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A Triple Review of the Theory of Reliance on External Constructive Facts --Centered on Wellspacher's Doctrine

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Abstract

At this stage, there is a misunderstanding of Wellspacher's theory of reliance on external constitutive facts, which needs to be reviewed and repositioned. Based on Kant's philosophy of law and the doctrine of "external identifiable signs" advocated by natural law scholars, Wellspacher further developed the theory of reliance on external constitutive facts based on the private law history of the idea of publicity. This theory did not originate from the criticism of the doctrine of dispositive authority, which was only one of the starting points of the doctrinal work in this theory and did not take a central position. The theory of appearance of rights was not pioneered or created by Wellspacher, but existed before him; Wellspacher is credited with distilling and abstracting the general principles from the scattered legal provisions, and establishing the basic framework for future generations of appearance of rights liability.

Keywords: appearance of rights, external constitutive facts, dispositive authority theory, reliance theory

1. Introduction

Legal appearance theory (Rechtsscheintheorie), as an "intermediate theory", connects the principle of reliance protection, which is one of the cornerstones of civil law, to the specific civil and commercial legal systems such as good faith acquisition, apparent agency, assignment of claims, and enforcement (Cui, 2019), and its important function is evident. The Austrian scholar Wellspacher, who published the book *Reliance on External Constituent Facts in Civil Law*, is well known to our scholars as a strong advocate of the theory of appearance of rights. However, there are still many shortcomings and even misunderstandings in the study of Wellspacher and his "theory of reliance on external facts", which are as follows: Firstly, it is argued that Wellspacher proposed the theory of reliance on external constituent facts as a criticism of the doctrine of dispositive authority (Ma, 2003); secondly, it is argued that Wellspacher originated or first proposed the theory of appearance of rights (Ye & Shi, 2008); thirdly, it is argued that Wellspacher's reliance on external constituent facts is a no-fault or consequential liability, but without any detailed justification. The third is that the reliance on external constitutive facts, as advocated by Wellspacher, is a no-fault or consequential liability, but without any detailed justification (Liu, 2013). The reasons for this are, firstly, that the existing research results in China are highly concentrated and secondary literature; and secondly, that only part of the arguments of the theory of reliance on external constitutive facts have been focused on, but the theoretical basis and specific structure of the theory have not been studied in depth. In conclusion, it is necessary to review Wellspacher's "external constitutive factual reliance theory".

In this paper, we examine the theoretical basis of the theory of external constitutive reliance, analyze the theoretical framework constructed by Wellspacher as a whole, and then review the three shortcomings or misunderstandings mentioned above, and re-evaluate Wellspacher's theory of external constitutive reliance.

2. The Theoretical Basis of "External Factual Reliance Theory

2.1 The Examination of the Idea of Publicity in the History of Private Law

As early as 1904, Wellspacher had already made a detailed study of the idea of publicity (Publizitätsgedanke) and published the article "The idea of publicity and the action of movable property in modern application". This article analyzes the development of the idea of publicity and chattel actions by using the method of private law history, mainly the relevant provisions of the Codex Theresianus, supplemented by the relevant provisions of the Prussian General State Code.

Firstly, according to Wellspacher, the idea of publicity was already present in the earliest draft of the Austrian Civil Code, the Teresian Code of 1766, and its scope was not limited to bona fide acquisitions (Wellspacher, 1904). The reason for the inclusion of the idea of publicity is that the idea of publicity in the modern sense was not systematically promoted until Huber and Gierke, but the Theresian Code was well before that time. However, many of the provisions of the Theresian Code, such as the concept of protection of the buyer, fit well with the doctrine of publicity advocated by later Germanic law scholars such as Huber and Gierke. It is clear that in the German region, in the face of the in-depth exploration and systematic interpretation of the idea of publicity by the German Kirk and the Swiss Huber, the Austrian Wellspacher did not want to be outdone in this respect.

Secondly, where does the element of the idea of publicity in the Teresian Code come from? According to Wellspacher, it all points to German law. Of course, Wellspacher does not refer to a specific legal system, but to the continuing development of German legal thought: the notarial function of possession of movable property, and the notion of defective rights as a precondition for the right of restitution: on the level of the notarial function of possession of movable property, the doctrine holds that possession is a form of universal publicity of property rights (allgemein kundbare Form der dinglichen Rechte) and a presumption of the existence of rights; it also acts as a form of empowerment of property transactions (Legitimationsmittel). The buyer may assume the possessor (Inhaber der Gewere) to be the true owner of the right. On the level of publicity of defects of rights, the unconditional return of stolen goods is also derived from the idea of publicity. Under the idea of publicity, the present possession can be broken only if there is a publicity of the defect of right, which contradicts the present possession (Wellspacher, 1904). Stolen goods precisely met the aforementioned condition, because the legal order treated the defect of right in stolen goods as notifiable; In the close communal relations of medieval German life, the theft or robbery of movable property could be made public in a very simple way - by calling (Gerüfte). The call further facilitated the publicity of the theft (Kundbarmachung) and marked the beginning of the recovery of the lost chattel (Wang & Ren, 2015), and also formed the basis for the recovery of ownership from any third party.

