中青年法学文库



司法解释论

董皞著

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序 言

司法解释是横跨立法权与司法权、在行政诉讼制度产生以后又涉及行政权的我国法律体系中极为重要的组成部分,它直接影响着依法治国方略的实施。司法解释在我国虽早已实际存在并发挥着相当的作用,但迄今在理论上仍疏于研究。各界对司法解释的理解和评论很不相同。随着我国法治实践的进展和司法作用司法解释与立法、行政之间的关系,是实践提出的迫切要求。董皞的《司法解释论》正是在这种历史背景下,适应时代需要而问世的。它填补了我国法学研究中的一项空白,是我国第一部系统、全面而又深刻地论述司法解释的专著。其实践意义自不待言。

该书从司法解释之基本涵义与宪法地位着手,追本溯源,寻求司法解释之成因,研究司法解释之演进,中外比较,阐述司法解释之理论,剖析司法解释之模式,进而探求司法解释与其他法律解释,司法解释与法律适用,司法解释与判例之关系,最后以预测司法解释之发展趋势为结语,洋洋洒洒,几及司法解释之一切方面,自成完整体系。

该书以中国司法解释为出发点和归结点,力图对我国实践中涉及司法解释现象都作出理论评述;以解决中国司法解释中存在的问题为著述目标,每有所论,则务求深意。如作者通过对法律

适用过程中的局限性以及立法与法律适用的分离和法官不得拒绝审判案例的职责的分析,形成了司法解释产生的必然性的观点;通过对司法解释究竟是一种权力还是手段的论述形成了司法解释只是一种手段的观点,并且认为中国司法解释应为一元多级体制、司法解释的对象应包括事实和法律两方面等等,新观点、新理念俯拾即是,皆道人所未道,实为作者创造性劳动之成果。总之,董皞此书将对我国之司法解释产生积极影响,这是确定无疑的。

面对董皞这本几十万字的专著,不禁感慨万千。董皞做法院领导工作已数年,任重事杂,然而又生性活跃,社会活动不少,但竟以3年业余时间,攻成博士学位。写此宏篇巨著时,真是夜以继日,几乎将所有夜间与假日休息时间,全部用于钻研与写作。杜门不得,逃至他室,寒窗苦研如此。原以为早已解董皞之干练、明敏,至此又深感其毅力之惊人;不仅如此,通读全书,觉其思路缜密、开掘深刻、立论新颖,清新之气扑面而来。至此,又深为其严谨、灵性而赞叹。有此精神,何事不成!后生可畏,后生可喜。我期待董皞更大的成功!

应松年 1998 年 8 月于北京为公桥畔

内容提要

司法解释是司法权的重要组成部分,是行使司法权不可或缺的手段。世界上绝大多数国家的宪法对司法解释从不同角度或层面给予了充分肯定,司法解释的宪法地位已为各国宪政实践所证实。确定司法解释的宪法地位,对于正确认识司法权,理顺司法解释体制,合理运用司法解释,以达到正确适用法律,实现立法者意志的目的都具有重要的意义。

司法者解释法律是立法与司法权力分立的结果,司法解释的产生和需要是由于成文法的局限性所致。法律是过去或现在的立法者根据当时的情况制定的适用于未来社会的行为规范,因而带有一定程度上的预测性质。社会的复杂性和多变性,使得立法者既不可能制定出包罗万象的法律,也不可能使法律成为适应千变万化社会的万能法。成文法的局限性主要表现为:1)一般规则对个别案件之局限性——缺乏平衡性;2)有限规则对无限客体之局限性——缺乏周延性;3)模糊规则对确定事项之局限性——缺乏明确性;4)稳定规则对发展事物之局限性——缺乏应变性;5)刻板规则对丰富内涵之局限性——缺乏灵活性。成文

法的这些局限性是由立法客体对立法者的制约、立法者本身认识的局限性和作为法律载体的语言的局限性所决定的。立法的意义在于法律的适用,但成文法的局限性只有在法律适用过程中才能显现出来。由于立法者与法律适用的分离,以及法官不得拒绝审判案件的职责,必然将法律适用过程中解决成文法局限性的任务推到法官面前,法官不是立法者,解决成文法局限性的杀手锏只能是司法解释。

