

From Adjudication under Law to Discretion—Methodological Interpretation for the Causes of “Different Judgments in Similar Cases”

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Abstract. Hard cases often involve in different opinions because of different trial judges. When different opinions act on specific cases, different adjudication results would be achieved, which is called “different judgments in similar cases”. Different adjudication results imply characteristic reasoning processes, factor considerations and legal methods application of judges. Cases with similar forms are classified according to different degrees of adjudication results’ compliance with the positive law, and methodology is applied to interpret the subjective and objective reasons for different adjudication results in individual cases, to provide the firsthand empirical data for standard setting of similar cases and uniform application of the law. “Similar cases” is an uncertain concept, lacking normative definition and unified judgment standards, plus reasons including the uncertainty of legal norm’s meaning, the result orientation of legal method selection and application, the subjectivity of judge’s discretion and so on, the occurrence of “different judgments” is reasonable.

Introduction

In a legal state, judges must take the law as a standard, think about the case according to the law, and must not interpret, criticize or even modify the law unless it is unavoidable. Based on this logic, in order to achieve a balance between universal justice and individual justice, judges should strictly adhere to the principle of adjudication according to law, with the exception of discretion in very limited circumstances or special cases. The order’s demand for unity, stability and formality sometimes intensely confronts and conflicts with justice value standard’s demand for individuality, variability and substantiality.[1] However, from the perspective of social effects, the adjudication results of the cases with similar forms are almost contrary, which is beyond the expectations of the public, giving people an unfair feeling. Under the background of deepening judicial openness and increasing popularity of big data statistics technology, “different judgments in similar cases” faces greater doubts.

Adjudication under Law under the Mode of Subsumption Reasoning

Juridical Logic of Adjudication under Law

Application of law refers to a logical thinking process in which the facts of pending cases are placed under the elements of legal norms to obtain specific conclusions.[2] This kind of logical thinking mode is called subsumption, commonly known as syllogism reasoning. Among the elements of reasoning, the legal norm (T) is the major premise, the specific case fact (S) is the second premise, and the occurrence of certain legal effects is its conclusion (R). The elements of legal norms (T) usually consist of multiple element features (M). Therefore, the facts of the pending case must conform to all the element features required by the legal norms, so that the legal effect set by the legal norms occurs after subsumption. Some scholars present the subsumption process with this formula: $T=M1+M2+M3 \rightarrow R$ $S= M1+M2+M3 \rightarrow R$. [3]

Effect Examination and Method Application of Adjudication under Law

“As legislation is a process of continuous trial and error correction, we may start with a mistake, and then can still eliminate the mistake through appropriate process.”[4] In the case that the facts of the pending case meet the application condition of legal norms, even if the adjudication result is beyond the acceptable level of the average person, the judge should not be discretionary on the basis of fairness. “If the judge thinks that the law is morally unfair, he/she should first resign from the public office before taking a conscientious action. Otherwise, the legal order will face the danger of collapse.” [5] In most cases, legal norms can effectively play a predetermined role, successfully subsuming the facts of corresponding pending case and draw a proper adjudication conclusion, and the judge is not required to explain the law. Although that the law cannot be applied without explanation is regarded as a truth by most legal methodologists, the judicial reality reveals this is a false proposition that uses exaggerated rhetoric.

Legal Interpretation within the “Semantic Range” of Text

Juridical Logic of Legal Interpretation

Legal interpretation is the clarification of the meaning of the law by the court or the judge. It not only refers to clarifying the vague meaning, but also includes eliminating the contradiction of the law and adjusting the inappropriateness of the law. The reason why it needs to be explained is that the “asymmetry between fact and norms” of legal reasoning appears in the real state.[6] The goal of the interpretation should be the purpose of norms, because any explanation should contribute to realizing the normative purpose pursued by the content of norms.[7] Then, can the judge find out the true intention of the legislators to formulate the norm based on the text or legislative information? The answer is negative. On the one hand, the legislators are not a single individual, but an organ composed of different individuals, and the will expressed through the legal text is a mixture of collective will; on the other hand, the legislators consider the common characteristics of similar cases when formulating the law, while the interpreters and applicators must consider the individual problems of specific case.[8] The legal interpretation must be based on the legal text, taking objective basic position, taking justice as the goal, and taking universal justice concept as the standard, to make conscientious interpretation.

