

Consideration of “Creation” in Legal Finding: From the Formulation of Limitations of Law and the Judge’s Own Initiative

ZHANG Zhiwen^{[a],*}

^[a]Ph.D. Research Center of Traffic Law, Shandong Jiaotong University, Ji’nan, China.

*Corresponding author.

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Abstract

Legal finding, which limits the free discretion originally, is out of the shape under the deduction of Jurisprudence of Concepts. Teleological Jurisprudence, the Jurisprudence of Interests and Jurisprudence of Free Law etc. vie with each other to analyze and reduce the “soul” of judicial process on this condition. Even though “creation” has been elevated to the height of “life” of the law, it’s very essential to look through and consider “creation”, which is the key point of clearing the origin, from the standpoint of the limitation of statute law, activity judges possess themselves, understanding of law’s creativity and jurisdiction operation.

Key words: Legal finding; Creation; Jurisdiction; Judge

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INTRODUCTION

The fact of legal finding having experienced a shock firstly comes from scholars’ criticism against statute. Legal finding, which limits the free discretion originally, goes to extremes under the deduction of Jurisprudence of Concepts. It is exactly because of this, Teleological Jurisprudence, the Jurisprudence of Interests and Jurisprudence of Free Law etc. are given birth to rise, but

the latter runs to another extreme in the way that statute is completely excluded from legal process. Similarly, the positive law school represented by Hart holds that the law has open structure and center significance from semantic analysis prospective—when the rules are powerless or when they have the loopholes, we have to seek help from no legal things. Free discretion has been eroding the “Rules building” constructed by rules with great efforts and introduces the “creation”. In the eyes of some scholars, “creation” is raised to the height of law’s life. In author’s view, creating law and finding law accompany each other, but the proportion of creating law in justices just is increasing progressively with clarity of rules decreasing.” In learning legal process, the theory of creating law must be considered as the most general common view, although there is still divergence among the volume and the scope of judicial legislation.”

1. IT IS BECAUSE OF THE LIMITATIONS OF THE STATUTE THAT THE LAW NEEDS “CREATION”

With the Napoleonic Code having been published, the statute reached its top as the human being’s crystallizations of wisdom. After then many countries rush to follow it or even use it to standardize social activities and expect everything to be under the adjusting of law. When the statute got the honorable status as the only resource applied to the case by judges, all sorts of “troubles” determined by gene order at the beginning of pregnancy occurred. The leaks, conflicts and ambiguousness of the statute are the result of the encounter of itself and living case facts. “The endless changes of human affairs, causing no matter what art in no time can make rules that can be absolutely apply to all of the issues.” However, if the existence of so many “malpractices” above of the statute is traced back to its source, it should boil down to the

limits of the lawmakers' reason. In the history of human legislation, no matter how brilliant, strictness and diligent the lawmakers are, the leaks, conflicts and ambiguousness of the statute are all inevitable, with regard to which the law theoretical areas practically reach the unanimous consensus. The lawmakers of the limited reason in no time have the abilities to establish rules to standardize all the society lives. The way that seeks the answer to all the problems possible in the statute has come to an end. Therefore, the statute cannot reach the acme of perfection. The obsceneness and ambiguousness of the meaning needs the judicial process to explain; the leak of the rules needs the judicial process to supply; the conflicts between the regulations need the judicial process to reconcile. Seeing through the three settlements, no matter supply leaks, explain rules or reconcile conflicts, justice's wisdom is always involved in, either measuring interest or judging values. This way that merely discovers laws and employs logical inference to apply facts not only does not maintain the stability of the laws, but increases the "nothingness and rash" of the statute. Thus, it is more dialectically admitting than concealing the limits of the statute. After all, statutes are always an ordinary statement, but some situations which are not included in the statutes also exist. What the statute consider is the major cases, In other words, it means typical and general situations. However, the statute cannot explain the special ones and usually cannot be just in particular cases.

"Law must point to various people, many kinds of activities and different objects and situations; The successful operation of law towards extensive social fields rests with such an extensive and spreading ability that regards the particular activity, issue and situation as the general case law classified." Such an extensive and spreading ability of law can be shaped and achieved just because the judge puts the judicial wisdom into use in a creative way." Any types of texts must be explained at first before people understand them." The prime way to explain the law is literal interpretation, which is the activity, operated according to literary contents of law language and its usual usage modes. Generally speaking, literal interpretation is just the starting point when the judge uses the law and it is not enough to confirm the meaning of law articles. We need to consider the relationship between different laws, legislative spirit and social changes etc. Since then the creative judicial activities begin to be shaped, such as teleological interpretation, complementing holes and value evaluation, by which the judge deals with creative interpretation activities. When we adopt the method which expounds the teleological interpretation of legal questions according to the goal of legal norm, the question that we need to answer firstly is what is the goal and how to select it when there are many paralleling goals or the goal is not clear. The "goal" in the teleological interpretation of method includes not only people's various goals, but also the goal of the statute, of

modern people, of legislator and of the judiciary etc. It should be mentioned that evaluative factors always get involved in when we measure and optimize the standard of teleological interpretation. That is because "the basic presupposition of teleological arguments is that among optional interpretation programs, there is a kind of better one to serve the final goal of the statute."

