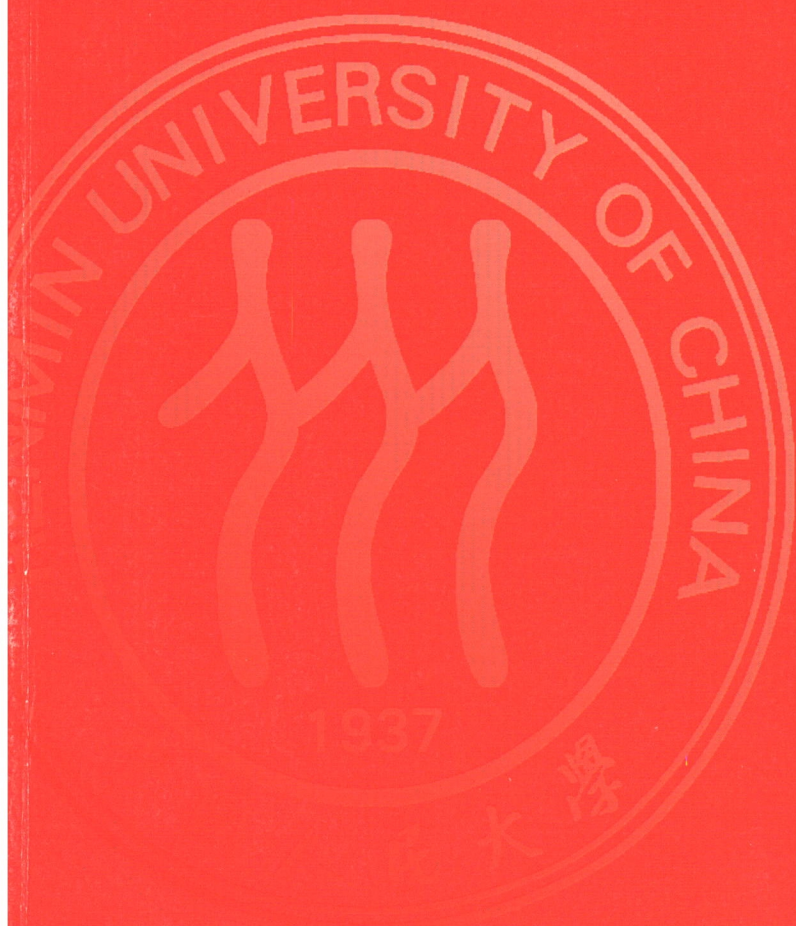


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ABSTRACTS

The Approach of Rule of Law to Promoting the Development of New Rural Collective Economy

FANG Shaokun · 1 ·

The development of the new rural collective economy not only embodies the innovation of the realization form of rural collective ownership, but also endows the basic rural management system with new connotation. The new rural collective economy has such legal characteristics as public ownership, diversity of organizational carriers, clarity of property rights and members, scientific governance mechanism, and diversity of interest distribution. To promote the development of the new rural collective economy, we shall adhere to the bottom line of rule of law for the rural collective ownership, adhere to the goal of rule of law to safeguarding the fundamental interests of peasants, and adhere to the concept of rule of law to promoting market-oriented reform based on rule of law. In order to promote the development of the new rural collective economy at the legal system level, we shall build a subject model, property rights structure and governance system that adapt to the development of the new rural collective economy. In order to ensure that the development of the new rural collective economy is promoted within the framework of the rule of law, we shall enact the Law on the Promotion of the New Rural Collective Economy as soon as possible, by adhering to the legal thinking of rule of law and following the approach of rule of law.

