

# The Risks and Control of Judicial Application of Legal Doctrine

Qian Tang<sup>1</sup>

<sup>1</sup> School of Law, Xinjiang University

Correspondence: Qian Tang, School of Law, Xinjiang University.

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## Abstract

In judicial practice, the judicial application of legal doctrine is necessary and reasonable, but its application is still in an irregular and risky state, because the theoretical and practical communities have failed to conduct orderly and effective dialogue and communication in this process. Due to the characteristics of the stage of development of legal doctrine itself, the lack of positive interaction between the theoretical and practical circles, as well as the difficulty of integrating legal doctrine into the judiciary and other problems exist, which will lead to the abstraction of the argumentation of the reasoning of the judges, the decline of the credibility of judicial decisions, the reduction of the attributes of judicial authority and other risks. In order to effectively prevent these risks, legal doctrine in judicial practice should comply with the principles of strengthening judicial authority as the ultimate goal, strengthening the status of legal subjects as the fundamental starting point, and solving practical problems as the guide.

**Keywords:** legal doctrine, judicial application, risk, prevention

## 1. Introduction

Legal doctrine plays an important role not only in the theoretical world, but also in the practical world, where the development of legal doctrine forms a certain jurisprudential content and influences judicial practice. Legal doctrine is the fountainhead of jurisprudence formation. It is through the attacks and debates among scholars that jurisprudence may stand out and be treated as legal axioms. As early as the Roman Empire, the doctrines of prominent jurists served as an important basis for the administration of justice. In 462 A.D., the two emperors of Eastern and

Western Rome together promulgated the famous Law of Citation, which made it clear by law that the doctrines and writings of the five great jurists, such as Gaius and Urbium, had the same legal force as the officially promulgated code. In recent times, legal doctrine has continued to play a significant role in countries around the world. However, in judicial practice around the world, the use of legal doctrine is still in a state of irregularity, and the use of judicial doctrine in China has been affected to a certain extent, thus lacking rules and convincingness in adjudication. In this context, it is urgent to clarify the risks and

causes of legal doctrines in judicial practice, and then to propose rules for their application in judicial practice.

At present, legal doctrines in China's judicial practice mainly appear in the form of documents to enhance the rationality of the documents, which can not only respond to public opinion but also show the judicial practice.

This can respond to public opinion and show the logic of judicial application. Moreover, legal doctrines are not directly invoked in judgments, but only indirectly participate in the law-making process. At the same time, there is a lack of theoretical investigation and in-depth analysis of the risks and ethical problems of legal doctrine application due to the specificity of judicial practice. This paper attempts to investigate this issue and breaks it down into three questions: First, what are the risks in the application of legal doctrine in judicial practice at this stage? Second, what are the causes of these risks? Third, can this risk be solved by the existing legal system? If not, in what ways do we need to deal with them?

## **2. Risks of Judicial Application of Legal Doctrines**

Legal doctrine refers to the principles, rules, concepts and standards proposed and interpreted by official and authoritative jurists, or the systematic theories of case types or legal orders, from which reasoning can be made based on this system and its logical connotations. In many cases, the use of legal doctrines in judicial decisions is indispensable for their doctrinal justification, but while it strengthens the social acceptance and acceptability of the decisions, it also poses risks that cannot be ignored in the judicial field. In addition, the three most problematic aspects of the judicial process are which legal doctrine to choose, when to apply it, and how to apply it, as it may cause the risk that the public may have difficulty in accepting the outcome of the decision, leading to a decline in judicial credibility and undermining legal authority.

The purpose of judicial application is to realize the justice of each case, so that everyone can feel the authority and justice of justice, which requires This requires the judicial process to make clear and concrete judgments and arguments, and the legal doctrine of the argument has a high degree

of abstraction, its arguments are generally not easy to understand. The German jurist Larenz said: "Jurisprudence is not only concerned with the stability and clarity of the law, but also with the details, with the achievement of more justice through the completion of some detailed work."

Legal doctrine is usually used in judicial practice for adjudicative reasoning, but if legal doctrine is not concretized, it cannot be truly integrated with the effect of adjudicative reasoning in this case will be in the form of a concrete case, which makes the argument on a specific issue become an argument on an abstract issue.