Effect Examination and Method Application of Legal Interpretation

When there is a hard case, disputes about the understanding of the law’s meaning would arise, and disputes over whether the law applies to the pending case would arise as well. Legal interpretation is people’s interpretation of a legal text, and the effect of interpretation is influenced by both the subject of interpretation and the object of interpretation. In terms of subject, no matter how high the requirements of the system for the professionalization of judges and the criteria for the judges’ legal knowledge, it is impossible to eliminate the individual differences in the knowledge composition, thinking mode and value judgment of the judges. In terms of object, legal texts and the concepts they contain are often ambiguous. For cases in which subsumption reasoning is difficult, the judge needs to explore the purpose of legal norms in the uncertain case of the law, and try to give adjudication reasons that do not exceed the meaning of the text. In the process of exploring the purpose of the law and interpreting, the personal value judgment of the judge is inevitably evolved into it. However, it is impossible and unnecessary to completely exclude the subjective factors of the judge. The uncertainty of the meaning of legal norms overlaps with the interpreter’s personal value judgment, so it is difficult for hard cases to obtain the “only correct” answer that Dworkin insists.

Loophole Supplement beyond the “Semantic Range”

Juridical Logic of Loophole Supplement

The line between narrow legal interpretation and loophole supplement is very vague. Zippelius believes that the boundary between legal interpretation and loophole supplement is the “possible semantics” of legal text. If the law applies beyond this limit, for example, considering legitimate equal treatment, a legal norm is applied to the condition that the semantics is clearly beyond the norm’s scope of application based on the norm, or the legal norm is not applied to situation that is clearly within its scope of application, these practices are not legal interpretations. The concept of law is ambiguous, with core areas and marginal areas, its range should be determined according to the law, and there should be room for judgment in the marginal gray area, but it cannot exceed its possible meaning.[9] The reason why the possible semantics of legal text is used as the boundary of legal interpretation is because the legal concept has been given a specific meaning when it is used. This meaning should be generally included in the concept itself, but should not be deleted or added by the interpreter. The “possible” in “possible semantics” is the maximum scope of meaning that ordinary people can understand from the concept itself. Thus, the interpretation within the semantic range is narrow legal interpretation, and the interpretation beyond the semantic range is loophole supplement. When it is impossible to draw adjudication conclusions from subsumption reasoning, if applying narrow legal interpretation is still unable to achieve the purpose, it is likely that the law has a loophole. Whether or not it constitutes a legal loophole should be determined by whether it violates the normative plan.[10] When there is a loophole in the law, based on the principle of prohibiting the refusal of adjudication, the judge should not refute the plaintiff’s claim on the grounds that there is no legal basis, but should supplement the legal loophole and complete the adjudication instead.

Identification of Legal Loopholes and Application of Supplement Methods

When designing rules, legislators have done their best to make the rules stable and flexible to adapt to the changing social life. However, human reason is always limited, while new conditions in judicial practice are infinite, making it difficult for the legislative plan to catch up with social changes, and there will be a mismatch between legal rules and social facts or even a lack of legal rules. If the law is mechanically applied to special cases, it is difficult to accomplish the purpose of right protection and justice realization of the law, but it would accomplish the very opposite instead. That the parties bear the unfair consequences arising from legislators’ negligence obviously violates the justice of the entire legal system. The ultimate pursuit of the judiciary is to achieve fairness and justice. As injustice arises when the applicable effect of the law cannot realize the legislative goal, the judge is obliged to examine and weigh the judicial consequences. Therefore, without violating the legal order, the judge can improve the law and complete the proper adjudication of specific cases by identifying and filling the loophole.

