JUDGE AS LAW – DECLARER?

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I Codification argument and counterargument

The legal phenomena and thinking during the latter half of nineteenth century in America are significant, especially for understanding the present situation. This period itself includes so many aspects of problems, for instance the rapid progress of social change mixed with the capitalistic development in America and so on. In the field of law, there appeared a cry for codification of the common law, perhaps and partly in corresponding with such a changing situation on the one hand, and partly by questioning of legitimacy of judicial (law making) power in a democratic state.[1] Thus, D.D.Field put it in the speech at Albany Law School, 1885. "The present condition of our law is anomalous. For the main part, it is derived from the Common Law of England, but so mixed and belended with other rules and usages that it can hardly be called a system at all[2]." From this viewpoint he urged law reform as follows, but it was also the same case with the preceding period. J. Story's remarks show an similar illustration of this problematic situation. "The question is often discussed in our day, how far it is practicable to give a complete system of positive law, or a complete code of direct legislation. And, if practicable, the farther question arises, how far it is desirable, or founded in sound policy. These questions have been the subject

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1) M.J. Horwitz, The transformation of American law, pp.256ff., 1977.

2) D.D. Field, Reform in the legal profession and the laws, 1885, in: The legal mind in America, ed. by P. Miller, p.287, 1962.

of ardent controversy among the civilians and jurists of the continent of Europe, living under the civil law.....In the countries governed by the common law, and especially in England and the United States, the same questions have of late been matter of wide discussion among the legal profession, as well as among statesmen, and a great diversity of opinion has been exhibited on the subject.[3]"

To understand the passage, it may be enough to remember Thibaut-Savigny controversy on the Continent, Bentham's, Austin's argument for codification of common law in England. How about in the U.S.? One example will be exhibited by D.D.Field – J.C.Carter, though a stage of controversy between American lawyers appeared rather a bit later than the former two. Here, I merely trace some trends underlying their way of thinking and discussion in order to make a simple comparison with the present we are now faced with.

D.D.Field energetically emphasized and planned out codification of common law. But he didn't imagine a complete code of law, like *Panomion* under Bentham. It will be shown by the following passage. "If it were assumed as essential to a code that it should contain a rule for every transaction that in the compass of time can possibly arise, the objection might have some force; but no sane person holds any such idea. We know that new relations will hereafter arise which no human eye has foreseen, and for which new laws must be made. The plan of code does not include a provision for every future case, in all future times; it contemplates the collecting and digesting of existing rules and the framing of new ones, for all that man's wisdom can discern of what is to come hereafter.[4]"

Then, for what purpose he proposed his plan of codification? One of possible purposes is to offer certain guidance for citizen as well as for judge, lawyer, litigants. The other is to eliminate uncertainty and questionable post facto legislative character involved in common law adjudication. "When a decision is made upon the Common Law, it is announced as an authoritative declaration of an existing rule; if it be not really that, then the Judges,

3) J. Story, Law, legislation and code, Appendix to VII Encyclopedia Americana (Lieber editor, new ed., 1835), in : Howe, Readings in American legal history, p.460, 1949.

4) (2) p.291f.

instead of interpreting, are making law.....Judges are not the wisest legislators, any more than legislators are the wisest Judges. And if it were otherwise, there is this difference between the two modes of legislation, that legislation by a Legislature is made known before it is executed, while legislation by a court occurs after the fact, and necessarily supposes a party to be the victim of a rule unknown until after the transaction which calls it forth.[5]"

It is interesting to read this passage, because Field maintained idea of judge as law-declarer, law-finder in accordance with the theory of separation of powers in a democratic state while *in reality* he recognized such a dangerous tendency of judicial legislation. So far, Lawyers on the side of common law tradition are not far from Field's idea in form or theory, but in reality.[6] According to J.C. Gray, Carter held an idea of judge as law-declarer even in reality.[7]

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5) (2) p.292f.

