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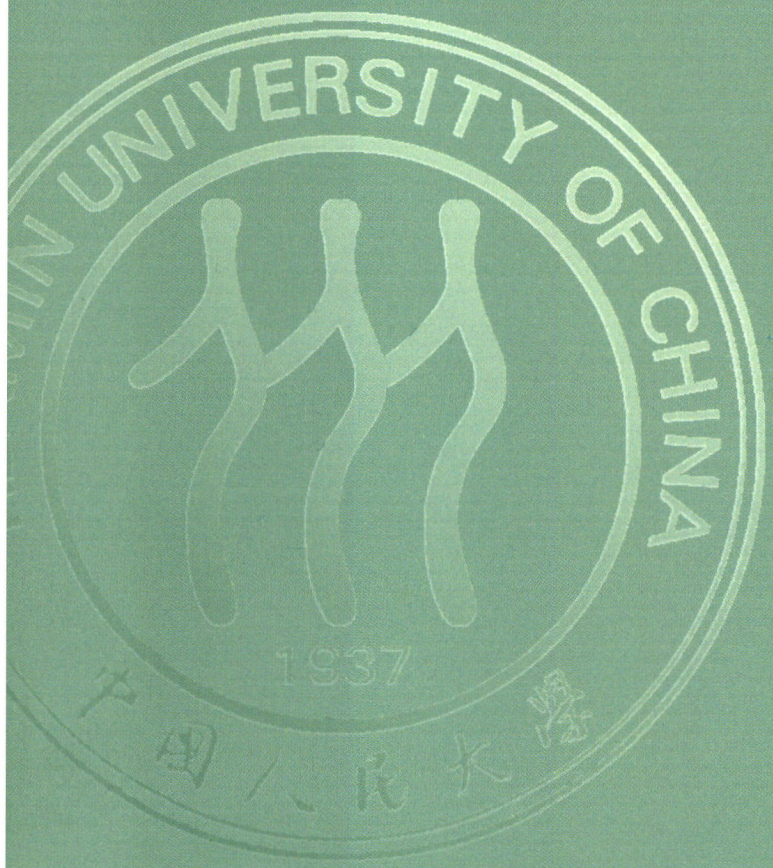

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主题研讨：建构中国自主的法学知识体系

专　论

视　点

争　鸣

评　注

ABSTRACTS

The construction of the rule of law discourse system in contemporary China cannot be separated from the practical logic of the historical subject. Over the past century, the Communist Party of China has continuously deepened its understanding of the rule of law in the journey of saving, founding, enriching and rejuvenating the country, and has generated the rule of law discourse system with Chinese style. The rule of law discourse of CPC is reborn in the revolutionary ideal and developed in the practice of revolutionary struggle, showing the dialectics of revolution and rule of law. The expansion of the discourse of rule of law from "ideal type" to "institutional type" is shaped gradually, reflected in twists and turns, continued in reform, and gradually realized the integration of value principles and institutional norms. In the new era, CPC's discourse has moved from "institutional type" to more thoughtful and integrated innovation, and the core essence of its system construction can be concentratively reflected in Xi Jinping Thought on the Rule of Law. The rule of law discourse system generated by CPC in the past century has not only met the institutional requirements in the sense of "thin rule of law", but also opened the construction of theoretical and cultural system in the sense of "thick rule of law", showing a consistent three-dimensional balanced construction logic and development character.

Key Words Communist Party of China; Xi Jinping Thought on the Rule of Law; Discourse System of the Rule of Law; Socialist Legal System with Chinese Characteristics; Comprehensively Implement the Rule of Law

Liao Yi, Ph.D. in Law, Professor of Wuhan University Law School.

After the promulgation of China's Civil Code, the boundary of contract and torts needs to be clarified. One popular view claims that the obligation of protection should be exclusively classified from contract into torts. But it causes the functional contraction of contract and the puffiness of torts as well as the multi-level competitions between them. From the perspective of the history of civil law, this opinion is the recurrence of the Pandectists, which departed from the open boundary in Roman law, in which contract and torts were allowed to compete freely, but the crossing area was mainly regulated by contract with the supplement of torts. But modern German law repaired the defects of Pandectists by developing the doctrine of accessory obligation and turned back to the Roman tradition. Accordingly, China's Civil Code should allow the existence of moderate competition in the crossing area but go beyond the traditional theories by integrating the factors of contractual and tortious liability to reach a unified legal result.

Key Words Accessory Obligation; Obligation of Protection; Obligation of Security; Legal Competition; The Compilation of the Civil Code

Wang Nijie, Ph.D. in Law, Lecturer of Fudan University Law School.