Discretion after Refusing to Obey the Law

Juridical Logic and Practice of Refusing to Obey the Law

That the judge refuses to obey and deviates from the current legal provisions means that the judge corrects, even excludes and substitutes legal evaluations through his/her own evaluation, and consciously makes judgments deviating from the current legal norms. The judge’s revision of the normative purpose often occurs when there has been a long period of time between the promulgation and application of the law, economy, society and politics have changed a lot, the factual composition and normative purposes are no longer suitable, and the legislators are still able to adjust. Due to the need of fair adjudication, it is justified for the judge to correct the purpose of the norms. However, changes in facts and universal values are not sufficient to justify the judge’s refusal to apply or deviation from the law. Judges must consider the boundary between judicial

decisions and legislation, and only if it is believed that the amendment to the normative purpose is also the will of the legislator, and when it is urgently needed by the adjudication, the deviation from the law is justified. Through a certain degree of rule creation, the judge comprehends a new legal thought that is implied in the law and continues its development, and then demonstrates this new idea through judicial decisions, which is a more or less amendment to the law, and a transcendence and improvement to the original plan of the law. The judge plays the role of “correcting the law” here. Certainly, the rules created by the judge must be derived from the basic principles of the current law. If the basic principles and order of the law are violated, the judge’s disobedience to the law does not have legitimacy, but should be included in the legal nihilism of illegal adjudication. The most typical characteristic of legal nihilism is to conduct “illegal judicature” and “extra-legal operations” by belittling or even ignoring the objective existence and proper authority of existing legislation in judicial practice.[11] The legal nihilism pursues the so-called substantive justice, and itself has a thinking tendency of disintegrating the rule of law, as the mode of thinking it advocated is not based on the consideration of the law, but on the grasp of the substantive factors outside the law, regarding the substantive factors as thinking and judgment basis. [12]

Reasons and Methods for Discretion

The legitimacy of the consequences investigation does not come from the authority of legislators, nor from the correctness of the results derived from the legal text, but from the beneficial derivation of these results. To some extent, the consequences investigation must be able to be measured by the “beneficial” criteria. Therefore, it must be avoided that in addition to this beneficial effect, the interpretation results bring about other negative effects that would offset (or even exceed) the benefits of achieving this goal.[13] While the judge achieves the justice of individual case through discretion, it is likely to undermine the unity and authority of the law, and impact the most basic value standard in law justice, order, on a larger scale. The judge’s deviation from the law is not the same as the illegal judgment. In order to resolve the unfair consequences caused by legal adjudication, the judge choose to disobey the law. However, there must be sufficient reasons to prove that the adjudication strategy chosen is more beneficial than the strict adjudication under law, otherwise, the judge should tolerate and abide by the law. Most of the situations in which judicial decisions shock public opinion and deviate from general expectations are due to the judge’s belief that he/she has to adhere to the statutory provisions and dares not deviate from the results of syllogism.

Individual justice is important, but excessive pursuit of justice in the case will inevitably undermine universal justice. The judge’s critique of the law in the process of pursuing substantive justice is more daring, fairness often gives way to equality, and the subjectivity of the adjudication is further highlighted. Our judicial system has not been able to provide a legal mechanism to ensure that judges must act in accordance with the law, and legal persons are not able to form their own unique legal thinking and legal methods.[14] It can be seen from the reasons for the case adjudication that the judge’s evaluation, observance of the law and deviation from the law are still at the stage dominated by experience and intuition, lacking necessary self-consciousness and rule consciousness. Discretion and other methods are often used as tools for the justification of adjudication conclusions, the appearance timing of which is chosen by the judge, lacking the rules of applicable conditions of the method.

Conclusion: Causes and Norms of Different Judgments in Similar Cases

“Different judgments in similar cases” makes the law appear unstable, the predictability is reduced, and the principle of equal treatment is threatened, which must cause the referee’s vigilance and reflection. However, any two things will not be exactly the same, especially in the case of complicated and variable cases. “Similar cases” itself is an uncertain concept, lacking normative definition and unified judgment standard. Comprehensively grasping the specific circumstances of the case’s adjudication and objectively treating the rationality generated from differentiated

decisions can eliminate people's misunderstanding on "different judgments in similar cases" to a certain extent.

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