高校本科毕业论文摘要抽样结果（4）

高校本科毕业生英语写作能力评价

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【OAPS】规范性文件的附带司法审查 ——以172个案例为分析样本； Incidental Review of Administrative Normative Documents: A Case Study of 172 Cases

ABSTRACT

Approaching to the fifth year after the amendment of Administrative Litigation Law, the practical effects of the framework of incidental review of normative documents in the new Law increasingly appeal to the academic. Concrete issues relating to the framework of incidental review are diversified. However, this Article only focuses on the issues unveiled by the 172 cases. Through conducting an empirical study, this Article can conclude that in litigations where a party applies for incidental review, owing to the existing double-incidental condition, cases which could manage to enter the substantial review stage only account for one third. Moreover, nowadays, the framework of conducting incidental review still lacks hierarchies, and the criteria of review are relatively formal. Besides, in the dynamic process of incidental review, the lack of rules of burden of proof, and the improper design of rules guiding the participation of upper-level administrative agencies, can bring obstacles to the functioning of incidental review which is intended to supervise the document-making of administrative agencies and to protect the rights of people under administration. The "incidental" condition in the existing legal system has already squeezed out space where judicial review can function as intended. Therefore, the design of concrete rules in the substantial review stage cannot limit to focusing on what is formal. Instead, the design should head to rebuild the hierarchies of review and widen the scope of materials subject to scrutiny.

Keyword: Normative Document; Incidental Review; Administrative Litigation

中文摘要

临近《行政诉讼法》修改后的第五年，新法设计的规范性文件附带审查制度究竟在司法实践中实效如何，引人瞩目。有关这一制度的具体话题涉及方方面面，但本文仅贴合 172 个司法案件所反映的事实进行论述。基于实证研究，文章初步得出经验性的结论，在行政相对人提出附带审查申请的案件中，由于双重附带性条件的存在，真正能够进入实质审查环节的案件仅占总量的三分之一。而且，目前实践中合法性审查展开的层次依然较为单一，具体的审查标准偏重形式的判断。此外，在司法审查的动态展开中，举证责任规则的缺失、上级行政机关参与规则建构的偏差，都会对附带审查制度监督依法行政、保障公民权利功能的发挥造成障碍。现行制度为司法审查设计的附带性条件，已经挤压了审查功能发挥的空间，因此实质审查阶段的规则设计不可再固守形式，更应在司法资源合理运用的前提下朝着深化审查层次、拓宽审查解明程度的方向发展。

关键词：规范性文件；附带司法审查；行政诉讼

【OAPS】投资连结保险合同的法律适用； Legal Application of Investment-linked Insurance Contracts

ABSTRACT

On the background of the development of the investment-linked insurance in recent years, this article summarizes the research results obtained by the current theorists and the disputes on the existing problems of legal application on the basis of collecting and sorting out the existing literature. Starting from the concept of the investment-linked insurance, this article points out the dual properties of insurance and investment that it possesses, and discusses in detail the insurance, trust and securities properties involved in the different degree of it. Compared with the traditional life insurance products, it is believed that the part of the investment account has clearly escaped from the category of insurance and belongs to the nature of investment. Considering whether the insurance law is applicable to the investment-linked insurance and how to apply the relevant laws and regulations in the investment field, this article focuses on the application of the special protection that the insurance law gives to the policyholders, and analyzes the reasons, methods and the results of this protection. By rethinking the existing views and discussions, this article analyzes and clarifies the essence of the problem, tries to construct the way of law application and coordination, and gives the criteria and the basis for determining the legal application, to provide solutions for the juridical practice.

Keywords：investment-linked insurance; nature analysis; legal application; special protection for the policyholder

中文摘要

本文以投资连结保险近年来的发展为背景，在收集和整理现有文献的基础上进行综述，概括出目前理论界已经取得的研究成果及仍然存在的法律适用问题上的争议。从投资连结保险的概念出发，指出其所具有的保险和投资双重属性，详细论述了投资连结保险不同程度涉及的保险、信托和证券属性，并与传统人身保险产品进行比较，认为其中的投资账户部分已经明显逸出了保险的范畴而具有投资的性质。针对投资连结保险能否适用《保险法》、如何进行投资相关法律法规补充适用的问题，本文着重讨论了《保险法》对投保人特殊保护制度的适用问题，从保护原因、方式和结果等方面进行逐一分析。通过反思已有的观点和论述，本文对问题的本质进行了分析和厘清，尝试构造出法律适用与相互让位、协调的路径，提出了法律适用判断的标准和依据，为司法实践提供了解决问题的思路。

关键词：投资连结保险；性质分析；法律适用；投保人的特殊保护

【OAPS】韩国少年犯罪司法对中国的启示； Implication of Korean juvenile criminal system for China

ABSTRACT

In order to promote the healthy growth of juveniles, almost half of juvenile criminal cases are conditionally suspended in Korea based on the degree of crime and its type. Korea has already built a national correctional system for juvenile delinquents. From the discovery of the crime to a conviction of juvenile cases, the Korean correctional system of juvenile criminal procedure is diversified, specialized and scientific. Additionally, Both Korean judges and prosecutors have a broad discretionary authority of sending juvenile delinquents to a correctional institution rather than direct punishment. China may be able to use experiences of Korea with respect to the correctional system of conditionally suspended criminal cases as it revises on juvenile system.

