

# Dualistic Perspective of Legislative Background Data

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**Abstract:** The charm of the legislative background data lies in its duality of being able to build a bridge between the practical field of legislation and judicature and the theoretical field of academic research. Proper application of legislative background data is an important criterion to distinguish between professionals and the public. On the application of legislative background data, from the legislative point of view, legislators need to use the conclusions and reasons of the value judgments formed around the opinions of the proponents as the basis for criticism and argumentation, reaching a minimal consensus through power; from the perspective of interpretivism, the judge needs to focus on the legislator's existing law text and legislative background information to give explanation as the basis for future amendments, reaching maximum consensus through power. On searching the legislative background data, different searching paths and methods could be exploited in the distinction between the text data recorded by the recorder and the audio-visual data recorded by the expositor. The enlightenment obtained from legislative background data should be used for the construction and perfection of the wisdom and intelligence of the court. The judges should be the ideological assistants of the legislators. The search for enlightenment from legislative background data can be conducted from three perspectives, namely cognition, arrangement, and disclosure. Therefore, legislative background data should be standardized by law.

**Keywords:** Legislative background data; Duality; Legislation; Interpretivism

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## 1. Neglected Part: Legislative Background Data

At present, the theses of law students (including graduation theses) and the research results of some law researchers show such stereotyped routines as “concept and characteristics—foreign legislation cases—existing problems—solutions” and so on. For the time being, such routines have noticeable disadvantages including having no clear arguments and being textbooks rather than treatises. Moreover, even the general public who do not have four years of undergraduate, two to three years of graduate and three to six years of doctor education in law can make some comments on the provisions of law and can point out some problems lying in those provisions. It is thought that the public with a high school or higher education can read the law provisions and perhaps, based on their rich experiences, they will have a more life-like and in-depth understanding of the relevant provisions, or even their understanding will surpass the so-called “research” conducted by law students (including undergraduates, graduates and doctors) and law researchers. Therefore, some professional researchers may seem not to be so professional when compared with the general public. It is not a matter of right or wrong to distinguish between the value judgments made by the public and those by the professionals. Nevertheless, in terms of inner evaluation and acceptance degree, the former may not be convinced by the argument and explanation made by the latter on certain legal issues. As such, the superiority of professionals’ capability and level of professionals over those of the public can be reflected on their utilization of legislative background data.<sup>①</sup>

Let us discuss the professionals and ignore the public at first. Although the constitution, criminal law, civil law and other disciplines launch on a heated discussion on law doctrinal theology<sup>[1]</sup>, great attention should be paid to legislative background data in researching these disciplines. Legal doctrinal theology can only tell people the principles of existing laws, but it cannot explain why the laws have such principles. Compared with “know-what”, “know-why” is more helpful for the in-depth understanding, learning and propagation of law (whether it is in legislation process, or has already been completed). Exclusive propagation of the law system will achieve better practical results. In practice, being an “invisible product” of legislation, legislative background data is often neglected by professionals, and few people show interest in relevant legislative background data. Legislative background data has important functions. It is an important bridge to effectively connect legislation and the judicial process, an important basis to connect law value science and legal hermeneutics, and also an important link to promote effective interactions between law practice and law theory. The application and searching of legislative background data are respectively related to the characteristics of the two dimensions, and thus have an impact on the formulation, implementation and research of the law.

## 2. Application of Legislative Background Data: From Legislation Theory to Interpretivism Theory

During the utilization of legislative background data, perhaps there would be a confusion that some

① The criteria for distinguishing and judging professionals and the public are not only the proper application of legislative background data, but also systematic and typification thinking methods, etc.

opinions of legislative background data, especially those opinions raised by different stakeholders are different or even completely contradictory. So how could we make decisions to reasonably strengthen the persuasiveness of the legislators or the judges' point of view, or how to judge these views to effectively express the views of legislators or judges? From the academic aspect, such confusion can be further divided into two problems based on time differences: Before the promulgation of the formal text of legislation, how do legislators coordinate value judgments of different interest conflicts? After the formal text of the legislation is promulgated, during the law implementation process, how do the judges deal with the contradictory or ambiguous provisions of law found in the application of legislation?

