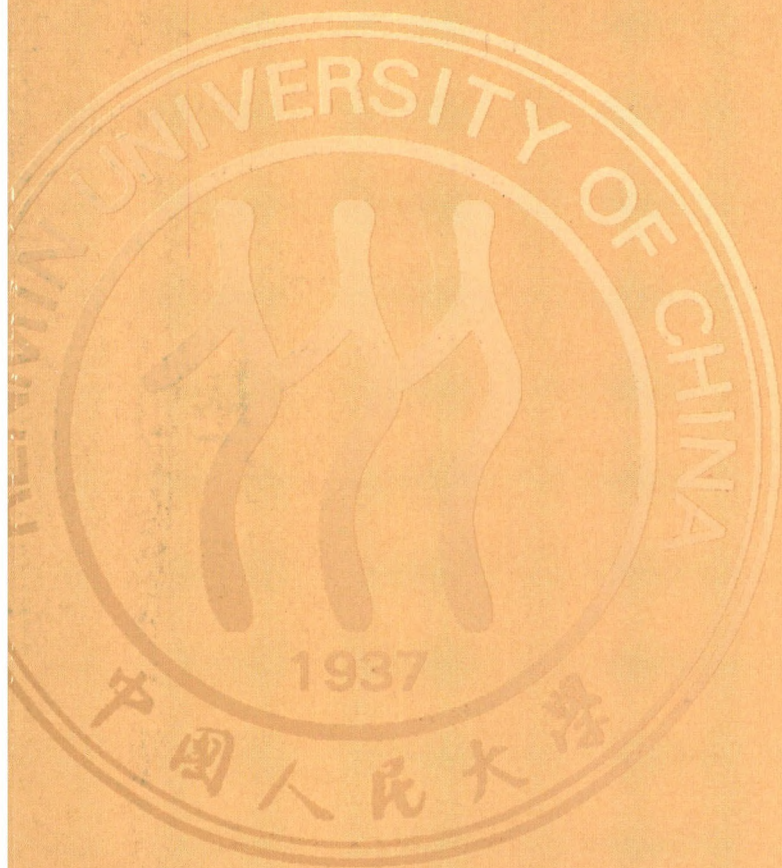




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ABSTRACTS

Relationship between the Path of the Rule of Law and the System of the Rule of Law :

A Research on Xi Jinping Thought on the Rule of Law

ZHU Jingwen · 1 ·

Adhering to the path of socialist rule of law with Chinese characteristics and the system of socialist rule of law with Chinese characteristics is in the important position in Xi Jinping Thought on the Rule of Law. In the strategic design of overall law-based governance, the path and system of rule of law are at different levels. The path of the rule of law is in the position to determine the direction of advancing the rule of law, while the system of rule of law is an essential tool for comprehensively advancing the rule of law in China. Without the system of the rule of law, the path of the rule of law will be vacated. Without the path of the rule of law, the construction of system of the rule of law will lose its direction. Only by unifying the path and system of the rule of law, can the study of Xi Jinping Thought on the Rule of Law not deviate and its core essence be fully and accurately understood. Xi Jinping Thought on the Rule of Law is the unity of the path, system and social foundation of the rule of law.

Key Words Xi Jinping Thought on the Rule of Law; The Path of the Rule of Law; The System of the Rule of Law; Overall Law-based Governance; Historical Materialism

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The Constitutional Reasoning of the Highest Organ of State Power

REN Xirong · 16 ·

Constitutional reasoning is the logical process and basic form of constitutional clarification. The main contradiction in the implementation of the Chinese Constitution is between the active interpretation of the meaning of the Constitution and the requirement to regulate social life. In order to achieve the goal of “perfecting the system and mechanism of ensuring the implementation of the constitution” brought forward in Fourth Plenary Session of the 19th Central Committee of Chinese Communist Party, the highest organ of state power, which is NPC and its Standing Committee, should output constitutional connotations regularly through constitutional reasoning to form a mechanism for exporting constitutional meaning with Chinese characteristics. The constitutional reasoning is beneficial for repeatedly confirming the “appropriate” outputting center of constitutional meaning, stimulating the inner power of the “living constitution”, and also favorable for providing a basis for other subjects to implement constitutional reasoning. Among various types of constitutional reasoning and different reasoning structures, the constitutional reasoning for the exercise of power can be summarized as four basic rational elements: political legitimacy, constitutional textual basis, the relationship between the constitution and the specific sector laws, and the constitutional procedure. The normalization of constitutional reasoning can provide conceptual systems, analytical logics, and demonstration methods for other social subjects implementing the constitution, thereby comprehensively improving the effectiveness of the constitution in

state governance.

