The phenomenon of judge law or the "Hohfeld case" revisited

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Abstract. The article examines the still disputed phenomenon of the so-called judge law. This term implies the ability of judges "to make law" besides the national legislative body. Although the proponents of judge law were often accused of trying to destroy the paradigm of supremacy of legislative acts over all other legal acts, including court decisions, the judge law ideology never questioned the crucial importance of normative acts, emanating from national legislative bodies. The problem of these acts is that they – more often than not – do not reflect the real social conditions, a particular judge is confronted with. In many cases, a judge cannot rely on legislative acts, because – in terms of the French Code Civil – the necessary normative provisions are non-existent, fuzzy, or insufficient. Nevertheless, any judge has to properly adjudicate a case at hand if he/she is eager to circumvent the accusation of denial of justice. According to Hohfeld professional lawyers, including judges, are usually not coherent while using the fundamental legal concepts, such as "contract", "property", "business", "corporation" etc. In practical life it means the following: either one can depict his or her interests in the terms of "rights" or he/she is simply legally non-existent.
Keywords: analytical jurisprudence, judge law, legal norms, legal methodology, forensic discourse

1 Introduction

The path of law does not guarantee a smooth journey from birth to death to anyone: difficulties and confrontations are bound to occur in the course of life of any person. This means that the key to the nature of legal profession is the figure of a mysterious judge who is trying a hard case. Indeed, you do not have to forgo hard legal training in the spring of your life in order to "solve" easy cases later on as a professional lawyer. So, one cannot easily dismiss the famous statement of Oliver Wendell Holmes Jr.: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" [1].

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2 Methods

The topic of our investigation lends itself to an interdisciplinary approach. Here, the normativist method comes to the fore, which is presented in our article by Hans Kelsen. The second one is the sociological method: no legal sociologist can "stomach" a picture of a judge as a simple "law pronouncing machine". The third method applied in our investigation may be called a structural legal method as developed by Wesley Newcomd Hohfeld. The latter may also be praised as a proponent of a "linguistic bias" within the Anglo-American legal science (see below).

3 Results

The phenomenon of *judge law* [2-4] remains the topic of virulent controversy among legal scholars throughout the world. The term "judge law or courtroom law" may be regarded as a "rebellion term" against legal positivism. Actually, the proponents of judge law in the early 20th century suggested that the change of legal paradigm with the legislative power at its apex had been long overdue.

Some legal positivists were taken by surprise: for them the "battle cry" of proponents of judge law came to be very disquieting. It was for the first time since the establishment of the rule of law principle as a cornerstone of a liberal national state that young lawyers came to question the social role of lawmaking prerogative of a national legislative body. They posed a "naïve" question: "What are judges doing *in fact,* when they are adjudicating cases, especially the hard ones?"

4 Discussion

Arguing with Holmes (see above), Hans Kelsen rejects the equation of "law in action" with "the prophecies of what the courts will do in fact". According to Kelsen, "[t]he significance of the statement: "A is legally obliged to certain behavior," is not "It is probable that a court will enact sanction against A," but: "If a court establishes that A behaved the opposite way, then it ought to order a sanction against A" [5]. Kelsen also holds that the definition of law by Holmes surely misses the target as far as the *lawmaking* function of judges is concerned.

"Holmes' definition of law […] is scarcely adequate in those cases where a court acts as a legislator […] To predict with a reasonable degree of probability what a court will do when acting as a legislator is as impossible as to predict with a reasonable degree of probability what laws a legislative body will pass" [5].

Kelsen does not reject the lawmaking function of judges in principle. But, he has a peculiar notion of the laws, any judge is bound to make. Thus, Kelsen discriminates between two "tiers" of law. The "higher" tier of law is at the disposal of a legislative body, which specializes in generating *abstract* norms. The other – "lower" – tier of law has as its *raison d'etre* a subsidiary activity of judges, which amounts to transforming abstract norms of a positive law into *individual* court-room norms.

"But there is no doubt that law does not consist of general norms only. Law includes individual norms, i.e. norms which determine the behavior of one individual in one non-recurring situation and which therefore are valid only for one particular case and may be obeyed or applied only once" [5]. The Kelsenian insight provokes an interesting questions. For example, "How is it possible for a judge to trigger off a mysterious transformation of abstract norms into individual ones in the first place?"

"A key characteristic of contemporary legal thought is "rights discourse". What is "rights discourse"? A discursive practice is a dialogue (not a resolution) between different

viewpoints. Rights discourse, then, is the practice by various contending theorists of determining or imposing some vision of "rights" [6].

Actually, it was W. N. Hohfeld (1879–1918), who thoroughly examined the ambiguous content of the "rights rhetoric". He taught law in Yale University in the early 20th century. Among his most ardent students was Karl Llewellyn [7] – one of the "founding fathers" of American legal realism. The main work, which made Hohfeld famous, is called "Fundamental legal concepts as applied in judicial reasoning" [8]. "The crux of Hohfeld's argument is that "rights" do not necessarily imply corresponding remedies, duties, or other rights" [6].

Hohfeld prefers a method of exemplification to that of a nominal definition. Thus, he exemplifies the meaning of each fundamental legal concept by means of its structural juxtaposition to other terms. "Hohfeld's general strategy (this too is a departure from standard legal scholarship) was to describe these basic legal conceptions as *relations of legal form*—that is to say, stripped so far as possible of *substantive content*" [9].