In this case, the effect of adjudication reasoning will be reduced to a certain extent, and the parties to the case and the public will find it difficult to agree with the reasons and results of adjudication. This copy-and-paste model will cause damage to the acceptability of the decision, directly copying an academic paper published in the *Queen Mary Journal of Intellectual Property* in the UK, resulting in the court being forced to republish the judgment. This is a good example of the harm that the copy-and-paste model can cause to the acceptability of decisions. Usually, in cases that are complex and difficult to resolve judges will cite legal doctrines within a certain range and specify certain legal doctrines, which can make the decision more convincing. However, if judges do not handle the relationship between the transformation of legal doctrine and the resolution of difficult cases, there may be a mismatch between the legal doctrine cited and the specific case, which is not conducive to enhancing the persuasiveness of the decision.

Legal doctrines are generally specific to certain types of cases or common problems, and their application to specific cases requires specific and substantive translation. In order to achieve justice in individual cases, legal doctrines should be organically integrated with the cases, so that the answers of legal doctrines can really respond to the questions of specific cases. The core focus of the case should be the claim, if the legal doctrine is applied in the justice without discrimination, directly into the judicial decision, without substantive transformation, then the focus becomes the application of certain rules and abstract factual arguments. Concrete arguments become abstract arguments, not only to make the

case more complex, the persuasive power of the parties will be greatly reduced, not only for the realization of individual justice, but also for the construction of the rule of law society. In general, although the use of legal doctrines for argumentation may solve the problems of a certain type of phenomenon and provide more reference for future judicial decisions, it may weaken the persuasiveness of the decision to some extent.

### **3. The Wrong Medicine: The Use of Inappropriate Resulting in the Decline of the Credibility of the Decision**

Unlike case law countries, China is a codified country, the legal norms of the culture are the formal source of China, that is, the trial of cases must have a clear legal basis, the first to apply the legal norms, the trial on the basis of the law, and legal doctrine can only be in a supportive position, with legal doctrine and other informal sources of law only to enhance the persuasive power of the decision. The Fourth Plenary Session of the 18th Party Central Committee pointed out: "Promote strict justice and adhere to the facts as the basis and the law as the criterion." In the process of judicial application and building a just society under the rule of law, to achieve procedural justice and substantive justice, basing on facts and using the law as a criterion is the most basic and important principle. Although China does not take legal doctrine as a source of law like some other civil law countries, such as Article 1 of the First Draft of the German Civil Code, and the status of jurisprudence and doctrine as a source of law is not clearly defined in the civil law where legal doctrine is frequently applied, doctrine and jurisprudence do play a certain role in the actual trial process of judges, and the use of legal doctrine is also common in adjudication and legal interpretation. On the one hand, legal doctrine and doctrine have their positive significance, for example, in explaining legal terms and filling legal loopholes; on the other hand, legal doctrine has also been misused or abused in judicial decisions. The judicial process of indirectly invoking legal doctrines and selecting the wrong legal doctrines have intensified the people's distrust of judicial decisions. Although our courts are more or less influenced by legal doctrines in judicial trials, we rarely see legal doctrines cited in judgments, in

this case, judges are essentially using or drawing on legal doctrines for implicit invocation, while the parties to the case, scholars and the public only see the results but not the process. Therefore, it is impossible to judge the appropriateness of the decision. Then, the goal of using legal doctrine to enhance the evidence of doctrine is not achieved, and it can also be said that the wrong medicine has appeared.

The situation of wrong medicine. Legal doctrine as a prescription fails to treat the disease of inadequate reasoning of judges. This situation is obviously not conducive to enhancing the credibility of adjudication, leading to a decrease in people's judicial trust, which is the core area of legal trust...

When people talk about law, they naturally associate it with justice. By using multiple linear regression and fuzzy set qualitative comparative analysis, Chinese scholar Zhou Limin found that the judicial trust of litigation experiencers was significantly lower than that of other citizens, one of the reasons being the influence of equal treatment and evaluation of judges' moral character. The lack of sufficient argumentation in the judge's reasoning affects the subjective impressions of the judge, and makes it difficult for the judge to accept the outcome and creates a subjective judgment of mistrust in the judge. The public may have a better impression of and trust in judges if they have not participated in the litigation, but after participating in the judicial process, they may have distrust in the judiciary due to the lack of persuasiveness of judges' decisions. The law must be believed, otherwise it will be null and void. If justice is not authoritative and recognized by the people, it is difficult for the law of a country to become a guide for public action and a rule for judicial decision. In today's democratic society, democracy is the main source of legal authority, not the king.

