APPLICATION AND FINDING OF LAW

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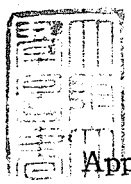

I

Application of law or finding of it has often been talked about until now. These two questions are indeed very important for men of legal profession. It may be said that their chief activity is to apply and find law. This applies not only to men of legal profession in the judicial field, such as judges and lawyers, but also under the doctrine of rule of law to officers in the administrative field, at least about binding administrative measures. They always perform application and finding of law at the management of concrete cases. Now, what meaning have application of law and finding of it in connection with the settlements of civil disputes ? I should like to think over this question, limiting to civil cases, as a part of the study about the logic of settling civil disputes or that of decision. It will be possible and significant to take this question from the standpoint of legal science of general proceedings, which undertakes the basis common to both civil and criminal suits; but I do not consider the latter, because there is restraint by the doctrine of nulla poena sine lege about criminal case, and also because it is not the subject of my special study.

II

First of all, what meaning application and finding of law have been thought to have so far, concerning the settlements of civil disputes, may be answered as follows. The settlements of civil disputes which are mentioned here involve both compulsory settlement by decision and voluntary one by compromise agreements, conciliation and award. Finding of law is chiefly discussed about the latter in the meaning that they are not settlements by "law", on the contrary application of law is discussed about the former.

There is no need of mentioning here that the logic of syllo-

gism has been considered about decision, above all, judgement, and that severe criticism has been given for such thought especially from the side of "freie Reehtswissenschaft". Now, legal syllogism has the following structure. A code is considered a collection of legal rules, and a legal rule is consisted of legal condition and legal effect, and further legal condition can be analysed into legal facts. It is what our righteousness requires that at the settlements of concrete disputes, similar cases must be settled similarly. The guarantee of equal protection of law, that is "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. (the Constitution: art. 14, par. 1) and the guarantee of due process of law (the Constitution: art. 31) are the two great points of judicature of the democratic society. Therefore a legal rule which is a major premise of legal syllogism cannot but naturally appear as an abstract hypothetic proposition as of "If there are such and such facts, such and such effects will be born". At the same time this assures predictability of legal life, in other words it can be predicted beforehand how a case should be settled, if it took place, and also this in good for the safety of legal dealings and the prevention of legal disputes. Application of law is to apply a legal rule as a major premise to acknowledged fact at the settlement of a concrete case. If we apply a legal rule which is a major premises, to these facts of minor premises the conclusion which is got from legal syllogism as its logically inevitable result is namely decision, especially judgement. Now a civil dispute is a quarrel about the existence or non-existence of legal right and duty, which are given as legal effects in the construction of legal rule. But as Tuhr said, "Niemand hat je ein Recht gesehen", a dispute about the existence or non-existence of legal right and duty which is the chief subject of civil suits reduces to a dispute about the existence or non-existence of legal facts composing legal conditions, in which the legal right and duty in dispute are contained as legal effects. Apart from admissed facts, about the existence or non-existences of disputed facts, minutely speaking, the truth of factual allegations, the court of justice must judge it by free conviction considering the whole purport of oral arguments, and the results by taking evidence. This is what

is called a free conviction, and a fact acknowledged by it, becomes a minor premise in legal syllogism. On other words, the existence or non-existence of legal right and duty can not be recognized by the actions of our five senses, but after all it should be recognized only through legal facts, judging from the structure of legal rule. All legal facts are the facts to be recognized by our five senses, although there may be the difference of degree about difficulty of recognition. (bona fides, mala fides and fraudulent will.) Accordingly in a concrete case, all of the existence of disputed facts can be, and cannot but be acknowledged by evidences.