Key Words New Rural Collective Economy; Legal Characteristics; Concept of Rule of Law; Approach of Rule of Law; New Rural Collective Economy Promotion Law

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Rule of Law Objectives for Deepening the Linkage Reform of the Rural Land System

CHEN Xiaojun · 15 ·

The deepening of the linked reform of the rural land system is an inevitable demand of the new era of socialism, and it is the right thing to do in order to implement the high-quality development of China's agricultural land system under a systematic concept, in line with the "Chinese modernization". The nearly five-year joint reform of the agricultural land system has resulted in the legislative transformation of pilot experiences, but there are still many reasonable institutional experiences that have not yet been absorbed by the existing law, and some laws have triggered conflicts of interest in their operation, which are worthy of deep concern. The deepening of the joint reform of the agricultural land system should be further concerned with the rights-based correction of "power-centredness" and the enhancement of the connotation and ranking of legal values and functions to promote the reform of the agricultural land system, to clarify the attribution of property rights and boundaries of authority, to smooth the flow of factors and urban-rural integration, to coordinate effective markets and active governments, and to choose reasonable rights models and systematic rules. The new system of legal governance of the joint agricultural land system is led by the rule of law: the rule of

“equal land and equal rights” effectively promotes the equal rights of state-owned land and collective land; along the path of coexistence of public welfare and market access, the conflict between the rules of the land expropriation and collective construction land systems is reconciled; through the conversion of land use legitimacy, the land use of residential land and collective construction land is enriched. The mechanism of benign exchange between residential land and collective construction land is enriched by the conversion of land use; the adjustment of interactive rules is adopted to achieve the organic integration of expropriation and residential land system.

Key Words Agricultural Land System; Linked Reform; Contemporary Meaning; Legislative Effectiveness; Rule of Law Objectives

Chen Xiaojun, Professor of Institute of Land Law of Guangdong University of Foreign Studies.

An Empirical Research on the Performance of People’s Assessors in Adjudication :

Analyzing Judicial Big Data of 360000 Criminal Judgments WANG Xiang YU Xiaohong · 30 ·

As an important part of China’s judicial system, the people’s assessor system has drawn significant attention from both the government and society. However, concerns about “accompanying without trial” and “trial without deliberation” have dominated discussions among assessors in academic circles for a long time. To address these concerns, this paper systematically examines the performance of people’s assessors in trials, drawing on data from 360000 criminal judicial documents and first-hand field research materials. The study finds that assessors can systematically influence trial outcomes, and that their participation leads to more “lenient” verdicts. Furthermore, different combinations of assessors and judges in the panel have different effects on case outcomes. The study proposes a theoretical mechanism to explain these findings. Judges are able to self-interestedly offset assessors’ shortcomings, while assessors can dynamically utilize their own abilities. Judges and assessors also form strategic “alliances” in organizing the collegial court.

Key Words People’s Assessors; Assessor System; Capacity to Participate; Judicial Big Data; Computational Jurisprudence

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“Like Cases Should Be Treated Alike” in the Chinese Context :

Implication Mechanism and Institutionalization LI Zhenxian · 45 ·

Unlike the theory and practice of “like cases should be treated alike” dominated by the thought pattern of case law system, “like cases should be treated alike” in Chinese context has multiple meanings and specific practice mechanisms. The inherent stipulation of the Chinese context in “like cases should be treated alike” lies in the basic condition of the extensive application of precedents to solve the problem of the formation of judicial consensus in the court-oriented mode of operation of the court system. Determined by the multi-level Chinese context, “like cases should be treated alike” has multiple implications, including the basic requirements of the legal application, the fundamental principles of judicial ethics, the basic skills of judicial adjudication, and the basic methods of trial supervision. In practice, the mechanism for identifying “simi-

lar cases” is the direct reappearance of the similarity of cases on the basis of “value unit”. The mechanism for realizing the “similar judgement” is tending to convergence of the judicial opinions in similar cases on the basis of comprehensive consideration of judicial authority and judicial rationality. The corresponding system arrangements are the institutionalization of judicial consensus, focusing on the construction of litigation procedures for “like cases should be treated alike”, the systematic improvements of the precedents application system, and the informatization energization of “like cases should be treated alike”.