### **2.1 Legislation Theory: Pursue Minimum Consensus**

"Legislation is the minimum consensus that people can reach in current society," "Legislation is also the maximum consensus that people can reach in current society". These two sentences share the same meaning in certain people's discourse system or certain contexts. From the perspective of fact description, these two sentences do share the same meaning. But if based on the promulgation time of legislative texts and the corresponding academic researches, slight differences can be detected, that is, the former sentence is mainly based on the legislation theory, and the latter is based more on the interpretativism theory.

As a starting point, the application of legislative background data before the promulgation of formal legislative text will be studied first. In the process of legislation, two key characteristics should be paid great attention. First, at this time, the legislative background data hasn't been completed yet; it is gradually and simultaneously completed along with

the legislation process. Second, during legislation, competent authorities for legislation play the leading role. The essence of the whole legislation process is that the legislators find the relationship and conflicts of interests, adopt the appropriate coordination strategies to adjust the interest relations and resolve the conflict of interests. On the one hand, experts and scholars, judges, lawyers, the public and other proponents tend to express their views and opinions in the legislation process, and strive to make their own value judgments accepted by the competent authorities for legislation; on the other hand, when the legislative authorities invite opinions of the proponents, they will often request the latter to meet two "one or two words" (the informal expression of "concise and comprehensive comments") requirements, that is, to bring forth conclusions drawn by the proponents on corresponding issues in one or two words, and also give corresponding reasons for such conclusions in one or two words. During the process of expressing opinions and listening to opinions, whether it is the official record or private record, the recorded value judgment conclusions and reasons, such as the records or brief report of the drafting colloquial, etc., of course, are legislative background data if they are collated. As people differ in their life experiences, interest pursuits, social backgrounds, knowledge levels and so on, they usually have different value orientations and judgments, or even contradictory conclusions. So it is difficult to reach a consensus.

At this point, the collated legislative background data has the significance of being criticized and argued. To prove an value judgment conclusion, although it may fall into the "Münchhausen-trilemma"<sup>[2]</sup> with infinite recursions, circular arguments, categorically terminated discussions, ideally speaking, at least in arguments, if refutation can be made one by one on all the other views of specific systems prescribed in the legislative

background data before the views and reasons of legislators or proponents are presented, perhaps the corresponding value judgment conclusion will be more acceptable. That is to say, refutation goes before argumentation, provided that records of legislation background data are used. Furthermore, neither refutation nor argumentation can be made without thinking and exploring in three dimensions, namely legitimacy, rationality and effectiveness.

Nevertheless, the theory of “refutation goes before argumentation” may not match the complexity of life. Sometimes two conditions might occur, namely, “the conclusion of value judgments is hard to convince upon refutation” and “some problems cannot be solved.” The first situation often occurs in legislation with fiercely conflicting values or legislation with tilting value tendencies. *Labor Contract Law* should have a strong legislative purpose to protect the interests of workers. In the process of legislation, opinions like “Why not protect the interests of employers” have been repeatedly aired, and such questioning voice keeps continuing. On the Two Sessions (NPC & CPPCC) of the year when *Labor Contract Law* was promulgated, some

employer representatives proposed amendments to the law. In addition, almost every year during the Two Sessions, there will be employer representatives challenging the law’s unilaterally protection of the workers’ interests. In this case, no matter how strongly to refute the employer representatives’ insistence on dual protection view, “The *Labor Contract Law* should not only protect the interests of workers, but also protect the interests of employers,” it is difficult to persuade an employer or employer representatives due to actually existing benefits, especially in the current economic downturn. The second situation often occurs in specific cases or examples to which there is no existing law to be applied. For the relationship between compensation for industrial injury and compensation for tort, it is more likely to be difficult to solve the problem whether it is advocated “double compensation,”<sup>[3]</sup> or “a single compensation or for upper limit not for lower limit”<sup>[4]</sup>. A case study of legislative background data is the Yong-Wen CRH accident and the then relevant research hosted by the Ministry of Human Resources and Social Security. Advocates of “double compensation” will encounter the fairness