Now it will be a question if decision is limited to such judging by recognition or reasoning, or if it contains the action of will beside judging. Apart from that, if the settlement of a concrete case were given by the use of legal syllogism, a judges' duty would be very simple like an automatic machine of sale, and at the most, would only be a little difficult at the acknowledgement of facts; for if he only acknowledged facts, the conclusion would be given in logical necessity, as it were mechanically. But is the decision really such a thing? Montesquieu said surely that a judge is " la bouche qui prononce les paroles de la loi, " (L'esprit de loi,) and the word " decision " is "Rechtsprechung " in German, which means " to tell the law ", or " to speak in the court. ") The former was spoken, however, for the purpose of assurance of fundametal human rights against arbitrary decisions in the Middle Ages, and the latter would have been born with the background of finding of law by court assembly (" dinggenossenschaftliche Rechtsfindung ") in the Old German Age. According to changes of times the points may differ variously, but there must be something beyond the changes concerning the settlement of civil disputes. It is what function decision has; and from this standpoint, decision is required to be coccretely proper, as it is the settlement of concrete disputes. What is concrete propriety of decission is a difficult question which cannot be discussed briefly. Supposing decision must be concretely proper, whether it can be attained, or can be assured to be attained by above mentioned legal syllogism is not only questionable but also impossible. It is because legal rule and fact which receives application of it are different in dimension, and are under the contrary fates. If I say so, I do

not mean that as legal rule is not a law of nature but a law of worth, we cannot help permiting violation of law. What I want to say is that legal rule generally static under written law,on the contrary, fact is dynamic. Minutely speaking, it is as follows. Law is an outward and compulsory norm of human society, of which order it keeps as well as the standards of religion, morality and customs, accompanying the fact that men are destined to keep social life. Bnt under written law, legal rules are made generally as mens' conscious works called statutes; and since a code is formed and takes effect through legal process, it is only a lifeless thing written on the paper in itself. On the contrary, a fact which receives application of legal rule is a part of continually changing social life. Therefore we cannot help saying it is impossible for us to settle a living thing with a lifeless thing. Of course, legislators may sometimes make mistakes as they are mortal. But even if they formed a complete code as a legislation, expecting every cisputes which might happen in future, a case which they could not imagine might take place, or a legal rule which could give concletely proper settlement at first, might become unable to fulfil its function as time goes by. Because social life is always developping without stopping for a moment. Then, on the one hand statute cannot entirely deny the effects of customary law, although there may be the difference of degree, in which it ackowledges them, on the other hand the interpretation of legal rule becomes an important question in order to make a decision concretely proper. As for as we use legal syllogism, for the purpose of altering a decision of its conclusion, if we only change legal rules of major premises or facts of minor premises we may get a different conclusion in logical necessity, comparing with the cases when we use no such altering. Another standard is necessary in order to judge if the conclussion got by applying legal rules without interpretting them will be concretely proper as the settlement a case; and after all it will be judges' view of life. In case the conclusion is decided not to be concretely proper, judges may get a concretely proper decision as they expect, if they interpret legal rules as major premises by enlarging, restrictive or contrary interpretations. Of course, they do not choose a concretely proper decision for the acknowledged facts among several

conclusions. In the presence of a concrete case, judges will get its settlement without through logical process of legal syllogism, or as an extreme case, they will get it intuitively before they acknowledge facts; and they will interpret legal rules according this settlement, and at the same time will acknowledge facts connecting them with legal rules of major premises. Interpretation of law is a technic to draw a concretely proper decision out of logic of syllogism, so that it does not mean such an explanatory provision teaching spirit at the bottom of law as the Civil Code: Art. 1b, par. 2— "This law shall be interpreted with principle of individual dignity and the essential equality of the sexes." Interpretation of law is variously discussed, for instance research after legislators' will, or research for the will of law, still more grammatical interpretation or logical interpretation. In short, its principal object is to get concretely proper decision as the settlement of civil disputes at each time and each place. Accordingly a legal rule should be interpreted in the lapse of history, moreover limitedness and unlimitedness of interpretation of law is discussed, and this question will be related with such problems as completeness and defect of law. It is also connected with the question of finding of law.

Because a code is mens' conscious work, there may be some defects from the beginning of its legislation, which were not known by legislators, or even a complete code at the time of legislation may bring forth defects with changes of society. At any rate we have to recognize that a code accompanies some defects. Now it may be said that law is complete in itself, and what is defective is only a code. But judges cannot refuse the decision of civil cases for the reason of defects of law, so that if there is any defect in a code they must find natually a legal rule as the standard for settling the dispute. Judges must find legal rule not only in the case of defect of a code but also always about the settlement of disputes in the field of law of obligations because in present private law, especially in such field, the Civil Code itself acknowledges the principle of freedom of contract to a large extent, and leaves mutual legal relations among individuals to the agreement of their mutual wills. It will be also a question whether substantial law is the standard of conduct or that of decision but it is no doubt that the standard of conduct has at