Key Words Constitutional Reasoning; Constitutional Interpretation; Highest Organ of State Power

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The System and Application of the Legal Basis of The Right to Claim for the Return of Unjust Enrichment

WANG Hongliang · 30 ·

Starting from the provisions of the Civil Code, this article attempts to find out China's system of the legal basis of the right to claim for the return of unjust enrichment. Firstly, it will reflect on the general clause of the right to claim for unjust enrichment, and it believes that its legal conditions are unclear. Secondly, it will be determined that the legal basis of the right to claim for payment of unjust enrichment is Article 985, and the basis for the right to claim of unjust enrichment in an infringement is Article 122. The condition of the right to claim for payment-type unjust enrichment is an existing payment and lack of legal reason, while the key factor of infringement-type unjust enrichment is an infringement. The legal basis of the infringement-type unjust enrichment refers to an infringement of the status of rights and the damage to others refers to the infringement of legal status protected by law. Thirdly, the basis of the claim for the return of unjust enrichment in the case of contract failure is Article 157 and Article 366, paragraph 1. In addition, in the case of infringement-type unjust enrichment, except for the general situation, the Civil Code also stipulates the right to request the return of unjust enrichment in the case of attachment (Article 322), and the direct claim-type unjust enrichment (Article 988) and the right to claim the return of unjust enrichment in the case of unauthorized disposition (Article 311, Paragraph 2). Finally, in addition to the general right to claim for return of expenses, the Civil Code also stipulates expenses instead of the gains in the case of attachment, with the purpose of protecting the acquirer from forced gains. In the case of payment by a third party, it is also possible to claim the right for return of unjust enrichment (Article 524, Paragraph 2).

Key Words Unjust Enrichment; Legal Basis of the Right to Claim for the Return of Unjust Enrichment; Payment-type Unjust Enrichment; Infringement-type Unjust Enrichment

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Modes of Criminal Compliance and the Proof of Compliance Program

LIN Jing · 47 ·

In recent years, Chinese scholars have advocated the introduction of criminal compliance prevailing in the west, to deal with the compliance risks of Chinese enterprises in the context of globalization. The key issue demonstrated by foreign experience is the proof of effectiveness of compliance program, to address the problem of "window dressing". From the perspective of comparative law, lack of a compliance program can be perceived as an element of a crime, affirmative defense, culpability score for sentencing and content of a deferred prosecution agreement, so called modes of criminal compliance in this paper. The burden of proof and the standard of proof differ from each other under different modes. The setting of the burden of proof and the

standard of proof, to some degree, determines the extent to which criminal compliance is allowed to play a role in the adjudication. This paper argues that in present China, a prudent approach, which, one the hand, encourages enterprises to set up compliance program, and, one the other hand, prevent the risk “of window dressing”.

Key Words Criminal Compliance; Modes of Criminal Compliance; Burden of Proof; Compliance Program

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When May Constitutional Rights Restrain Private Conducts :

An Analysis of the State Action Doctrine in the U. S.

ZOU Yi · 62 ·

Both China and the United States face the same theoretical and practical issue: under what circumstances constitutional rights may restrain private conducts. According to the state action doctrine established by the U. S. Supreme Court, constitutional rights generally only apply to government actions, however, when there is a sufficient relevance between a private action and a government one, as an artificial “state action”, the former may be restrained by constitutional rights. Judging from relevant U. S. Supreme Court cases, state actions could be identified in two basic approaches: the two-part approach and the classification approach. The latter contains four specific standards: government involvement, public function, combined action and judicial enforcement. The first approach does ignore some situations in which a private action can constitute a state action and does not fully define others; both standards of combined action and judicial enforcement under the second one also have logical limitations. After 1970, the Supreme Court tended to identify state actions more strictly, so the range of private conducts subject to constitutional rights was narrowed down clearly. On the one hand, the state action doctrine contributes to preserve private autonomy, freedom of contract and market competition; on the other hand, it helps to prevent the government from infringing constitutional rights indirectly and avoiding constitutional responsibilities. The doctrine can provide lessons for China.

Key Words Constitutional Right; Private Conduct; U. S. Supreme Court; State Action Doctrine

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The Principle of Effectiveness of Emergency Response Administrative Organization

JIN Jian · 75 ·

The effectiveness of the agencies in dealing with public emergencies is the key to the performance of public tasks in the area of emergency administration. However, the organizational effectiveness of emergency administration and the rule of law are easily contradicted under the order of constitutionalism. The constitution establishes the normative basis of the organizational effectiveness of emergency administration. The state's obligation of protection, the radiative effect of fundamental rights on the organizational effectiveness and the protection of fundamental rights through the organizational norms form the interpretation framework of the constitution. The improvement of organizational effectiveness of public emergency response should be carried

out within the framework of rule of law, which must meet the basic requirements of law priority, law reservation and law stability. The characteristic of public emergencies determines the appropriate and flexible design of the emergency administrative organisation law. We should adhere to the unity of emergency administration, give full play to the potential of existing administrative unit relationship coordination mechanism, and introduce new means, such as the right of direct intervention of higher agencies, administrative assistance and emergency jurisdiction, so as to improve the effectiveness of emergency administrative organization.