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problem of different compensation for different lives. Some of the dead were traveling on business or working on the train, but some others were not. Therefore, some people can get the 915,000 *Yuan* of compensation for the tort and then get an additional compensation for the cost of work injury, but others can only get the 915,000 *Yuan* of compensation for the tort, which means different compensation among the dead in the same accident. At the same time, getting “double compensation” means that he/she benefited from the disaster, which violates the basic principle of “compensation on loss.” The “single compensation or for upper limit not for lower limit” proposition will meet with the query of why only one party get compensation and the other party does not, also raise a matter of fairness. So, whether advocating “double compensation,” or “single compensation or for upper limit not for lower limit,” problems cannot be easily solved.

In such circumstances, the dominant position of the legislative authorities with their legislation power plays an essential role in the legislation process, since they have the power to make the final decision, by using legislative background data that bears various value judgment conclusions and justifications. Legislative authorities may give the final word on the controversial value judgments on which consensus can hardly be reached. Baptized by various legislative procedures, a conclusion of minimum consensus could be adopted or prescribed so as to strengthen the acceptability of such law provisions.

## **2.2 Interpretativism theory: Pursue Maximum Consensus**

The formal legislation text will also have an impact on the use of legislative background data after its promulgation. In the interpretativism stage, it corresponds with the two key features of the legislation stage. First, legislative background data has been formed or has been basically formed at

this time; second, in the process of application of legislation, the judiciary is in an intermediate and independent ruling position.

The essence of the whole judicial process is the process for the judges to adjust the interest relationship, resolve conflicts of interest and make decision in accordance with the provisions of the existing law. However, there may be ambiguities, conflicts, deficiencies, and other circumstances in the expressions of the legislation texts, which need to be dealt with by appropriate legal techniques. The key is that, when judges encounter ambiguity, conflict, deficiencies and other similar circumstances, the judgment should follow the original intention of the legislator, or the text itself, or the expositor’s understanding?

Before responding to this confusion, foreign experience and views, especially those of the United States, can be consulted firstly. Apparently, legislative background data seems to have lost its effect and value, but “the Federalist Paper,” as the legislative data of the US Constitution establishment, is considered to have the authority to determine the intent of the constitution framers. Thus, it was “...often used by the Supreme Court and other courts to interpret the Federal Constitution ... In 1934, for example, in the case of Home Building and Loan Association Sue Blaisdell, the Supreme Court used the Federalist Paper No. 44 to elaborate the basis of the contract terms.”<sup>[5]</sup> In addition, some of the views and opinions in the Anti-Federalist Papers not only provide a better understanding of the Federalist Papers, but also can be used to effectively understand the constitutional system of the United States.<sup>[6]</sup> In fact, it has always been questioned and debated in the practical field and theoretical field on the practice that the interpretation resorts to reflect the legislative background data of the legislators’ intentions. “Judge Holmes of the United States, the founder of the modern pragmatism school of law, strongly affirms



making judgment by virtue of long-term experience in cases of Constitution interpretation of the Constitution, and advocates disregarding the original intention and relevant words in the formation of Constitution...the California courts argued that their state constitution must ‘be interpreted according to the changing situation and the growing needs of the people’... Professor Miller and Howell once said, ‘there is no room for such a muddle-headed view in the second half of 20<sup>th</sup> century that the judges refer to the original intention of the framers in Constitutional interpretation.’<sup>[7]</sup> This shows that there are also disputes abroad, and the practices of different courts vary from each other.

