Front. Law China 2007, 2(4): 518–537
DOI 10.1007/s11463-007-0024-y

RESEARCH ARTICLE

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Mode of making legal decisions

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Abstract Legal decisions are results of the use of law, which includes the application of law and the finding of law, but mainly referring to the latter. In the application of law, facts match norms, and thus legal decisions could be obtained directly through deduction thereof, which is called the deduction mode. However, in the finding of law, since facts are not symmetric to norms, before making judgment through deduction, facts and norms shall be equalized. That is to say, facts shall be generalized and then upgraded to the provisions, while norms shall be concrete and downwards to specific cases, conducting for spiral upwards, which is called equalization mode.

Keywords legal decisions, finding of law, deduction mode, equalization mode

摘要 法律判断是应用法律的结果，法律应用包括法律适用和法律发现，且主要是后者。在法律适用中，事实与规范相适应，判断可直接通过推论得出，这称为推论模式；而在法律发现中，由于事实与规范不对称，在通过推论得出判断之前，先要对事实与规范进行等置，使事实一般化，将个案向规范提升，使规范向个案下延，并在两者之间来回审视，螺旋式向上发展，即等置模式。

关键词 法律判断，法律发现，推论模式，等置模式

Since the formation of human ideological system, the separation and the unity between facts and norms or between “to be” and “ought to be” has always been one of the basic questions that trouble people (Kaufmann and Hassemer, 2000;

Translated from *Faxue Yanjiu* 法学研究 (Chinese Journal of Law), 2004, 26(1): 140–149

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Russell, 1981; Sun, 2000).[1] In terms of jurisprudence, its history advances mainly centering on facts and norms, with numerous theses generated, such as native law and foreign law, traditional law and modern law, civilian law and state law, law and morality, and rules and principles. First of all, this paper relates to facts and norms in a general view of law, whereby the former is the living relationship of "to be" and the latter, the value judgment of "ought to be". The purpose of studying them is to determine the general code of people conduct. Then, this paper focuses on tackling the facts and the norms in the application of law, whereby the facts refer to the individual cases that actually happen and the norms mainly refer to the statutory law. The handling of them is designated to make a concrete legal decision, namely, determining the standards of individual acts of people. In either case, people faces the issue on how to communicate facts with norms. In terms of the relationship of these two levels, I hold the monistic view of the use of law that they are relatively independent from each other, meanwhile, they form a progressive relationship. In the abstract concept, law is the mapping of the living relationship of "to be" and the value judgment of "ought to be monism". But the acquisition of such a corresponding meaning mostly takes place in the (view of application). Hence, law is actually the result of equalizing individual cases and norms such as the statutory law. Law is not only a kind of presupposition, but also a kind of action. How to take action, namely, how to realize the presupposed norms in dealing with the individual cases? This paper will give answers to it through exploration of the mode of formation of legal decisions.

It is generally accepted that the availability of decisions is one of the main characteristics of activities of the application of law. With the formation of such a consensus, the interests in the methods of the formation of legal decisions become increasingly higher in the domestic juristic circle, and the legal methods selected, the relations between various legal methods and how to apply them depend on the mode of the formation of legal decisions to a large extent. What is "mode"?

[1] German juristic philosopher Arthur Kaufmann once made the following comparison and summarization with respect to the respective contents of "to be" and "ought to be": perceptive world–reasoning world, phenomenal person–normative person, acquired–inborn, intuition–concept, phenomenon–essence, empirical–transcendental, experience–thinking, intrinsic–transcending, open system–closed system, the study of word order–the study of axiom, events–norms, concrete and substantial–abstract and general, real enforcement force–spiritual power, effectiveness–validity, heteronomy–autonomy, compulsion–freedom, causality–purposes, matters–essence, basis–superstructure, interest science of law–conceptual science of law, social jurisprudence–normative jurisprudence and so on. Kaufmann also summarized three basic viewpoints on the relationship between "to be" and "ought to be" in history: the identity of them (the monist methodology), the inconsistency of them (the duality methodology) and the equalization and correlation of them (the polar methodology).

H. Poser, a German scholar, has interpreted T. Kuhn's view of the meanings of the "paradigm" which caused the revolution in the field of science philosophy as follows: "The paradigm determines not only our vantage point and what kind of questions should be proposed, but also how to answer to the specific questions that have been raised and the means and methods to solve such questions"; "there is no science without paradigm, because paradigm is the theorized coordinate or the compass. Only on the basis of such coordinate is it possible to classify and normalize certain research fields." (Poser, 2002). Of course, Kuhn discusses "paradigm" in terms of the special feature of certain science, while this paper won't discuss the special feature of the science of law. Anyway, Poser's definition of "paradigm" may be used to understand the meaning of the mode of legal decisions, namely, the mode plays a role of deciding the vantage point of making decisions, what kind of questions to be put forward and how to answer such questions in the formation of legal decisions.

1 Finding of law or application of law

Legal decisions are the conclusive judgment of binding force arising from the use of law, which is ultimately expressed as the court judgment and decision, the legal, administrative, administrative reconsideration and arbitration decisions by public security organs and procuratorate. And at different stages of the application of law, problems of decisions also take place, such as the judgment of facts and the kind of norms to be chosen. First, the formation of legal decisions relates to the way of viewing the use of law, namely, finding of law or application of law or both. Such discrimination seems to have some characteristics of the conceptual jurisprudence which has been seriously criticized and deemed "overelaborate", moreover, it doesn't confirm to the usual usage of the terms (for usually "the use of law" and "the application of law" are used alternatively without being distinguished). Accordingly, it results from the complexity in the use of law. Different understandings of the finding of law determine the answers to all the questions that have been raised, and thus it shall start with the finding of law.