Key Words Emergency Response Administrative Organization; Principle of Effectiveness; Rule of law; Emergent Public Incidents

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Anti-Money Laundering Criminal Legal Regulations in China from the Perspective of the Overall National Security Concept

WANG Xin · 90 ·

Non-traditional national security is an essential part of the overall national security concept. With the increasing development of money laundering, its harmfulness began to fission. It broke away from the single attribute attached to upstream crimes in the initial stage, and gradually escalated into a prominent problem of non-traditional security. Anti-money laundering was thus promoted to safeguard national security and international political stability in the view of the overall strategic height. Anti-money laundering has a very broad radiation. As a connecting point, it links many non-traditional national security issues such as China's financial security, combating terrorism, and international cooperation. It is an important part of maintaining the national security system and has become a practice. It has also become an important link and grasp of the overall national security concept. In view of the harmfulness and severe situation of money laundering, after a long period of practice and development, China has already established a relatively complete anti-money laundering criminal legal system. However, in the face of the new complex situation and the background of international cooperation, we need to re-examine anti-money laundering from the perspective of the overall national security concept. Therefore, we could fully understand that anti-money laundering plays a role in promoting the modernization of the national governance system and governance capabilities, and maintaining economic and social security. Applying the international anti-money laundering standards that China has clearly committed to implement as a frame of reference, it will be implemented from multiple levels such as further improving anti-money laundering criminal legislation, strengthening judicial awareness of combating money laundering crimes, and improving judicial practice.

Key Words Overall National Security Concept; Money Laundering; Terrorist Financing; Accusation System; FATF

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***On Discretion of the Court in Compensation for Property Loss Infringing on
Personality Rights***

WANG Yegang · 104 ·

It is an important tendency in the development of comparative law to continuously expand the power of the court to determine the amount of compensation in the infringement of personality rights. Conforming to this development trend and continuing the legislative experience of the Tort Liability Law, China's Civil Code stipulates rules of the court discretion in compensation for property loss infringing on personality rights. The object of the court's discretion is the amount of the injured party's property loss rather than the amount of the tortfeasor's profit. In the case of infringement of personality rights, the court may determine the amount of compensation at the discretion according to its own authority, and the injured party may request the court to determine the amount of compensation at the discretion as well; moreover, when the injured party claims against the tortfeasor to compensate for property loss but unable to provide the proof of the amount of one's own property loss nor the amount of the tortfeasor's profit, the court is also obliged to determine the amount of compensation at the discretion in accordance with its authority. For the need of preventing damage, in specific cases, the court shall generally determine the amount of compensation at the discretion based on reference factors of damage prevention such as the amount of proposed royalties, the amount of the tortfeasor's profit, and so forth.

Key Words Personality Rights; Property Loss; Damage Prevention; Court Discretion

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***Institutional Construction and Judicial Application of Director's Self-dealing of the
Company with Limited Liability***

CHI Ying · 116 ·

The directors of a joint-stock company shall not conduct self-dealings, and the supervisory board shall conduct transactions with the directors on the company's behalf. Therefore, the provisions of Paragraph 1, IV of Article 148 of the Company Law may only apply to limited liability companies. The above regulation applies for entering into contracts or conducting transactions by the directors and senior management personnel with themselves or third parties they represent in the name of the company. The purpose of Paragraph 1, IV of Article 148 of the Company Law is to prevent the abstract risk of conflict of interest. The actual existence of the conflict of interest is not one of the preconditions for its application. Therefore, self-dealings by directors authorized by the Articles of Association or approved by the shareholder meetings before or after the self-dealings are effective. The institute of substantive fairness review from Anglo-American law which allows the court to conduct judicial review on the fairness of the self-dealing shall not be adopted in Chinese Company Law. The effectiveness of the self-dealing conducted by the directors against law is suspending and the company has the choice to make it effective by retrospective approval.