In today's democratic society, democracy is the primary source of legal authority, not kingship or divine authority. As Dworkin said: "The court is the capital of the legal empire, and the judge is the prince of the empire." The importance of the judge in the judicial process can be imagined, as Marx said, "the judge has no superior but the law". Judges represent the authority of the judiciary, and the perfection or otherwise of their

adjudication reasoning will also affect the strength of judicial authority. To achieve the function of justice, to a certain extent, it depends on whether the judge can accurately determine the facts and correctly apply the law in a specific trial, and then judge the case fairly. However, there are still many controversies in trial cases, and the application of legal doctrine to trials can lead to more problems because of its low status in the law, the rather vague conditions for its application, the lack of uniform application procedures, and the lack of proper application methods, all of which can further lead to the reduction of the attributes of judicial authority. The English jurist Joseph Raz has pointed out that “A fundamental characteristic of law is the authority of legality”. Judicial authority is a necessary part of legal authority, to achieve the rule of law and good law and good governance, the law must be convinced by the people, so that the law has authority, the judiciary has authority. Legitimate authority is not the use of violence to force the public to obey it, but people agree with it based on certain criteria, and those laws that reflect social justice and moral values formally require the democratization of the legislative process, the standardization of legal expression and the scientificization of the legal system. Only such laws are well-made laws and will be generally accepted. In a good social order, there is nothing more valuable than the general agreement and obedience to the law, and good law has real legal authority only in a good social order. Legal doctrine, because of its own characteristics, may weaken the authority of the judiciary to a certain extent if it is improperly applied in the judicial process, and then undermine the authority of the law. Specifically, if a judge does not have a good grasp of the objects, conditions and methods of applying legal doctrines in judicial decisions, it will be difficult for the judge to accept the doctrinal evidence because what the judge answers with legal doctrines is not what the public wants to know. The 2017 verdict in the “mother of humiliation murder case” has led to strong public skepticism and difficulties in accepting the facts and verdict found in the verdict, which reveals a serious fracture between public trust in the law and judicial authority. The verdict of the “insulting mother murder case” has led to strong public doubts, and people have difficulty in accepting the

facts and verdict of the verdict. In view of the current development, it is indispensable to use doctrines in justice, but it is undesirable to rely entirely or mainly on doctrines in justice. The question of which doctrines to use and how to use them is urgent. While the authority of the judiciary is relevant to everyone and essential to the protection of civil rights and freedoms, the plurality of legal doctrines may lead to ambiguity in their application. Even if a general doctrine is applied, what is the general doctrine, what method is used to select the legal doctrine as the general doctrine, and whether the choice can be made to achieve the same judgment. It is debatable whether the choice of doctrine can lead to the same judgment in the same case and whether it can achieve true judicial uniformity.

#### **4. Control of the Risk of Judicial Application of Legal Doctrines**

At present, the application of legal doctrines in judicial practice is in its initial stage, and as legal doctrines are continuously applied to justice, the risk of concrete arguments becoming abstract arguments, decreasing credibility of judicial decisions and reducing judicial authority will gradually intensify. In order to ensure the rule of law and realize the positive role of legal doctrines in justice, the following three aspects should be strengthened.

##### *3.1 To Strengthen Judicial Authority as the Ultimate Goal*

Authority exists universally in human society, and it can refer to both the prestige or power that makes people believe and the relationship of support and obedience shown to authority. When the term authority is used to refer to the former, it has a greater degree of exclusivity, and when it is used to refer to the latter, the individual or institution with authority has a greater degree of exclusivity.

When the term authority is used to refer to the former, it has a greater degree of exclusivity, and when it is used to refer to the latter, the individual or institution with authority is accepted and defended to some extent by its audience.

The authority of justice is predicated on the effectiveness of the law, and a law without effectiveness has no authority at all. This requires that the application of legal doctrine should pay

full attention to the inherent properties of justice itself, not to shake the authority of justice, reduce the transparency of justice and respect the passivity of justice, control the application of legal doctrine within the scope of strengthening the authority of justice, and use legal doctrine as a means to strengthen judicial authority.