6) "The codes that Field had in mind would be the work of experts-men like Field himself. The legislature would simply take the codes and give them its stamp of validity. The codes, then, would be the product of a legal elite; they would be subtle and flexible, as the common law should have been, but was not, since the common law had become (unfortunately) imprisoned by history and by the narrow self-interest of old-fashioned men. Carter and Field, then, agree about ends; disagreed about means. They both valued flexibility in the law; liked a businesslike rationality; distrusted the role of non-experts, of laymen, in the making of law. Carter preferred common-law judges, as philosopher-kings; and looked on codes as strait-jackets. Field took the opposite view." L.M. Friedmann, A history of American law, p.352, 1973. This is an interesting contrast, because C.F.v. Savigny already figuratively wrote his relation to Thibaut's idea of codification by means of the same type of contrast, that is, same in their purpose, opposite in their means. „In dem Zweck sind wir einig: wir wollen Grundlage eines sicheren Rechts, sicher gegen Eingriff der Willkühr und ungerechter Gesinnung; desgleichen Gemeinschaft der Nation und Concentration ihrer wissenschaftlichen Bestrebungen auf dasselbe Object. Für diesen Zweck verlangen sie ein Gesetzbuch, was aber die gewünschte Einheit nur für die Hälfte von Deutschland hervorbringen, die andere Hälfte dagegen schärfer als vorher absondern würde. Ich sehe das rechte Mittel in einer organisch fortschreitenden Rechtswissenschaft, die der ganzen Nation gemein seyn kann." Savigny, Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft, 1814, in Thibaut und Savigny, herausg. von J. Stern, §12, S.166.

7) "Mr. Carter denies that judges make Law; he says that they merely declare or discover Law already existing. I have tried to maintain the contrary, and to test the correctness of Mr. Carter's theory. But Mr. Carter goes further and denies that custom is only one of the sources of nonstatutory Law. He says it *is* the non-statutory Law itself, that it is the whole non-statutory Law. This view he presses with great energy." J.C. Gray, The nature and sources of the law, 1909, new and rev. e.d., p.283. Cf.pp.233ff. Gray critized Carter's idea, while he pointed out a difference between Carter and W. Blackstone within a same ground of declaratory theory of law. Gray, pp.284, 222.

J.C. Carter is well known as a powerful opponent to the codification movement. Actually, he recognized codification, or legislation possible in regard to public law.[8][9][10] It was the field of private law which according to him was alien from codification by nature.[11] He wrote private law principally belonging to unwritten law, though maintaining a sphere for written law as mentioned above. Within a wider sphere of unwritten law, he paid a special attention to the case law, judicial precedent. "The legislator came, in the order of social development, *after* the judge, not to displace him, but to perform an office for which he was incompetent. The function of legislation is suppletory to that of the judge.[12]"

II Carter's idea of judge as law-declarer

His emphasis on judicial precedent, however, comes from another source, that is, custom. It is because judicial precedent deeply originates from custom necessary for social life and it becomes a kind of evidence of custom. Generally speaking, what supports judicial precedent he emphasized is customary law. But, this is also the case for legislation, statute. Following the passage above cited, he wrote as follows: The function of legislation "is to catch the new and growing, but imperfect, customs which society is forming in its unconscious effort to repress evils and improve its condition—customs of the existence of which the judges are uncertain and at variance, or which are so different from former precedent that they cannot declare them without inconsistency—and to give to these formal shape and ratification[13]". The more to make legislation effective, the more it is necessary sufficiently to take account of social customs.

The weight given to customary law may be clear. It is given a central

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8) J.C. Carter, Law: its origin, growth, and function, pp.230, 234, 253ff. 263ff.

9) Carter, The provinces of the written and the unwritten law, 24 American Law Review, pp. 1ff., 1890.

10) Field, Codification—Mr. Field's answer to Mr. Carter, 24 Am. L. Rev., pp. 259f., 1890.

11) "But what is generally intended by the believers in codification is the statement in writing not only of Public Law, but of all the rules of Private Law also, so that whether we wish to know what the political divisions of a State, or what the duties of public officers are, or what conduct is to be punished as criminal, or what contracts are to be enforced, or, in general, what rights may be asserted by one man against another, we must be guided by the statute-book". (8) pp. 264f.

