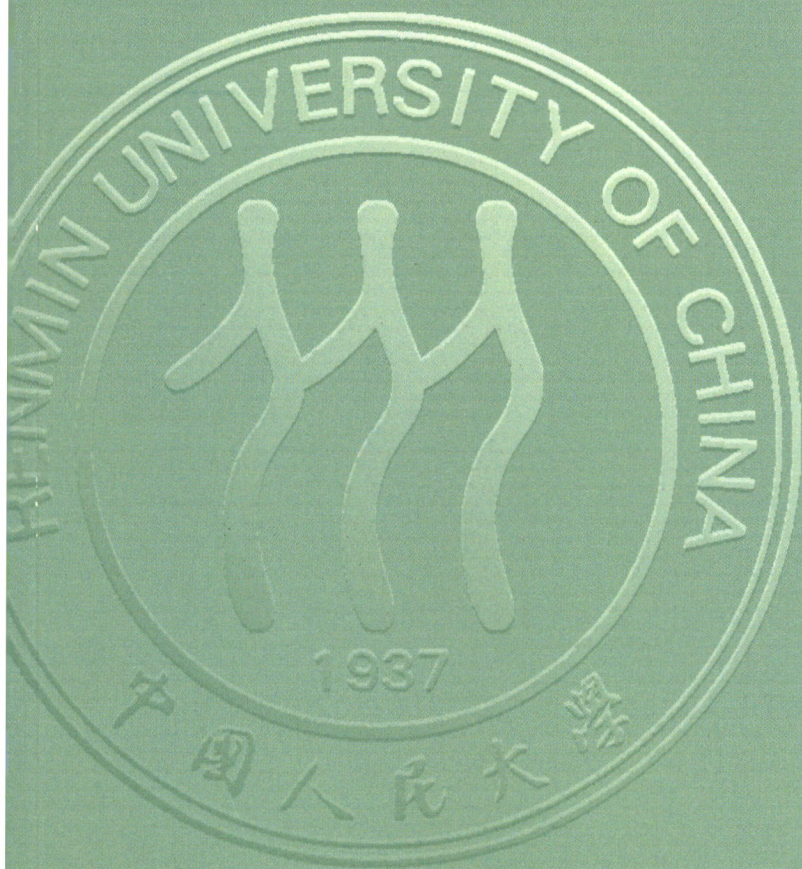




# 法学家

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## ABSTRACTS

***The Generative Logic, Value Orientation and Practical Mechanisms of China's Human Rights Development: A Theoretical Interpretation of "Following a Chinese Path of Human Rights" in the Report of the 20<sup>th</sup> National Congress of the Communist Party of China***

QI Yanping · 1 ·

The report of the 20<sup>th</sup> National Congress of the Communist Party of China emphasized that we will follow a Chinese path of human rights development, actively participate in global human rights governance, and promote all-around advancement of human rights. Chinese path of human rights development is based on the unity of the historical logic of "the whole takes precedence over the individual" in modern China, the logic of the cultural tradition of "publicity precedes the privateness", and the practical preference logic of "the whole/individual coexistence". Active promotion of human rights by all is based on the principle of equality, while the judicial protection of individual human rights is based on freedom. The tension between equality and freedom constitutes the transcendental value structure of human rights in contemporary China. On the vertical historical axis, "active promotion of human rights by all" and "judicial protection of human rights by individuals" are in a sequential relationship in strategy, but they have developed into a new stage of parallel progress in the horizontal practice of contemporary China. To realize the balanced output of the duality function of human rights in contemporary China, we need to complement, supplement and strengthen the individual-oriented human rights institutional system under the guidance of Xi Jinping Thought on the Rule of Law.

**Key Words** Chinese Human Rights; Development Path; Generative Logic; Value Orientation; Practice Mechanism

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***Singapore Convention on Mediation and the Legislation of China's Commercial Mediation Law from the Perspective of Contextualism: With a Focus on the Mediation Model***

XIONG Hao · 17 ·

China has signed the Singapore Convention on Mediation in 2019. Therefore, it has become an important and urgent issue to construct the implementation plan of the Convention and commercial mediation legislation that is compatible with the local context and the requirements of the Convention. This paper argues that the domestic legalization of the Singapore Convention on Mediation is not simply a matter of rules compatibility and institutional cohesion, but a matter of differentiation and convergence of cultural contexts. To solve this problem, we need to deeply comprehend Chinese social-cultural contexts, rather than blindly following the mediation paradigms of Western countries. Based on China's subjective perspective, the value proposition of the implementation of the Convention should be clarified, and the cultural preference of different mediation modes should be analyzed, through which the basic principles and detailed rules of Chinese commercial mediation law can be well constructed in the balance of Chinese context and international standards.