司法解释的发展无论是大陆法系还是普通法系都曾经历了一个曲折的过程,以大陆法系尤甚。其发展历程围绕着两条主线进行:一是法官释法是否意味着司法权对立法权的侵犯,集中表现在是否允许法官解释法律的问题上;二是面对法律的模糊和漏洞,释法者追寻立法者的原意是否可能,立法者的原意不能适应已经变化了的社会现状又该如何,集中表现在法律解释的目标是采用主观标准还是客观标准的问题上。从古罗马开始,法官释法的足迹是沿着一条被禁止——被限制——有限创制的道路前进的,"在今天的西方世界,立法与司法之间的明确界限已经模糊"。[1] 法律解释的目标也在经历了以探求立法者原意的主观解释论和探求客观存在的法律目的的客观解释论之间此消彼长的反复较量之后,客观解释论取得了优势,现今仍占据通说地位。有关司法解释的各种理论在解释学、法解释学不断发展的基础上也逐步走向发展和完善。

司法解释作为法律解释的一种与其他法律解释相比有着自己的特殊性,对司法解释进行再分类,深入研究各类司法解释的特

^[1] 徐国栋著: (民法基本原则解释),中国政法大学出版社 1992年版,第 362页。 Xu Guo Dong, Interpretation of Fundamental principles of civil law, P362. Chinese Political and law University Press, 1992.

点具有十分重要的理论和现实意义。司法解释究系一种手段抑或 一种权力是一个有争议的问题。在中国,法律解释特别是具有拘 束力的解释一向被看作是一种权力, 因而出现了有关法律解释的 这样或那样的决定,对谁可以作出解释,可以作哪一方面的解释 都作了明确具体规定,由此形成了有着中国特色的法律解释体 制、包括司法解释的体制和模式。中国现行司法解释体制可以称 之为二元一级的司法解释体制,即最高人民法院和最高人民检察 院两个职能不同的最高机关才有解释权的司法解释体制。我们无 法否认这一现实,作为行使侦查、公诉职能的检察机关也拥有司 法解释权,且这种解释对审判机关也具有拘束力,岂不是公诉机 关的法律文件成了审判的依据?同时,我国的司法解释主体排除 了最高人民法院以下的各级法院和法官的司法解释权, 这与法官 在适用法律过程中事实上不可避免地解释法律的实际情况明显不 符。司法解释的主体不是法院更不只是最高法院,而是裁判案件 的审判组织和法官。只有代之以一元多级的司法解释体制,才能 保证我国司法解释体制的真实性与合理性。但当我们认真审视法 律适用过程中的司法解释时却发现,司法解释并不表现为一种权 力,而是法官实现法律适用目的的手段。从这个角度看,并不存 在什么事实上的司法解释体制问题, 研究司法解释体制仅仅是着 眼于中国立法关于司法解释的规定而已。

司法权的实现手段是法律适用,实现法律适用的重要手段便是司法解释。司法解释是具有主观能动性的法官在面对实际案件时,根据案件的具体事实就所选择适用的法律进行的理解和说明。对于司法解释来说法律和事实二者缺一不可,司法解释不仅包含了对法律的理解,而且包括了对事实的分析,司法解释的对象既有法律也有事实。司法解释是法律和事实的结合剂。在中国作为手段的司法解释无论在形式上还是内容上都有亟待完善的方

面,特别是最高法院公布的案例应当作为司法解释的一种特殊形式,司法解释的形式应当更加严肃和规范,司法解释的内容应当更加详尽,更具说理性。

司法解释有着悠久的发展历史,更有着强劲的生命力。随着 社会生活的飞速变化,司法解释的性质、目标和作用也在不断地 发展,人们对司法解释的认识也会更加深刻,司法解释在法治社 会中的作用也将日益突出。

ABSTRACT

Judicial interpretation is a vital part of judicial power, which is also a necessary means to assume judicial power. Majorities of constitutions in the world have granted plenty positive attitude to judicial interpretation from varies of angels or phases. And constitutions' practice of many states has proved the constitutive status of judicial interpretation. To ascertain the constitutive status of judicial interpretation, it will have progressive significant for correctly comprehending judicial power and judicial interpretation system and reasonably using judicial interpretation to realize the purpose of legislator's will by means of applying to law correctly.