The finding of law had different meanings in previous understandings. First, it was the form of the generation of law. Disputes exist on the issue of whether the law is formulated (legislation) or found in human life. For example, Savigny, the representative of historical school of law, held that what the lawmakers should do was not to create the law, but merely to express and arrange the existing laws (customary law that embodied national spirits). This is the finding of law in a broader legislative view that embodies the "presupposed view of law". However, according to "the view of the use of law" which holds that law exists in the course

of the use of law, different understandings of legal findings mainly exist in the following course of the use of law.

Second, it is the legal acquisition, namely, the activity of the judge to seek the origins of law and legal norms suitable for individual cases. The origins of law include: statutory law, case law, customary law, jurisprudence and morals. The continental legal system first of all searches the origins of law in statutory law and Anglo-American legal system prefers to find them in case law. Such meaning does not involve the questions whether law is created in the use of law, therefore, although intervening into the use of law, it does not reflect the substance claimed by some people that legal finding is functional in creating law.

Third, it is a kind of activity of the use of law essentially different from the application of law. The traditional mainstream view holds that the finding of law is substantially different from the application of law. The application of law means the deduction of the existing law into cases, which refers to a standard situation. Just as Montesquieu said, the decision made by a judge was a "precise copy of law", who just needed his eyes and only served as the "mouth to declare and speak out law". Feuerbach, the drafter of the Bavarian Criminal Law of 1813, held that the interpretation of the criminal law should be prohibited. From the viewpoint of such people, the majority of the cases have corresponding legal provisions, and although there is the need to make "literal, logical, systematic and historical interpretation" of the provisions as was summarized by Savigny, the deductive mode of syllogism can apply those provisions to cases. Legal professionals should place themselves to a neutral position in the relations of lawsuits, and efforts should be made to exclude their personal value judgment in order to reach the essential neutrality. Meanwhile, taking the application of law as a standard situation is also closely related to the long-term held belief that law should be perfect, which is demonstrated by the esteem of codes in Europe. Bergbohm claimed that law shall be free from loopholes, and thus for the minority cases that no corresponding legal provisions could be found, he called them in "the space free from law" (the rechtsfreier Raum). Although such kind of belief had been smashed, the majority still considered the imperfection of law as the material deficiency of legislation. Since 1907 when Zitelmann proposed that there were holes in law, people regarded the creative activities of filling up the loopholes of law as "the finding of law", but held that it was merely a special circumstance in the use of law. People still focus on the application of law (Kaufmann, 1997).

Fourth, it is a kind of activity of the use of law without essential difference from the application of law. By contrast with the views of the traditional mainstream, a minority opinion claims there is no essential difference between the two. For example, Arthur Kaufmann held that they only have some differences in the degree of legal expansion (referring to the change of legal meaning and its

extension). The expansion of the application of law is smaller than the expansion of the finding of law. There is no expansion to the clear provisions on numbers (capacity age and registered capital), whereby the means of deductive reasoning may be directly adopted, while expansions exist with other concepts and provisions (such as lethal weapons and dangerous methods). Therefore, the application of law is one of the findings of law, where exists a containing relationship by level between the finding of law and the application of law. Kaufmann always interchanged the use of those two concepts and named them together as legal acquisition (Kaufmann, 1997; Kaufmann, 1999a).

Apparently, Kaufmann changed the meaning of the traditional application of law and held that it was one of the situations where law cannot be directly used. It has been a consensus that law cannot be directly applied like a vending device. And it is also a penetrating truth that the finding of law should be adopted in most circumstances. However, no definite concept could be found in Kaufmann's works on how to generally call the small number of situations where direct application of law (provisions on numbers and other clear provisions). For the purposes of differentiating the two situations where law can be directly used and where law cannot be directly used, the author holds that there is no use in realizing such differentiation by dividing the finding of law and the application of law based on the degree of legal expansion, and it would be better to define the legal finding as the circumstance where law could not be directly used without regard to the degree of legal expansion, while the circumstance where law can be directly used[2] (Chen, 2000) is still called the application of law in the traditional sense. Then, the course of the use of law is not limited to the finding of law or the application of law, but includes both of them, where the relationship between the finding of law and the application of law is parallel rather than vertical.

Then, why to adopt finding of law?

The field where the finding of law works is in the circumstance where law can not be directly applied. The so-called "law can not be directly applied" refers to the incompatibility between facts (the minor premise) and norms (the major premise). The key of the formation of legal decisions lies in solving the issue of the adaptation. In terms of the characteristics of the use of law, whether they match each other depends on norms, namely, there are only uncertain norms but no uncertain facts. Though facts are relatively certain forever, because natural facts (original facts) can not be completely represented by people, the up-to-now

[2] Chen Jinzhao regards the target of the finding of law as how to seek proper judgment of individual cases, discover the solution to them; and holds the statute law are merely proper evidence for explaining such method, but the finding of law (actually the finding of the judgment of individual cases) itself is not a method, while how to find the law generates the problem of method.

ascertained facts are certain. The academic circle has given many inspiring reasons concerning why there should be the finding of law. From the angle of demonstration, this paper takes a look at various circumstances concerning whether facts match norms and the degree of such matching (taking Chinese law and related disputes as examples):

(1) The matching of facts and norms. It is referred to as the clear normative standards available for ascertained facts. Such standards strictly mean clear and definite provisions on numbers (such as age, time, registered capital, stolen amount, quorum for passing of law, the degree of kinship), without exception to expansion or reduction. Broadly, they also include the provisions on clearly listed authority, procedures, effective scope, level of effectiveness, status of subjects and consequential offense, which are the extreme minority of cases where law can be applied directly through the means of deductive reasoning.