In addition to violating criminal procedure "blindly", the formation of wrongful conviction may also result from "ingrained" explicit cognitive biases or "unconscious" implicit cognitive deviations. And the dominant prejudice and the systematic path of prejudice transmission would especially lead to negative impacts on subsequent criminal procedure. In the process of criminal pre-trial procedure reform, with following "substantial diversity of cognitive subjects", "timely monitoring of cognitive behaviors" and "effective balance of cognitive structure" principles, the cognitive basis of "prior intervention by prosecutorate" and "integration of arrest and prosecution" should be explored, and the pre-trial cognitive structure should be balanced under the center of protectorate's leading responsibility.

Key Words Pre-Trial Procedure; Cognitive Deviation; Investigation-Centered; Integration of Arrest and Prosecution; Leading Responsibility

Xie Shu, Ph.D. in Law, Associate Professor of School of Criminal Justice of China University of Political Science and Law.

The evidence analysis based on the experience of ordinary life is often controversial, and empirical rule should be used prudently in criminal proof. Empirical research found that the application of empirical rule in criminal proof is not only common, but also unstandardized. The issues of the justification for the empirical rule include confirming whether the empirical rule is reliable and whetherits application process is reliable. To facilitate the practice, we should establish some rules for confirming empirical rule, such as clarifying the basic standard for judging the reliability of empirical rule by the objectified and specified judgment methods; and establishing the rules for the justification by empirical rule including proof prior to inference, revocable inference, dynamic distribution of burden of proof and conservative extrapolation.

Key Words Criminal proof; Empirical Rule; Fact-finding; Evidence analysis

Luo Weipeng, Ph.D. in Law, Associate Professor of Law School of Southwestern University of Finance and Economics, Postdoctoral researcher of Sichuan University Law School.

The lack of the theory of administrative common violation has led to "different penalties for the same case" in practice. The theory of joint violation includes two parts, namely, "recognition criteria" and "rules of adjudication", and its construction and application are based on the culpability principle. The role of the culpability principle in the theory of common violation is reflected in the "syllogism" reasoning of punishment: in determining the major premise, it helps to explain the elements of violations; in the inclusion, it helps to determine the relative of the premise; in determining the result of punishment, it helps to judge the conditions of aggravating and aggravating punishment. The standard of joint violation should adopt the "standard of common conduct", that is, each actor establishes a common behavior, and at least one party knows that other actors are working together to achieve the illegal results. The principle of "different penalties for one case" is used to determine the responsibility of the perpetrators and issue separate penalty decisions. In a few special cases, such as legislation stipulating joint liability, the special judgment rule shall apply.

Key Words Administrative Joint Violation; "Recognition Criteria"; "Rules of Adjudication"; Culpability Principle; Administrative Penalties

Zhang Xuefu, Ph.D. Candidate in China University of Political Science and Law.

The Avoidance of Marriage Engagement System in the Soviet Area Marriage Legislation under Red Revolutionary Logic *CHEN Huilin · 76 ·*

Soviet Area marriage legislation, based on red revolutionary logic factors of anti-imperialism and anti-feudalism, marriage freedom, liberation of women, and abolition of the arranged marriages and mercenary marriages, etc., evades the marriage engagement system albeit indirectly stipuloding it through imposing ban on it. The evasion, the marriage legislation in the sense of national law in our country firstly not stipulating the marriage engagement system, is both different from the thousands of years of Chinese pre-modern legislative tradition and the mainstream or general cases of the world marriage legislation at that time. It embodies the inclination of applying standpoint of the soviet regime. negating and rejecting the marriage engagement or marriage engagement system at law, and reflects Chinese communists' thorough and radical Soviet revolutionary spirit in marriage engagement in the early times and the attempt of revolutionary mobilization through legislation, which starts the precedent or tradition of the marriage legislation evading the marriage engagement system in the regime of the Communist Party of China. Soviet Area marriage legislation evading marriage engagement system is historically inevitable, but also with some practical problems that need reflection.

Key Words Communist Party of China; Marriage Legislation; Marriage Engagement System; Revolutionary Logic; Soviet Area

Chen Huilin, Ph.D. in Law, Professor of Law School, Zhongnan University of Economics and Law.