**Key Words** Singapore Convention on Mediation; Contextualism; Legislation on Commercial Mediation; Mediation Styles; Cultural Contexts

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***From Yīnsī to Yǐnsī: The Evolution of Privacy in Modern China***

LU Zhenhao · 31 ·

The right to privacy in China should be regarded in terms of endogenous evolution, different from the general idea among scholars that merely traces the origin of Chinese privacy to foreign laws. The issue is how a negative notion, *Yīnsī* [privateness to shade] to be criticized, transforms into a positive notion, *Yǐnsī* [privateness to hide] to criticize others. The research considers two critical contexts, including *Piguan Yīnsī* [critique on officers] and *Pimin Yīnsī* [critique on civilians]. It also analyzes three critical ideas: political, social, and private morality. In the context of *Pimin Yīnsī*, governanceism from political morality and individualism from private morality respectively have developed two kinds of *Yǐnsī*: the former serving the historic reunification of the Chinese nation, while the latter serving the succession of privacy from the exotic context. In contrast, social morality induces *Yīnsī*, the subject to be criticized. As for the context of *Piguan Yīnsī*, it does not give rise to the notion of *Yǐnsī*, but constitutes an inherent limitation of the right to privacy. Specifically, the nonlinear evolution of modern privacy in China is a result of the interaction of these three ideas. There was either a mutation of the individualistic sense of *Yǐnsī*, a temporary disappearance of these two *Yǐnsī*, revitalization and development of these two *Yǐnsī*, or even a settlement of the right to privacy. This contributes to a disenchanting understanding of contemporary protection of the right to privacy.

**Key Words** Privacy; Yinsi; Right to Privacy; Critical Legal Studies; Intellectual History

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***The Supplementary Role of Administrative Branch in Constitutional Review***

LI Ruiyi · 46 ·

For achieving the administrative purpose or improving work efficiency, the administrative branch usually ignores the constitutionality of administrative actions, which causes infringement on fundamental rights. The establishment of the institutions to guide and restrain the administrative branch for the purpose of exercising the powers in consistent with the Constitution, as well as assisting the Standing Committee of the National People's Congress with the help of those institutions, can enhance the idea of exercising the power according to the Constitution and play a supplementary role to complete the constitutional review system. Firstly, improve the constitutionality of the legislative drafts by evaluation of unconstitutional risks of the legislative drafts; Secondly, activate the power of the State Council to make the application of constitutional review by selecting cases among the administrative review cases and petition letters; Thirdly, establish the institution that administrative department, whose business is relevant to the unconstitutional controversy, provides the solution choice, to lighten the possible heavy workload of the standing committee of the NPC to constitutional review in the future; Last, require the administrative branch to consider the Constitution when interpreting the law enforcement basis, to enhance the constitutional review's function on protecting the fundamental rights.

**Key Words** Constitutional Review; Supplementary Function; Executing the Power according to the Constitution

Li Ruiyi, Ph.D. in Law, Associate Professor of Nankai University Law School.

***Right and Wrong of the Disadvantaged: The Theories and Principles of******Tax Burden Distribution in Tax Law***

ZHANG Mujun · 60 ·

Tax Laws distribute tax according to the faculty principle based on the sacrifice theory, the benefit principle based on the cost theory, or the faculty principle based on the ability theory. According to the faculty



principle based on sacrifice theory and the benefit principle based on cost theory, when the weak need public goods to exercise their lawful rights but cannot afford tax, the strong can refuse to bear tax liability. People who work hard but unfortunately become weak have not “done something wrong”, they deserve equal rights and should be allowed to realize their rights with other members’s help. This is within the meaning of social justice. Since tax is essentially public expenditures apportioned to members, the faculty principle based on ability theory meets the requirement of social justice by asking members to bear taxes according to their economic capacity, therefore is more practical and objective, and should be the basic principle that China’s tax laws generally follow when distributing tax burden to taxpayers. The benefit principle could be used to limit extra tax burden or relief, so as to avoid the weak seeking government spending that goes beyond what is necessary for equal rights.

**Key Words** Distribution of Tax Burden; Tax Fairness; Social Justice; Faculty Principle; Benefit Principle

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### ***Value Judgment of Labor Law Protection for Organizational Platform Practitioners***

DONG Wenjun · 72 ·

The work characteristics of organizational platform practitioners coexisting autonomy with labor control have led to disputes over the existence of their labor relations in judicial trial practice and theoretical research, and the essence of the dispute is the difference in value judgments on whether they should be inclined to be protected as laborers in the sense of labor law. Although platform practitioners have different work characteristics from offline laborers, the contractual relationship between them and the platform or its cooperative enterprises is also a combination of labor and means of production, and they also have no equal negotiation ability with the platform or its cooperative enterprises, so platform practitioners should also receive the tilting protection of labor law. As for the institutional response to the value judgment of platform practitioners’ preferential protection, first of all, it is necessary to clarify the identity of platform practitioners through the identification of labor relations. On this basis, in view of the work autonomy of platform practitioners compared with offline workers, we should further consider the solutions applicable to the specific systems of the current labor law.