Key Words Like Cases Should Be Treated Alike; Application of Precedents; Guidance Case System; Guiding Case; Operation of the Court as A Whole

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The Evasion of Algorithm and Its Regulation: From the Perspective of Legal Sociology

QIU Yaokun · 60 ·

Although the algorithm power is strong, it may still be evaded, and there is a continuous dynamic game relationship between it and its objects of governance. The basic strategies of evasion of algorithm include avoiding becoming the objects of governance, adjusting to meet the requirements of governance and confusing the subjects of governance. The reason for this phenomenon is that the rigidity of technology is limited, and it does not match the balance of interests required for the treatment of marginal governance issues. It is unable to convert all “standards” into “rules” and solve the fundamental social contradictions behind the pluralistic normative order. However, most people are not evaders of algorithm, and the algorithm power is generally effective. A few evasions of algorithm also help limit the algorithm power, balancing governance and freedom, and promoting social stability and the comprehensive efficiency of governance. We only need to adhere to the principle of inclusive and prudent regulation, strengthen the regulation of simple evasions of algorithm, maintain tolerance for complex evasions of algorithm, and explore the regulative role of social norms.

Key Words Algorithm; Evasion of Algorithm; Legal Evasion; Internet Governance; Pluralistic Norms; Law and Technology

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On the “In Accordance with Law” in the Chinese Civil Code

LI Chang · 75 ·

There are 162 “Yifa (in Accordance with law)” in the Chinese Civil Code. This mode of legislation has a long history in China. However, there has been a lack of academic analysis of this term. The function of this term is to indicate other norms in positive law, which includes all levels of norms. But in fact this term has no real normative function. When words appear in the language game of the system of norms, the elements of the words have been influenced by other norms, which replace the role of this term. And this term has no indicative function beyond the word itself. The customary use of this term originates from the General Principles of Civil Law and was intended to fulfil the task of propaganda and education about the rule of law at that time. However, the current misuse of this term has created many practical problems. Legislators should get rid of

the myth of this term and make the following changes: Firstly, those terms that have had a negative effect should be deleted. Secondly, when this term is used to indicate the positive element of the relative word, the relevant norms should be clearly indicated.

Key Words In Accordance with Law; Legal Norm System; Directive Function; Chinese Civil Code

Li Chang, Ph.D. Candidate in Law, Institute of Roman Law and Comparative Legal History of University of Bonn in Germany.

Research on the Relationship between Oversight Supervision and Criminal Procuratorial

Supervision under the Principle of State Power Supervision

FAN Chongyi · 88 ·

With the transfer of the investigation power of duty crimes brought about by the reform of the supervision system, the relationship and connection between the criminal procuratorial supervision of the procuratorial organs and the oversight supervision of the oversight authorities have become a major problem facing the current judicial reform. Oversight supervision and criminal procuratorial supervision rely on supervisory power and procuratorial power with mixed attributes respectively. The former integrates Party discipline supervision, political discipline supervision and legal discipline supervision, and its supervision means are mainly reflected in the handling of job-related violations and the investigation of job-related crimes. The latter can be subdivided into criminal legal supervision and litigation supervision. Through the detailed analysis of the specific functions of the two supervision, we can find that the criminal legal supervision and oversight supervision have differences, similarities and complementarities in matters such as the scope of jurisdiction, supervision methods and supervision stages. The scope of oversight supervision covers the procurators, but the procuratorial organs can play a role in restricting the supervision and investigation activities in connection with compulsory measures, evidence materials and supplementary investigations. Of course, in practical work, there may be imbalances such as “generalizing the whole by partial means”, “confusing concepts” and “emphasizing cooperation and neglecting restriction”. Therefore, we should put the two major supervisions into the state power system for examination, and further straighten out the relationship between Criminal Procuratorial Supervision and oversight supervision under the guidance of the principle of state power supervision.

Key Words Power Supervision; Oversight Supervision; Criminal Procuratorial Supervision; Supervision and Investigation

Fan Chongyi, Professor of China University of Political Science and Law.