Keywords: Korean juvenile criminal system; Conditionally suspended criminals; Correctional system of juvenile criminal procedure; Implications for China

中文摘要

为了促进少年的健康成长，在韩国少年犯罪司法实践中，大多数案件通过保护处分和附条件不起诉方法处理。依据非行的内容、犯罪的种类、罪情程度采取不同的保护处分和附条件不起诉措施。对受附条件不起诉少年的教育、观察、教导已形成覆盖全国范围的统一体系，从非行少年的发现，鉴定到矫治的程序上已实现了多样化、专业化和科学化。此外，韩国少年法保障了韩国少年庭法官和检察官在审理保护案件和刑事案件中采取矫治措施的裁量权。韩中两国对于少年案件处理上都在强调“以教育为主，惩罚为辅”的基本原则，韩国少年司法的实践及其帮教支持体系对于中国少年司法有着一定借鉴意义。

关键词：韩国少年司法；附条件不起诉实践；帮教体系；对中国的借鉴

规制纵向非价格垄断协议——“类型化”与反垄断考量； Regulating vertical non-price restraints: categorization and the antitrust concern

ABSTRACT

Horizontal restraints and vertical price-fixing restraints are stipulated in Antitrust Law, whereas vertical non-prices ones are not, which has led to difficulties in enforcement. This is probably due to the “double nature” of vertical non-price restraints. While pro-competitive at most times, they can also raise antitrust concerns. Thus, this thesis considers it necessary to categorize vertical non-price agreements in Article 14 to avoid vagueness in enforcement. Despite the counterargument about their pro-competitiveness, this thesis holds that categorizing vertical agreements will better achieve the goal of resource allocation efficiency and social welfare as long as a “double exemption system” is introduced. Cutting-edge economic theories and cases have shown the positive correlation between the anticompetitive effect of a vertical non-price agreement and the market power of the undertakings. Thus, a putative exemption should be given to those undertakings with little market power, which is assessed comprehensively on its market share and the nature of the market. If the agreement falls out of the putative exemption, its actual or potential negative effect on competition needs to be analyzed. Finally, an individual exemption test should be taken as to whether it is based on the justifiable business goal. The aforementioned “double exemption system”, therefore, justifies the necessity of categorization of vertical non-price agreements that may raise antitrust concerns. As for the categorization process, the very nature of those agreements should be analyzed instead of the forms. Thus, the thesis divides vertical non-price agreements that may arouse antitrust concerns into three types, namely, vertical non-price resale restraints, supply-concentration by means of exclusive distribution, and restrictions on buyers’ freedom to purchase, sell, or use competitive goods of the seller.

Key Words: vertical non-price restraints; resale restraints; exclusive distribution; single branding.

中文摘要

我国《反垄断法》第十三与十四条明确了横向垄断协议与纵向价格垄断协议的相关类型，而对纵向非价格垄断协议只字未提。未将其纳入法条是因为纵向非价格协议促进与损害竞争的双重性。目前汽车行业、医疗行业，涉及纵向非价格垄断协议的现象屡见不鲜，但因为《反垄断法》第十四条未明确规定纵向非价格垄断协议之类型，使得执法中刻意规避了对纵向非价格垄断协议的认定与查处。因而，笔者认为，应当通过将典型的纵向非价格协议进行类型化，使执法具有明确性。虽然纵向非价格协议通常有提升经济效率之效果，但这并不影响将纵向非价格协议进行类型化以纳入法条，只是需要在类型化的基础上建立推定豁免与个案豁免。鉴于现代经济理论发现经营者的市场势力与协议的反竞争风险具有密不可分性，又鉴于各国司法实践中普遍将经营者市场势力作为判断协议违法性的重要考量，笔者认为在将纵向非价格垄断协议进行类型化后，应当效仿各国普遍做法，首先以经营者的市场份额与该市场的相关情况为门槛，对于不具有市场力量之经营者予以推定豁免；其次，当一纵向非价格垄断协议不能被推定豁免，因从协议实质出发，类比典型的纵向非价格垄断协议，并结合经济分析对其反竞争之效果进行违法性认定；最后，在被认定违法的纵向非价格协议上进行个案豁免，具体考量限制实施之合理性，即目的合理性、目的与手段的合比例性。因而，对其进行类型化恰恰能使执法对象清晰化、执法考量明确化，因为每一类型的纵向非价格协议对竞争的作用机制不同，其考量重点也有偏向性。例如，对于排他性供货类协议，常需要注意协议反竞争效果在产业链中的传导性，因而要重点关注买方在其下游市场中的市场地位。而面对纵向协议中的多重“灰色地带”，笔者将透过这些“名义上”的类型，直击行为实质进行类型化。因此，笔者最后将典型纵向非价格协议归为三类：其一，限制转售地域、客户，其实质是限制买方转售自由；其二，以排他性方式供货；其三，限制买方购买、使用或销售竞争性商品。而对其考量重点与考量因素，本文将对比美国、欧盟、日本的做法，并结合其国情与政策目标，为我国纵向非价格垄断协议的规制对我国纵向限制执法指南构建初步架构。

关键词：纵向非价格垄断协议；转售市场限制，排他性经销；品牌专卖

【OAPS】试论清代法律中的“戏杀”； “XiSha” in the Criminal Law of Qing Dynasty

ABSTRACT

The “six traditional Chinese homicides” system is the most unique crime system in Chinese traditional criminal law, which distinguishes itself from other homicide crimes in other legal systems. Among all these six homicides, “XiSha” is the extremely special one, that is, in the game activities of mutual voluntariness, which may lead to the death of participants, criminal actor engages in with other people, and his behaviors eventually cause the victim’s death. “XiSha” had been formed as a standardized legal norm in the Tang Dynasty. From then on, its definition had been increased or decreased through successive revisions. It eventually became mature in the laws of the Qing Dynasty.

