CHINESE JOURNAL OF LAW

(Bimonthly)

Vol. 40, No. 6, November 2018

CONTENTS

Fact-finding and the Use of Evidence in Cases Involving Both Civil and Criminal Issues ……Long Zongzhi

Abstract: The predetermined proof value of the result of fact-finding in an effective judgment is both connected to and different from such concepts as res judicata, issue preclusion, etc. In establishing mechanisms governing predetermined value of proof and the use of evidence in cases involving both civil and criminal issues, consideration should be taken of such elements as the unity of judicature, the independence, efficiency and fairness of procedure, the priority of criminal trial and the rules of civil procedure. Meanwhile, the characteristics of Chinese judicial system and litigation should also be considered. The special force of criminal fact-finding should be confirmed, but such force should be subject to the "rule of necessity" and "the rule of determined facts". An effective civil decision can be used as documentary evidence and submitted to the criminal court, which can decide whether or to admit it and give its reasons. The criminal court should be cautious in applying the "penetration principle" to exclude the result of civil fact-finding and if it finds it necessary to deny the force of civil decision, it should do so in a proper manner. In special types of cases, the criminal court should take facts ascertained by the civil court as predetermined facts. In deciding the admissibility of such evidence, the court should consider such questions as whether the judgment is effective, whether such evidence is used as basis of judgment, and whether such evidence is testimony or physical evidence. The use of testimony gathered in criminal cases by the civil court should abide by the rules of civil procedure. Records of interrogation and interview and expert opinions should be examined in accordance with law, and be used properly by taking into due consideration of the means of proof and the formation of evidence.

Keywords: cases involving both civil and criminal issues; fact-finding; predetermined value; use of evidence

Justification for "Corroboration" as a Method of Proof…… Xue Aichang

Abstract: In China, the method of corroboration, as a universal empirical rule, is not

only established in law, but also applied universally by factfinders in practice. But in the theoretical circle, there are many ambiguities and misunderstandings about the concept, the theoretical basis, the necessity, and the preconditions of corroboration. There are even people who claim that “corroboration” can lead to misjudged criminal cases. In view of this situation, this paper attempts to clarify a series of misunderstandings surrounding “corroboration”, respond to some typical criticisms, and defend “corroboration” as a method of proof from an interdisciplinary perspective. Firstly, this paper further elaborates the concept of “corroboration”, pointing out that the connotation of “corroboration” is more than “consistency”, less than “entailment”, and equivalent to “fitting together’”. Considering the dimension of subjectivity, the extension of “corroboration” includes evidential fact, factum probandum and background beliefs. Meanwhile, this paper also points out that the theoretical foundation of the method of “corroboration” is evidential holism and coherence as criterion of truth, rather than the coherence theory of truth and the correspondence theory of truth. In view of the cognitive characteristics of human beings, the method of “corroboration” is the necessary means for us to evaluate the evidence, and this is supported by the related results of philosophical, psychological and other researches. So, to some extent, the method of “corroboration” has the inevitability in the biological and psychological senses. It is also a universal method of proof, not unique to China. But the effective application of the method of “corroboration” depends on the satisfaction of its preconditions. Many of the so-called negative effects of the method is precisely the result of the failure to meet these preconditions, rather than inherent in the method itself. Therefore, this paper also defends “corroboration” against some typical criticisms, and proves that there is no necessary connection between the method and misjudged criminal cases. But at the same time, this paper also points out that the method of “corroboration” can be justified only in a methodological sense. Whether it can be justified in other senses remains to be further explored.