(2) Relative adaptation between facts and norms. It means that although norms are generally clear, exceptions of certain expansion or reduction and discretion still exist, such as those quite clearly defined concepts in norms (weapons and legal person), the provisions on extents (heavier or less punishment or mitigation), the provisions on degrees (such as the statutory standards of serious bodily injury), demonstrative items proclaimed in writing (such as the substantial change of contracts), falling as the majority circumstances.

(3) The incompatibility between facts and norms. It means that, although prescribed by law, exceptions of rather larger expansion or reduction and discretion still exist, such as the provisions on the legal principles including good faith, change of circumstances, legally prescribed punishment for a specified crime; provisions on value judgment such as reasonable term, due care, obvious injustice, malicious conspiracy, public interest, appropriate content; provisions on degrees such as seriousness of circumstances, material loss, serious results, large amount, required limits and substantial misunderstanding; confirmative provisions such as clear facts, proven evidences and concrete and specific contents; and other provisions on improper keeping, force majeure (including unpredictability, unavoidability and failure to overcome), fully knowing and dangerous methods.

(4) Facts that are lack of normative standards. Under some circumstances, legal judgment may not be available, such as the relations of colleagues, friends, love affairs, homosexuality, euthanasia, and drug abuse, or legal judgment may be made in principles of prohibiting the silence of the judge in law, provided that the legal provision that should have been made is not available, such as no legal provision is available on whether administrative procedure law or civil procedure law shall apply when a lawsuit has been initiated by reason of objection to the punishment made according to the rules of schools, where the judge shall not

refuse to entertain such cases.[3] The law used for assessment is created or selected by the judges.

(5) The matching of facts and norms in form but not in essence. Namely, the result of the use of the formally reasonable law may reach an unbearable degree of substantive unfairness, which is typical in the application of evil law, e.g., to a lesser extent, deducting and recognizing commodity housing as products through conceptual deduction, where consumer protection law could apply and once there are any problems in the quality of the commodity housing, double liquidated damages may be claimed.

Hence, it can be seen that facts are not symmetric with norms from paragraph (2) to paragraph (5) with the existence of different degrees of legal expansion, which is the basis of the finding of law. A further question is why the lawmaker does not avoid the asymmetry between facts and norms in advance so as to match the two of them, instead of leaving it to judiciaries to do the finding of law? With the limitations of human's rationality and changeable social life, loopholes during the adjustment of law are inevitable; therefore, the finding of law is required, which is a theory of objective failure. Also, some people hold that the imperfection of law is not the deficiency at all, which, on the contrary, is inborn and inevitable. The law can probably not be expressed clearly, since it is created for cases with indefinite diversity. A self-closed, completed, impeccable and clear law (if possible) may lead to the stagnation of law (Kaufmann, 1997). Such a thought may be subjective and intentional.

According to my monistic view of the use of law for either natural law or statutory law, no matter the "lawmakers" believe how sufficiently logic it is and how correct its content is, it is only a general chart of law and a pre-drawn theoretical blueprint. The ultimate solution of the theoretical issue of what the law is depends on how to understand and realize the correct law. There is a concrete process of application from norms to facts in accordance with the change of time and space, whereby the concretion is not to locate something by following up a map but requires the creative application of norms by the users. Even the customary laws with local characteristics will come across the issue whether to

[3] It always happens in China that the court refuses to entertain a case due to lack of clear provisions. For example, in 2002, a schoolgirl in a higher education institution in Southwest China was ordered to withdraw from school together with her boyfriend due to unmarried pregnancy, and when they brought forth an administrative proceeding with claims that the school had infringed on their rights of receiving education and privacy, the prosecution was rejected by the reason that the forced withdrawal from school falls under internal management and outside administration proceedings and court jurisdiction. This year in Britain, a female undergraduate defeated her former middle school where she was dismissed for the same reason, and the school gave her certain compensation and apologized to her and was prepared to modify the rules of school in relation to processing pregnancy of girl students. See *Chutian City News*, January 27, 2003.

apply the principle that "benefits are to be shared exclusively among one's own people" when farming land is to be apportioned to those men who marry into and live with the bride's family. The finding of law undertakes the task for realizing such view of legal application. Just like the summarization of Kaufmann from another angle, no legal principles mean no legal rules, and no legal rules mean no legal decisions, and at the same time, no legal rules could be acquired only from legal principles and no legal decisions could be acquired only from legal rules (Kaufmann, 1997). Therefore, creative application of law is required. Owing to no understanding of the process of such relative movement, the theory of natural law holds that positive legal norms come from absolute juristic ethical principles and concrete legal decisions could be obtained from positive legal provisions; on the other hand, the legal positivism of normative theory holds that concrete legal decisions can be made without taking experience into consideration as well, but completely deducted from the law of lawmakers. These two theories are not consistent ontologically, and both have at the same time entered into the methodological fallacy by starting from a closed knowledge system to carry out deduction.