Following the "Saussurian" [10-15] logic of Hohfeld, we can distinguish and juxtapose four distinct "things": claims, liberties, authorities, and immunities. The same is true about "duty", which ceases to be a catch-all term for various legal duties. Indeed, "there is a remarkable similarity between what Saussure was doing in linguistics and what Hohfeld was doing in analytical jurisprudence. Saussure's semiology is based upon two important concepts. The first is the arbitrary relationship between the signifier and the thing signified, and the second is that signs take their meaning from their mutual relationships in a system of signification" [16].

Hohfeld divides fundamental legal categories into two distinct groups: "jural *opposites*" and the "jural *correlatives*". Hohfeld presents the "jural opposites" in the following order:

- Right (=Claim) vs. No-right (=No-Claim);
- Privilege (= Liberty) vs. Duty (=Legal duty);
- Power (=Authority) vs. Disability (=Lack of authority);
- Immunity (=Freedom from external authority) vs. Liability (=Being subject to external authority).

It is very important to bear in mind that the "jural opposites" focus on the *status* of a *single* person. The first dyad of "jural opposite" means the following: you may have a valid claim to something (=a right), otherwise, you have none (="no-right"). The second dyad of "jural opposites" means the following: either you enjoy a privilege (=liberty to do or not to do), or you are bound to act in somebody's interest. "We have a privilege to do something exactly when we don't have a duty to refrain from it" [17].

The third dyad means the following: either you have authority, or you are "disabled", i.e. you have no power in a specific legal relationship and must obey to some external authority. The last (the fourth) dyad means: either you are "immune" from external authority over you, or else you are "liable" to forbear this external authority.

The "jural correlates" are presented by Hohfeld as follows:

- Right←→Duty
- Privilege←→No-Right,
- Power←→Liability
- Immunity←→Disability [8].

In the context of "jural correlates" it is the legal *relation* between the two agents, which matters. In other words, the personal status of the two agents is determined by a mere juxtaposition of them within a specific legal relationship. The first dyad of "jural correlates" is easy to understand: if I have a valid claim (=right), then someone else is bound to have a corresponding duty (=legal duty). The second dyad means: if you have a privilege (=liberty to do or not to do something), then someone else has "no-claim" against you, as far as the object of your privilege is concerned. The last (=the fourth) dyad of "jural

correlates" paradoxically means the following: your immunity (=legal *independence*) legally *depends* on disability (=powerlessness) of those, who in other circumstances could have been "bossing" you around.

Claim-rights and privileges-liberties fall into the first – order group of fundamental legal concepts. They are easy to understand. The only difficulty arises when in the courtroom discourse the parties concerned are muddling the distinct meaning of both terms, unconsciously substituting the one for another (see below).

With power-rights and immunity-rights it is quite another story: here we are confronted with their intrinsic complexity. As argues Reka Markovich, "with Power-rights […] have the ability to change legal positions; for instance: if I have a parcel, I have a power to sell it, but selling it changes my claim-rights, privileges, and actually my powers connected to it" [17]. In other words, by selling my land parcel, I cease to be a landowner with corresponding powers. With these powers gone, all my previous claims, privileges, and immunities are "extinguished".

We may regard Hohfeld as a pioneer of the *relational* jurisprudence: "Thus, the ultimate point of the Hohfeldian analytic was that contract and property rights did not refer to real entities, but to particular contingent allocations of power created and enforced by state actors, that divided up the permissible forms of private power" [16].

Hohfeld actually established analytical jurisprudence as an *applied* science, specially designed for *courtroom* discourse. He was the first among Anglo-American jurists, who had spotted three very elusive mistakes of legal language, which easily cumulate and are due to lack of elementary linguistic discipline. They are associated with "ambiguity", "slippage" and "blending" of logically heterogeneous concepts in courtroom discourse.

"These mistakes, according to Hohfeld, both spring from and engender ambiguity, slippage, and blending. *Ambiguity* arises when we do not know which referent we are talking about. So, […] when the court refers to "the contract," is it talking about the agreement, the document, or the legal relations brought into being by the agreement? […][…] *Slippage* arises when the courts shift from one referent to another without noticing. Thus, in one sentence, the court is discussing the agreement between the parties ("the contract"), and in the next, […] the court has switched to a discussion of the legal relations established (also "the contract"). Over time, with sufficient repetition of such vagaries, what we get is *blending*—the case law entrenchment of substantive legal concepts that are confused blends of the legal relation and its object as well as the physical and mental events […] (to wit, "the contract")" [9].

5 Conclusion

1. It seems that more than a century after Hohfeld's death nothing has changed in courtroom discourse habits. Courtroom rhetoric does not lend itself to neatly discriminate (1) *mental* facts, for example contract as an agreement "in mind"; (2) reified (materialized) *legal* objects, for example, a contract as a legal *document* and (3) an established legal *relationship*, which is to direct the conduct of the parties concerned.

2. In the courtroom rhetoric the same word, for example "contract" may easily wander among its three meanings, or modes of existence with nobody present in the courtroom trying to stop this linguistic pathology.

3. The outcome of this forensic linguistic activity boils down to fatally muddling incongruous modes of reality; in the end judges happen to regard this muddled state of affairs as an "objective" court decision, which is in fact not.

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