Keywords: corroboration; Holism; truth; coherence

Criminal Law Protection of Collective Legal Interest and Its Boundary

…… **Sun Guoxiang**

Abstract: The original value of legal interest lies in the protection of individual freedom and the core of collective legal interest is to maintain order. Collective legal interest appears to be in an entanglement with personal freedom, but they are not completely opposite to each other. Real and stable individual freedom can be realized only through various institutional arrangements in society. The internal logic of freedom determines that, by protecting collective legal interests, the criminal law usually also upholds individual freedom and constitutes the necessary external social conditions for free development. Because the traditional criminal law, which is centered on the protection of personal legal interest, cannot effectively respond to the various risks and challenges of modern social life, the protection of collective legal interest is expanding in modern criminal law. It is not advisable to exaggerate the abstractness and ambiguity of collective legal interest and completely deny the necessity and legitimacy of criminal law expansion. However, collective legal interest is not only the interest of the people, but also has a potential of instrumental extension. The image and function of collective legal interest still need cautious thinking. The ease of the tension between collective and individual legal interests can be achieved by embedding factors of personal legal interest as an entry-level condition for criminal law protection, so as to highlight the contours and boundaries of collective legal interests in a society ruled by law. In this sense, collective legal interest can also play a critical role in preventing the over-expansion of criminal law protection.

Keywords: legal interest; personal legal interest; collective legal interest; boundary of criminal law

An Examination of Conceptual Relationships of Basic Principles of Civil Law

…… **Yi Jun**

Abstract: In articles 3-9 of the General Provisions of the Civil Law, civil legislators

list eight basic principles, including the protection of rights and interests, equality and private autonomy, thereby expressing in a very intuitive way the basic values that they desire to pursue and charting the blueprint of an ideal civil society life. This piece of legislation also raises the thorny and important issue of the contextual relationships of the basic principles of civil law. These basic principles can be divided into two major sections: those aimed at realizing individual values and those aimed at realizing social values. If the basic principles are understood as a set of "programs" based on the theory of "scientific research programs" by the British philosopher of science Imre Rakatos, these programs are composed of "hard cores" and "protective belts". Among these principles, basic individual principles of rights protection, formal equality, negative freedom and formal fairness are the hard cores; basic social principles of good faith, legality, public policy, and environmental protection are the protective belts. The former constitutes the strongest and hardest part of civil law and should be strictly adhered to, so as to maintain the existence of civil law; the latter is a soft part of civil law, with elasticity and flexibility that enable the civil law to adapt to social changes. The two work together to form an overall picture of civil law. The way they interact with each other is not static and solidified, but dynamic and cooperative, that is, not only mutually complementary, but also mutually restrictive. Basic individual principles have the prima-facie-character compared with basic social principles, that is, in the preliminary judgment, the basic principles of individuality have greater weight, but this judgment can be overthrown by an argument based on more sufficient grounds.

Keywords: basic principles of civil law; individual values; social values; the theory of scientific research programs

The Private Law Positioning and Protection of Data…… Ji Hailong

Abstract: Strict distinction should be made between **“**data” at two different levels: the data file at the syntactic level and the digital information at the content level. Data file is the form manifesting the digital information while digital information is the content

of data files. The information contained in data files is non-rivalrous from the economic perspective. It is not necessary to establish a general absolute right to the information contained in data files. Under the current law, the interest contained in the data file and the digital information is protected by a number of legal institutions, all of which are however subject to limitations. Data files are physical existence, which, although can be controlled by the human being, is intangible. Data files may constitute the object of right because they can be demarcated, controlled and easily separated from the storage device. A kind of absolute right, i.e. the data file ownership, should be established particularly due to the considerations in respect of possession law, bankruptcy law, enforcement law, etc. The original acquirer of the data file ownership should be the creator of the data file from the economic point of view; and the content of the data file ownership is similar to but not identical with the other absolute rights.

