

Is Legal Renewal Real?

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ABSTRACT. *“is a Law Renewal Real” is an Important Theoretical Question. It Contains Two Sub-Questions: Firstly, in the Legal System, Whether It is Necessary for the Legal System, and Whether This Concept is Independant Tocan Be Legal Interpretation? Secondly, If the Renewal of the Law is Real, Will This Application Break the Normative of Law? To Address These Issues. First of All, This Paper Defines the Relationship between the “the Open Text of Law” and the Generality of Law, and the Existence of “the Open Text of Law” Does Not Break the Generality of Law. On the Contrary, It Shows That Generality is Achieved through the Understanding of Legal Norms. Secondly, Law Renewal Exists as a Way of Legal Understanding, Which is Different from Legal Interpretation in Concept, Utility and Function. Finally, Legal Renewal is Often Blamed for “Judge Legislation”. However, Compared with the Legal Interpretation Applicable to the Content of Legal Provisions, Legal Renewal to Fill the “Loophole” through Legal Reasoning under the Legal Value, is Not Contrary to the Rule of Law to Make Judicial Argument.*

KEYWORDS: *Legal Renewal, Legal Interpretation, Legal Methodology*

1. Introduction

“Law renewal” refers to the continued creating law in judicial practice, which is called “Richterliche Rechtsfortbildung” in Germany. It not only has the function that is to associate the abstract laws and regulations with the specific cases, so as to achieve judicial fairness. More importantly, the judge can fill the legal loopholes with aiming at cases, and legal principle, resorting to relevant Richterliche Rechtsfortbildung skill in a certain jurisdiction. The case can be solved while the purpose of perfecting the law can be achieved.

In the discussion of Chinese legal theory, there is a proposition that the concept that legal renewal is not independent, and its necessity and legitimacy are disputed. In Anglo-American law system, judges follow the principle of the case to adopt. In the process of deciding precedents, judges may apply the use of generalized classification to a minimum. Therefore, the meaning of legal interpretation includes the room for judges to carry out legal renewal activities in English. Some theoretical claims: Legal interpretation refers to the activities of judges who understand and apply the law in the judicial process, and the renewal of legal interpretation is a kind

of legal interpretation. There are also theories that in continental law systems, legal interpretation should be based strictly on the provisions of the law, and the renewal of law is an act of legislation by judges, contrary to the basic position of the rule of law.

2. Judicial Methodology in Hard Case

Legal thought “The only correct answer” has a long history in the history of Western. It is a very popular idea among lawyers that vagueness they use guarantees that inevitably there will be no right answer to certain legal question. But the popularity of this idea is based on a failure to discriminate between the fact and the consequences of vagueness in canonical legal language. [1]The generality of the law requires less indeterminacy of legal rules. Indeterminacy refers to legal issues do not have absolutely right answer, at least not unique. Even though, in the continental law systems, the formulation of written law with explicit general forms of language seems clear, dependable, and certiant. In all filed of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, they will have what has been termed an open texture, which prive indeterminate. [2]

Therefore Professor Dr. Karl Larenz believed that even if the content of positive law was once recognized as a legitimate order, there is no guarantee that the judges' decisions are all legitimate, however the judge's decision must still be measured by this requirement, which is absolutely impossible to fully realize, and constitutes a meaningful correlation between positive law and legal thought.[3] The validity of the judgement requires not only the consistency of the outcome of legal reasoning and the pre-set results of the legal provisions, but also the requirement that the result be considered to be legitimate and unique. The so-called “marginal zone” based on Hart's “the open text” is not the result of generality of law, but rather the common features provided for in the definition of words, which means that semantic consensus and semantic habits do not exist here.[4]

In hard cases, judges' labour under two connected handicaps whenever we seek to regulate. The first handicap is our ignorance of face, human legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring. The second handicap is our relative indeterminacy of aim that it brings with first handicap. On the one hand, judges should make the interpretation of law to eliminate indeterminate. [5] The term “interpretation” is often understood as the interpretation of law in a specific judicial process, which is a method of operation in a specific political and moral environment. When legal text is ambiouis or paradoxical, the judge explains and makes a decision to the parties after understanding the contents of the code by legal interpretation. After understanding the legal text, justice can ensure that judges accurately judge the rights of all parties in common cases. On the other hand, legal system is a “seamless net” and all legal issues are covered by it, so there are no legal “loopholes”. Until we put the general aim of law into legal understanding, based on literary understanding, it does not

eliminate the many troubles caused by the lag of law. When text of codes loss some rules in hard cases, judges should fix legal system with legal renewal. Legal interpretation is limited to understanding within the meaning of the original legal text and the purpose of legislation, while the law in the judicial process is renewed and the judge's creative renewal of the law in order to realize the fairness of the case. Therefore, there are differences in the premise, purpose and scope of application. The premise of legal interpretation is that when there are differences in the understanding of the legal provisions, the judge is required to make a clear explanation of its meaning, and the law renewal is to face the existence of the law vacancy, the purpose of legal interpretation is to apply the written law more perfectly, and the law renewal is to close the loopholes in the law, so that the case can be resolved.