**Key Words** Organizational Platform Practitioners; Value Judgment; Subordination of Labor Relations; Tilt Protection; Weak Position of Negotiation Ability

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### ***On the Basis of Claim for Damages in the Marriage and Family Series of the Civil Code***

LI Yongjun · 87 ·

The marriage and family law is returned to the civil code, and it cannot “return to form but not to substance”. A very important sign of whether it really returns is whether its claim can be coordinated with the basic system of claim in the civil code. Articles 1054 and 1091 of the marriage and family code of the civil code stipulate “compensation for damage”, is its claim based on contracting fault liability or tort liability? This paper holds that article 1054 provides a special liability for contracting fault, which is different from the liability for contracting fault in the contract part, because it includes compensation for mental damage; Arti-

cle 1091 stipulates that “special tort liability or fault liability”, which is different from the general tort liability in the tort liability series, cannot be recognized as general tort liability because it requires fault + damage + causality. Its so-called “fault” is completely specified by the marriage and family series, which is different from the special fault in the tort liability series. The principle of fault offset is not applicable. As long as both parties have faults, it can not constitute this kind of claim for compensation. However, neither article 1054 nor article 1091 shall prevent the other composition of general tort.

**Key Words** Marriage; Contracting Negligence; Tort Liability; Damage Compensation; Identity Contract

Li Yongjun, Ph.D. in Law, Professor of the Civil, Commercial and Economic Law School of China University of Political Science and Law.

### ***Jurisprudential Interpretation of “Actually Control Inventories” in Floating Pledge***

LUO Shuai · 98 ·

The purpose of “actually control inventories” is to control the pledger’s freedom to dominate and dispose of the pledged inventories within the risk range that does not lead to the unpredictable realization of the pledge. There is no certain causal relationship between the state of possession and the effect of “actually control inventories”. When the creditor entrusts a third party to supervise the goods, if the creditor wants to “actually control the goods”, the supervisor needs to actually perform the agreed supervision obligations. The supervisor only assumes the obligation of custody when it possesses the pledged inventories, otherwise he only assumes the obligation of supervision. According to functionalism, floating pledge transactions that do not meet the requirements of “actually control inventories” can establish a floating mortgage when the requirements of a floating mortgage are met. When the floating pledge is not established or cannot be fully realized, the parties should first determine what obligations the parties should bear and have violated, and how many faults they have, so as to initially determine whether the liability for compensation is supplementary liability, share liability or joint liability; then consider whether there are relevant exemptions, so as to further determine the scope of responsibility of each party.

**Key Words** Floating Pledge; Actually Control Inventories; Possession; Agreement of Supervision; Obligation of Supervision

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### ***Normative Basis of the Emergency Suspension of Payment in Telecom Network Fraud Cases :***

***Also on Article20 of Anti-Telecom and Online Fraud Law***

CHU Dianqing · 112 ·

The suspension of payment is the behavior that banks and other payment institutions refuse to perform their payment obligations for legal or contractual reasons. The suspension of payment based on the doctrine of legal assistance obligation is a specific way for payment institutions to assist public authorities in controlling the property involved, the reason of which is the public authority’s intention to control the property involved. Accordingly, the emergency suspension of payment in telecom network fraud cases is a type of freezing coercive measure. The basic institutional elements of such measure should be set in the law. The internal rules include the premise of application and the scope of authority. The legitimacy of the authorization in Article 20 of *Anti-Telecom and Online Fraud Law* might be arguable. The external rules are the stipulation on the connection between emergency suspension of payment and freezing. The existing mode of direct transformation would lead to the improper expansion of the efficacy of either measure. The suspension of payment should be



regarded as a rapid response measure to deal with the rapid transfer of funds involved in new type crimes, rather than a substitute for the freezing before a criminal case is filed. The emergency suspension of payment shall not be transformed into the freezing directly.