By referring to modern criminal law theories, this article aims to analyze the compositions of the “XiSha” in the laws of the Qing Dynasty from the perspectives of objective elements as well as subjective elements. Meanwhile, by doing the study of the related cases described in the “Criminal Cases Review” (“Xing An Hui Lan”), the comparison and differentiation among “XiSha” and “DouSha” as well as “GuoShiSha” are made. In the end of this article, the definition of “XiSha” in the laws of Qing Dynasty is summed up; at the same time, compared with other modern law systems, the characteristics of legal mode of “situation law” in Chinese laws, which represented by “XiSha” are clarified.

Keyword: game activity; XiSha; criminal law; *Xing An Hui Lan*; *Da Qing Lv Li*

中文摘要

“六杀”是中华法系区别于其他法系的最为独特的罪行体系。其中，“戏杀”极为特别，即是指在相互自愿的情形下，犯罪行为人在与他人共同参与的可能导致他人死亡的游戏活动中，其实施的行为最终造成他人死亡的危害后果。“戏杀”在唐律中形成了规范化的法律规范，后又经过历代的修改增减，最终在清代法律中形态成熟。

本文旨在通过参照现代刑法理论，从客观要件和主观要件的角度剖析清代法律中“戏杀”罪行的构成；同时，通过研究《刑案汇览》中所记述的相关案例，比较并区分“戏杀”与“斗杀”、“过失杀”在主观恶意上的差异；最终，归纳出清代法律中戏杀罪的界分，并明晰以清律“戏杀”为代表的中华法系情境法在与现代刑法比较下的特点。

关键词：戏；戏杀；刑律；《刑案汇览》；《大清律例》

【OAPS】论双层股权结构在我国的适用及制度配套； On the Application of Dual-class share Structure in China and Its Supporting System

ABSTRACT

Although dual-class structure does not satisfy the “one share-one vote” principle, it is a good solution to the tension between the company’s financing needs for development and the company founder’s desire to maintain control. In various countries, dual-class structure has received recognition to different degrees. The structure allows the company to finance and in the meanwhile allows the founders and management team to maintain control, enables the founder team to harvest non-monetary benefits, improves the company's governance efficiency, and enables investors to obtain profits. However, because of the separation of voting rights and cash flow rights under dual-class structure, since its birth dual-class structure has received a lot of questions, mainly on the agency cost and supervision. Although China does not explicitly prohibit dual-class structure, China does not support the structure. In practice, many companies go to list in other countries for regulatory arbitrage, which causes losses in China’s stock market. China should try to accept dual-class share structure, and at the same time by improving the information disclosure system, restricting the ratio between the voting power of super vote and inferior vote and the matters where super vote could be applied, adopting dual-class structure gradually, improving shareholder representation litigation and introducing class action to prevent and resolve the possible problems.

Keywords: Dual-class share structure; control; agency cost; one share-one vote

中文摘要

双层股权结构虽然不符合“一股一票”原则，但是却很好地解决了公司发展的融资需求和创始人团队对公司控制权保持的问题，在各个国家获得了不同程度的认可。该结构可以使公司融资的同时保持创始人和管理层团队的控制权、使创始人团队收获非金钱收益、提高公司的治理效率、同时使投资人获得利润回报。但是，由于双层股权结构对投票权和现金流权进行了分流，从其诞生以来就受到了不少质疑，质疑主要是关于代理成本和对管理层的监督。我国虽未直接禁止双层股权制度，但是也未明确肯定。实践中，不少公司利用监管套利远赴重洋上市，对我国的证券市场造成了损失。我国应当尝试接纳双层股权结构，同时通过完善信息披露制度、对表决权的差额和优级表决权的运用事项进行限制、采用渐进推进的策略、完善股东代表诉讼和引进引进集体诉讼制度，来预防和解决其可能产生的问题。

关键词：双层股权结构；控制权；代理成本；一股一票

【OAPS】后巴黎时代下典型国家自主贡献方案的法经济学分析； The Legal and Economic Analysis of Selected Intended Nationally Determined Contributions in the Post-Paris Era

ABSTRACT

Intended Nationally Determined Contribution, abbreviated as INDC, is the mechanism of the national commitment to reduction of greenhouse gas emissions, which was proposed in Warsaw Climate Change Conference for the first time. As the most promising mechanism for dealing with climate changes in the Post Paris Era, INDC has not been systematically studied and analyzed by domestic and international academic staffs yet. As a result, this dissertation is aimed at selecting typical INDCs and carrying out the interdisciplinary research of these INDCs from perspectives of law and economics.