the same time a side of the standard of decision at the settlement of disputes. When I say finding of law here, I mean the standard of decision not that of conduct. Of course, judges cannot find legal rules without relation to facts. When they use the discovered legal rule as the standard of the settlement of a dispute, under the prerent code of civil procedure, they should take reasoning method of legal syllogism, in the form of ordering clause and statements of the grounds of decision, just as they do in the case of using written law as the standard. As it were, they take the method of application of law, applying the discovered legal rule to acknowledged facts as a major premise. The reason why judges should take such a method is the subject which Ehrlich tried to make clear especially in his "Juristische Logik". Apart from that, when decision has no ground of it or there are some inconsistency among its grounds, needless to say, the ground of revision is acknowledged. Now violation of law by decision which generally forms ground of revision is mentioned as "No application or unproper application of legal rule shall be violation of law." (old Code of Civil Procedure: Art. 435.) The so-called legal rule should be considered to include not only legal rules in written law, customary law and case-law, but also rules which are found by judges for the settlement of concrete cases. At the same time this will have the meaning of establishing the system of "decision by law," as assurance of fundamental human rights against arbitrary decision in the Middle Ages. At any rate, since judges are not permitted to reject decision about civil cases, they should keep the following rule. "In the absence of an applicable written law for decision of a civil case, the judge shall decide according to custom, and in default thereof by infering reason and justice" as is wonderfully said in No. 103 Law (Directions of Administration of Justice): Art. 3, which was proclaimed by the Great Council of State (Dajōgwan) on June 8th in 1875. The so-called inference of reason and justice is nothing but finding of law in question. In short its principle is as provided in Swiss Civil Code: Art. 1, "The law governs all cases coming within the letter or the spirit of any of its provisions. In the absence of an applicable provision of law, the judge shall decide according to customary law, and in default thereof according to the rules which he would lay down

if he had to act as legislator. He shall be guided by solutions sanctioned by legal doctrine and case-law."

The question of source of law is taken up in the meaning of acknowledging material of law. Legal right and duty are laws made concrete according to concrete cases, and moreover they are worth their names for the first time when their existence is acknowledged by the final judgement in the court of justice. After all what is called the question of source of law should be said the problem concerning settlement of disputes, especially standard of decision. It may be considered that such standard of settling disputes is law, minutely speaking legal rule or standard of decision forming a major premise of legal syllogism. As the legal rules in such meaning, there are case-law, reason and justice besides written law and customary law. It is a difficult question what reason and justice is. In short it is reason of society which is necessarily drawn out of such human destiny as human life does not exist apart from society, and which rules the time and the place according to function of law that is the standard giving external and forcible order to social life. Besides the question whether legal doctrine is also recognized as source of law is answered by many negative opinions. But it is no doubt that legal doctrine is taken as the standard of decision as is provided in Swiss Civil Code; Art. 1. Jurist-law includes what may be called law of doctrine besides case-law or judge-made law. At present when written law has developped to a high degree, legal doctrine has meaning only about interpretation of written law; but there were times when it had an important meaning as source of law and fulfiled its function, as we see in responsa prudentium[1] in Roman law or Aktensendung[2] for universities in German "allgemeines Recht".

III

According to legal syllogism, there are many legal rules forming major premises, such as written law, customary law, case-law and reason-law. If these legal rules are applied to acknowledged facts

1) Response of jurists.
2) Asking of opinion by sending records.