2 Deduction mode or equalization mode

How does a legal decision form? With different answers as for whether the use of law is the finding of law or the application of law, different modes of the formation of decisions can be concluded. In history, people who took the use of law as the application of law held that legal decisions could naturally be obtained through deduction, and deductive syllogism is the tool of deduction since deduction was "the research on 'reaching conclusions naturally'" (Wang, 2000), as well as "the reasoning that necessary connection exists between premise and conclusion" (Jin, 1979). This is the so-called deduction mode, which shall, exactly speaking, be called the deduction mode of deductive syllogism. For example, E. Schmidt, a German who shares the same teacher Liszt with Radbruch, held that judgment is made by a deductive means in two strictly separated acts that come one after the other in time, namely, firstly exploring the facts neutrally, objectively and purely without any prejudice before finding law without external disturbance or any political stand. In the forgoing process, every judge can reach the same conclusion just as other judges, all of whom are "replaceable as judges" (Kaufmann, 1999a). The American traditional jurisprudence of liberalism also holds the same attitude, and believes that judicial act is different from the legislative act of policy options in that the former can reach decisions objectively and neutrally, where the tool of such decisions is legal reasoning. The deduction mode limits itself to a pure copy of the presupposition of statutory law, to the process of deduction between the minor and major premises of the use of law, and to the cognitive activities of the

legal professionals, therefore, it consequentially does not care about the content of the living relations and believes that the minor and major premises of decisions form separately. For the purposes of successfully carrying out deduction, the deduction mode also uses the forgoing four traditional interpreting methods so as to clarify the two premises. "Interpretation + deduction" constitute the method of deduction mode.

However, it is impossible for the majority of the facts or the cases, as minor premises, to take place exactly pursuant to law and especially, it is impossible for the wrongdoers to engage in illegal acts according to law. The recent case (on 6 August 2003) of theft of the grapes available for the purpose of scientific research committed by the farmer laborers is just a typical example. All laws, as major premise, are not clearly ascertained and loopholes are inevitable, even if a clear law is available for application, and it may sometimes be opposite to its objective purpose; and some other laws apparently reach an unbearable degree of unjustness. Facing such circumstances, deduction mode may be impotent, since the deductive syllogism could not bring any new recognition, hence unable to solve the new problems that is not clearly targeted or uncovered by major premises; meanwhile, the difference between minor and major premises are not the same as the extensional difference between superior and inferior concepts, which fall under the two different fields of facts and norms, with many meaningful connotative difference. For example, it is stipulated in the provision 232 of the Criminal Justice of the PRC that those who commit the crime of intentional homicide should be sentenced death penalty, life imprisonment or fixed-term imprisonment for more than ten years. The juridical police who execute the death penalty obviously commit the intentional homicide, but this provision should not be applied to such a case, or the deduction mode may enforcedly reach unjust conclusion, since the major premise itself is not fair sometimes. For instance, the stipulation of enforced detention of the urban wanderers by public security personnel was abolished in July 2003. Those two premises are not formed respectively but generated from mutual adaptation. The core of the formation of legal decisions does not lie in the deduction from major premises to minor ones, but in how to cope with facts and norms for obtaining the minor and major premises, which is the most difficult matter in the use of law. Thus, it is difficult for the deduction mode to independently undertake important tasks of the use of law. How to obtain those two premises is the object of thinking in constructing a new mode.

The critics of the deduction mode first appeared in the famous conclusion of Holmes, "The life of law is not logic but always experience". Such anti-logic stand was followed and developed by the legal realism, critical jurisprudence, Toulmin, and Posner in the US and the UK. In the area of German language where the deduction mode was once popular, critics and amendments started

from the beginning of the twentieth century (such as interest jurisprudence and the movement of free law), and was further deepened until the middle period of the 20th century. For instance, Engisch held that the deduction that the deduction mode mainly relied on "had less persuasiveness in the judicial field than in the mathematic field that could be guaranteed by the guiding thought of the axiomatic method" (Engisch, 1963; Kaufmann, 1997). Larenz clearly pointed out that, "In fact, the focus of the application of law does not lie in the ultimate deduction but in the judgment of each specific factor of the factual act made prior to the deduction, namely, judging whether those specific factors are consistent with the characteristics named in the composition of an act" (Larenz/Canaris, 1995), "the weight of the deduction in the strict logical meaning in the application of law is much less than that previously supposed by people or believed by the legal professionals" (Larenz, 1991). F. Bydlinski also clearly noticed that the difficult points of the application of law do not lie in deduction, "but in the preparation of minor and major premises, and such kind of preparation lasts to the final reach of (or failure to reach) the conclusion" (Bydlinski, 1991).