No legal orders can be perfect and flaws always exist. In brief, there is no law without flaw. As Wei Deshi said, "ban on refusing the referee" is the principle when the judge play legislative functions where the flaw exists, but the criminal law should be excluded. The premise of *rechtsfortbildung* is when the statute cannot play a role in solving law issues and the statute has a primary or secondary adjustable flaws. This hole should be complemented "according to the standard of practical reason and the universal justice of strong community, and the judge's decision." To avoid "suspicion of lawmaking", the judge define this process as "creative discovery of law". In reality, it is to maintain separation of powers which is formulated by constitution and to avoid the fact that the judge appraises and creates laws. This appellation is just for own comfort formally, which has a far distance to the real performance in the judicial practice. As far as Wei Deshi can see, the functions of judicial decree can be divided into three areas: firstly, illustrating and applying to current laws associating to the cases remain to resolve, in other words, it is to consider obey the law; secondly, proving and supplementing the leaks of laws, it is also called that creating laws continuously means "the law out of law"; finally, refusing to obey the current laws, the court uses the evaluation of the judge himself instead of judgment of law, and this is called "the law violating the sense of law".

In "to consider obey the law", except sense explanation, the ways of explanation such as system explanation、meaning explanation、limiting and shrinking explanation and extending explanation "are not the simple understanding activities of laws and are also capable of creating laws which in nature belongs to legislation lengthening". Evaluative factors get involved at the primary stage of leak-filling which in other words means the process of leak-affirming. "When the court is affirming the leaks, it is not a simply ratiocination of formal reason, but a critical evaluation on the law regulations in existence or not." "Affirming leaks states clearly the function of the transformation of the function of the court from law applying to the judge's legislation." The practice that try to avoid the judges 'value evaluation and strictly apply to laws has already made no sense. Wei Deshi thinks that the thought that regards leak filling as "creative law discovery" is unrealistic "which here involved is not law discovery but lawmaking, because where law regulations are insufficient, 'discovery' is impossible." Merely judge legislation is "limited by law and statute" and covered with

semblance purely and scientifically applying to laws. So to speak, it is leak affirming as well as leak filling that are evaluative behavior of the judges. According to the reversal degree, judges' refusal to obey the current laws can be divided into four forms: Departure from the law on surface. It means that the judge makes a decision according to the idea of the legislator not the literal meaning of law articles; if we happen to meet with the "exceptional holes", the practical way is to complement by "changing the overbroad regulations and articles instead of changing the standard purpose and adjusting the goal itself through teleologische reduction; when the judge modifies the standard purpose, he rejects the present law and makes some law towards the same issue; fourthly, the judge rejects the application of law completely and makes a new law. Judge's departure from law cannot be the act on impulse or without consideration. Only under the condition of "completely specific and strict premise" can he make an exceptional decision. "Only the judge ensures that the legislators can also make a judgment different from the present law according to the instructive legal principles and adjusted targets even when they are confronted with the specific benefit condition decided by the judge, which then would be the reason for judge's departure from the law." For the judges, the standard of pending case is less close to the law, there can be more reasons for the departure. All in all, "creation" is involved in the judicial decision process.

"Value evaluation is the highest one among various legal methods which should be applied with great consideration." Among comments on the four forms of departure from law which Wei Deshi listed, fairness, justice, freedom, democracy and human rights and other legal targets have played a vital role in the reason for departure from the law. Because people's opinions towards value vary, in this occasion, the revised written law will certainly become an unpredictable retroactivity law for the party and interested party, which may be dangerous to the stability of law. As a result, it is necessary to conduct a detailed argument and illustration, which will make it easy for the legal community and party to supervise evaluation behavior.

2. JUDGE'S INITIATIVE HAS PROMOTED THE "CREATION" IN THE JUDICIAL PROCESS

That is true. Judge's original motivation and external power from the fact that statute has limitations and judge cannot refuse a verdict for not stipulating in explicit terms. If the points above can be regarded as the exterior reasons for making law, the judge with judicial powers cannot be ignored as the internal factor. Conceptual jurisprudence emphasizes the logicity and coherence of law which can strengthen the stability of law. Consequently, the judge is

regarded as the mouth of declaring law. The judge then becomes this creature who cannot make any decisions according to his own interests under tighten legal restraint. Compared to conceptual jurisprudence, freedom law supports this idea that when the judge's carelessness and social changes result in loopholes, the judge should seek the flexible and proper law to replace the statute. So we can find that whether conceptual jurisprudence or freedom law, both only explain the troubles produced before judicial referee the major premise which result in the duty of judge being to find law or create law but not to understand the judge himself with initiative. In real terms, as Cassirer said, "men do not have the inherent abstract nature or unchangeable humanity; men's nature is always in the process and only in the hard working process that people constantly create culture. Therefore, humanity is not a material object but a process of self-shaping: the real humanity actually is men's innumerable creative activities."