**Key Words** Telecom and Online Fraud; Emergency Suspension of Payment; Freezing; Internal Rules; External Rules

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### ***Restructure of the Review Rules of Voluntariness of Pleading Guilty and Accepting Punishment***

WU Siyuan • 127 •

The current review rules of voluntariness are established from the core perspective of the judge's decision-making which focuses on the efficiency and convenience. Judge-Centered Review Rules mainly favor the external evaluation of objective behavior and lack internal analysis of the defendant's subjective state, so the judges have almost lost the opportunity and even the ability to examine the defendant's subjective state and contains the risk of involuntary confession. To review the defendant's true willingness, we should turn to the perspective of the defendant's cognition to reconstruct the review rules. The Defendant-Centered Review Rules will establish "Compliance Standard" which links the defendant's subjective willingness with objective situation in the pre-trial procedure and leads the judge to make a comprehensive judgment to achieve the unity of internal analysis of subjective state and external evaluation of objective behavior. The Defendant-Centered Review Rules will also improve the court review mechanism to resolve the problem of formalization of voluntary review by improving the current situation of the defendant being dominated by the judge's power discourse system, increasing the level of verification of the defendant's true willingness to plead guilty and accept punishment, and reshaping the adjudication authority,

**Key Words** Judge-Centered; Defendant-Centered; Judgement Deviation; Subjective State; Objective Behavior

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### ***The Interpretation of "the Instigated Person has not Committed the Instigated Crime"***

—Based on the Indigenization of Accomplice Subordination Principle XIAO Peng • 141 •

Neither the dual system nor the unitary principle-offender system is directly supported by China's Criminal Code, which means both theories can exist in China's legal system. The principle and accomplice dividing system is not perfect, but it's better than the unitary principle offender system. There is a provision to punish preparatory act in China's Criminal Code. As a result, the accomplice-subordination theory should be interpreted as the subordination of preparatory theory. "The instigated person has not committed the instigated crime" means the instigated person has committed the preparatory act but not yet the perpetrating act. This interpretation scheme would neither cause punishing discoordination nor make the Article 29, Section 2 of Criminal Code a provision for attention. In addition, this interpretation scheme is able to deal with relative theoretical problems.

**Key Words** Instigate Crime; Preparatory Crime; Accomplice Subordination Theory; Unitary Principle Offender System

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***On the Interpretation of the Concept of Trademark Use and Its Legislative Definition***

YIN Shaoping · 156 ·

The ambiguous understanding over the concept of trademark use has come a long way, and misinterpretation has become the dominant opinion in practice for a long time. The reasons lie in the lack of systematic thinking and consciousness of legal methods, as well as theoretical research of trademark law being divorced from practice leading to difficulty in timely answering questions encountered in practice. Through comprehensive use of interpretative methods including comparative interpretation, systematic interpretation and purposive interpretation, true meaning of the concept can be articulated. By analyzing the relationship between the concept of trademark use and the exclusive right to use and right of prohibition of using trademark, from two directions can the concept be recognized. The phrase “so as to identify the sources of goods” in the definition in Article 48 of the Trademark Law is intended to define the connotation of and reveal the essential characteristics of the concept of trademark use, but not to limit its scope to the situation where the trademark has actually played a role of identification. When amending the Trademark Law in the future, the legislative definition should be improved to avoid further misunderstanding.

**Key Words** Trademark Use; Origin-indicating Function; Interpretation Method

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***Comments on Art. 979 of the Civil Code of People's Republic of China***

*(Composition of Negotiorum Gestio and the Administrator's Right to Claim)*

WU Xunxiang · 169 ·

The structure of Article 979 of the Civil Code is somehow complex. In addition to the constituent elements of Negotiorum Gestio, this article also provides for the administrator's right to claim reimbursement of necessary expenses and appropriate compensation for damage, as well as the beneficiary's defence to the establishment of the administrator's claim and the exclusion of that defence. The administrator's intention to manage, i. e. to avoid damage to the interests of others, is an important element in determining the establishment of Negotiorum Gestio under this section. The absence of a statutory or contractual obligation on the part of the administrator to intervene in the affairs of others should be judged objectively. When defining the affairs of another person, a uniform judgement should be made in relation to the administrator's intention to manage. Paragraph 2 of this article does not adopt the “doctrine of the justified Negotiorum Gestio”, but rather blocks the establishment of the administrator's claim by granting a defence to the beneficiary, which will, however, be excluded if the beneficiary's true intention is unlawful. In the event of an uncaused administration, the administrator may claim from the beneficiary, in addition to reimbursement of necessary expenses, appropriate compensation for the loss suffered as a result of the administration of his affairs. The administrator's right to claim compensation for damages breaks through the traditional doctrine that limits the system of uncaused administration to the correction of an abnormal state of property, and enables our uncaused administration system to be applied in the context of emergency relief and righteousness.

**Key Words** Negotiorum Gestio; Intention to Manage; Necessary Expenses; Appropriate Compensation

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