The Categorization of Reservations under the Functional Perspective *LUO Kun · 89 ·*

The existing "content-legal effect" categorization of reservations is not enough to provide sufficient theoretical guidance for the accurate application of the reservation system. According to the comparative law, the scope of application of reservation has gradually expanded from some typical contracts such as sale and loan to a wider range. In addition to the categorization under the perspective of "content-legal effect", reservations can also be categorized into reservations of the right of claim and reservations of the right of formation, unilateral reservations and bilateral reservations, etc. Through the comprehensive review of the categorizations of reservations, we can see that the function of reservations can also be categorized into two aspects as a whole: avoiding laws and reinforcing laws. The reservation system in China is mainly used to evade the approval procedures or to circumvent regulations about the establishment elements of specific contract types so as to advance the binding force of contracts, or to clarify or strengthen the legal obligations and the scope of entering liability of contracting parties. The reservation stipulated in the article 495 of the Civil Code belongs to the reservations with the right of claim, and reservations with different functions have different recognition standards and legal effects. Based on the principle of freedom, the reservations with formation right should be validly concluded.

Key Words Reservation; Categorization; Function; Civil Code

Luo Kun, Ph.D. in Law, Professor of Law School of Wuhan University; Research Fellow of Center for Judicial Case Studies of Wuhan University.

Reconstructing the Basis of Imputationing the Crime of Securities Market Manipulation: From the Dilemmatic Evaluation of Manipulative Control over Information

GENG Jianing · 103 ·

The dichotomy between trade-based manipulation and information-based manipulation shall be subverted. As a result, the crime of manipulating securities market is to be reclassified, according to the different principles of imputation, into fraud-manipulation based on organizational jurisdiction and advantage-abuse based on institutional jurisdiction. The judgment on the issue whether behaviors could distort the mechanism in which both trading price and trading volume are formed, should go beyond the factual dimension, focusing on the question whether the objective attribution of manipulability is due to the creation of false signals with regard to trading price and volume which deceive investors' reasonable expectation of the market, or the failure to carry out positive obligations aimed at maintaining the free competition in the securities pricing process, namely restricting improperly the participation of other variables in the pricing process or exacerbating the asymmetry of market information. It is not justifiable to attribute the abnormal fluctuations in the securities market to a single person without special identities who uses non-false information to induce transactions. Only if the asymmetric information is created by subjects with dynamic information advantage who assume positive obligations, can the miscellaneous provision be applied because their behaviors, in terms of the advantage abuse, are comparable with the violation of positive obligations by those who have financial advantage, stockholding advantage or static information advantage.

Key Words Manipulative Control over Information; Miscellaneous Provision; Jurisdiction (Zuständigkeit); Recognized Solidarity; Advantage-Abuse

Geng Jianing, Ph.D. in Law, Associate Professor of China University of Political Science and Law Criminal Justice School.

The Explanation and Determination of "Bad Faith" in the Act of Unfair Competition of "Bad Faith Incompatibility" on the Intenet

JIAO Haitao · 115 ·

"Bad faith incompatibility" is a new type of act of unfair competition related to the Internet established in the 2017 amendment of the Anti-Unfair Competition Law of the People's Republic of China(AUCL) . Art. 12 of AUCL establishes the standard of "bad faith incompatibility" from three aspects: means, damage consequences and behavior performance. Among them, the identification of "bad faith" is not only the key but also the difficulty. The requirement of "bad faith" in AUCL represents the high standard of identifying such act of unfair competition and also reflects the cautious attitude of legal regulation. The determination of "bad faith" should not be relaxed, still less should it be abandoned. The meaning of "bad faith" includes "knowing" and "intention". The former refers to "direct intention", while the latter refers to the improper intention of the actor. In practice, the determination of "bad faith" can only be based on individual cases and proved by circumstance evidence, mainly examining the performance and extent of incompatibility, the behaviors of the actor and its competitors, etc. When necessary, "bad faith" can also be presumed, and then the actor can prove that he does not have "bad faith".

Key Words Bad Faith Incompatibility; Bad Faith; Knowing; Intention

Jiao Haitao, Ph.D. in Law, Professor of Civil, Commercial and Economic Law School, CUPL.

Although the victim-offender reconciliation procedure of public prosecution cases has achieved some success since it was introduced in the legislation in 2012, the empirical analysis of 1210 adjudication documents of the second instance procedure shows that it is faced with problems in practice, such as the breaking through the legal scope of application, the poor effect of leniency obtained by the defendant in the first instance, the second instance reconciliation eroding the first instance and the inverse increase of the contradictions and differences between prosecution, defense, and trial. In addition to the lack of substantive law basis, the path dependence in operation, and the insufficient guarantee of voluntariness. Pretrial criminal coercive measures also determine the result of the trial in a great degree. In summary, China should improve the system in the following two aspects: firstly, the criminal substantive law should provide powerful support for reconciliation. Secondly, the scopes for applications of reconciliation should be extended, pre-trial non custodial compulsory measures should be encouraged, voluntariness safeguarding mechanism should be reinforced, and the compensation evaluation of the second instance should be postponed to the enforcement stage.

