognition, and extends the application of context theory.

Key Words Facial Recognition; Identity Authentication; Cyberspace; Privacy; Personal Information Protection

Hu Ling, Ph.D. in Law, Associate Professor of Law School of Shanghai University of Finance and Economics.

The Expansion and Limitation of the Crime of Illegal Business Practices:***A Survey from the Perspective of Administrative Licensing***

CHEN Xingliang · 56 ·

Illegal Business Practices constitute an important crime in Chinese criminal law. Because, legislatively

speaking, article 225 of the Criminal Law is the bottom clause. Illegal Business Practices have the characteristics of pocket crime. After the implementation of the “Administrative Licensing Law”, business practices that violate administrative licenses are declared to be Illegal Business Practices and convicted, in this way, the scope of what constitutes Illegal Business Practices has been greatly expanded and has become the criminal penalty of the Administrative Licensing Law. Administrative licenses are divided into general administrative licensing and special permission. A violation of general licensing is an act of administrative malfeasance. Only violations of special permissions can meet the requirements of the element “the violation of state regulations” in the crime of Illegal Business Practices. Therefore, violations of general administrative licensing cannot constitute the crime of Illegal Business Practices. Only violation of special permission and compliance with the entity requirements of Article 225, Item 4 of the Criminal Law can constitute crimes of Illegal Business Practices.

Key Words Illegal Business Practices; Violations of Administrative Licensing; Bottom Clause; Legally Prescribed Punishment for a Crime

Chen Xingliang, Ph.D. in Law, Professor of Peking University Law School.

The Theoretical Development and Judicial Application of the Principle of the Primacy of Facts :

A Classic Issue in Labor Law Theory

CHEN Jingyuan · 72 ·

In many countries, the principle of the primacy of facts is universally applicable when judges determining the existence of an employment relationship. The main function of this principle is to lift the veil of disguised employment, and the value orientation of it is to ensure that individuals in an employment relationship have the protection but at the same time not to interfere with true civil and commercial relationships. The principle of the primacy of facts means the determination of the existence of employment relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary agreement or terms. However, this principle generally is applied when it is beneficial to workers. The conditions and indicators for identifying an employment relationship may vary from countries for their different legal system and social background. According to China's conditions, it is advisable to insist on the personal subordination as the core condition when determining the existence of employment relationship, establish a stable logical relationship between economic subordination and personal subordination, and keep the methods of defining open-ended.

Key Words Principle of the Primacy of Facts; Disguised Employment Relationship; Agreement; Personal Subordination; Economic Subordination

Chen Jingyuan, Ph.D. in Law, Research Fellow of Tsinghua University Law School.

Jurisprudential Connotation and System Improvement of the Self-Adjustment

Mechanism of Rural Land Contracting Relations

ZHU Zhizhou · 86 ·

Rural land contracting relationship is the legal relationship formed by collective organizations and contracted peasant households as a result of land contracting contract. The core content of this relationship is

land contracting right, which is embodied in the land contractual management right of collective peasant households in the Rural Land Contract Law of 2018. It essentially reflects the division of collective land ownership by collective members, and it is the legal realization of collective land ownership and double-level management. The system of exchange, transfer and voluntary return of contracted land is the legal mechanism for collective farmers to adjust the contractual relationship independently. Its essence is the self-adjustment of the contractual relationship of land, which belongs to the system category of perfecting the contractual relationship of rural land. It is different from the adjustment system dominated by collective organization and is also distinguished from the free transfer of the right of land management. The 2018 Rural Land Contract Law makes a scientific distinction between the independent adjustment of land contracting relationship and the transfer of land management right, highlighting the legal status of the former. However, from the perspective of system construction, there is still room for improvement, which needs to be paid attention to by the civil code.

Key Words Land Contract Relationship; Self-adjustment Mechanism; Connotation Definition; System Improvement

Zhu Zhizhou, Ph.D. in Law, Associate Professor of Inner Mongolia University Law School.

The legal principle and application of registration confrontation in quasi-real property rights changes

— also about Article 225 of the Civil Code of PRC

CUI Shuanlin · 101 ·

Article 225 and other provisions of the Civil Code of PRC stipulates the registration confrontation rules for changes in quasi-real estate rights based on legal actions. The legislative purpose of the system is to “promote transaction efficiency on the macro level, encourage transaction security on the micro level”, and “encourage transaction security”. It is also reflected as “the better maintenance of transaction security wins.” The main normative purpose of Article 225 is “publication effective plus registration confrontation”, where “publication effective” includes “registration can also have the effect of effective requirements”. According to this, in the context of multiple changes in real right of quasi real estate, “bona fide third party that cannot be confronted without registration” is the bona fide and registered property right assignee. In the quasi-real estate multiple ownership transfer, multiple mortgage rights establishment, and mortgage rights establishment and ownership rights coexistence, there are well-intentioned third parties who cannot be confronted without registration.

Key Words Legislative Purpose; Confrontation; Deliver; Registration; Bona Fide Third Party

Cui Shuanlin, Ph.D. in Law, Associate Professor of Law School of Nanjing Normal University.