In fact, Professor Zhang Zhiming gives convincing reasons and conclusions on how to explain the “theory of legislative intention–theory of legal text–theory of the main body of interpretation” of legislation from the viewpoint of a lawyer supporting “legal certainty.”<sup>[8]</sup> In the author’s view, if, in a specific case (probably difficult cases), different understandings result from interpretation from the three perspectives, namely original legislative intent, legal text and interpretation main body, the following two aspects can be considered. The first consideration is reference of weak sense: According to Article 104 of the *Legislation Law*, the Supreme People’s Court must consider the restriction of legislation at the national level on the judicial interpretation during judicial interpretation formulation, that is, at least conform to the legislation’s original intention. At this point, the legislation’s original intent can be determined based on legislative background data, which means that the interpretation main body should pursue and follow the legislation’s original intention based on the legal text. This thought can also be applied in specific judiciary. “In the absence or shortage of formal legal origins, the judge should take the appropriate technical approach to pursue the

legislation’s original intention, if the legislator will take certain coordinated strategies and regulations to resolve this dilemma, then the judge will imitate to make his legal decision.”<sup>[9]</sup> The reason why this is weak sense is that the existing law text should be a natural product of legal theory, but now it relies on the existing law provisions to prove the rationality of legal theory, which is the anti-logic condition. The second consideration is Hegel’s negation of negation theory.<sup>[10]</sup> The pursuit and following of legislation original intent may refute “the meaning of the legal text” and “the understanding of the interpretation main body.” But at the same time, it is in the process of forming a new legislative background data for the future revision of the law as a critical reference, through this once again refutation, a better or more advanced affirmation can be achieved, unifying the legislation original intention, the legal text, the interpretation main body, and achieving legislative perfection and renewal.

The reason for these two considerations, in fact, is that the judge can use the judicial judgment power to pursue the legislation’s original intention based on legislative background data and then obtain the maximum consensus. Since legislation itself is the act of public wills,<sup>[11]</sup> it can be presumed to represent the views of the overwhelming majority. Whether it is for the obedience of judicial judgment or the pursuit or compliance with the legislation’s original intention, it can get the interpretation conclusions with maximum consensus. As a result, the legislative background data also realizes its significance of interpretation and fewer detours, errors avoidance, controversy reduction in future revision.

### 3. The Searching of Legislative Background Data: From Typification to Normalization

Relevant legislative background data is the

prerequisite to use legislative background data.

### 3.1 Typification: Searching Corresponding Paths and Methods

As the specific expression form of legislative background data is quite varied, a typification of itself should be done before searching for the legislative background data. From the academic point of view, there is a distinction in meaning, and there is always a distinction in purpose or purpose orientation. In other words, there would be different searching paths and methods for different types of legislative background data. According to the expression form of the legislative background data, it can be divided into text data and audio-visual data. The text data can also be re-typed into official recorded text data and scholar recorded text data according to the identity of the recording subject; audiovisual data can also be re-typed into official expositor's audio-visual data and scholar's audio-visual data according to the identity of the expositor.

There are at least two channels to find the official record of the text data. First, it can be found through the official website of legislative authority. For the legislative background data of law, one can search them in the "website of China National People's Congress," the official website of NPC to find what is reflected in the "Legislative Law." The website is <http://www.npc.gov.cn>. After log-in, in the middle of the page, there are five categories of "legislative work," "legislative developments," "deliberation of draft laws," "deliberation speech," "legal world", "legislative topics." Click in the "legislative topics," there will be a total of 100 legislative topics from the discussion of legislation of supervision law on oct.15th, 2007 to the discussion of legislation of National Defense Transportation Law on April 29th, 2016, involving the legislative background data of legislation work in four aspects; drafting, reviewing, annulment, interpretation (mostly in drafting and