Key Words Criminal Reconciliation; Second Instance Trial; Structure of Criminal Punishment; Compulsory Measures

Wang Guifang, Ph. D. in Economics, Associate Professor of Huazhong Science and Technology Law School.

After the land management right has been stipulated in the Civil Code, the interpretation theory of it should be the basic positioning of its legal nature, so as to understand the right structure and promote the application of the system. There is a lack of legal basis and legal support to define the land management right based on the length of period (five years as the boundary), registered or not. The legal nature of the land management right should be defined as the creditor's right (not property right) after a comprehensive consideration of the interpretation of the text, system and purpose of the law. As far as the text is concerned, Article 339 of the Civil Code and Article 36 of the Law on the Contracting of Rural Land are the legal basis for the characterization of the land management right as creditor's right. These two legal provisions establish that the land management right is based on creditor's forms of transfer, such as the lease of the land contractual management right or the acquisition of shares. The exchange or transfer of the land contractual management right does not create a new land management right, but only gives rise to a change in this right to usufruct as a whole (Article 334 of the Civil Code). As far as the legal system is concerned, the legal restriction that "the written consent of the contractor" is required for the retransfer of the land management right and the guarantee of financing (Articles 46 and 47 of the Law on the Contracting of Rural Land), could support its creditor's right characterization. There is also no parent right basis for the characterization of the land management right as a right to usufruct in the Civil Code. As far as the purpose of the law is concerned, the provision of "maintaining the stability of rural contractual management relations" determines that the legal reform of contracted land should not change the title of the land contractual management right (which should not be replaced by "the land management right") and the attribute of a right to usufruct. It also means that it is impossible to characterize the land management right as a right to usufruct to avoid contradicting the principle of One

Thing, One Right. The characterization of creditor's right on the land management right will have a systemic effect on the following legal interpretations: the mode of creation of rights, the construction of legal rules (subject, object, content, mode of acquisition, the transfer of the right and the relief of the right), antagonism and financing guarantees.

Key Words Interpretation Theory; Land Management Right; Register; Length of Period; Creditor's Right

Shan Pingji, Ph.D. in Law, Associate Professor of Law School of Southeast University; Director of the Research Center for Civil Prosecution of Southeast University.

Practical Unfolding of the Punishment Basis for Attempted Offenders *WANG Jun · 161 ·*

On the basis of punishment for attempted offense, there is a debate between the subjective attempt theory and the objective attempt theory. The subjective attempt theory is the mainstream position in China's judicial practice, while the objective attempted crime is a powerful point of view in China's academic circles. The two are always in opposition, which is obviously necessary for rethinking. There are many questionings about China's judicial decisions academically, but these reviews have some problems. Among them, the objective danger theory can not identify the specific danger in the attempted offense, nor does it accord with the legal interest protection purpose of criminal law, while the specific danger theory has the "danger" of sliding to the subjective theory on attempt. Therefore, most of the judgment in practice are reasonable, but the reasons for their arguments need to be improved theoretically. As far as the establishment scope of attempted crime is concerned, the standard of material ignorance based on the impression theory is reasonable. As for the determination of attempted crime, it is necessary to give priority to the subjective constituent elements and to take intention as the focus of judgment. The above views are generally in line with the position of judicial practice, and will improve its lack of reasoning. It is a more pragmatic treatment scheme.

Key Words Attempted Offense; Subjective Attempt Theory; Objective Attempt Theory; Impression Theory; Initiating a Crime

Wang Jun, Ph.D. in Law, Associate Professor of Kenneth Wang School of Law/Public Law Research Center of Soochow University.

Comments on Article 679 of the Civil Code (Formation of Natural Person Loan Contract) *LIU Yong · 175 ·*

The normative intention of Article 679 of the Civil Code is to define the loan of natural persons as the real contract. But this rule has caused certain obstacles to juridical practice and academic theory. It's also necessary to distinguish the loan of civil natural persons and the loan of natural persons with commercial purpose and identify their establishment requirements respectively. The validity of "prior loan consensus" is recognized by most courts, and the formation of the loan of natural persons with commercial purpose should be explained as two-stage consensus. The "real essential element" requirement of Article 679 is not only reflected in the formation requirements, but also in the obligations of repayment. Article 679 is a semi-mandatory norm. The parties could conclude the loan as a consensual contract, which is by nature an innominate contract.

Key Words Loan of Natural Persons; Real Essential Element; Two-stage Consensus; Consensual

Liu Yong, Ph.D. in Law, Associate Professor of Nanjing University Law School.

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