In this dissertation, eight economic entities including Japan, United States, European Union, Brazil, India, South Africa, China and Jamaica, have been selected and divided into three different interest groups, i.e., *Developed Countries*, *Emerging Economies* and *Alliance of Small Island States*. Under the framework of every interest group, each country's INDC will be discussed from perspectives of the development of macro-economy and environment, the analysis of particular contents, and features of the document; and then, in the end of each chapter, all the countries belonging to the same interest group will be compared and analyzed point by point. When discussing about the country profile, the quantitative indicators will be used to describe the economic and environmental development of the country. And the contents of INDC will be analyzed through legal level and institutional framework, while features of the document will be focused on exploring and testifying the feasibility of INDC from perspectives of national geographic features, political structures, evolution of the international politics, rotation of ruling parties, diplomatic autonomy, and so on. In a nutshell, based on the above comprehensive analysis of INDCs, the dissertation will look back to China itself, rethink the system and policies put forward by the Chinese government to deal with climate change, and propose better plans which are ideally suited to China.

Key words: Intended Nationally Determined Contribution; The Economic Analysis of Law; Post Paris Era

中文摘要

国家自主贡献方案(Intended Nationally Determined Contributions, INDC)是华沙气候变化大会上提出的国家自主承诺减排机制。作为后巴黎时代下应对气候变化最具发展前景的制度，迄今为止，国内外学术界未对其进行过系统的梳理及研究工作。故而，本文旨在选取典型国家自主贡献方案，从法律与经济的双向层面进行小型的跨学科研究。

本文选取了日本、美国、欧盟、巴西、印度、南非、中国以及牙买加等八个经济体，并将其划分到发达国家、新兴经济体及小岛屿发展中国家联盟三个不同的利益集团。在每个利益集团下，对单个国家自主贡献方案从宏观经济与环境的发展情况、自主减排方案的内容梳理、文件特色三方面逐一展开讨论，并在每个章节的最后对归类为该利益集团的所有国家进行横向的比较与分析。在讨论国别基本情况时，采用量化的经济指标来对其经济及环境发展情况展开描述；自主减排方案的内容透过法理层面及制度架构进行分析；在最后的文件特色部分，则结合了各国的地理面貌、政治架构、国际形势的演变、政党轮替、外交自主性等多方面的内容来探讨自主贡献方案撰写的初衷及落实的可行性。全文的最后则将研究的目光回溯到中国本身，结合上文的比较分析，取其精华，去其糟粕，反思中国气候变化的制度与政策，提出适合中国国情的改进方案。

关键词：国家自主贡献方案；法经济学分析；后巴黎时代

【OAPS】特种刑事临时法庭研究； A Study on The Provisional Court for Special Criminal Cases

ABSTRACT

The Provisional Court for Special Criminal Cases ("the Court") was established by the Nanjing National Government in 1927 and dissolved in 1928. The building and development of the Court clearly reflected the judicial system in the revolution time while its reform took along the line of purging KMT.

The organic rules of the Court undertook several modifications, which shew the substantial divergences within the central committee of KMT. The diversity of the local regulations also revealed the difference in attitudes. Generally speaking, the administrators in the Court were professional. They tried their best to deal with the cases in accordance with the law but at the cost of efficiency. The Court enjoyed considerable independence from the party-state system in its duration. In the second half of 1928, the policy preference shifted with the Court dissolved. Wang Chonghui, then Minster of Justice, regarded it as an effort to fulfill the unification of judicial power.

Key words: Provisional Court for Special Criminal Cases; judicial independence; unification of judicial power

中文摘要

特种刑事临时法庭是南京国民政府于 1927 年设立并于 1928 年撤销的特种法庭。它深受国共合作时期设立的革命法制的影响，并为完成清党而有所改革。它的组织条例几易其稿，反映了国民党中央对此认识的分歧。地方条例也表现出各省对此态度的不一致。其人员整体上较为专业，努力依法办事，办案进度较慢，专业性较强。特刑庭的独立性总能得到国民政府的支持，而党部和政府和个人因素对特刑庭的干预很有限。为了实现司法权的统一，国民政府撤销特刑庭和其他类似的特种法庭；司法部长王宠惠此时亦认为司法统一优先于司法党化。

关键词：特刑庭；司法独立；司法统一

【OAPS】革命尚未成功：开放存取与学术期刊文章的版权制度； The Revolution is Not Yet completed: Open Access and the Copyright Law of Academic Journal Articles

ABSTRACT

Open Access is a brand new model of publishing journal articles, under which the readers who used to suffer from magnate publishers can now easily access academic resources. Nevertheless, for the researchers and academia as a whole, is this movement really beneficial? Opinions diverge. People are concerned over whether Open Access is economically sustainable, how to take care of its quality control, and most significantly, whether Open Access violates copyright law. This article will respond to these worries, and propose several improvement measures in the hope of constructing a better regime. This article also contemplates the relationship between Open Access movement and Copyright as part of the Private Ownership System.