Some domestic scholars have criticized the deduction mode for a long time. The latest critique by Zhu Qiongyu is quite powerful. He held that the autonomy of private law required that legal effects directly happen on the basis of legal acts, instead of coming from the legal norms as the major premise, which denied the mode that the judicial syllogism acts as the deduction of private law (Zheng, 2002). For the purposes of "breaking through" the limitation of the form of logics, more people thereby developed the logic not only focusing on the research of form but also on the content, such as substantive reasoning or dialectic reasoning, and even interpretation was regarded as reasoning. Also, it seemed that reasoning had become a term for the use of law and the applicable scope of reasoning even had been expanded to legislation and judicature."[4] (Wang, 2002; Yong, 2002; Zhang, 2000). Let alone how far they are from the reasoning in the strict meaning that reflects the necessary connection between premise and conclusion and how

[4] For example, Zhang Baosheng: *Theory and Method of Legal Reasoning*, CUPSL Press 2000; *The Logic in the Application of Law*, editor-in-chief of Yong Qi, CUPSL Press, 2002. This paper holds that deduction (reasoning) only refers to deductive conclusions, even logic only refers to deductive conclusions. If deduction refers to more than that, then the critiques of the mode of deduction by those scholars such as Holmes will be unjustifiable, or people will not know what they want to criticize. Wang Hong divides reasoning into factual, legal, and trial or judicial judgment reasoning, opening a new way of thinking, which is reasonable, in his writing: *Judicial Judgment and Legal Reasoning* (Current Affairs Press, 2002). However, he also calls the establishment of major premise, namely the process of seeking norms as legal reasoning with the suspicion of "pan- reasoning". Wang Hong himself also admitted that, "The deductive process of identifying facts is not completely the process of logical deduction, and similarly, the deductive process of seeking legal norms is not purely the process of logical deduction". (p.11)

to clear up the borderline between concepts, purely in view of the whole process of the use of law, it is hard to have a summary by reasoning, no matter how broader it is. Of course, the use of reasoning in the course of identifying the facts and seeking the norms was not denied. However, substantive reasoning could not answer the question of inevitability but provide an answer with probability. Those reasoning such as substantive reasoning is not logic in my understanding (This paper holds that logic shares the same connotation with deductive conclusion and deduction or reasoning). The way out is beyond the logic. Most of the domestic scholars were limited by the thinking of "pan-logic" and could not explore a new mode in place of the deduction mode. In German jurisprudence circle, there is still a minority who defend the deduction mode nowadays, including the most important figures such as Koch and Russmann, who attribute legal acquisition to deduction and hold that the deductive conclusion is beneficial, which is, however, not credible everywhere (Koch/Rüssmann, 1982).

Many people believe that the failure of the deduction mode originates from the binary methodology on the basis of binary division between facts and norms. Such judgment is only partially correct. The first main point of the binary methodology is that facts are facts, and norms are norms, both of which belong to different fields. The former is extrinsic, objective, physical, touchable, and measurable, where people should answer the questions of "true" or "false" and the answers thereto form knowledge. The latter is intrinsic and subjective assessment that may be experienced and perceived, where people shall answer the questions of "right" or "wrong", "fair" or "unfair" and the answers thereto are suggestions. Consequently, facts and norms could not be mutual deducted, such as compensation could not be inferred from damages, because of no necessary connection between them, while it is a factitious setup whether the compensation is needed, which is the second main point of the binary methodology. The later generations named this thought proposed by Hume "the law of Hume", whether or not and how to deduct norms from facts have almost become one of the difficult problems in all the schools of philosophy and jurisprudence after Hume (Sun, 2000). Back to the relations between the deduction mode and the binary methodology, it is no doubt that the deduction mode mainly differentiates facts and norms. But since facts and norms could not be mutually deducted, the deduction mode is neither the same as the binary methodology, nor does it answer the following question: if there are no elements of "to be" in "ought to be", and the latter is not open to the former, and vice versa, and if there is no common superior concept above them, how to make "ought to be" match "to be", and vice versa, and how to deduct facts based on norms? Frankly speaking, the basis of the deduction mode is not clear.

Nevertheless, legal decisions are always formed between facts and norms, and then, what is the basis of decisions? The normative propositions, such as damage

requires for compensation, remedy follows rights and contracts should be obeyed, have nearly become the legal axiom that are generally accepted by people, but why so? The reason is not clear. Among many efforts, more attention shall be paid to Kaufmann's claim, who placed facts and norms into a mapping relation and held that the basis of their being mutually categorized is the structurally entanglement of "ought to be" and "to be", that is, "to be" shall involve the elements of "ought to be", vice versa, whereby the gap between them might be bridged (Kaufmann, 1997). Later, he added that facts and norms together had a superior concept: the foundation of "to be" (Sein Uberhaupt), which means all the things of "being", the things "being" facts and norms. "Ought to be" is not "naught", and as a fact, it has just another physical form: it "is ought to be" (Kaufmann, 1999a). His monist methodology of unity of opposites not only negates the binary methodology (Many people don't stick to this strict binary methodology any more.) but also solves the problem of failure of mutual deduction between facts and norms that cannot be solved by the deduction mode, but he did not intend to solve such problems on behalf of the deduction mode, but seek to find a mode in substitution of the deduction mode, which is the so-called equalization mode.