or admissed facts which are minor premises, the conclusion is given in logical necessity; so that legal syllogism is nothing but a deductive method. (In concrete cases, there are usually acknowledged facts and admissed one in the facts to be applied to legal facts which make up a legal condition.) The question is what application of law means essentially. As I said before, legal rule forming a major premise in legal syllogism and fact forming a minor premise in it are different in dimension, for one is static and the other is dynamic. Therefore even if settlement of disputes, especially decision has to take such syllogism formally, we should reflect if everything is settled by syllogism of a mere form of thought of logic. Actual social life is too complicated to be given order by legal rules. If I do not refer to doctrines of historical jurisprudence, the question whether law is made or born is an important problem relating to the basis of law. There are enough reasons for the requirement of reasoning form of legal syllogism about settlement of civil disputes, especially decision. But what shows great characteristic against Continental law, especially against this deductive method under the principle of written law is inductive method under the principle of unwritten law as in Anglo-American law. In common law a case has binding force as precedent, which is the law found by a judge for the purpose of settling a concrete case; so that common law is nothing but so-called judge-made law. On earth, is law given, or is it born? As for the primitive form of law there were times when it was thought to be given by god, which consideration was for the sake of securing authority of decision namely of law. The form of decision responding it is calismatic finding of law ("kalismatische Rechtsfindung"), that is the decision which seeks its authority for the outward and super-human power. Men were born, lived and died in those primitive times too, so that from their fatal fact that they form society, laws were naturally born as things to give order to it. In other words, law is born in social life which is ruled by it and the necessity of social life brings forth law. Now a civil dispute is a section of social life. Therefore the law for settling disputes naturally exists as a department of law. Looking back upon history of decision we find that present written law has come into existence since the age of codification

according to the development of modern states and that there was only decision in former times. Minutely speaking, when villagers were going to settle a concrete affair, even though they seeked the standard for super-human authority of an Oracle, still they found the settlement by themselves. When a similar case took place afterwards, they settled it according to the settlement of the former case which had been handed down by word of month among old villagers. They did so according to their feeling of justice that similar cases should be settled similarly. (The same case does not occur twice.) The more such cases were similarly settled one after another, the more the standard assumed quality of rule, losing concreteness of concrete affairs. So that these rules were handed down among some villagers, and were brought up whenever an affair took place. They were written down and editted according to discovery of letters and invention of printing, and further they became to have the form of code which is seen in the countries of written-law, according to the development of modern states. Therefore written law is nothing but congelation of precedents of decision. It is significant that the first books of law, such as Twelve Tables, Lex Salica and some others were all the editions of precedents of decision. At the same time most of the laws written in these books of law are modes of procedure. This also tells that decision precedes law both in time and in logic, in opposition to the principle of present written law, just as Roman law is said to have no system of legal right, but have only the system of Actio. Now after the age of calismatic finding of law, finding of law by court-assembly ("dinggenossenschaftliche Rechtsfindung") is recognized, which form is seen about Roman law, but is found in purer form about German law. Centumviri and decemviri in Roman law were the courts consisted of men who were elected from common people. In times of formulary procedure too, in order to receive the judex's judgement, the praetor's formula was necessary previous to it, but the judex himself was also elected from people. The necessity of formula is just the same with that of a writ in equity. Further in German law, at first all villagers having a certain qualification had a assembly ("Ding"), and settled disputes with administrative business at the same time. As society became complicated on the

one hand, and sovereignty was enlarged on the other, law-advisors (Rachineburgi or Sacebarone) were elected from people, and also experts of law (men who learned Roman law going abroad to the Bologna University and so on in Italy) were appointed law-speakers (Richter) by the king. The court which was composed of those law-advisors (Urteiler) and law-speakers became to settle disputes. But settlement of dispute itself was entirely the question of the whole village. So that even in this age, although villagers having a certain qualification did not assume the duty of co-operating in the administration of justice ("Dingpflicht") unlike in the previous age, still they could attend the meeting ("Umstand") and make contrary proposals of decision against law-advisors' proposal of decision. If they did not come to agreement about the question which proposal of decision should be taken out of more than two, they decided it by a duel in the end. At any rate, in order to form a decision and give effect to it as the settlement of a civil dispute, it was necessary for the law-speaker to take up the proposal of decision and proclaim it the decision ("Rechtsprechen".) Nedless to say, the system of appeal as seen at present was not recognized under such construction. The contrary proposal of decision fulfiled function of appeal. I shall add that there was Hundred-Court about German law too. The Anglo-Saxons belonging to the German race ruled then Celts and then the Normans that were also a part of the German race conquered the former, leaded by William. Accordingly the system of "dinggenossenschaftliche Rechtsfindung" of German law which had above-mentioned construction was brought to Englnad across the Straits of Dover, where it developped in comparatively pure form being separated by the Straits, judging from the degree of development of the means of communication at that time. Common law is nothing but its product. There is Brunners' minute study about the origin of jury system. Can we not say that the system of "dinggenossenschaftliche Rechtsfindung" in German law developped into jury system in England, and brought forth "Schöffen" system in Germany? At any rate under "dinggenossenschaftliche Rechtsfindung" the standard was always found by people or law-advisors who were elected from people, in order to settle concrete cases, and law-speakers' proclamation of law, namely decision only

ratified, as it were, the settlement by discovered legal rules. Such a way of settling disputes is inductive, and not deductive as in present legal syllogism. The binding force of precedent in common law should be understood under the background of such history. In this meaning judicial legislation is said in Anglo-American law. It is necessary for us to remember that discovered laws are always living laws.