"Know yourself", the classic words, engraved in the stone pillars in Ancient Greek Delphi Temple, has become the most basic and abstruse problem in philosophy history, which drives the scholars from the old days and at the present time to work for it. It can be said that men's problem or humanity proves to be the start point and also the finishing point. However, in the enlightenment period of Greek philosophy, what the human knowledge focuses on is physical universe "which only relates to the external world, in terms of all direct demands and practical benefits, all the human beings depend on his environment". The focus of philosophy is transferred from nature to man himself from Socrates. Socrates abandoned the way that is used to study the nature of physical objects to describe men's humanity and tried to answer "what is a man" through communication and conversation face to face, that is, we can regard human being as the creature with sense by getting rid of all the external and occasional characters and depending on men's internal needs. "judgment is the major power and the shared source between truth and morals." However, in the dark Middle Ages, men's sense was shadowed by deity. Deity replaced sense and made it be its dependency. Augustine holds that eternal law reflects the sense and will of personified Christian God. The understanding of eternal law creates natural law. Thus, sense found the way to wisdom and truth through the help from nature and power of God, because at this time, sense was not its self-evidence. Since then, as the human's understanding towards universe increased, such as Copernicus's heliocentric theory, Leibniz's calculus, Descartes' methodology, sense went back to its original meaning again. However, the shortcoming was that sense was pushed to another extreme. "Human reason realized its unlimitedness through measuring its own power by eternal universe." Since THE ORIGIN OF SPECIES of Darwin was published, the method to think about human nature changed from mathematic and dreamy

mental analysis to empirical analysis, such as experience, evidence collection, which was focused on in evolution theory. “Nietzsche spoke highly of “will to power” in public; Freud stressed sexual desire instinct; Marx praised economic instinct; all of them were another understanding of human nature influenced by this method. In Cassirer’s opinion, the theory about man in modern times has gone into the era that the feudal princes existed simultaneously and struggled for hegemony. Man has got trapped into self-understanding crisis. For this reason, Cassirer did not deviate “man is rational animal”—a point in Socrates era, instead, he further pushed it into depth and regarded it as a symbol and culture. This symbolic imagination and wisdom freed man from the trouble relying on perceptual materials to build their own world. It broke through the limitations set by biological needs and actual benefits, avoided becoming the “prisoner in cave” defined by Plato and found the way to “ideal world”. Moreover, the process of man using symbols was just the process of creativity and constructivism.

If human analysis is made from original angle in philosophy, let us back to judicial process to observe the authentic evidence analysis of judge’s creativity. The formation of Common law system benefits from empiricism and the case law system. “Precedent system means that in common law suit, judge can create law in solving the party’s arguments and also can create precedent in constitution and statute interpretation.” Precedent follow system itself presets the space to create law. Withal Zweigert analyzed it in this way, “British and American judge started his judgment with some particular precedents which was quoted as the most relevant one to the point by the party’s lawyer before the judge. Among these precedents, judge confirmed some ‘rule’—a way to resolve the specific and particular real problems. Judge also investigated how these ‘rules’ were limited, expanded and improved by other ‘precedents’ and then constantly thought about some related and real problems. Judge gradually drew out ‘principle’ and ‘standard’ at higher level which were applied to make the experimental way to resolve the cases before him; after that, he used similar cases to test whether his solving-method is proper or not and made the final decision.” “The major premise” of ruling case is produced in the combination between inductive thought based on specific reality and the careful treatment towards precedents. The law whose life is regarded as “experience” and “logic” is exactly the vivid interpretation towards judge’s statute.

Thoroughly influenced by rationalism, although the judge who pursues the statutes of the socialist mainland legal system did not have the open reason to make law as

other fellows, the existence of discretion became the fact as bigotry to statute was broken through. “Theoretically or legally, in some civil law countries, judge have no right to make law, neither to acknowledge the rule of “following precedents”, while judge in judicial practice “strongly intends to follow the legal precedents , especially those from higher court”, for saving lawsuit time and protecting judicial dignity. To some extent, for imitation out of such actions and under the influence of old positivism and appeal system, meanwhile, shifting off the judicial responsibility to apply the “wrong law”, it was not strange that the judge in the continental law system followed the precedents. This kind of behavior began when the law was described as the standard to cut disputes. In the modern law terms, it can be said as “same case, same judgment”. Obviously, judge’s authorization of making law when he followed precedents was less than other counterparts’. However, it changed after renaissance. Creating law appeared in a public identity where statute did not standardize or where only had some general and outline regulations. For example, the Swiss Civil Code applies the mode which deals with law limitations based on fundamental principles of civil law. Thus, it is acknowledged in the continental law system that judge creates law. It should be pointed that “creating law” is still seen as the action of country but not the individual behavior. “In the statutory countries, the judicial power to create law is based on written law made by legislators which is limited by legislators’ will. This constraint is not the denial to creativity of judicial powers but make it have rules to follow.

CONCLUSION

Law limitation paved the way for the judicial judge in the process of creating law. The judge its own initiative also increased creating law possible. Therefore, the double pressure of “force”, it is not surprising that the judge creates the law in the process of finding law.

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