The Interpretation of the Crime of Infringing Citizens' Personal Information

“for Legal Business Activities”

YANG Nan · 105 ·

The current judicial interpretation sets special conviction and sentencing standards for the illegal acquisition of personal information for legitimate business activities. This interpretation has not only given rise to controversy as to whether it is an element of the conviction or of the sentence, but has also been hollowed out by the lack of explanation of the underwriting clause, the scope of the expansive information and the misinterpretation of the provision that a previously punished person has committed a second offence. The analysis reveals that “for legal business activities” is not used to establish the offence of infringement of personal infor-

mation, but is only a penalty circumstance. Whether or not it is also (incidentally or otherwise) used as an objective or subjective fact to determine illegality or culpability, it should be used as a circumstance to reduce the penalty of responsibility. The scope of “other aggravating circumstances” should be precisely defined, the personal information of the category “affecting the personal and property security” should be strictly interpreted, and the provisions of “aggravating circumstances” for previous offences should be amended. This will prevent the scope of application of this special rule from being unduly restricted. At the same time, if the perpetrator obtains personal information for legitimate business activities, the penalty of liability may be reduced even if other conditions are not met and the special rule cannot be applied.

Key Words Crime of Infringing Citizens’ Personal Information; For Legal Business Activities; In Serious Cases; Penalty Circumstances

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On the Application of Appearance Doctrine in Civil and Commercial Trials

WU Guangrong · 118 ·

Due to reliance on appearance rights or appearance authorization, Appearance Doctrine aims to protect the counterpart who trades with the party without actual rights. It protects the transaction security of the counterpart at the expense of the interests of party who has the actual right. Its legitimacy should be weighed by the legislator and internalized into a specific system. Therefore, the judge cannot use Appearance Doctrine as the basis for judgment without breaking away from the specific system. In the current law, bona fide acquisition, registration confrontation, Apparent Agency (Representative) and other systems all embody the legal principle of Appearance Doctrine. But they are different in legal structure and the scope of application. In judicial practice, Appearance Doctrine is abused in some cases of disputes over the ownership of real estate or equity that have nothing to do with transactions, and cases of enforcement objections (lawsuits). It is due to that judges mistakenly equates the Rights Presumption with Appearance Doctrine, ignoring the institutional logic of the Rights Presumption itself. In the enforcement procedure, whether the enforcement measures are taken according to the Real Estate Register or the judgments are made on an enforcement objection raised by an outsider, it is the result of the application of the Rights Presumption. In the enforcement objection action or the right confirmation action, although the registered obligee may still be recognized as the real obligee, this is not the result of the Appearance Doctrine, but the result of the application of the right change rule.

Key Words Appearance Doctrine; Rights Presumption; Bona fide Acquisition; Registration Confrontation; Apparent Agency

Wu Guangrong, Ph.D. in Law, Professor of National Judge’s College.

Systematic Coordination between the Enforcement Ways of Reservation of Ownership

ZHANG Jing · 131 ·

Under the present system of the combination of formalism and functionalism, reservation of ownership has three ways of enforcement: the scheme of reclamation, the enforcement procedure for property rights of security, and termination of the contract with the effect of restitution. Reclamation is a kind of private en-

forcement that is contingent on the buyer's approval and the contract's existence. The enforcement procedure for property rights of security can be initiated either by the seller or the buyer, and it is applicable in the situation where more than 75% price has been paid. Termination of the contract, subject to the rules of termination, will give rise to exclusively the effect of restitution. However, where more than half of the price has been paid, this effect can be adjusted according to art. 758 (1) of Chinese Civil Code. In the buyer's bankruptcy, the administrator is only entitled to choose when the enforcement of reservation of ownership does not start. If the administrator choose to perform the contract, the seller can choose the enforcement procedure for property rights of security or terminate the contract, in addition to applying the scheme of reclamation and the rule of mutual benefit debt. If the administrator chooses to terminate the contract, only the effect of restitution arises.