12) Carter, The ideal and the actual in the law, 24 Am. L. Rev., p. 775, 1890.

13) (12) p. 775.

position in his view of the sources of the law both to support and ground judicial precedent and legislation, thus custom "is the only law we discover at the beginning of society, or of society when first exposed to our observation[14]". It is also clearer from this context that his emphasis on judicial precedent is due to its proximity to cusotmary law.

Viewed from this perspective, he seems to use the word law in a broader scope including legislation, precedent, custom, and so on. Limiting our topic to judicial activity, a judge is surrounded by all kind of legal means enough to make a judicial decision through those sources of the law, even in hard cases. It reminds us the socalled declatory theory. Indeed, he pointed out: "That judges *declare*, and do not *make*, the law is not a fiction or a pretense, but a profound truth. If courts really made the law, they would have and feel the freedom of legislators. They could and would make it in accordance with their own views of justice and expediency. They would not in fact be *bound*, or *feel* that they wore bound, by any pre-existing law. I need not say the case is precisely contrary. They must follow the law as it has been before declared; or, if the case has new features, they must decide it consistently with established rules. .....Any judge who assumed to possess that measure of *arbitrary* power which a legislator really enjoys would clearly subject himself to impeachment[15]".

In his main work, Law: its origin, growth, and function, Carter discussed the idea of J. Austin on judge's arbitrium. Judicial decision, Austin wrote, "must be left to the arbitrium of the judge[16]", when neither Code nor common law provides for new future case. This is a point which stimulates Carter's interest. What does judge's arbitrium mean? Does it mean judge's decision at his own pleasure? No, it doesn't. To sum up what was written in question-answer style, his idea is like this; "The Judge is undoubtedly bound to make his decision according to all those considerations of human experience, sound sense, custom, right reason, conscience, equity, and justice

14) (8) pp. 19, 173.
15) (9) p.21.
16) J. Austin, Lectures on jurisprudence, vol. 2, 5th ed., rev. and ed. by R. Campbell, pp. 664f., 656, 1885.

which lawyers apply to such cases[17]". Then there are certain things which exist in the absence of all law. Certain existing things, like sound sense, custom, etc., indicate the various sources of the law. "The judge then finds in those sources of law a rule by which he may decide the case, and when he finds it he is bound to apply it[18]". If this is what the arbitrium of the judge means, the judge merely finds and declare preexisting rule as suggested by the declatory theory.

Of course, terms used above are various and full of nuance. But Carter stressed "to consider the consequences of conduct with the view of finding what conduct is on the whole, most productive of the equal happiness of all in society, and inasmuch as the first lesson which man in society learned was that the greater degree of social happiness was produced by a conformity to custom, the real process becomes an inquiry as to what is the custom[19]". Various terms, that is, standards are all — naturalistically? — understood in the light of *custom*. Here again, it is clear that custom is used as a key conception (combined with his own peculiar view of science).

Moreover, he added. "When this is found, it is declared and enforced, and it is therefore the rule for the regulation of conduct which is enforced by society, and this is the precise definition of law.[20]" Above all, it is Carter's idea that the judge does not make law, but merely find and declare it even in new case.

Why Carter so much stressed on the declatory theory in the latter half of nineteenth century, that is, even after the period, when Bentham and Austin pointed out the fact of common law as judge-*made* law? It comes from his sense of lawyer? No. The strong representative of codification, Field, too, was a lawyer. Partly, it may come from his complex interests interwoven with his underlying group interests. Apart from it, further question will be raised.

At first glance, it concerns with a usage of the word law or legal rule. When Carter speaks of judge finding and declaring law or rule in the various

17) (8) p. 310.
18) (8) p. 311.
19) (8) p. 312.
20) (8) p. 312.

sources of the law, law or rule seems to be conceived in a *broader* sense, because human experience, custom, right reason, justice, etc., are all held together as various souces of the law.

To make a comparison, we shall quote Austin's passage: "Where there is no rule in the system applicable to the case, the judge virtually makes one, if he decides at all, or decides on any general ground.