First, the application of legal doctrine should fully respect the authority of the judiciary. Judicial authority is a type of authority, which refers to the convincing power of justice in daily life in a certain scope. According to Max Weber's classification of authority theory, judicial authority belongs to jurisprudential authority. This means that the law must have the supremacy, that is, the supremacy of the law. In modern rule of law countries, the subject of law-abiding is all citizens, and no one can be above the law, which requires people to obey the law, that is, the essence of authority requires obedience. Therefore, in the process of application of legal doctrine should follow the principle that legal doctrine can be applied after the application of the law and discourage the direct application of legal doctrine in the judicial trial to reduce the negative impact of doctrine on justice. For example, in a case to determine whether the basis of the claim for the return of the corresponding money is ownership, the Beijing Third Intermediate People's Court cited two doctrines, namely, the "depositor's ownership" and the "depositor's claim", and explained the use of the two doctrines to determine The Court also explained the use of the two doctrines to determine the ownership of the currency, thus illustrating that neither doctrine affects the "possession is ownership" rule. This approach not only enhances the reasoning of the decision, but also fully respects the authority of the judiciary.

It is a jurisprudential type of authority. This means that the law has to be supreme, i.e., the supremacy of the law. In a modern state governed by the rule of law, the subject of law-abiding is all citizens, and no one is above the law, which requires people to obey the law, i.e., the essence of authority requires obedience. Therefore, in the application of legal doctrine should follow the principle that legal doctrine can be applied after the application of the law and discourage the direct application of legal doctrine in judicial trials

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Second, the application of legal doctrine must be within the limits of judicial transparency. Unlike administrative activities, judicial decisions must fully reflect transparency and openness. The use of legal doctrine as a supplement to legal sources when the law does not explicitly provide for it can, to a certain extent, increase the legitimacy and acceptability of judicial decisions. However, the characteristics of legal doctrine make it ambiguous in application, so it must be applied within the scope of judicial transparency, i.e., the application of legal doctrine should not break through the boundaries of the law but should be done within the scope clearly stipulated by the law. For example, the People's Court of Jinniu District, Chengdu City, applied the legal doctrine of anonymous partner in determining the partnership of the parties, and explained the concept of anonymous partner in detail so that the parties and the public could understand the legal terminology. Third, legal doctrine should respect the passive property of justice. The passive nature of justice is one of the main characteristics of justice, which means that judicial.

It means that the judiciary cannot take the initiative to adjudicate and prejudge disputes or conflicts in society, and the passivity of the judiciary requires the parties to file lawsuits in court. Passivity is the key to judicial neutrality, and it is the main difference between judicial power and other powers. This means that the legal doctrine of initiative and prejudgment is not only incompatible with justice, but also antagonistic.



Therefore, legal doctrine should be guided by respecting the passivity of justice, but not directly regulating social relations. For example, the People's Court of Xi County, on the premise of applying the law, relied on the "loss of inheritance doctrine" in determining the calculation of costs, which not only solved the practical problems, but also limited the doctrine to the framework of the law, instead of using the doctrine to directly determine.

### *3.2 To Strengthen the Status of Statutory Law as the Fundamental Starting Point*

First, "the number of legal provisions is to some extent closely related to the size of judicial discretion; when there are more legal provisions, judicial discretion is smaller, and when there are fewer legal provisions, judicial discretion is larger." The publication of statutory law weakened judicial discretion, and our country began the era of statutory law from the Spring and Autumn period when statutory law was cast on a tripod. However, the law alone was not sufficient to regulate all aspects of social life, and reliance on law alone was not sufficient to regulate all aspects of social life, hence the use of legal doctrine, ethics, morality, and religious beliefs as means to regulate social relations. While these approaches have certain advantages for the administration of justice, the advantages of statutory law are unmatched by other means. When an idea or rule is spelled out in legal terms, judicial discretion in this area becomes narrower and people have a more precise prediction of what the consequences of their actions will be. In most cases, statutory law is more conducive to social stability than judicial discretion, so the weakening of discretionary power and the strengthening of statutory law in the legal system is an inevitable trend. In the future, the general direction of China's judicial system reform should be to weaken judicial discretion and strengthen the status of statutory law within a certain limit as the fundamental starting point.