reviewing). For the legislative background data of administrative regulations, departmental rules and regulations and some laws, one can search in "Chinese government legal information network," the official website of Legislative Affairs Office of the State Council actually. Information on that website has been reflected in the "Legislative Law." The website is <http://www.chinalaw.gov.cn/>. In the upper left corner of the page, the "opinion soliciting system of draft laws and regulations" and "solicitation notice for opinion of draft" are specially set. It is worth noting that both the exposure draft (or draft for approval) and description of the latest draft laws, administrative regulations and departmental rules and regulations to be consulted, the exposure draft (or draft for approval) and description of the solicited draft of laws and administrative regulations since 2007, and the exposure draft (or draft for approval) and description of the solicited draft of department rules since 2008 are in "opinion soliciting system of draft laws and regulations." These practices of the official website are the specific implementation of Article 37, Item 2 of Article 67 in *Legislation Law* on public consultation of draft laws and draft administrative regulations. Second, it can be found through the legislative understanding and applicable books published by the legislative staff in the legislative authority after the promulgation of laws. Such book titles are often with "explanation," "interpretation" and other similar words, which become a series of reference data. Among them, the "explanation" series books are published by Law Press China, and the "interpretation" series books are published by China Legal Publishing House. Explanations are often started from three perspectives; "gist of article," "legislative background," and "interpretation of article." All the articles one by one, and relevant legislative background data such as description of "XX Legislation (Draft)" or "XX Legislative

Amendments (Draft),” report on deliberation result, report on amendments, etc. will be attached.

The textual data recorded for the scholar may not be as readily available as the officially recorded text, because it is either from the recorded notes in legislation symposium as a scholar, or scholars who participate in the legislative symposium, or retrieval and search the scholar’s published thesis or books with the information of legislative background.<sup>[12]</sup>

As for the audio-visual data of official expositor and academic scholars, if they are invited to give lectures in universities or research institutions or in paid training courses, one may need to record the legislative background, legislative development, legislation original intention, legislative causes, etc. of the lecturers by visiting the learning site. The difference between the audio-visual data of the official expositor and the academic scholars is mainly on the authority and difficulty. The former is more authoritative but not easy to obtain, but the latter is easy to obtain but less authoritative. With the development of network and technology, some VCDs and DVDs of audio-visual data of official expositor and academic scholars can be obtained through bookstores or online bookstores. Some audio-visual data of academic scholars can be obtained through the “Super Star Class—Super Star Academic Video,” and some audio-visual data of academic scholars can be obtained through some video website of universities, scientific research institutions, such as legal documents and the Legal Information Network of Renmin University of China, etc. Sometimes, some audio-visual data are recorded by universities or research institutions, and made into textual forms after being collected and revised by teachers and students, then the content of the lecture will be published on the relevant academic website, such as China Jurisprudence Network, China Private Law Network, China Civil and Commercial Law Network, China Labor Law and Social Security

Law Network after classification according to different research items. In addition, the original manuscript may also be collected and included in a published book, such as the “*Law School in the People’s University lectures*” in Renmin University of China School of Law, “xx Law lectures”<sup>[13]</sup> series of Southwest University of Political Science and Law School, etc. These books are often in multi-division or multi-volume form of continuous publication. The Law Press China also specializes in the publication of scholarly lectures, which often involve lectures on the relevant legislative background.<sup>[14]</sup>

### 3.2 Normalization: Exploration of Corresponding Phenomena or Problems

Although there are different searching paths and methods to obtain different types of legislative background data, in reality, there are still a lot of legislative background data in undisclosed state,<sup>[15]</sup> so there is nowhere to be found. Here is the official publication of pure legislative background data (see table below) as an example. Compared with the legislative background data obtained through network and lectures, the content of legislative background data obtained from official publication are more comprehensive, specific and integrated. It not only involves various types of drafts and related notes, reports on the results of the deliberations, reports of amendments, and opinions of distinguished or implicit NPC deputies that can be obtained through the Internet and the lecture sites, but also includes “Survey of legislature (including briefing),” “Opinions of the central and local authorities on XX (draft),” “Opinions of universities and research institutions on XX (draft),” “Opinions of other relevant subjects on XX (draft),” “Briefing on draft symposium,” “Cases of the judge on the legitimacy of the articles,” “Investigation report on the situation of foreign legislation,” “Excerpts and briefings of certain cases,” “Research report on XX