Key Words Reservation of Ownership; Reclamation; Enforcement Procedure for Property Rights of Security; Termination of the Contract; Functionalism; Formalism

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Debate on Subjective Illegitimacy Element and Its Positioning

LUO Shilong · 146 ·

Excluding, exceptionally admitting and fully admitting subjective illegitimacy elements are the three theories on whether subjective illegitimacy elements shall be taken into account while identifying illegitimacy. The first two theories, due to their own deficiencies, cannot well complete the task of illegitimacy identification while the third one is in line with the connotation and function of illegitimacy determination. It can not only avoid declaring illegal situations without anticipated possibility but also be conducive to the accurate identification of illegitimacy. Illegitimacy identification lies in determining what the perpetrator has done, and responsibility determination lies in judging whether it is possible to condemn what the perpetrator has done. The illegal facts have corresponding responsibilities in the responsibility stage, so it is neither necessary nor proper to take the subjective internal illegal facts as the responsibility elements. The approaches of simple responsibility intention and negligence as well as dual intention and negligence are not appropriate for the systematic positioning of intention and negligence. With the theory of fully admitting subjective illegitimacy elements, the approach of simple intention of illegitimacy and negligence shall be promoted.

Key Words Illegitimacy; Subjective Illegitimacy Elements; Imaginary Defense; Intention of Illegitimacy; Responsibility

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Administrative Authorization as A Mechanism of Power Transfer

LI Dewang · 161 ·

In recent years, the legislative trend of power transfer by administrative agencies through authorization has gradually strengthened, and the practice of authorization led by administrative agencies has become more vigorous. However, the mainstream academic theories tend to understand "administrative authorization" as

“authorization by laws, regulations and rules”, which either directly negates the authorization by administrative organs or regards the latter as a special case of the former. Unfortunately, the mainstream academic theories neglect the independence of the delegation will and the delegation act of the administrative organ, fails to construct the concept of administrative delegation in the sense of substantive law, and is difficult to provide substantive standard for the distinction between delegation and delegation in concrete operation. Based on the realistic needs of the development of current administrative practice and the construction of national governance system in our country, we should make clear that administrative authorization is an independent legal mechanism through which administrative organs realize the transfer of functions and powers through independent authorization. From the perspective of the legal structure of the way of allocation of administrative powers, administrative delegation is different from the setting of powers, legal authorization and administrative delegation. The establishment of administrative authorization requires the competent administrative organs to make specific authorization acts according to the clear legal norms of authorization, and the legal effect of authorization acts lies in the transfer of administrative power. Although the legal relationship of administrative authorization is mainly an internal administrative law relationship, the power transfer brought by administrative authorization will still form a certain external legal effect. Bound by the principle of procedural rule of law, administrative authorization should follow specific announcement procedures.

Key Words Administrative Authorization; Act of Authorization; Transfer of Authority; Allocation of Functions and Powers; Legal Authorization

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Comments on Article 423 of the Civil Code (Determination of Creditor's Right

Secured by Maximum Mortgage)

WU Yiwen · 175 ·

Article 423 of the Civil Code specifies the legitimate circumstances where the creditor's right secured by the maximum mortgage is determined. The parties shall freely agree on the term for determining the creditor's right. There should be no limit in terms of the determine period of maximum mortgage which is meant to secure the exercise of creditor's right. When no determine period agreed, the mortgagee can file a claim to determine the creditor's right at any time. However, the mortgagor is groundless to exercise the right until two years after the maximum mortgage had been created. The determination right is the formation right. If the mortgaged property is seized or detained, the creditor's right will be determined when the mortgagee knew or should have known such fact. Where the debtor or mortgagor has been declared bankrupt or dissolved, the creditor's right shall also be determined. The creditor's right shall be determined in the case of subparagraph (2) if the parties exercised the determine right, while in other subparagraphs, the creditor's right shall be determined if the specified circumstances occurred. Once the creditor's right is determined, the subordination of the maximum mortgage is restored, and the maximum mortgage can be transferred with the transfer of the creditor's right.

Key Words Maximum Mortgage; Determination of Creditor's Right; Determine Period; Subordination
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