Judicial Methodology
Criminal Law Case Studies

法律适用方法
刑法案例分析

国家法官学院
德国国际合作机构 著

法律适用方法

刑法案例分析

国 家 法 官 学 院   著
德 国 国 际 合 作 机 构

主要编写人员

Eberhard Siegismund

Prof. Dr. Evelyn Henning

王晓芳

李纬华

德国国际合作机构–中德法律合作项目和国家法官学院

自1996年以来，我们一直在中华人民共和国卓有成效的司法改革中为最高人民法院和国家法官学院提供支持。为确保法治原则在法律适用过程中得到更好的实施和遵循，我们已为5000多名法官提供了法律适用方法的培训。

欲了解更多信息，请访问：

德国国际合作机构（GIZ）   国家法官学院
中德法律合作项目

塔园外交办公楼1-13-2   通州区天成桥甲一号
亮马河南路14号   101100 北京，中国
100600 北京，中国

电 话：+86 (0)10 8532 1401   电 话：+86 (0)10 6755 9045
网 址：www.law-reform.cn   网 址：njc.chinacourt.org

序 一

美国法学家德沃金将没有清晰的法律规范加以确定指引的案件定义为"疑难案件"，认为对于"疑难案件"，法官需要通过运用正确的法律解释方法以及价值判断，发现案件的唯一正解。法律适用的结果是否存在唯一正解尚存争议，但是法律适用方法的客观化和统一却并非不可能：法官通过运用统一的、能为客观标准所衡量的法律适用方法，作出契合法律规范和承载法律基本价值内涵的裁判结论，在某种程度上也是回应了统一适用法律的司法本质要求。从方法论的意义上讲，素以完备和严谨著称的德国法律适用方法无疑对我国法律适用技术的完善和发展具有很强的借鉴意义和参考价值。

国家法官学院作为最高人民法院下属的全国法院法官培训机构，多年来一直致力于与各国保持着友好交流合作关系，并学习与借鉴他国有益的经验。自 1998 年至今，国家法官学院与德国国际合作机构联合举办二十多期法律适用方法培训班，内容涉及刑法、民法、行政法等多个领域，主要选取中国的案例，运用中国的法律，采用德国的案例分析方法（归入法、关系分析法）分析案件，得出结论。在举办培训班的过程中，参加培训的法官纷纷表示，此两种案例分析方法逻辑严密，推理缜密，对中国法官分析案情、运用法律具有很大的启发和借鉴作用。通过这二十多期培训班的举办，在每期培训班上，对本套书所选的案例都进行了讨论，我们将这些精选的案例集结出版，既是中德双方在法官培训领域的合作成果，也凝结了中德法官的智慧和心血。

2010 年，最高人民法院院长、首席大法官王胜俊在准确把握人民法院教育培训工作规律、科学总结教育培训实践经验的基础上，提出了"一个目标、两个转变、三个倡导"的法院教育培训工作方针，即以树立社会主义法治理念、提高司法能力为目标；实现由理论型培训向理论与实践结合型转变，由知识型培训向知识与能力结合型转变；倡导法官教学、案例教学、现场教学。本套丛书的出版，正是以法院教育培训工作方针为指导，运用案例教学的手段，以法官亲历式的教学方式，将法律适用方法融入个案的裁判过程中，以期提升法官学员的法律逻辑思维能力、驾驭法律信息资源的能力以及将理论知识运用于司法实践解决实际问题的能力。

国家法官学院院长 高憬宏

Preface

Ronald Myles Dworkin, an American legal scholar, defines "hard case" as a case where the judge is required to move beyond the rules that are explicit in legal texts (such as constitutional provisions, statutes, and cases) and resort to principles. Dworkin argues that the judge must apply the right methods of legal interpretation and value judgment to reach the only correct decision in a hard case. Although it is still controversial whether there is "the only correct decision", the objectivity and unity in application of law would not necessarily be impossible: we may consider that a judge has, to some extent, fulfilled the intrinsic requirements of unity of application of law, if he or she applies the law in a way that is united and measurable by objective standards to make an adjudication that well fits the legal rules and at the same time carries the basic value of law. In terms of methodology, German practice on application of law, which has long been admired for its soundness and preciseness, is of great reference value for China to further develop and improve the application of law.