Key Words Director's Self-dealing; Authorization in the Article of Association; Approval by the Board of Directors; Unauthorized Representation; Suspending Ineffective

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Research on Legal Issues of Equity Entrustment

LIU Yingshuang · 130 ·

The company Law and judicial interpretation on the equity entrustment are not complete. The equity entrustment agreement can be divided into different situations according to the “dormant” situation of the dormant shareholders. The equity entrustment agreement in different situations has the legal nature of dormant agency and trust respectively. The equity entrustment agreement circumvented by laws and regulations should be invalid if it violates the mandatory provisions of the validity of laws and administrative regulations. The equity entrustment agreement that is against public order and good customs should also be invalid. The effective legal consequences of the equity entrustment agreement should be that the nominal shareholders are the shareholders of the company. Dormant shareholders may claim the corresponding property rights and interests of the company’s equity. The legal consequences of invalidation of the equity entrustment agreement should be: usually, nominal shareholders continue to hold the equity and pay appropriate compensation to the dormant shareholders. If the equity entrustment in a listed company or a special financial company damages the openness principle of the securities market and the order and safety of the financial market, the equity shall be temporarily held by the regulatory department or its affiliated institutions or a specific fund, and then auctioned to the eligible subjects. In the future revision of the company law, we should improve the system of implicit agency equity entrustment and construct the system of trust equity entrustment.

Key Words Equity Entrustment; Nominal Shareholder; Dormant Shareholder; Trust; Dormant Agent
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Investigation and Redefinition of the Function of the Proviso in Jurisdiction

DU Zhihan · 142 ·

The proviso in Article 13 of the Criminal Law of China is a legislative declaration of the modesty of criminal law, and there has been a theoretical debate regarding its function in jurisdiction: “Decriminalization” or “Limiting Criminalization”. It can be seen from the judicial decisions that the judicial practice processes the proviso as a general standard of decriminalization, which hinders the normal application of other causes of incrimination. The viewpoint that the proviso has the function of “limiting criminalization” has the correct notion of crime identification and conviction methodology, which is preferable. Under the antagonistic pattern between the theory of “Decriminalization Standard” and the theory of “Limiting Criminalization”, the independent significance of the proviso is obscured by the constitution theory of crime, which gives rise to the tendency to disregard or even abolish the proviso. It is necessary to overcome the shortage of this opposing schema, to take the proviso as the basis, and to comprehensively examine the actual judicial function played by the proviso. The proviso of Article 13 of the Criminal Law has the “connecting function” of extending the causes of decriminalization in addition to the function of “limiting criminalization”. Criminal law theory and judicial practice can make proper use of this function to develop a normative, open and diversified system of causes of decriminalization.

Key Words Judicial Decriminalization; Proviso; Decriminalization Function; Limiting Criminalization Function; Reinforce Function.

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On Relationship of Mutual Assent In Criminal Law

WANG Feiyue · 155 ·

The theory of correspondence offense has several disadvantages, and it should be replaced by relationship of mutual assent. The relationship of mutual assent in criminal law consists of three elements: more than two equal and independent actors, more than two wills which are produced by negotiation, and more than two actions which are executed respectively but at the same time. The relationship of actors during the process of correspondence offense, the relationship among those employees taking part in the crime committed by unit, and the relationship between the offeror and recipient, belong to the same very relationship. The study of relationship of mutual assent in criminal law, can not only solve many problems in criminal theory and criminal legislation, but also give instructions to judges during the process of determination of actions characterized by relationship of mutual assent.

Key Words Correspondence Offense; Relationship of Mutual Assent; Accomplice; Scope of Being Punished; Protection of Rights

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Commentary on Article 641 of the Civil Code (Sales under Retention of Ownership)

WANG Lidong · 170 ·

Article 641 of the Civil Code provides that in the contract of sale the parties may agree on retention of ownership, and that the seller's ownership without registration is not effective against third parties in good faith. Systematically, the provisions over the retention-of-ownership are located in the third part of the Civil Code ("contracts"), and the realization of the retention is subject to the basic rules about the transfer of ownership in movables, which embodies a certain formalistic character. However, in view of the rules set by the Civil Code for the effect of the retained ownership and the realization of the seller's rights, the legislator prefers to regulate the retention-of-ownership from a functionalistic perspective, according to which the retained ownership is actually a security right. The seller, who registers the retention of ownership within 10 days after delivery, has super-priority; and in other cases, the seller's rights are determined by reference to § 414 I. The buyer acquires already ownership before the condition is fulfilled, and the transfer of ownership after the condition is fulfilled only means that the seller's security right ceases to exist. Thus, the buyer can effectively create new security rights for a third party before the condition is fulfilled; the sub-buyer, in the ordinary course of the buyer's business, can acquire ownership free of the seller's rights.

Key Words Retention of Ownership; Functionalism; Priority; BIOCOP

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