Keywords: Copyright; Open Access (OA); OA Journals; OA Repositories

中文摘要

开放存取是互联网时代下一种全新的出版模式。这种模式在很大程度上解放了深受商业出版商剥削的读者，但是对于研究者和整个学术界而言，开放存取的利弊之争从未停息。人们有这样的担忧：这种模式在经济上可持续吗？它如何保证学术文章的质量？最重要的，它违反版权制度吗？本文将一一回应这些疑问，并为建设更完善的制度提出一些可能的改进方案。同时本文也思考了开放存取运动和私有制下的版权制度之间的关系。

关键词：版权；开放存取；开放存取期刊；开放存取知识库

夫妻共同债务的认定规则研究； Study on Rules of Community Debts

ABSTRACT

Considering the institutional background of the community property system in China and Article 41 of the *Marriage Law of the People's Republic of China*, the basis of the community debt should be defined as the purpose of serving the community interests. The transformation of the community debt rules in China has been obviously practice-oriented. In order to solve the problem of debt evasion by divorce, Article 24 of *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Marriage Law of the People's Republic of China (II) ("Interpretation II")* establishes the community debt presumption. In order to solve the problem of embezzlement of debtor's spouse's property by fictitious community debt, *Interpretation of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Cases Involving Marital Debt Disputes ("Rule No.2")* adopts the idea of typification and marks the transformation from the presumption of community debt to the presumption of personal debt.

Through the study of more than 300 judicial decisions, it is found that the *Rule No.2* has not been completely followed in practice. The amount standard has become the main criterion for judging whether the debt serves the family's need in daily life. Many courts distribute the burden of proof for whether the debt has been used to serve family's need in daily life to the creditors, which should have been borne by the spouses according to *Rule No.2*. And many courts even directly adopt personal debt presumption for debts with no common expression of will, without considering whether family's need in daily life has been served. Meanwhile, *Rule No.2* also brings serious injustice in internal and external relations: it is difficult for creditors to overturn the presumption of personal debt and the standard of community debt is extremely strict, which opens a convenient door for debt evasion by divorce and endangers transaction safety and efficiency; on the other hand, the over-protection of the debtor's spouse does not match their expectations of sharing operational income, resulting in uneven distribution of interests in the internal relations between spouses.

Based on the judicial practice of *Rule No.2* and the principle of the balance of rights and obligations, this article advocates that, except for the situations of expression of common will or family agency, where the creditors should bear the burden of proof of the existence of the expression of common will or the appropriateness of the debt to meet the daily household needs, the community debt presumption should apply, and the burden of proof of the actual use of funds should be distributed to the spouses. This arrangement complies with the fairness requirement of the burden of proof distribution, avoids the high transactional cost caused by over-emphasizing on the co-signing of debts, and has experience from other countries to learn from in the perspective of comparative law.

In response to the criticism on the community debt presumption rule, this article puts forward three solutions. (1) Provide more refutation methods for spouses to challenge the community debt presumption by abstract legislative language. The specific ways of refutation vary according to the types of community debt and their basis. (2) For community debts based on the sharing of the proceeds of community property, the debtor's spouse should assume "limited liability" by his/her share in the community to creditors, so as to avoid the extreme unfairness of carrying high debts after divorce. (3) Further improve the right of non-debtor spouses to recover debts from debtors. Presume debts as personal debts and distribute the burden of proof of the use of funds to debtors in internal recovery proceedings. The specific recoverable amount should be determined according to the divorce agreement or the type of debts ultimately determined in internal proceedings.

Keywords: community debt; community life; burden of proof; debt evasion by divorce; right of recovery

中文摘要

结合我国婚后所得共同制的制度背景和《婚姻法》第 41 条，夫妻共同债务的基础应定位为夫妻共同体利益之目的。我国夫妻共同债务认定规则的变迁具有明显的实践导向色彩。为解决离婚逃债问题，《婚姻法司法解释(二)》第 24 条确立了共同债务推定规则。为解决虚构债务侵占债务人配偶财产问题，《关于审理涉及夫妻债务纠纷案件适用法律有关问题的解释》（“《2 号文》”）采取类型化区分思路，标志着从共债推定到个债推定的基本立场转变。

通过研究逾 300 份司法判决，发现《2 号文》所确立的规则在实践中未能得到完全贯彻：数额大小成为判断是否满足家庭日常生活需要的主要标准；本应由夫妻一方承担的用于家庭日常生活的证明责任常被分配给债权人；许多法院甚至将无共同意思表示的债务一概推定为个人债务。同时《2 号文》也在内外部关系中带来严重不公：共同债务的认定标准极其严格，债权人难以推翻个债推定，为离婚逃债打开方便之门，危害了交易安全和效率；对债务人配偶的过度保护与其共享经营收益的期待不匹配，造成内部关系中利益分配不均衡。

基于《2 号文》的司法实践及权利与义务相一致之原则，本文主张除了在共同意思表示和家事代理的场合债权人还需要对共同意思表示的存在和债务满足日常家事需要的适当性承担证明责任外，夫妻共同债务的认定应回归到共债推定规则，将证明资金实际用途的证明责任分配给夫妻一方。这样的安排更符合证明责任分配的公平性要求，避免了过分强调共债共签带来的极高的交易成本。

为回应对于共债推定规则之不足的批评，本文从三个方面提出解决思路：其一是以抽象的立法语言为债务人及其配偶推翻共债推定提供更多的反证路径，具体反驳方式应根据共同债务类型及其基础的不同而不同。其二是在基于共享共同财产之收益而承担共同债务的场合债务人配偶应以夫妻共同财产为限向债权人承担“有限责任”，以避免离婚后背负高额债务的极端不公平现象。其三是进一步完善非举债方配偶向债务人进行追偿的权利，在内部追偿诉讼中将债务推定为个人债务并将资金用途的证明责任分配给债务人，具体的可追偿数额应根据夫妻离婚协议或内部关系中最终确定的债务类型确定。