3. Legitimacy of Legal Renewal

Among the challenges to the rationality of the renewal of the law, the most violent one is this recognition of the judge's right to create law is the basic condition that leads to the abuse of the judge's discretion. The challengers argue that it is a "law-making" act to have a judge try beyond the rules itself in hard cases. In this act, despite various judicial systems and professional ethics and ethical restrictions, judges still have the possibility of undermining the authority of the law, thus further leading to the proliferation of judicial injustice.

First and foremost, the legal authority lies in the realization of legal predictability. For both parties to the trial, excessive discretion will expand the unpredictability of trial activities, thus breaking the limitation of the principle of non-retroactivity. Secondly, the law-making of judges shows that judges are not only judicials representing neutral positions, but also legislators with majority democratic representation, which is a challenge to the fundamental principle of power constraint and balance, a modern democracy. Third, the judge's law-making will lead to the instability of the legal system, will break the stability and self-contact of the legal system. In the impact of the law-making, judges can also use the authority of "law-making" to challenge the principle of the priority application of the rules of law. In addition, the function of the judge is to clarify the relationship between the rights and obligations of the parties in the legal dispute, which is the adjustment of the social relationship in the procedure, rather than to guarantee the fairness of the case in the absolute sense. [6]

However, the law in the legal authority refers to the whole concept of self-harmonization in all the legal sources, systems, and intrinsic values, which consist mainly of the law-making law. Although law is recognized by citizens under the rule of law through a series of formulation, modification and application from the perspective of predictability. In fact, the reason of citizens support trials precisely is consistent with the public's judgment of a particular value in some particular issue. Even if there are individual cases of unfairness is caused by the limitations of the normative system and language, the public can accept it with tolerance. However,

this tolerant attitude does not apply to those type-based error cases which the value-based judgment is completely diverged.

Opponents' concerns that legal renewal provides a “checkerboard” that focuses only on the rationality of judgments under occasional moments or by accidental jurisdiction, and not on the integrity and integration between solutions. [6] That is the principled link between the various solutions is not taken into account, so that the value of the rule of law is totally contrary to the requirements of “consistency”. However, this paper holds that the so-called judicial discretion is not related to the judge's personal understanding of the law, but is the non-free choice completely subservient to the rule of law majesty and legal authority which pursuit value behind the law.

In judicial activities, the judge should judge the claims of both parties to the lawsuit. Legal right is a kind of political concept, its legitimacy and legality are granted by legal norms in form. Instead, understanding its legitimacy and legitimacy requires exploring the source of value behind it. Thus, Ronald Dworkin points out there are two sources of rights from an point of empirical view: political policies for the achievement of collective goals, and the requirement solely from the moral principles of individual equity. Policies and principles are the main basis for political proof, and in order to achieve the collective goal, the policy requires the right of the law to be established. However, such established rights are recognized only if they are in accordance with the principles and become the legitimate grounds for the voluntary obedience of the public (rights arising from policies are rationalized by legal principles). [5]

In the other path, the rights arising from the socially recognized moral principles are only entered into the system of making laws or, in other forms, fixed in the legal system, without being excluded by the policy. The rationality of moral principles over political policy is naturally proven, and if policymakers block or accept them, they will not die. Therefore, when a moral value is accepted by law, it can enter into the argumentation of legal rights and provide proof of legalization for the renewal of the law.

The type of Legal Understanding	Reasons	Legitimacy	charactes
Legal Interpretation	Personal Right & Collective goals	Based on legal rules & Legal principles	By exercising smaller judicial discretion
Legal renewal	Personal Right	Based on Legal Principles & Moral Principles which selected by Law	High burden of argument & By greater exercising judicial discretion

To sum up, judicial discretion to carry out objective moral judgment, in the law agreed within the scope of value. Recognition of the judge's choice in the judgement does not amount to an admission that the choice is arbitrary and unbound, and certainly does not consider it a breach of the law. Therefore, the renewal of law

should not be regarded as a breach of the law, but as one of the indispensable methodologies for the application of the law.

4. Conclusion

As an independent concept, legal renewal is true in legal methodology. Legal renewal can effectively address the “open text of law” and fill legal loopholes. In the definition of concept, in the context of civil law system, there is a need for a distinction between legal renewal and legal interpretation. As one of the ways of legal understanding, the law renewal is effective, the judge uses judicial discretion to carry out legal renewal, not only does not violate the basic provisions of the law, but further improves the content of legal norms.

In summary, the renewal of the law is not only true, but also legitimate. On the basis of reaching consensus on this conclusion, the next step in the study of Chinese judicial theory should focus on the specific operation method of law renewal.

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