Now application means comparison; and in the case of application of law, law and acknowledged fact is compared. But comparison is only possible among things of the same dimension, that is on the same plane. If we regard law as a given thing, we cannot compare such static law and changeful dynamic social life, because they are different in dimension. The application of the former to the latter is impossible by nature. Thus said Sauer, and discussed as follows. On the one hand abstract law is made concrete in some degree according to concrete affairs, on the other in connection with that, concrete social facts are made abstract in some degree, in the meaning that the facts having legal meanings are taken up, and the facts without such meaning are cast aside. As it were, when materializing of things above and abstracting of things below concur on a plane, for the first time they can be compared, and application of law is done. The law to be applied at the spot of the concurrence of both is not abstract law itself before the application, but is materialized in some degree according to concrete affairs. Sauer called this standard "konkrete Gestaltungsnorm" according to his view of suit that it is "Sachgestaltung." ("Juristische Methodenlehre") Ehrlich also spoke of "konkrete Entscheidungsnorm" only once in his "Grundlegung der Soziologie des Rechts." According to his opinion that law is born from real life of society, so that there is no difference between so-called questions of law and questions of fact, his "konkrete Entscheidungsnorm" is namely Sauer's "konkrete Gestaltungsnorm" and both of them are the very living laws which form the standard to settle concrete cases. According to the doctrine of stare decisis in common law, it is about ratio decidendei that a case has binding force as a law, and obiter dictum which is related by the judge in no connection with the settlement of the affair has not such power. The ratio decidendei is nothing but Ehrlich's "konkrete Entscheidungsnorm" and Sauer's

"konkrete Gestaltungsnorm, and each of them is living law itself. Therefore no matter whether the form of legal syllogism is taken or not, and without regard to the principle of written law or that of unwritten law, the standard of settling disputes is always living law. The organs of settling disputes, such as judges, consiliators and arbitrators always have to find living laws, and usually they are finding them in order to settle disputes. I suppose finding of law has been thought as follows until now. Though judges take formally the form of application of law by syllogism, in case there is no written law, customary law, or case-law as a major premise, they must for the first time find a law to be the standard for settling the dispute. But it is not true, and I must say application of law is namely finding of law. In other words, not only when there is no applicable law in written law, customary law and case-law, but also when the laws included in these source of law are used, they are not always applied to facts as they are. The settlement of dispute would be impossible if it were not for finding of living laws in the meaning as Sauer thought, that for the purpose of settling concrete affairs, according to them, legal rules are made concrete in some degree. The living law should be born and taken out of facts of disputes. At first it is useful as the standard to settle the concrete case, but afterwards it will become that for settling later affairs as a part of case-law. By and by it is made more abstract, as it were, crystallized and it may happen to be taken into written law. Thus a new living law is always found through the same course.

If we think in this way, we cannot but say that application of law under the principle of written law and application of law under the principle of unwritten law have not such different characters as are thought, but they are just the same in essence as settlement of civil disputes. The doctrine of stare decisis seems to be something new and unfamiliar for us who are accustomed to the way of thougnt of Continental law. But we too are usually finding living laws as ratio decidendei, although under written law, in order to settle civil disputes. Of course, capricious settlement cannot be permitted about the settlement by compromise agreement, conciliation and award, though it is not the settlement by law, and finding of living law is required for stronger reason

comparing with the case under written legal rule. The difference between compulsory settlement by decision and voluntary settlement by these is only whether restriction is or is not about finding of living law. In voluntary settlement which is not restrained by written law, finding of living law is difficult all the more.