关键词：夫妻共同债务；共同生活；证明责任；离婚逃债；追偿权

【OAPS】商业银行主要股东加重责任研究； Research on the Enhanced Obligation of Commercial Banks' Major Shareholders

ABSTRACT

By contrast to the general corporate governance, the governance of commercial banks pays more attention to safety. As commercial banks are crucial in the field of finance, their safety has direct relation to systemic risk. Under the background of commercial banks' high leverage, shareholders are very likely to abuse their rights owing to the scattered nature of the bank obligation structure and the socializing of the bank risk. Shareholders' right abuse may directly threaten the safety of banks. Therefore, it is particularly necessary to enhancing the regulation of major shareholders in light of their substantial influence on the banks.

The institution of the enhanced obligation of commercial banks' major shareholders is one of the means for enhancing the regulation of banks' major shareholders. This institution breaks through the limited liability principle in the traditional company law, and introduces particular shareholders' no fault liability. According to Article 11 and Article 12 of Guidelines on the Corporate Governance of Commercial Banks and Article 19 of Interim Measures for the Equity Management of Commercial Banks, China has basically established this institution. In terms of the obligation subject, the obligation form and the obligation consequence, China has enacted generally complete rules. The obligation subject is the "major shareholder." As for the obligation form, the institution has included the obligation of supporting reasonable capital plans, the obligation of making capital supplementation plans, the obligation of capital supplementation, the obligation of not impeding the capital supplementation of other shareholders and new shareholders and the obligation of reporting capital supplementation abilities. As for the obligation consequence, the institution has included "correction with time limit," "ordered share transfer and management right restriction" and "circulation, public condemnation and industry access injunction."

Based on the experience from the comparative law, China's institution of the enhanced obligation of commercial banks' major shareholders can be improved. According to the difference as to the intensity of regulation, the main similar institutions in the other jurisdictions can be identified as the intense regulation mode, the moderate regulation mode and the weak regulation mode, respectively. The institution of the United States belongs to the the intense regulation mode, the institution of Russia belongs to the moderate regulation mode and the institutions of Japan and China's Taiwan belong to the weak regulation mode. Currently, China has adopted the weak regulation mode. In the normative sense, considering the significant possibility of the occurrence of major shareholders' right abuse and the seriousness of the negative consequences, now China should adopt the intense regulation mode. In the future, with the gradual improvement of the external restriction institution regulating major shareholders and the risk management institution regarding the bank industry, China should gradually turn to embrace the moderate regulation mode or even the weak regulation mode. In addition, now the positions of China's relevant prescriptions in the legal hierarchy are too low, which may result in inadequate importance attached to relevant prescriptions and even the issue of validity in the area of legislation law. Consequently, China should promote the position of relevant prescriptions to the level of "law."

Keywords: Commercial bank; major shareholder; enhanced obligation

中文摘要

相比于一般的公司治理，商业银行的治理尤其强调安全性。由于商业银行在金融领域发挥着关键作用，其安全性问题直接涉及系统性风险。在商业银行高杠杆运营的背景下，由于债务结构的分散性和银行风险的社会化，很可能发生股东滥用权利的问题。这会对银行的安全性产生直接的冲击。就主要股东这一特殊股东群体而言，由于其话语权极大，因此尤其有必要对其强化规制。

商业银行主要股东加重责任制度是对银行主要股东的强化规制手段之一。该制度突破了传统公司法上的有限责任原则，并引入了特殊的股东无过错责任。依据《商业银行公司治理指引》第 11 条、第 12 条和《商业银行股权管理暂行办法》第 19 条等规定，我国已初步确立该制度。我国在责任主体、责任形式和责任后果等三方面均有较为完整的规定。我国以“主要股东”为责任主体。就责任形式而言，当前我国的相关制度包含合理资本规划支持义务、资本补充计划制定义务、资本补充义务、对其他股东或者新股东补充资本的不阻碍义务和资本补充能力报告义务。就责任后果而言，我国规定了“限期改正”、“责令转让股权和限制经营管理权利”以及“通报、公开谴责和行业禁入”这三大类规制措施。

参照比较法上的经验，我国的商业银行主要股东加重责任制度仍有完善空间。在比较法层面，根据规制力度的不同，可将各主要相关立法例分别归于强规制模式、一般规制模式和弱规制模式。美国属于强规制模式，俄罗斯属于一般规制模式，而日本和中国台湾则属于弱规制模式。当前，我国采弱规制模式。从规范的视角来看，考虑到主要股东权利滥用发生概率的显著性及其损害后果的严重性，现阶段我国应当采强规制模式。在未来，随着主要股东外部约束机制和银行业风险应对机制的逐渐完善，我国应逐渐向一般规制模式乃至弱规制模式转型。此外，当前我国相关规定的法律位阶较低。这可能导致相关规定所受到的重视程度不足，甚至还会引发立法法层面的效力问题。因此，我国应当将相关规定的位阶提升到“法律”的层次。

关键词：商业银行；主要股东；加重责任

【OAPS】夫妻共同债务制度的组织化重构——基于民商交融的视角； Reconstruction of the Marital Joint Debt Institution——Based on the Blending of Civil and Commercial Perspectives