The equalization mode focuses on the equalization between facts and norms and the thinking of equalization is an evolution process. Engisch talked about equalization on the basis of comparison of cases: equalizing the cases proposed to be judged with the cases that were identified to be against law according to the construction of juristic acts. He named equalization "the original deduction" (Engisch, 1963). From his point of view, this type of deduction, as equalization, existed in the minor premise of logical deduction; in other words, the comparison is between minor premises and facts and is actually the comparison of cases. Kaufmann followed Engisch on this conception but developed it to the level of legal view. Starting from his foregoing monist view of law, he held that "to be" and "ought to be" were neither uniform nor opposite to each other, but were similarly associated with each other, and law was the mapping of "to be" and "ought to be" and had the nature of similarity (Kaufmann, 1999b). This judgment formed the basis of his equalization mode. Methodologically, it is a kind of theory of similarity (Kaufmann and Hassemer, 2000). Now that law is the mapping of "to be" and "ought to be", in view of application, it is the result of processing facts and norms, i.e. the judgment. However, facts and norms are at different levels and the "raw material" of the process of specific law to judgment. If not processed, they could not be mutually categorized, as norms are "ought to be" defined abstractly and generally, while facts are "to be" disorderly and unsystematic forms. "Only after using experiences to enrich norms and using norms to enrich cases by means of mutual "match", hence explaining such matching by demonstration, may the categorization be possible", and equalization

can take place. The premise of potential equalization is the resemblance of cases and norms though they are different, namely, they are similar at the concrete point of the intention of law or the nature of matters, provided that norms and facts must have identity in the relationship of meaning" (Kaufmann and Hassemer, 2000). Since norms abstractly summarize typical or quasi facts, the equalization of facts and norms is in fact the equalization of the cases proposed to be judged with the cases that have been identified to be against law, hence discovering if the identity of meanings exists. So, it begets the nature of equalization, which is not only a determination and deduction, or an interpretation, but also an act of active construction. The finding of law or the legal acquisition is a kind of analogy between facts and norms, which has, therefore, become the main approach to the finding of law or the legal acquisition.

Apparently, Kaufman's equalization mode takes analogy as the core of equalization. Furthermore, the idea of analogy also lies at a core position in his jurisprudence philosophy.[5] Regarding equalization, some scholars held different opinions from Kaufmann. For example, Fikenstscher refused to accept the equalization theory and held that such theory has the defects of indescribability in logic, impossibility of carrying out syllogistic deduction and sole provision of contingent decisions (Fikentscher, 1977). Kaufmann defended that he never negated the deduction of syllogism, and that cases and norms shall have the force of deduction prior to deduction; and thus for its realization, equalization is needed (Kaufmann, 1997). Kaufmann's equalization mode is on the basis of the binary theory of the use of law that divides the use of law into the finding of law (the application of law) as the main body, and then the direct use. However, according to the above definition of the finding of law, analogy is only the main approach of the finding of law; therefore, his equalization mode with the core of analogy could only be used in the finding of law, which may not cover all the use of law, that is, the equalization mode is not equal to the mode of the formation of decisions.

Of course, the equalization mode or other theories only object to the over-evaluation of deduction that deduction is everything for the use of law, but do not deny deduction itself. On the contrary, those theories contain deduction since it is the necessary and ultimate stage of the formation of decisions, and there is necessary connection between decisions and premises and hence decisions have the correctness and logical strength that is beyond any negation. Some scholars, such as Pawlowski, have correctly seen that in the "simple cases" of clear

[5] In his academic autobiography—*The Forty-five-year Course of Jurisphilosophy*, he takes the book *Analogy and "the Nature of the Matters"* which concentrates on interpreting the idea of analogy as a milestone of the development of his jurisphilosophy. This article is on R. Alexy, R. Dreier u. U. Neumann (Hrsg.), Archiv für Rechts - und Sozialphilosophie, Beiheft 44. 1991, S. 144–162.

matching between facts and norms, conclusions could be directly inferred from provisions deductively (Pawlowski, 1981). It leaves excuses for the existence of the deduction mode, which shall not be fully discarded. We cannot judge only on the basis of deduction, because equalization, which is time consuming, or some other processes need to be performed before deduction. Such processes are conducted on the basis of the construction of minor and major premises with many activities and methods involved.

On the basis of such understanding and the theories of forerunners, the author summarizes the mode of formation of decisions in the use of law into two kinds: the deduction mode with extremely narrow scope of use, and the equalization mode with equalization before deduction adopted by the majority of the use of law. The author understands equalization in a broader sense than Kaufmann's equalization with the core of analogy, including the contents and methods such as supposed-proving, summarization, interpretation and demonstration besides analogy. This might make readers confused to some extent. But the term of equalization will serve this paper's purpose before a more appropriate expression is available.

In addition, while people attack the deduction mode, the circle of legal practice in China does not have sufficient understanding in the functions and roles of deduction, where the law enforcement officials and judiciaries prefer to consider social effects, moral sense and other specific needs. The court judgment on the case of estate dispute between Zhang Xueying and Jiang Lunfang in 2001 in Luzhou, Sichuan was representative, which denied the legality of the act of testament owing to the immorality of cohabitation.[6] In the practice of law in China but not in legal theory, deduction is actually worth being promoted.

3 Survey on general path and methods

The use of law is mainly the finding of law, where the formation of legal decisions in the finding of law has a process of equalization at first, and equalization solves the problem of the matching between minor and major premises in the legal decisions. Same as the application of law, the finding of law also relates to the identification of the factual act and seeking normative standards (the composition of acts). Equalization depends on the different relations between facts and norms.