As a national training body for judges and an institution subordinated to the Supreme People's Court of the People's Republic of China, the National Judges College has been dedicated for years to the friendly exchange and cooperation with foreign countries, drawing upon the good experience of others' countries. Since 1998, the College has, jointly with Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, offered more than twenty sessions of training courses on the application of criminal, civil and administrative laws. The training courses selected cases from those filed in the People's Republic of China and applied Chinese laws accordingly, while using German case analysis method (e. g. inductive reasoning and relation analysis) to reach decisions. During the training, most participants pointed out that both inductive reasoning and relation analysis are logically rigorous and highly enlightening methods that Chinese judges should refer to when they analyze cases and apply the law. As a collection of typical cases which have been fully discussed in the training courses, this series of books embodies the achievements of Sino-German cooperation on the training of judges and represents the wisdom and hard work of judges from both sides.

Wang Shengjun, Chief Justice and President of the Supreme People's Court, proposed in 2010 a set of guiding principles for judicial training, i. e. "One Goal, Two Transformations and

Three Advocacies", which is based on the rules and practical experience derived from the training of judges. One Goal refers to the goal of building the concept of rule of law and promoting the judicial capacity in socialist China; Two Transformations refers to transforming from theory oriented training to training that combines theory and practice, and from knowledge based training to training that integrates knowledge and competence; and Three Advocacies refers to the advocacies of peer learning, case method and on-site teaching. Following these guiding principles, this series elaborates methods for application of law through case study and judges' personal experience, aiming to improve the logical thinking ability, information processing ability and problem solving ability of judges in their judicial practice by applying theories.

By Gao Jinghong
President of the National Judges College

序 二

在过去的十年间，德国国际合作机构（GIZ）中德法律合作项目与国家法官学院在民法、行政法和刑法的法律适用方法方面举办了长期培训班并取得了丰硕的成果。现在，我们将培训中所涉及的材料整理出版。这是双方长期以来卓有成效合作的又一重要里程碑。

此次出版以及我们所举办的培训课程都旨在协助中方合作伙伴建立起以法治为基础的社会主义市场经济。这不仅要求立法者制定相应的法律，同时也需要这些法律必须得到有效的实施，这是法律专家、特别是每天都要适用法律解决问题的法官的主要任务。法律只有在其结果可预见的情况下才能很好的得到执行。然而结果的可预见性并非总是能够得到保证，因为法律本身常常极为复杂、不够明确或者不能满足现实的需要。这也是法律适用方法能够有助于确保结论可预见或至少是能够被理解的原因。

为了达到上述目标，对于未来法律适用者的培训就尤为重要。因此，中国的相关部门在近些年为了保证必要的培训也进行了可观的投入。我们此次出版本丛书正是希望中国读者能够了解并掌握德国法律工作者在其开始学习法律时就接触到的适用法律的方法。这种做法能够引导我们在分析法律案件时适用类似的思维方式。其中的一种方法（归入法）旨在通过将法律基础分解为逐个的前提要件并将其与案件事实相比较从而决定抽象的规则在个案中的可适用性。另一种方法（关系分析法）则适用于对复杂的民事案件的理解、架构以及裁判。

这些方法最大的优点是其相对于所适用的法律的内容具有相当大的独立性，因此也可以为中国法官所用。为了使中国读者能够更好地理解这些方法，我们编写了一些适用中国法的案例作为介绍法律适用方法的素材。也许我们是方法论方面的专家，而您无疑是中国法方面的专家。因此我们希望读者能够指出我们在适用中国法过程中的不足。如果您作为中国的法官认为本书所介绍的方法对您的工作有所帮助，那么我们编写本书的目的就达到了。

这些刑法案例最初是由在比较刑法、国际刑法和跨学科刑法研究方面享有盛誉的德国马克斯－普朗克外国法和国际法研究所为德国国际合作机构编写的，之

后我们根据中国培训班参与者的愿望和建议又对这些刑法案例进行了调整和进一步修改。

最后请允许我对组织和支持本次出版的人员和机构表示感谢：首先要感谢我们的合作伙伴国家法官学院的高憬宏院长、曹士兵副院长以及国际合作处处长王晓芳女士；其次要感谢为我们提供这些案例的德国马克斯－普朗克外国法和国际法研究所；同时还要特别感谢为编写和改进培训材料做出巨大努力的德国专家伊芙琳教授博士（Prof. Dr. Evelyn Henning）、德国国际合作机构（GIZ）的前任同事们和短期培训项目的德国法官专家们，其中伊芙琳教授博士以其多年作为德国法官的经历和高水平的授课于 2010 年得到了德国法官协会的高度认可；最后还要感谢我们的法律专家蒋毅先生以及我的同事胡兰女士为本次出版所做出的努力。

德国国际合作机构中德法律合作项目主任

施吉（Eberhard Siegismund）

Case Study Methodology-Introductory Remarks

During the last ten years the Sino-German Legal Cooperation Programme of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH has developed a fruitful cooperation with the National Judges College carrying out long-term-training courses on judicial methodology in civil, administrative and criminal law. Now the publication of the used training materials marks another significant milestone in our longstanding and successful cooperation.