ABSTRACT

Article 24 of the Interpretation of the Supreme People's Court (SPC) on *Several Issues Concerning the Application of the Marriage Law of the People's Republic of China (II)* was heatedly discussed among both legal professional persons and the general public. In the context of disputes, the Supreme People's Court promulgated the *Interpretation of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Cases Involving Marital Debt Disputes* in 2018, recasting the martial joint property institution under the premise of reservation and joint liability under the nominal "domestic agency" rules and the "co-credit co-signature" rules. According to the *Interpretation of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Cases Involving Marital Debt Disputes*, whether a debt can be defined as marital joint debt is decided by the subjective "daily life" standards, which mitigates the negative effects of Article 24 of the *Several Issues Concerning the Application of the Marriage Law of the People's Republic of China (II)* and reduces transaction costs, to a certain degree. However, the subjective "daily life" standard are still insufficient. Beyond taking stop-gap measures, this article propose to build a better marital joint debt institution, which was based on the marital joint property system. Since traditional civil law method faces some difficulties in solving the relationship of the composite subjects, the method to divide internal and external relationship under the organizational law is worthy learning. In order to balance the order between special property system of the relative law and the general property law, the existing marital joint property system should be interpreted as potential marital joint property. Based on the perspective of the blend of civil and business, this article puts forward the concrete thinking of reconstructing the joint debt system of couples by introducing the concept of organizational law. This article will answer two questions: the scope of marital joint debt and how to determine it. This article holds the view that, as a negative aspect of potential common property, the marital joint debt is the debt that the marital joint property is responsible for, and not the debt that the husband and the wife are jointly and severally liable for. The semantics and logic of Article 41 of the *Marriage Law* exist for this kind of interpretation. Husband's or wife's personal debt, marital joint debt and joint liability debt are three separate systems that are independent but may intersect. The happening reason for the marital joint debt is "good for a common life". Daily household agency institution, intentional expressions, etc. are the causes of joint and several debts. Marital property relations should distinguish between internal and external relations. In external relations, a subjective interpretation of "daily life" according to husband and wife's behaviors can help to balance the interest between creditors and couples. In terms of internal relations, according to the idea of objective proof of responsibility, the burden of proof is distributed to the party that caused the debt and facilitates recovery. Taking objectively identified joint and matrimonial property as the property of responsibility, the moral hazard can be dismissed, and the other spouse can also control the risk. Through the analysis of the nature of marital joint debts, this article proposes a possibility of reconstructing the joint debt system of the husband and wife from the angle of legal teaching norms, based on the *Interpretation of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Cases Involving Marital Debt Disputes*, which is, "more preferred", but validity remains to be studied by more imperial studies. Nevertheless, this article provides a new and basic way of thinking marital joint debt. The purpose of reconstructing the marital joint debt system is not to eliminate marriage and family, but to satisfy people's inherent needs for controlling risks and encourage the occurrence of marital relations. This paper hopes to contribute wisdom through rational choice and good reflection to the codifying Chinese Civil Code.

Keywords: Marital Joint Debt Institution; Co-ownership of Obligation in Common; Separation of Internal and External Relation; Typification; Article 24 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Marriage Law of the People's Republic of China (II)

中文摘要

鲜有法律规范能像确立了夫妻共同债务推定规则的最高人民法院《关于适用<中华人民共和国婚姻法>若干问题的解释（二）》第 24 条这样，同时引发学界和大众的持续关注和讨论。2018 年，最高人民法院颁布《关于审理涉及夫妻债务纠纷案件法律有关问题的解释》，以名义上的“家事代理”规则和共债共签规则在保留连带责任前提下重塑了夫妻共同债务制度，它以主观化的“日常生活”界定共同债务，缓和了《婚姻法解释（二）》第 24 条的负面影响，降低了交易成本，但其主观标准仍有不足。本文试图在“头痛医头、脚痛医脚”之外提出基于夫妻共同生活和婚后所得共同制构建更优的夫妻共同债务制度。为解决好复合主体责任关系，组织法内外区分的思路值得民法借鉴。为平衡亲属法特别财产制度和一般财产法秩序，潜在共有理论值得引入。本文基于民商交融的视角，引入组织法理念，提出了重构夫妻共同债务制度的思路。本文将回答夫妻共同债务的范围及其认定两个问题。作为潜在共有财产的消极方面，夫妻共同债务是以夫妻共同财产负责的债务，而不是夫妻负有连带责任的债务。《婚姻法》第 41 条的语义和逻辑存在作此种解释的空间。夫妻个人债务、共同债务和连带债务是三项相互独立、但可能交叉的不同制度。夫妻共同债务的发生原因是“有益共同生活”，日常家事代理、意思表示等则是夫妻连带债务的发生原因。婚姻财产关系应当区分内外关系。在外部关系上，最高法通过主观解释“日常生活”认定夫妻共同财务进而平衡债权人与夫妻的思路值得保留。在内部关系上，根据客观证明责任的思路将证明责任分给引致债务一方，便利追偿。以客观认定的夫妻共同财产为责任财产，即可实现《婚姻法解释（二）》第 24 条所欲控制的道德风险，也有助于夫妻另一方控制风险。通过对夫妻共同债务的本质进行辨析，本文在《夫妻共同债务解释》的基础上从法教义学规范角度提出了重构夫妻共同债务制度的一种可能性，即“更优选项”，但其效度还有待更多事实学研究，并通过类型化为具体制度提供裁量基准。重构夫妻共同债务制度的目的并非要消解婚姻家庭，而是要满足人们对于控制风险的内在需要，进而鼓励婚姻关系的发生。值此《民法典·婚姻家庭编》修订之际，本文希望通过理性选择和良好反思为我国民法典编撰工作贡献智慧。