Law interpretation by judicial organs is the result of the separation of legislation and judicial power. And the cause of judicial interpretation's birth and being needed is the limitations of written law. As law is a series of action rules made by now or before legislators in accordance with original circumstance in order to apply to future society, law has a nature of forecasting in some degree. Complicative and changeable society limits the legislators neither to make out all – embraced law nor to make out universal law. The limitations of written law manifests as follows: 1. general rules to individual case – lacking of balance 2. limited rules to unlimited objects – lacking of distribution. 3. ambiguous rules to ascertained items – lacking of definition. 4. steady rules to developing things –

lacking of change . 5. mechanical rules to rich meaning — lacking of flexibility. The above — stated limitations of written law are determined by the limitation of legislative objects to legislators and the limitations of legislators and language as law carrier. The significance of legislation lies in applying to law, but the limitations of written law only appear in the course of applying to law. As the separation of legislator and applying to law and the duty of judge never refusing judicial work, the task of solving the limitations of written law is put in front of a judge during applying to law inevitably. As a judge is not a legislator, his secret weapon to solve the limitations of written law is only judicial interpretation.

The development of judicial interpretation whether in mainland law system or in common law system has experienced a winding course. Especially in mainland law system, its developing experience rounds about two main courses: One is whether a judge interpreting law means to invade legislative power, which focuses on whether the aim of permitting judge to interpret law; The other is whether the interpreter can seek the original meaning of legislator in front of ambiguous law and loopholes of law and how to solve when the original meaning of legislator can't be adapted to changed society, which focuses on whether the aim of law interpretation to adopt subjective standard or objective standard. From the beginning of ancient Rome, the footmarks of judge to interpret law traced along a forbidden — restrictive — limited making road. "Nowadays in west the world, The clear boundary between legislation and judiciary becomes obscure," ⁽¹⁾ After experienced struggling repeatedly between subjective in-

Xu Guo Dong. Iterpretation of fundamental principles of civil law, p362, Chinese Political and law university press, 1992.

terpretation theory which to probe into the original meaning and objective interpretation theory which to probe into the purpose of law objective existed, the objective interpretation theory in the aim of law interpretation occupied dominant position and still in general status in nowadays. Theories relating to judicial interpretation have been developed and perfected gradually on the base of the development of interpretation theory and law interpretation theory.

Judicial interpretation as one of law interpretations, it has its special characteristic compared with other law interpretation, so it has vital significant in theory and realistic to re - classify judicial interpretation and to study deeply characteristics of judicial interpretation. It is a controversy issue whether judicial interpretation is a means or a power. In China, law interpretation especially interpretation having binding force is always regarded as a power, therefore, there appear decisions relating to law interpretation required who to interpret and what to interpret clearly and forms law interpretation system with Chinese characteristics including of systems and modes of judicial interpretation. In China current judicial interpretation system may be called " Double Units and One Grade", namely, only the supreme court and the supreme procuratorate whose duties are different have power to interpret law. We can never deny the fact that, procurator organs when conducting reconnaissance and instituting public prosecution also assumes judicial interpretation power, which has binding force to judicial organs. Does it mean the law of public procurator constitutes the basis of trial? Meanwhile, the subjects of judicial interpretation in China have excluded lower courts and judges from the power of judicial interpretation except supreme court, which is completely inconsistency with the practice that judge unavoidably interprets law when applying to

law in realistic. The subjects of judicial interpretation should not be lower courts or the supreme court, but be judicial organs and judges. Only in place of the judicial interpretation system of "One Unit and Many Grade" can assure the reality and reasonableness of judicial interpretation system of China. But when screening carefully the judicial interpretation in the course of applying to law, we find out that, judicial interpretation is not manifested as a kind of power, but a means for the judge to realize the aim of applying to law. From this angel, there does not exist the issue of judicial interpretation system in fact. When studying judicial interpretation system, we only focus on the requirements relating to judicial interpretation in legislation of China.

The means to realize judicial power is to apply to law, and the means to realize applying to law is judicial interpretation. Judicial interpretation means that a conscious dynamic judge when applying to law in front of a real case conducts comprehension and explanation to selected law in accordance with detailed facts of a case. Law and facts to judicial interpretation are inseparable. Judicial interpretation not only includes of comprehension of law but also analysis of facts. The objects of judicial interpretation includes of law and facts. Judicial interpretation is the connection point of law and facts. In China, judicial interpretation as a means, whether in form or in meaning needs to be perfect, especially the supreme court published cases as a special form of judicial interpretation, whose form should be more strict and standard and its meaning should be more concrete and reasonable.