Now where the judge makes a judiciary rule, he may build it on any of various grounds, or derive it from any of various sources: e.g. a custom not having force of law, but obtaining throughout the community, or in some class of it, a maxim of international law; his own views of what law ought to be (be the standard which he assumes, general utility or any other)[21]".

Austin, in the context of this passage, seems careful in his law making theory by judge. Certainly, in such and such cases, the judge may make law, not arbitrarily, but on the various grounds. As it well known, Austin classified "law" in detail, such as like proper-improper, within laws proper divine, positive, and positive morality. As Austin here perhaps used "law" in the narrower sense of his *laws proper*, it leads to his apparent conclusion of judge-*made* law, apart from the laws improper, in another words, his broader usage of the word law. But, there are still *grounds* to be considered from which the judge may make law. In practice, these grounds do not remind us of Carter's sources of the law, equity, justice, such and such? I don't mean Austin's and Carter's view similar, but there is still a problem of the broader or narrower usage of the word law to be paid attention.

The other question concerns with custom. As noticed above, custom (or customary law) is given a central position.

The always existing custom offers basic means for finding and declaring law. How about a novel case? Is there any custom ready for dealing with such a case? To remember a catchphrase like "long established custom", *novelty* of the case is not always followed and covered by custom established for *long* period. But Carter already mentioned to "the new and growing, but imperfect, customs". It may well apply to a novel case. Questions, however, will be raised about how long, in what scale of people, in what

21) (16) pp. 638f.

intensity customs are growing. Carter's idea of custom as one of sources of the law is followed by common difficulties as well as theory of "free law" or "living law", etc.[22]

On the other hand, we can't overlook some illuminating aspects in his idea of custom. Often, we now are faced with the problem how to construct and theorize rights on environmental matters and so on. For this purpose it may be useful to refer to idea of "new and growing, but, imcomplete customs", let alone to study relevant legal provisions. Though Carter didn't consciously mention to such a new topic, we may interpret and switch his idea in this direction, in accordance with the way of facts-observation, "scientific"[23] investigation he tried to take. This way of thinking, furthermore, reminds me another aspect of the problem, that is "right" idea emanating from customs. Judge may find right growing as well as law or rule in such growing customs, for instance in connection with the problems of nuisance.

III In perspective

Hitherto, I have mainly traced and commented on Carter's idea. If we now look around various trends of legal theories in a broader perspective, we again are faced with different theories of judge as law-maker against such an idea of judge as law-finder, law-declarer, or oracle of law. One of the roots

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22) I don't mean all theories of this sort inescapable from such difficulties. For instance, one of the famous representatives, H.U. Kantorowicz, whether succesfully or not, made an effort to clarify for judge various kinds of "free" law outside of "formal" law, in order to prevent to make an arbitrary decision in a case unexpected and ungoverned by the provisions of formal law. Kantorowicz-Patterson, Legal science— A summary of its methodology, 28 Columbia L. Rev., 679, 1928.

23) Carter used terms "science", "scientific" in his discussion of codification-precedents-customs, but sometimes ambiguously. It was pointed out by R.L. Fowler. "The truth of Mr. Carter's most sweeping proposition, now urged against the Civil Code of New York, that all codification is unscientific in theory, depends much on what is meant by scientific. Science is most commonly referable to a body of knowledge arranged in an orderly manner. To be at all relevant to the pending measure, then, this proposition can only mean that in its present state the common law is better arranged than in any code, or else, that any statutory arrangement is unphilosophic. In order to discuss even so plain a proposition, it is necessary to be rid of ambiguous terms and, therefore, to decide in which of its conflicting meanings the term "common law" as it is of extended significance, is intended to be used." Fowler, Codification in the State of New York, 1884, quoted in Readings in American legal history, by M. Howe, p. 512, 1949.

of the interesting contrast, theory of the "Nightmare" and the "Noble Dream[24]" called by H.L.A. Hart will be found here, too, which shall be treated in another opportunity.

24) H.L.A. Hart, American jurisprudence through English eyes, 11Georgia L. Rev., 969, 1977.