关键词：夫妻共同债务制度；共同共有之债；内外关系；类型化；《婚姻法解释（二）》第 24 条

【OAPS】敌意收购立法中的利益平衡：比较与借鉴的视角； The Interest Balancing of Hostile Takeover Legislation--From the Perspective of Comparative Study

ABSTRACT

The legal rules of hostile takeover should respond to the conflicting interests among shareholders protection, avoiding looting good companies and increasing market efficiency. In each country's legislation, three main rules are usually adopted to balance the aforementioned conflicting interests, which include the distribution of anti-takeover strategies adoption power, mandatory tender offer and directors' duties. In China, there has been much theoretical discussion about hostile takeover. Scholars' opinions can generally be divided into two main ones, the deciding power of anti-takeover methods should be allocated to the shareholders' meeting or the board meeting. Although the "Measures for the Administration of the Takeover of Listed Companies" issued in 2006 has provided a basic regulatory framework for hostile takeover, clear and applicable rules are still lacked. At this stage, China has gone through the "separation of shares" reform for almost 10 years, Chin listed companies shares are becoming more dispersed and the merger and acquisition market is very active and prosperous. The case of *Vanke v. Baoneng* which arises much public attention exposes the regulatory problem brought by the unclear legislation concerning hostile takeover—CSRC's standing is swaying and inconsistent, giving the administrative opinion without legal profession. Therefore, the reflection of the interests balancing involved in hostile takeover legislation not only has theoretical meaning, but also has a profound practical meaning.

This article analyzes the problem of China's present hostile takeover legislation and commercial practice case. On this basis, it further analyzes hostile takeover legislation modes of U.K., U.S., Australia, Japan and European Union. During this process, special attention is given to the interests balancing process and its underground logic. Each jurisdiction's legislation is a "strategic response" to mixed factors such as listed companies' shareholding structure, investment groups' power, the mode and system of company laws, different regulators' characteristics, corporate litigation development, domestic protectionist tendency and the reserved place for rule flexibility. As for China, the article adopts the commercial law transplantation "fitting" theory raised by Kanda and Milhaup to analyze China company law system, different regulators' situation, listed company shareholding and governance characteristics as well as China's policy demands. Further, reasonable and cautious advice of hostile takeover legislation is provided. This article disagrees with some scholars' opinion that the deciding power of anti-takeover methods should belong to directors' boarding. On the contrary, the "shareholders' meeting mode" adopted by U.K. fits China's present situation better. Finally, some more specific advice is provided to improve China hostile takeover legislation through borrowing other jurisdictions' experience.

Keywords: Hostile Takeovers; Interests Balancing, Comparative Study; Commercial Law Transplantation

中文摘要

对于敌意收购的立法监管需要回应股东权利保护，防止掏空优质公司和提升并购效率之间的利益冲突问题。在各国的立法例上，主要是通过反收购措施决定权归属，是否采取强制要约制度以及董事信义义务来构建上述冲突利益的平衡。在我国，学者们对于敌意收购立法监管的理论讨论由来已久，整体而言观点可以分为，反收购措施决定权应归属于股东大会和其应归属于董事会两派观点。2006年的《上市公司收购管理办法》提供了基础的监管框架，但仍缺乏明确、可行的适用规则。尤其在我国经历了股权分置改革近十年，上市公司持股越来越分散，并购市场越加活跃的当下，以 "宝万之争" 为代表的热点案件暴露了我国在敌意收购立法上规则不明确所带来的监管问题：监管机关态度摇摆，所依据的方式主要是行政式的发言。对于敌意收购立法中冲突利益平衡的再审视在当下不仅具有理论意义，更具有现实意义。

本文在梳理我国立法和实践商事案例中存在问题的基础上，细致梳理了英国、美国、澳大利亚、日本、欧盟立法模式，关注其制度背后的利益平衡过程和逻辑脉络。本文认为，敌意收购本身所涉及的冲突利益衡量，需要综合考量上市公司股权结构、投资者团体力量对比、公司法本身体系特点、不同监管主体特点、公司诉讼发展现状、国内是否有保护主义倾向以及预留给规则的灵活性等具体因素，而各国最终立法模式的选择是对这些因素的 "策略性回应"。在此基础上，本文对我国公司法整体架构、不同监管机关现状、上市公司持股和治理特点、我国目前的政策需求进行分析，并结合 Kanda 和 Milhaupt 提出的商法制度移植微观、宏观适应性理论，为我国敌意收购立法提出合理审慎的改进意见。与学界目前已有的认为反收购决策权应该更多授予董事会的观点不同，本文认为英国式的股东大会模式更适合我国现状；并借鉴各法域制度经验，对我国敌意收购立法的完善提出了具体的建议。

关键词：敌意收购；利益平衡；比较借鉴；商法移植