Table of Officially published books with legislative background data only

No	Author	Title	Press	Version	Words
1	Civil Law Division of Legal Affairs Commission of National People's Congress (ed.)	Selection of legislative information of "The People's Republic of China Contract Law"	Law Press China	1999	433,000
2	Administrative Law Division of Legal Affairs Commission of National People's Congress Standing Committee (ed.)	Reference of Contract Law (Draft)	Press of Chinese Democratic Legal System	2006	215,000
3	Civil Law Division of Legal Affairs Commission of National People's Congress Standing Committee (ed.)	Legislation Background and Viewpoint of Property Law	Law Press China	2007	560,000
4	Civil Law Division of Legal Affairs Commission of National People's Congress Standing Committee (ed.)	Legislation Background and Viewpoint of Tort Liability Law	Law Press China	2010	776,000
5	Civil Law Division of Legal Affairs Commission of National People's Congress Standing Committee (ed.)	Legislation Background and Viewpoint of Civil Procedure Law	Law Press China	2012	710,000
6	Civil Law Division of Legal Affairs Commission of National People's Congress Standing Committee (ed.)	Legislation Background and Viewpoint of Consumer Protection Law	Law Press China	2013	439,000
7	Administrative Law Division of Legal Affairs Commission of National People's Congress Standing Committee (ed.)	Legislation Background and Viewpoint of Administrative Procedural Law	Law Press China	2015	524,000

Sources: retrieval data according to Amazon, Dangdang and other online bookstores. Here, with respect to the official published legislative data, only the books with exclusive contents of the legislative background data are included, excluding the common books in the market, which include the interpretation of the provisions.

system," etc.

According to the retrieval, four phenomena or problems can be found. First, within the framework of the socialist legal system with Chinese characteristics, relevant legislative background data of many important laws are not disclosed yet. Although it is not appropriate to say that none of the legislative background data out of this table haven't been disclosed, books solely contain legislative background data of laws are not found. Second, compared with Article 37 of the Legislative Law, it will be clear why there will be the conclusion of the facts. Article 37 only clearly requires the publication and solicitation of three types of texts, namely "the draft law, description of the draft law and description of its amendments, and so on." Even for those that are not required to publicize the descriptions of the draft

laws and their drafting and amendments, publishing authorities attach relevant legislative background data to the interpretation or explanation books, which also meet the requirements of *Legislation Law*, although no legislative background data other than those three types of texts are published as the Administrative Law Division and Civil Law Division of the Legal Affairs Commission of the National People's Congress Standing Committee do. From the perspective of interpretation, in Article 37 of the Legislative Law, an "and so on" is added after "description of the draft law and its drafting and amendments," the Administrative Law Division and Civil Law Division of Legal Affairs Commission of National People's Congress Standing Committee are not only doing specific work of "and so on," but also enrich and develop the provisions of *Legislation*

*Law*. Third, with respect to Item 2, Article 67 of the *Legislation Law*, the required disclosure of legislative background data on administrative regulations is more limited in scope. It only provides that “Administrative Draft Regulations” shall be disclosed and solicited to the public, and there is even no “and so on” behind. Although the State Council Legislative Affairs Office will also disclose the legislative background data of the second type of draft description in practice, compared with the publication and solicitation of law, it significantly reduces the disclosure of many legislative background data. Fourth, in Article 35 and Article 38 of the *Legislation Law* (2000) before revision in 2015, only the type of “important draft law” shall be disclosed and solicited to the public, and “administrative regulations” are not required by the *Legislation Law* (2000). “Disclosure and solicitation to the public” have already been put into implementation since the introduction of “*Legislation Law*” in 2000, but the draft law and solicitation notes had not been disclosed on the website of Chinese People’s National Congress until October, 2007, and the suggestion of National Law Division of Legal Affairs Commission of National People’s Congress Standing Committee was even later in April, 2008.<sup>[16]</sup> Be it 2007 or 2008, it can be found that it takes a certain period of time for the cognition, understanding and implementation of law in the implementation of the law (from the year of 2000 to about 2008). Therefore, we can take a rational view of the revised “*Legislation Law*” of the progress in its publication and solicitation of the three newly added types of texts, namely description of the draft law and its drafting and amendments and administrative regulations draft. It is a great step forward to require such publication and solicitation, although the scope of legislative background data disclosed in the amended Legislative Law may not be comprehensive, from the systematic point of view, the

provision of undisclosed description of the drafting and amendments of administrative regulations draft leave enough space for legislative background data for the future revision of *Legislation Law*.