IV

The law which gives order to our present society is civil law according to it being the civil society. But international law and labour law are developping, which are different from civil law in dimension, and accordingly accompany the sence different from that of civil law. Let alone those, since the society in which we live is the civil one, and the law ruling it is civil law, officers of the court, especially judges must be thoroughly conscious that they are organs of settling disputes in the civil society, even though present court is kept by expenses of the fisc as judicial organs of state and judges forming it are made national public officers, and that of special work. Present judges possess, as it were, both functions of a law-advisor and a law-speaker who were distinguished concretely about German law. This circumstances is the same about conciliators and arbitrators who deal with voluntary settlement by compromise agreement, conciliation and award. If the judges' ignorance of the world ("Weltfremdheit") or his fossilization should happen, it is because he loses conciousness that he is the organs of settling disputes in the civil society. Thus the code of civil procedure is also the law for settling disputes in the civil society. For instance, it is unreasonable by nature to make use of provisional orders ("einstweilige Verfuegungen") which are formed for disputes in the civil society, in order to settle disputes in the labour society which is different from civil one in dimension, and should develop rather denying it. For this purpose a system as of labour injunction should be made. At present acknowledgment of fact is left to free conviction of the court, and moreover "All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws." (the Constitution: Art. 76, par. 3.) Free conviction means to set judges free from restraint by law

concerning acknowledgment of fact, contrarily to the principle of legal evidence, and indipendence of jurisdiction means to free them from outward oppression concerning the use of jurisdiction; and these two are very reasonable in themselves. But as free conviction and judges' conscience are mentioned, their duties become all the more important and great. Especially in the present world where right and left are strongly opposed to each other, judges will have great hardship in order to keep their conscience fair. We ought to suppose how difficult is to be worth a good judge.

Now a civil dispute is the opposition of interests. As far as both of the parties concerned to the dispute are different in their standpoints in their consciousness, the dimensions or the planes where they stand upon are different. So that in order to settle the dispute, it is necessary for a judge to stand upon higher dimension or plane, denying the standpoints of both sides. The circumstances are the same about non-judicial agreements. When a dispute is settled by the non-judicial agreement, the parties concerned to the dispute deny in their consciousness their standpoints until then, and stand upon the higher and common standpoint. About compulsory settlement and voluntary one of disputes too, particularly about the latter, judges, conciliators and arbitrators who deal in the settlement should mind this point. Of course, where the principle of pleading is taken, the judge himself should not voluntarily bring both parties concerned to such high dimension by his authority. But as for decision when a suit is "formed" to such a degree, it becomes ripe for decision ("spruchreif") for the first time. Even if I do not refer to "amicable settlement" which is recognized by the Code of Procedure of Personal Suit, we ought not to overlook that lapse of time performs a great operation on this point especially in voluntary settlement, as it is called "the tutelar god of time." This question may belong to the question of legal psychology, but I should like to point ont that this point also has a very important meaning in order to get concretely proper settlement, if I say from the point of consciousness of the parties concerned to the dispute.

I have explained frankly what I think at present about the question of application and finding of law. In short, the conclusion

is that at the settlement of civil disputes, finding of law is always done under the mask of application of law. A statute has the mission to make present social life approach to the ideal society step by step. So that even if I claim such a conclusion, I never mean that we should ignore the ideal of law, for instance, that we should take up as living law, rules among good-for-nothings as they are. But I want to emphasize that when we find living law according to concrete cases, we are given concretely proper settlement for the first time. Creative function of decision lies in true meaning upon the point of finding of living law. For the sake of this, the thought of social engineering which was said by Pound may be necessary. It is reasonable that the studies of scholars who belong to "freie Rechtswissenschaft," "Interessen-jurisprudenz" and sociology of law have decision as their chief point. If I mention their names, there are "Recherche libre scientifique" by Jény, "Entscheidungsnorm" by Isay, "Fallrecht" by Heck, "Richterrecht" by Danz, "Theory of Judicial Decisions" by Pound, "Nature of Judicial Process" by Cardozo, and besides Sauer's "konkrete Gestalungsnorm" and Ehrlich's "konkrete Entscheidungsnorm" which I mentioned above.

I add in the end that on arranging my thought, I was greatly enlightened by Ehrlich's "Grundlegung der Soziologie des Rechts" and Weber's "Rechtssoziologie," though I did not quote them in each case.