German scholars Schneider and Schroth have summarized the related discussions in German legal circle, one of which is the normative judgment theory (2002). Such theory held that, legal decisions witnessed a linear and formal

[6] See Daily News of the Space of Jurisprudence: *The First Completed Case of Social Morality*, 2001-11-08, http://lawsky.org

development stage, and hence various forms of schemes were created with unfixed number of steps in order to reduce the complexity in the course of decisions and then achieve the purpose of acquiring correct decisions. The pure by-stage schemes have the following steps.

The verification of the issues→search for information→search for option solutions→assessment of the optional solutions (assessment of the possibility of answers)→the selection of the implementing strategy→execution. The authors thereof made different changes and modification. For example, Kilian split the process of judgment into the following phases: the raising of the issues→the target→the collection of optional solutions→the collection of information→ the selection of optional solutions→the detailed interpretation of optional solutions→the learning process.

In principle, the normative judgment theory starts from the scheme of "if—then", namely, from the outlines of conditional decisions. Luhmann held that such outline is functional and decisive for the legal system, since only this kind of outline provides necessary functions of reduction and simplification so as to enable the features of complexity of decisions to adapt to the lower degree of complexity of the legal system, which could be regarded as the advantages of such tendency. On the other hand, people have to admit the existence of creative decisions against orthodoxy. As a result, any scheme of linear phases could not solve the problems on the intentionality of decisions. From the experience of practical operation, legal professionals form a legal decision usually by following a general thinking process, since thinking always has a beginning and an end, which unnecessarily witnesses a mechanic pipeline operation and linear development, but goes between facts and norms in considering the different relations between facts and norms. Among them, various factors shall be considered that actually influence decisions, and the methods such as pre-understanding, understanding and communication will be used by combining with the results and the purposes of decisions. Legal decisions are a particular kind of decisions, the operation of its process is much more complex than that of the supposed theory. But the existence of the framework process schemes of legal decisions is a necessity, which, on the one hand, plays the role of reducing the complexity of the process of decisions, and on the other hand, constructs a safe place for the coming of such thinking as empirical and hermeneutical thinking.

The following scheme only represents the general path of a rough and simplified equalization, every step of which, however, is not isolated, and it is possible to ascertain facts and seek normative standards only through equalization that plays the role of connecting facts with norms. Equalization is the mutual consideration of facts and norms and a repeated review between them (Engisch, 1963). Specifically, facts shall be generalized and norms shall be concreted. Because facts are always represented as individual cases, the generalization

of facts upgrades individual cases to norms, hence checking to see whether the factors prescribed for the formation of acts in norms and the judgment maker always selects facts by associating with norms during the description of facts and excludes those facts that are not linked with norms. However, norms are always represented as general, where the concretion of norms means to extend norms to cases for checking whether the norms can meet the requirements of such cases, and even new norms may be created when the existing norms could not or not completely match facts. Or, by considering the interpretation of cases, concrete norms on cases will be formed from general norms, and facts are formed from cases by considering the construction of norms. The repeated review between facts and norms is not carried out on a plane level, instead, it is a spiral development: the composition of acts and facts are not mutual determined at the same level of annotation at any one time, but at many times and other "higher" levels respectively (Hassemer, 1968). Equalization mode A illuminates such a mutually related process (Fig. 1).

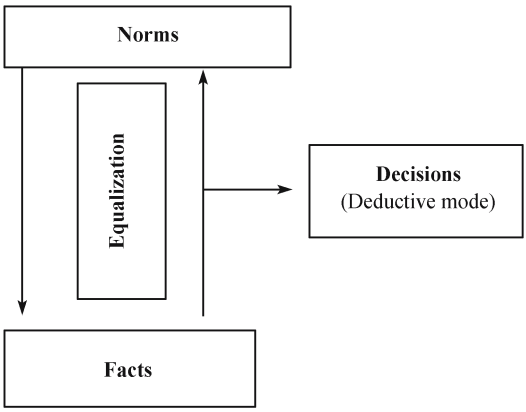

Fig. 1 Equalization mode A

The process of equalization meantime is the course to make facts and norms increasingly closer and tighter. Zeppeliu, a German scholar, has made detailed description of it, in which he mentioned that the repeated review between facts and norms should constantly exclude unrelated facts, the possibility of interpretation and norms: at the beginning there is always a rough combination with consideration on a big scope of norms worth examination, selection of interpretation and actual circumstances. And then, the possible major premise resorted by the judge to make judgment will be increasingly narrowed: first, some norms in discretion are regarded as "not related", and the proposition and ascertainment of the interpretation of acts will be considered inside the norms

under close selection and the selection shall be made through interpretation and discretional consideration. At the same time, "pertinent things" (namely, things that may be deducted according to the interpreted norms) shall be selected from a great deal of factual circumstances. There also exists relevance in all those steps. Therefore, on the one hand, concrete factual circumstances also determine the direction of the interpretation of norms; and on the other hand, the interpreted norms play the role of standard in what factual circumstances are finally determined as relevant (Zippelius, 2003). Finally, decisions are formed.

Equalization mode B, as taken from a Swiss scholar Mastronardi, better represents such approaching and closing process (Fig. 2) (Mastronardi, 2001).