Research on the Independence of Trust Property:

Focus on the Independence against the Settlor's Property

ZHAO Lianhui · 117 ·

The independence of trust property against the settlor is a neglected problem. This study is not only very important for understanding the independence of trust property, but also important for deepening the understanding of the essence of trust and trust operation mechanism. Through a disposition, the settlor separates the

trust property from his own property, and initially realizes the independent effect of the trust property. The rights reserved by the settlor are weak or strong does not necessarily lead to the failure of independence of the trust property. The independence of trust property is a possible rather than inevitable consequence of the establishment of a trust. It is a gradual process, which can only produce the independence against the settlor first. Whether the independence can be generated depends on whether the trust property is publicized or whether the trustee performs the respective management obligations.

Key Words Independence of Trust Property; Bankruptcy Remoteness; Passive Trust; Revocable Trust
Zhao Lianhui, Ph.D. in Law, Professor of CCE Law School of China University of Politics and Law.

***The Status Quo and Development of Issue Arrangement from the Perspective of
Elaborate Civil Procedures***

—Analysis of Practices Based on Rules and Judgments

LIU Yun · 131 ·

Focusing on the constituents of issue arrangement, this article specifically examines the rules and the actual cases of issue arrangement at the national level, the local level, and the individual level. The status quo of the issue arrangement in China exhibits following features: issue arrangement is applied to different stages of the procedures; subjects of issue arrangement assume two different modes in inquisitorial system for rules and adversary system for judgments; the selection of issues is based on the needs of trials; issue arrangement is mixed with other functions in the pretrial conferences; the effect is becoming more substantial and less nominal. In general, the problems of issue arrangement in China are mainly reflected in the lack of legislation and functional affiliation at the legislative level, as well as in the misapplication of methods and the little efficacy it produces at the judicial level. Therefore, it is practical and imperative to construct an issue arrangement mechanism that conforms to the law of judicial operation in China, which is also a requisite for elaborate procedures.

Key Words Civil Procedures; Issue Arrangement; Constituents; Elaborate Procedure

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The Imputation Method of Selective Constituent Elements Error

ZHAO Chunyu · 147 ·

Selective elements error is the situation that what the perpetrator recognized and the achieved fact subordinate to the same specific provisions of criminal law, but in different selective elements. It is difficult to reasonably solve the problem of the selective elements error according to the erroneous theory of the construction of a single constituent element error. The theory of specific conformity will create loopholes in punishment. The theory of statutory conformation will expand the scope of punishment. The filter function of the objective imputation theory is limited. The subjective imputation theory exists ambiguity. When dealing with the problem of the selective elements error, in order to achieve total responsibilities for unlawful results, it should put objective imputation firstly, then subjective imputation. Objective imputation is the normative evaluation of the behavior of the unlawful result blamed on the act according to the same legal interest. Subjective imputa-

tion is based on the judgment of the perpetrator to judge the unlawful result to the deliberate scope. When selective elements error of equivalent relationship occurred, it does not affect the range of subjective imputation. When selective elements error of non-equivalent relationship occurred, the illegal results should be attributed to intentionality within the scope of illegal coincidence.

Key Words Selective Elements Error; Deliberate Confirmation; Objective Imputation; Subjective Imputation; Illegal Coincidence

Zhao Chunyu, Ph.D. in Law, Associate Professor Yunnan University Law School.

Corroboration, Inference to the Best Explanation and the Proof of

Controversial Facts

LUO Weipeng · 163 ·

Plausible reasoning and objective inference cannot distinguish the criminal proof models between China and other countries. The so-called “objective inference-backstage rational inference” and “justifiable/open and normalized rational inference” cannot be regarded as the alternative theory for the corroboration. Its referential meaning is still the inference to the best explanation (IBE). IBE, which is the internal mechanism of the proof of controversial facts, is universal. It is just that, between China and other countries, the evidence law set different rules for IBE. IBE in China base on the corroboration. In the juridical practice, we can explore the accusation strategy, defense strategy and judgment strategy in the practice of criminal proof for need.

Key Words Criminal Proof; Fact-finding; Corroboration; Inference to the Best Explanation

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Comments on Article 501 of the Civil Code (Duty of Confidentiality of the Parties)

SHANG Lianjie · 177 ·

The protection objects of Article 501 of the Civil Code are expanded from “trade secret” to “any other confidential information”, which aims to maintain a fair competition order and restrain improper behavior. The party who breaks the duty of confidentiality bears essentially tort liability, which is in competition with liability for breach of contract under certain circumstances. Breach of the duty of confidentiality does not presuppose that the party clearly indicates that the information should be kept confidential, which usually manifest themselves as disclosure or improper use. On the issue of imputability, it should not be limited to deliberateness so as to strengthen the protection of victims. According to the explanatory theory, the amount of compensation should be calculated based on the actual loss of right holder of the trade secret right. When the actual loss is difficult to calculate, the amount of compensation should be determined based on the profit of the infringer and its contribution and then the license fee and the statutory compensation successively.

Key Words Duty of Confidentiality; Trade Secret; Tort Liability; Compensation; Profit Return

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法学家

THE JURIST

—— (双月刊) ——

2021/2 总第185期

国际标准刊号: ISSN1005-0221
国内统一刊号: CN11-3212/D
定价: 40.00元



微信公众号
faxuejiazz

ISSN 1005-0221