#### 4. Conclusion: Enlightenment of the Application and Searching of Legislative Background Data

First, the enlightenment obtained from the application of legislative background data is “making judges the ideological assistants of legislators.” During legislation, revision, annulment and interpretation of legislation, the judge, at the frontline of dispute judgment, can bring its important value into full play. Value consensus regarding legislation can be reached by applying and trying provisions of law in judicial judgments that adjust different interest relation and solve interest conflicts. That is to say legislators can draw on experience and nutrition of rationality from the judges. On the one hand, the judges have such ability. They know best of ambiguity, conflict and deficiency of the meanings of legislative texts. Judges will face such problems directly in judgment for any of the following causes: “the drafting process of the statute is often rushed and rough;”<sup>[17]</sup> due to restriction of language itself, the so-called “uncertain edge”<sup>[18]</sup> zones of legislation are inevitable; departments leading the law drafting may not be familiar with matters beyond their own business; new circumstances beyond the legislators’ expectation at the time of law drafting arise and/or other causes. If there is a corresponding feedback mechanism, it can serve as an important legislative background data for legislators to improve legislation. On the other hand, legislators also need this kind of practical rationality to bring innovation and nutrients to legislation. As Judge Benjamin Cardoso said, a man who was deeply impressed with pragmatism, the work of the legislator and

the judge has a specific connecting point.<sup>[19]</sup> In the current context of “Rule of Law”, making judges the ideological assistants of legislators is a key point to establish and improve courts of wisdom and intelligence.

Second, the enlightenment obtained from the searching of legislative background data is “Legislative background data should be standardized by *Legislation Law*.” It must be admitted that the *Legislation Law* does involve legislative background data, but lacks a series of standardized system on awareness, collation and publication of such data. From the cognitive point of view, the existing “*Legislation Law*” only provides four categories; “draft law, description of drafting and description of amendments” and “administrative regulation draft,” which are far less than the actual scope of the legislative background data. From the collection point of view, by comparing drafts, although additions, deletions and amendments

can be clearly detected, it is not easy to clarify the cases or instances that supports the formulation, annulment and amendment of such provisions, or whether the articles in the draft that have been deleted after the introduction of the official text can represent or explain the provision. Also the scattered situation of various legislative background data increases the difficulty of collection and arrangement. From the publishing point of view, there are still some deficiencies in the existing legislative background data, despite free open and paid open are understandable, the main problem lies in the non-disclosure of some legislative background data. Of course, the current disclosure of legislative background data is also in the improving stage, after all, the legislative background data published on the official website of the National People’s Congress and its Standing Committee is far richer than that of the four types provided in the “*Legislation Law*.”

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## REFERENCES

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- [1] Zhang Xiang. Elementary Constitutional Doctrine [J]. *Chinese and Foreign Jurisprudence*, 2013, (5).  
Chen Xingliang. Methodology of Criminal Law Doctrine [J]. *Chinese Journal of Law*, 2005, (2).  
Feng Jun. Position and Method of Doctrine of Criminal Law [J]. *Chinese and Foreign Jurisprudence*, 2014, (1).  
Xu Defeng. On Doctrine of Law and Value Judgment - Focus on the Method of Civil Law [J]. *Chinese and Foreign Jurisprudence*, 2008, (2).  
Xu Defeng. Application of Doctrine of Law [J]. *Chinese and Foreign Jurisprudence*, 2013, (5).
  - [2] Robert. Alexey (Germany). Theory of Legal Argumentation—Rational Argument Theory as Legal Proof Theory [M], Translated by Shu Guoying. Beijing: Chinese Legal Publishing House, 2002. Page 1-26.
  - [3] Yang Lixin. Return from Contract to Identity [M]. Beijing: Law Press China, 2007, Page 299.
  - [4] Zhang Xinbao. The Relationship between the Right to Claim Work Injury Insurance and the Claim for Common Personal Injury Compensation [J]. *Chinese Legal Science*. 2007, (2).  
Lin Jia. The Idea, Practice and Innovation of Social Security Law [M]. Beijing: China Renmin University Press, 2002, Page 243.
  - [5][7] James Antieau (USA). Constitutional Construction [M]. Translated by Li Jianfei. Beijing: China University of Politic Science and Law Press, 1999, Page 94-95, 107-110.
  - [6] Su Li. Possibly happening: the transformation of Chinese law [M]. Beijing: Law Press China, 2004, 106-107.
  - [8] Zhang Zhiming. Legal Hermeneutics [M]. Beijing: China Renmin University Press, 2015, Page 24-43.