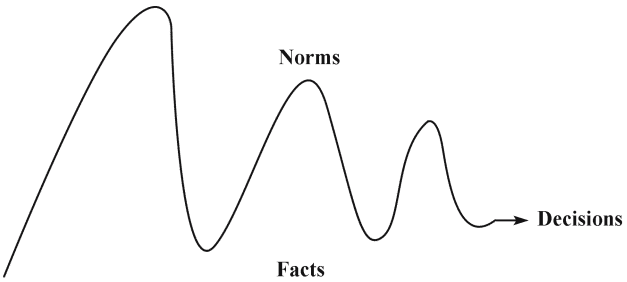

Fig. 2 Equalization mode B

The first of the two schemes of the equalization mode reflects the mutually mapping relation between facts and norms in the formation of legal decisions, while the second reflects the constantly approaching process between facts and norms in the formation of legal decisions, which is a mutually supplementary and converging complete equalization mode. Mastronardi better revealed this complete mode and split it into eight phases (Mastronardi, 2001).

1. The legal professional starts from facts and judges the facts on the basis of their pre-understanding;

2. His pre-understanding tells him which kind of characteristics of the facts is probably the key to the legal decisions;

3. He seeks the pertinent normative texts (statutory law and legal decisions) in the legal system for such characteristics of those facts;

4. Subsequently, the interpretation of normative texts is generated. Such interpretation shall place texts and facts into a correct relationship;

5. To such end, the legal professional determines first of all whether individual cases fall into the field of normative texts, and if so, he will endeavor to understand the normative representation of what texts is appropriate for the sphere of matters and individual cases: determining the normative outline or the aspect of "ought to be" of the answers to individual cases;

6. Starting from the normative outline, he ultimately selects the factors suitable for the use of norms from the facts: determining the factual aspects of the answers to individual cases in the normative field;

7. Now it is time to tackle the normative and factual aspects of individual cases, which can be compared. Normative representation is set for individual cases, and the views of facts should be reduced to view of the norms; and

8. Legal decisions are the outcome of such comparison: judging the factual act from the angle of norms.

The respective functions of those eight phases can be summarized as follows: phases 1 and 2 are the preparation for the construction of minor premise; phases 3 and 4 are the preparation for the construction of major premise; phases 5, 6, and 7 are the ultimate formation of minor and major premises on the basis of the comparison between facts and norms; and phase 8 acts conclusion.

During equalization, the formation of legal decisions goes through many phases, where various methods shall be applied individually or interactively by considering the relations between different facts and norms, therefore, the author finally summarizes the foregoing modes and methods and the relations between various methods:

During the formation of legal decisions, the mode of legal decisions plays the role of determining the vantage point of decision making and what kind of questions should be proposed, how to answer the questions and the methods of answering such questions. Starting from the binary view of law and methodology, the deduction mode holds that the minor and major premises of decisions are respectively formed and fixed, with a view on the deductive process in form between the minor and major premises of the use of law, regardless of the content thereof, and the "interpretation + deduction" forms the method of the deduction mode for answering the questions. On the other hand, the equalization mode is established in the monistic view of law and methodology, with a view to construct the minor and major premises of decisions, which holds that the construction is a cyclical and repeated process between facts and norms. During this process, supposed evidence, summarization, analogy and deduction act as the tools for the construction of minor and major premises, while interpretation and annotation occur during the process of supposed evidence, summarization, analogy and deduction, covering the two aspects of facts and law. Also, during interpretation and annotation, many other factors shall also be considered besides the traditional four factors, such as the measurement of results, the stability of law, the unity of law, the sense of right or wrong, impartiality and the capability for practice, which are always carried in a circle; and the methods of limitation and reduction, and expansion of teleology, amendment of law, fair violation of law, and supplement of law, etc., are designated to acquire the pertinent provisions of law. The finding of law and the application of law as a whole is also a process of legal demonstration, which aims at finding the acceptability and correctness of the

conclusions at different stages, and the possible results of such demonstration are: confirmation, failure to confirm, and falsification. Only after the formation of minor and major premises through the different activities of equalization can the necessary conclusion of decisions be obtained through deduction.

If viewed from the experiences in the formation of legal decisions, many other factors actually affect the decisions. For instance, in view of judicial sociology, the status at birth, personality, age, and social attitudes of the judges and the influence of social environment (colleagues and society) on the judges, features of the parties such as the employees (initiatives, knowledge and experiences in contacting with the court), the form of judgment (functional, free and oral), the organization form in the course of judgment, may affect the formation of decisions. Furthermore, the factors such as information, authority, public feelings and public opinions are related with the results of decisions (Kaufmann and Hassemer, 2002). Therefore, the question needs to be answered is how the judgment makers treat different problems and circumstances, how they understand the multiplicity of each question, and how they describe the multiplicity in an appropriate way. All the above are unsettled questions worthy of special study.

There are no precise and purely rational objects, the same are the affairs legal professionals handle. However, this does not mean that people are not allowed to do precise and rational thinking of these affairs. As has been stated by Hassemer, the judge of German Federal Constitutional court, one should do "rational thinking of the matters not purely rational" (Kaufmann, 1997; Hassemer, 1973). This can be considered as the meaning of the discussion and the theoretical orientation of the mode of the formation of legal decisions. Certainly, any mode has defects in its rigidity. Nonetheless, the anti-mode and anti-method attitude of "everything is ok" may always lead to an arbitrary decision, even approaching "Nothing works". Therefore, our mode should leave certain leeway between facts and norms and the equalization mode can make the judgment maker integrate facts and norms at the time of hesitation and expectation and communicate "to be" with "ought to be".

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