The publication and the trainings aim at assisting the Chinese efforts to establish a social market economy based on the rule of law. Therefore not only laws must be created by the legislator; they also have to be effectively implemented. Implementation is the major task of legal experts, especially judges who have to apply the law on an every-day-basis. Successful implementation of the law is only possible if its outcome is predictable. The predictability of the outcome, though, is not always guaranteed, since the law is very often complicated, not precise enough or simply not complete with regards to the many situations that can occur in real life. That is why a methodology of law application can be helpful in leading to predictable, at least comprehensible, results.
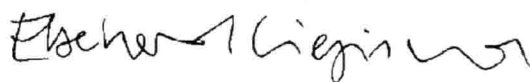
Therefore the importance of a good training of those who will be responsible for the application of laws in the future is evident. Consequently, the Chinese legislator has undertaken considerable efforts to guarantee the necessary training throughout recent years. With this volume of our publications we hope to give you a grasp of the methodical approach German lawyers learn from the beginning of their studies. This approach leads to a similar way of thinking. One of the techniques aims at determining the applicability of the abstract rule to the individual case by dividing the legal basis into its single requirements and comparing these to the facts of the case ("Subsumtionstechnik"). The other technique serves the comprehension, structuring and decision of complex cases concerning civil law ("Relationstechnik").

The advantage of these techniques is that they are largely independent from the content of the law that is to be applied; therefore they can also be useful for Chinese judges. In order to increase the comprehensibility for the Chinese reader we tried to create cases and examples applying Chinese law. Since we may be experts in methodology, you definitely are the experts for

Chinese law; so we ask for indulgence for any mistakes we may have made in the application of Chinese law. If you as Chinese judges find the case study methodology helpful in your work, the aim and objective of this book have been achieved.

At first the Criminal Law cases were developed for the GIZ by the German Max-Planck-Institute for Foreign and International Law, which is well known for its qualified research in the field of comparative, international and interdisciplinary criminal law. Subsequently the cases were adjusted and further developed based on the wishes and recommendations of our Chinese participants.

Last but not least please allow me to express my gratitude to all the organizers and supporters of the publication. First of all I am especially very grateful to the National Judges College, notably President Gao Jinghong, Vice President Cao Shibing and Mrs. Wang Xiaofang, head of International department. I want to thank the German Max-Planck-Institute for Foreign and International Law for the development of the cases. For fundamental improvements of the training materials I want to explicitly honour the efforts and achievements of our German expert Mrs. Prof. Dr. Evelyn Henning as well as our former GIZ colleagues and short-term expert judges. Especially Mrs. Prof. Dr. Evelyn Henning´s long-time experiences as a German judge and teacher have led to the high quality which was certificated by the German Judges Association in 2010. My thanks also go to our legal expert Mr. Jiang Yi and my colleague Mrs. Hu Lan, who both have made a lot of effort in making the publication possible.

Programme Director
GIZ-Sino-German Legal Cooperation Programme

目　录
Contents

第一部分　法律适用方法导论

第二部分　刑法简介

第三部分　统一解决方案模式

第四部分　案例要点分析

第五部分　刑法案例归入法分析

第一部分

法律适用方法导论

结　构

一、导论

二、理论背景

Ⅰ．法律、法规与规章的目的

1. 法律的目标

2. 法律适用的重要性

3. 日常生活当中的法律

4. 违法行为与纠纷

5. 法律与正义

Ⅱ．人们遵守或违反法律规则的理由

1. 对于某些规则自然而然的遵守

2. 因为受到强制力量的威胁而遵守

Ⅲ．法律之外可以作为社会组织原则的选择

Ⅳ．采用一定方法适用法律的理由

1. 法律适用中的问题

2. 一个统一的适用方法如何处理这些问题

3. 法律确定性是统一法律适用最主要的好处

4. 采用统一的法律适用方法的缺点

5. 一种可选的方法：归入法

三、归入法

Ⅰ．归入法的简要概述

1. 归入法的基本原则

2. 前提：找到准确的法律规定并确定其各个要件

3. 归入法

4. 归入法中的困难点

5. 法律的发展

6. 确定法律后果

Ⅱ．解决刑事案件