Keywords: data; data file ownership; personal data; object of right

Reflections on and Revision of the Relationship Between Trademark and Market Competition…… Zhang Kaiye

Abstract: The characterization of trademark as a tool of information (mainly a source identification and quality warranty) has been one of the most vital normative foundations of modern trademark law, which has led to an institutional myopia about the unexpected market power produced by trademark use. From a dynamic and market perspective, the trademark is more of a competitive tool than an information tool in nature. Trademark use may produce market power, which is the combination of "Recht" (a form of property rights) and marketing advantages (psychological attraction to consumers). When the formal institutional protection is inconsistent with consumers' recognition behavior, such protection may lead to anti-competitive, rent-seeking, information compression effects and so on, which deviate from the objectives of trademark protection, notably remedying market failure, facilitating trading, and ultimately maximizing the consumer welfare. In order to promote public

interests as well as trademark holders' benefits, trademark law must make a tradeoff between static efficiency and dynamic efficiency, that is, to eliminate opportunism such as deceit while leaving enough institutional space for competition. The closure of trademark right and the openness of fair use are conductive not only to solving the problem but also to avoiding further systematic risks.

Keywords: trademark; market power; undistorted competition; closure of right; fair use

Reflections on and Reconstruction of The Theory of Constitutive Elements of Taxation …… Ye Jinyu

Abstract: Constitutive elements of taxation share the common characteristics with other constitutive elements while exhibits the unique characteristics of tax law. This mixed nature equips it with three major functions, namely statutory taxation, protection of legal interests, and identification of different taxes. However, defects in the system of constitutive elements of taxation, such as the absence of basic concepts, scope and reasonable logic, have weakened the functions of the system, caused it to deviate from the track preset by the theory of constitutive elements, and greatly reduced its instrumental value as guidance for the establishment of rule of law in the field of taxation. The author of this article suggests that the theory of constitutive elements of taxation should take the identification of eligible and necessary classes for imposing tax as its systematic driving force, qualitative and quantitative element systems as its concrete subjects of analysis, and the system of eligible and necessary causes for tax exemption as its supplements. This theory reflects the general principle of constitutive elements of taxation, meets the actual needs of tax practice, incorporates the special nature of tax law, and strengthens the three functions of constitutive elements of taxation. According to this theory, qualitative and quantitative analyses are two crucial parts of the adoption, enforcement and interpretation of tax law and reasonable assessment of taxation can be made on any economic fact through the answering of the three core questions, namely whether it is taxable, what kind of

tax should be levied and how much tax should be levied, in the two-step process of transaction identification and tax evaluation.

Keywords： constitutive elements of taxation; tax classes; taxability; statutory taxation

On Civil Substantive Procedural Law ····· Chen Gang

Abstract: The process of independence of civil procedure law is not only a process of separation between substantive procedural law and substantive private law, but also an amalgamation of substantive procedural norms and procedural rules. Therefore, the Civil Procedure Law is a law that combines substantive litigation norms and procedures. In the future, China's civil procedure law should also be an intrinsic research object that combines these two kinds of litigation norms, so as to overcome the "inconsistent heat and cold" situation in the study of the two kinds of litigation norms. Civil substantive procedural law is a general term referring to litigation norms that regulate the legal relations of civil disputes as well as the formation of litigation in civil legal relations. In essence, it has undergone a transformation from the litigation norms attached to private law to civil procedure norms of public law nature. Therefore, in adjusting procedural law that regulates legal relationships of civil disputes, China should consciously exclude private law principles and jurisprudence in legislation and interpretation. At present, substantive litigation norms are seriously absent in China's civil procedure law, but can be found in large number scattered in separate civil laws and their judicial interpretations. In the long-run, the question of whether substantive litigation norms should be provided for in civil law or in civil procedure law is a major prerequisite theoretical issue that should be prioritized in the compilation of the civil code.