Judicial interpretation with long history has strong life. With the rapid change of society, the nature, aim and role of judicial interpretation have been developed. People will comprehend judicial interpretation

more deeply. The role of judicial interpretation in law - governed society will be more outstanding.

中青年法学文库

总序

中华民族具有悠久的学术文化传统。在我们的古典文化中,经学、史学、文学等学术领域都曾有过极为灿烂的成就,成为全人类文化遗产的重要组成部分。但是,正如其他任何国家的文化传统一样,中国古典学术文化的发展并不均衡,也有其缺陷。最突出的是,虽然我们有着漫长的成文法传统,但以法律现象为研究对象的法学却迟迟得不到发育、成长。清末以降,随着社会结构的变化、外来文化的影响以及法律学校的设立,法学才作为一门学科而确立其独立的地位。然而,一个世纪以来中国坎坷曲折的历史终于使法律难以走上坦途,经常在模仿域外法学与注释现行法律之间俳徊。到十年文革期间更索性彻底停滞。先天既不足,后天又失调,中国法学真可谓命运多舛、路途艰辛。

70年代末开始,改革开放国策的确立、法律教育的恢复以及法律制度的渐次发展提供了前所未有的良好环境。十多年来,我国的法学研究水准已经有了长足的提高;法律出版物的急剧增多也从一个侧面反映了这样的成绩。不过,至今没有一套由本国学者所撰写的理论法学丛书无疑是一个明显的缺憾。我们认为,法学以及法制的健康发展离不开深层次的理论探索。比起自然科学,法学与生活现实固然有更为紧密的联系,但这并不是说它仅仅是社会生活经验的反光镜,或只是国家实在法的回音壁。法学应当有其超越的一面,它必须在价值层面以及理论分析上给实在

法以导引。在建设性的同时,它需要有一种批判的性格。就中国特定的学术背景而言,它还要在外来学说与固有传统之间寻找合理的平衡,追求适度的超越,从而不仅为中国的现代化法制建设提供蓝图,而且对世界范围内重大法律课题作出创造性回应。这是当代中国法学家的使命,而为这种使命的完成而创造条件乃是法律出版者的职责。

"中青年法学文库"正是这样一套以法学理论新著为发表范围的丛书。我们希望文库能够成为高层次理论成果得以稳定而持续成长的一方园地,成为较为集中地展示中国法学界具有原创力学术作品的窗口。我们知道,要使这样的构想化为现实,除了出版社方面的努力外,更重要的是海内外中国法学界的鼎力推助和严谨扎实的工作。"庙廊之才,非一木之枝";清泉潺潺,端赖源头活水。区区微衷,尚请贤明鉴之。

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序

司法解释是法学研究中的一个重要课题,也是一国法律制度中的重要组成部分。在司法实践中,案件的事实和情节往往是纷繁复杂的,多数情形下,法律规范若不依立法精神加以阐述和说理,很难直接适用到具体案件中。因此,司法解释便成为法院(法官)行使司法权的一种重要手段;而在其对法律的解释过程中,许多法律规则便得以创设。有鉴于此,称司法解释为法学发展的动力和源泉之一亦不为过。这一点在西方国家,特别是普通法系国家表现得尤为突出;法律学者研究法律,很重要的方面,就是研究司法解释。当然,由于各国的法律传统和实践的不同,司法解释的地位和作用,亦有许多差别。但这并无碍于"法官造法"这一事实的存在。

在我国的法学理论和司法实践中,司法解释被赋予了特定的涵义。虽然到目前为止,我国的法学界对司法解释的概念尚未见统一的界定,但最高司法机关所从事的这一项工作自新中国建国伊始就一直在进行着。先后形成的数百万字的司法解释,作为我国的一种重要的法律渊源,在调整各种社会关系、保障社会主义现代化建设方面无疑发挥了巨大的作用。建国后的近30年中,司法解释实际上承担着将政策法律化的使命;党的十一届三中全会以后,司法解释又肩负着弥补立法工作的粗略和滞后的任务。应当说,最高司法机关的司法解释工作在一定程度上解决了司法