- [9] Benjamin Cardozo (USA). The Nature of the Judicial Process [M]. Translated by Su Li. Beijing: Commercial Press, 1998, Page 74.
- [10] Hegel (Germany). *Die Logik (Second Edition)* [M]. Translated by He Lin. Beijing: Commercial Press, 1980, Page 206-211.
- [11] Rousseau once said: Law is the act of public wills. Rousseau (France), The Social Contract (Third Edition) [M]. Translated by He Zhaowu. Beijing: Commercial Press, 2003, Page 47.
- [12] Yang Lixin. Tort Liability Law—Stories and Puzzles behind the Provisions [M]. Beijing: Law Press China, 2011, page 1-273.
- Chang Kai. Labor Right Theory—A Study on the Legal Adjustment of Contemporary Chinese Labor Relations[M]. Beijing: China Labor and Social Security Publishing House, 2004, Page 139-140.
- Wang Yi. Legislation Choice of the Property Protection System—Comments on Chapter Three of the Draft of Property Law [J]. *Chinese and Foreign Jurisprudence*, 2006, (1).
- Wang Yi. Legislation Suggestion on Legal Action System of The General Rules of Civil Law [J]. *Comparative Law Research*, 2016, (2).
- [13] Yi Tian. New Developments in Legislation of Real Right [A]. Lectures on Civil and Commercial Law: Volume 1 [M]. Beijing: Law Press China, 2008, Page 93-94, Page 98-100.
- Sun Xianzhong, Chen Xiaojun. *Implementation and Development of China's Property Law* [A]. Lectures on Civil and Commercial Law: Volume 2 [M]. Beijing: Law Press China, 2010, Page 292-294.
- Liang Huixing. Several Issues on Legislation of Tort Liability [A]. Lectures on Civil and Commercial Law: Volume 3 [M]. Beijing: Law Press China, 2010, Page 170-186.
- Liang Huixing. Several Issues on Theory and Practice of Contract Law [A]. Lectures on Civil and Commercial Law: Volume 4 [M]. Beijing: Law Press China, 2013, Page 299.
- [14] Yang Lixin. Return from Contract to Identity [M]. Beijing: Law Press China, 2007, Page 250-265.
- Liang Huixing. Living in Civil Law (Second Edition) [M]. Beijing: Law Press China, 2010, Page 57-213.
- Zhang Xinbao. On Tort Liability Law [M]. Beijing: Law Press China, 2011, Page 87-168, Page 287-343.
- [15] Zheng Wenrui. Legislative Background Data Should Also Be Disclosed [N]. *People's Daily*, Dec. 10th, 2014.
- [16] National Law Division of Legal Affairs Commission of National People's Congress Standing Committee. An Interpretation of the Legislation Law of the People's Republic of China[M]. Beijing: Chinese Legal Publishing House, 2015, Page 154.
- [17] Richard A. Posner (USA). Issues of Jurisprudence [M]. Translated by Su Li. Beijing: China University of Politic Science and Law Press, 2002, Page 338.
- [18] Hart (UK). The Concept of Law[M]. Translated by Zhang Wenxian, Zheng Chengliang, Du Jingyi, Song Jinna. Beijing: China Encyclopedia Publishing House, 1996, Page 13.
- [19] Benjamin Cardozo (USA). The Nature of the Judicial Process [M]. Translated by Su Li. Beijing: Commercial Press, 1998, Page 70.