Keywords: civil substantive procedural law; legal relationships of civil dispute; civil procedure law; civil code

Perfection of the Mechanism for Exercising the Property Right on State-Owned

Natural Resources ····· Cheng Xueyang

Abstract: In order to construct an ecological civilization and modernize the state governance capacity and system, China urgently need to establish and develop a mechanism for the exercise of property rights of natural resource assets. A scientific and reasonable mechanism for the exercise of property rights of natural resources should first of all separate natural resource assets from ordinary natural objects or natural resources and then register the ownership of natural resource assets and other related rights in a unified real estate registration system. The ownership should be exercised by special organs established under governments at different levels in accordance with the principle of "separation of owners from supervisors" and the principle of "giving full play to local initiatives under the unified leadership of the Central Government". The right to the management and administration of state-owned natural resources should be exercise by specific enterprises established or authorized by the government in accordance with the principle of "mixed ownership" and on the basis of distinguishing between profit-making state-owned assets and public interest state-owned assets, so as to realize the two main objectives of "separating government functions from enterprise management" and "sharing the proceeds of natural resource assets between central and local governments".

Keywords: natural resource assets; state ownership of natural resources; mechanism for exercising property rights; mixed ownership

Declaration of the Nullity of Administrative Acts ·····Wang Guisong

Abstract: A null administrative act is invalid *ab initio* in substantive law. In remedy law, parties may declare an administrative act void and null in any relevant procedure at any time. It doesn’t have to be excluded by rescissory action. Nullity is the result of the balance between legal stability and substantive justice. Therefore, it is difficult to make judgments in advance by logical deduction of legal norms. The judgment criterion of “significant and obvious unlawfulness” established in Article 75 of the Administrative Litigation Law is in line with the functional needs of null

administrative acts. Its essence is to require the court to balance such specific values as individual rights and interests, the situation of third parties, legal stability and administrative benefits. In view of the complexity of reality, the court should be allowed to declare the nullity of certain administrative acts that are not obviously unlawful under the guidance of the substantive spirit mentioned above. According to the requirements of protection of the right to sue and the principle of due process, etc., it is necessary to review the nullity of administrative acts only in declaratory null judgments.

Keywords: null administrative act; doctrine of significance and obviousness; doctrine of specific values balance; declaratory null judgment

Cooperative Governance of Critical Information Infrastructure Protection

……Chen Yuefeng

Abstract: Critical information infrastructure protection is the top priority and difficulty of cybersecurity governance. The security of critical information infrastructure has public attributes, and government regulation is justified in the absence of full availability in the private sector through market mechanisms. Governance objects for critical information infrastructure protection must be designated through systematic classification and adjusted prudently and dynamically. In the main framework of critical information infrastructure protection, limitations of hierarchical and departmentalized structures of government organizations are obvious, thus making cooperation an inevitable choice. This requires a close public-private partnership on the basis of an efficient and unified leadership and extensive and deep government collaboration. Critical information infrastructure protection entails systematic process control. However, traditional administrative activities such as ex-ante approval and ex post punishment are insufficient. In order to better achieve the purpose of protecting critical information infrastructure, it is necessary to comprehensively apply multiple administrative activities, such as “regulation-guarantee-payment”, and adopt full-process risk management measures

based on public-private partnership.

Keywords: critical information infrastructure; cybersecurity; government regulation; risk management; cooperative administration

The Predicament of Civil Law Protection of Personal Information and its Solution …… Ding Xiaodong

Abstract: Contemporary studies on information privacy adopt an individualistic approach and view personal information as an object of civil right. These studies argue that, according to foreign experience, civil law could provide effective protection to privacy. Yet this article argues that Western information privacy law has never endorsed a civil right to personal information. Meanwhile, traditional civil law faces great difficulty in providing effective protection to citizens' privacy in the age of information society. We should adopt a contextualized understanding of privacy and realize that the flow of personal information is a common good. The aim of protecting personal data is to regulate the risks associate with personal information and to promote the proper flow of personal information in concrete context. Therefore, we should employ consumer protection law to reinvigorate the civil law protection of personal information. Meanwhile, we should also employ public law to regulate risks and protect personal information.

Keywords: privacy; personal information; civil law protection; consumer protection; risk regulation