Second, China is a country of statutory law, and the people's courts, when adjudicating cases, refer mainly to statutory law, so that they can take the rules seriously and take the core work of the rule of law seriously, while other factors only play a certain role in the judges' adjudication of cases. Other factors only play a role as a reference for

judges to decide cases. For example, the Intermediate People's Court of Changzhi City, Shanxi Province, in determining whether there is a causal relationship between the injury and the act, although the reference to covert causation, but in the determination is mainly based on the explicit provisions of the law, doctrine only as a reference factor. Although statutory law has its limitations, such as the conflict between the fixed nature of the law and the development of society, and the conflict between the rigidity of the legal provisions and the flexibility of social change, due to our historical tradition and social reality, statutory law is irreplaceable, so at present, the fundamental starting point is mainly to strengthen the status of statutory law.

Third, legal doctrine should act as a translator between the law and the public, so as to rationalize, popularize, and materialize adjudicative reasoning, and thus enable the public to know and communicate effectively about the law. For example, the People's Court of Chancheng District, Foshan City, Guangdong Province, in finding that the tips made by the property service center of the property company of the Cinnamon Garden were considered to be acts of goodwill in civil law doctrine, and that no debt relationship arose between the property company of the Cinnamon Garden and the plaintiff, so that the public could better understand the legal relationship of debt and make the decision convincing. A generally recognized general theory of law is often a more mature theory formed after long-term research and continuous reflection, its object is often theoretical issues of law, although it is based on various social relationships in the real world, but also focus on solving the unity and coherence of the legal system, belongs to a relatively ideal intermediary approach, rather than replacing the law in the judicial decision.

### *3.3 To Solve Practical Problems as a Guide*

First, the combination of theory and practice. The application of contemporary legal doctrine suffers from the problem of incompatibility between theory and practice. First, the popular general doctrine of legal doctrine is usually used as a precondition, and then extended and extensively exegeted and argued according to one of the directions; second, a certain doctrine is taken as an

accepted general doctrine and unthinkingly. Finally, Chinese legal doctrine has been at a low ebb for a long time and has not formed a normative system. Legal doctrine is not metaphysics but should be oriented to solving practical problems that exist or may exist in reality. In a case concerning the attribution of a clubhouse and a kindergarten, since the property law did not clearly stipulate this, the judge of the Jiangsu High People's Court discussed the issue of its attribution based on the agreement theory, the area apportionment theory, the cost apportionment theory, and the planning theory, and the final result of the decision was in line with the law and balanced the interests of both parties. In the above-mentioned decision, the doctrine formed a benign guiding effect on practice and solved the practical problems, which belongs to the combination of doctrine and practice. Second, the state should regulate from the macro direction. A society must be governed by law if it is to develop continuously, effectively and stably, and the rule of law provides a stable and popularly accepted way of social governance. Legal doctrine should respond to the current reality of inadequate justice, propose various problem-solving theories for judicial reference, consider the actual function of legal doctrine invoked in adjudicative documents, discover the reasons behind it through empirical research, i.e., the various reasons for invoking or not invoking it, and think about the issues concerning the application of legal doctrine from a broader perspective. Legal doctrines should not be developed in a free and aimless manner, but in the context of social and legal problems, with the goal of solving problems and serving the public, which cannot be achieved by leaving them to their natural development, which requires the state to intervene appropriately to guide the development of legal doctrines.

Third, the theoretical community should strengthen ties with the practical community and make progress together to solve the problem of separation of theory and practice. Due to the interrelationship between the judicial systems in China and the influence of traditional concepts, the attitudes of higher courts and the government to a certain extent determine the practices of lower courts, while the courts do not attach much

importance to the theoretical views of the legal academy. This problem cannot be solved by education and self-awareness alone, but must be addressed at the institutional level. Only through the interaction between theory and practice can legal doctrine function as a bridge between the judicial system and the social system and thus contribute to the lasting strength of justice. Moreover, in most cases, if the judiciary focuses only on the visible facts and on the confrontation between the two litigants, ignoring the substantive rights, the judiciary may become increasingly rigid. When justice focuses on both the visible facts and the invisible facts, its social effectiveness in solving practical problems will be greatly increased.

When the judiciary focuses on both visible and invisible facts, its social effect in solving practical problems is greatly increased, i.e., all law is public, because all law is social. The legal academy should provide more practical and workable. This requires the legal profession to be close to the society and pay close attention to the development of the society. Because society is developing, social relations are also changing. The judicial system should also listen more to the views of the legal profession, not only to solve the existing problems, but also to pay attention to the problems. The judicial system should also listen to the views of the jurisprudence, and not only aim at solving existing problems, but also pay attention to the possible far-reaching effects of judicial operation on society.