Third, with regard to the development of the idea of publicity, Wellspacher refutes the view that "with the penetration of Roman law, the idea of publicity in German jurisprudence, previously recognized by general doctrine, gradually declined, and the acquisition was replaced by the protection of the bona fide acquirer, for whom Roman good faith (bona fide) is of decisive importance; the absolute The Roman concept of the right of return of ownership has been successful in Germany". After studying the relevant provisions of the Theresian Code and the Prussian General State Code, Wellspacher finally concluded that the idea of publicity in German law remained in full continuity until the end of the 18th century, a development that was hardly influenced by the Rezeption des römischen; although the historical law school attempted to expel German legal thought from the common law at the beginning of the 19th century, it was only superficially successful, and the ideas of chattel action and publicity as nationalen Rechtsstoffe were in fact only reinvented into Roman legal norms through modern application (Usus modernus) .

Unfortunately, the article "The idea of publicity and chattel action in modern application" is still an unfinished work, because it does not examine the further development of the idea of publicity and chattel action in the Austrian Civil Code and subsequent codes. This regret is remedied in *Reliance on External Constituent Facts in Civil Law*: the Austrian Civil Code and the modern legislation represented by the German Civil Code are examined with a doctrinal approach. In fact, this was also the intentional arrangement of Wellspacher, for he had shown that only after German jurisprudence has mastered the doctrinal task of the idea of publicity can it carry out an in-depth study of the latest law (Wellspacher, 1904). Thus, it is clear that Wellspacher's work on the Austrian Civil Code and the modern legislation represented by the German Civil Code has been carried out. It is thus clear that Wellspacher had already planned for himself the future task of proving the scope and meaning of the idea of publicity and of grasping its legal manifestations doctrinally (Selter, 2006). This is also considered to be one of the starting points of the ideas that led to the creation of Reliance on external constitutive facts in the civil law (Heinrich, 1954).

2.2 Following the Natural Law in the Philosophy of Law

2.2.1 Drawing on Kant's Jurisprudential Ideas

In his jurisprudence, Wellspacher also draws on Kant's justification for the acquisition by prescription. According to Wellspacher, Kant shifted the legal basis for justifying the acquisition by prescription to the "Unkennbarkeit" of ownership (Wellspacher, 1906). According to Kant's theory, the length of time has no significance for the acquisition by prescription (Kant, 1994), what is central is the public and effective identification of the right in rem (Kant, 1798). For example, when a bona fide A has been in possession of B's book for 10 years or more, B does not have any overt valid signs of ownership of the book, so A can acquire ownership of the book by prescription. In this regard, Wellspacher gave a high evaluation that until the end of the 18th century the idea of publicity existed only in scattered expressions, but the reasons provided by Kant to justify the acquisition by prescription (Berechtigung der Ersitzung) led directly to the

extremely clear principle of publicity (Wellspacher, 1906).

2.2.2 Inheritance and Development of Other Natural Law Scholars' Ideas of Trust Protection

Wellspacher also traces the protection of reliance to the theoretical doctrines of early natural law scholars such as Pusendorf, Wolf, Thomasius, and Martini. Here it is observed on three levels (Wellspacher, 1906): Firstly, natural law scholars have long considered possession as an external sign of ownership, because Kant and his successors distinguished between intrinsic, unknowable ownership and the sign of ownership (dem internen unkennbaren Eigentum und den Zeichen des Eigentums), and the most important of the signs of ownership was possession (Besitz). Therefore, the ancient natural law has regarded possession as a sign of an inner, unknowable meaning (Zeichen des inneren unkennbaren Willens). Secondly, the aforementioned theory of possession makes ownership identifiable is abstracted and further applied to the field of representation. The signifier is obliged to express his meaning (Willen) by means of the usual signs (üblichen Zeichen) in the transaction and to use words of usual meaning (im gewöhnlichen Sinne), just as the owner is obliged to make his rights identifiable (recognizable) by means of the generally valid signs (allgemeingültige Zeichen). The same is true of the words in the sense of gewöhnlichen Sinne. Thirdly, the above theory of identification is concretized again in the case of errors of meaning. Natural law scholars such as Tomasius and Martini argue that "the person who is notified can rely on the external signs of meaning (äußere Zeichen des Willens), so that in principle the person who has made a mistake in meaning should suffer a disadvantage. Zeiller, also a natural law scholar, argues for the error theory from this perspective: In the external legal transactions of human beings, what is internal and hidden (Innere und Verborgene) cannot be a norm of law and conduct (Norm des Rechts und des Verhaltens), only what is external and recognizable (Äußere und Erkennbare) can be.

Wellspacher also clearly recognized the inadequacy of their theory: Kant and his followers were content with very general principles that reveal little in the way of concrete constructions (konkrete Gestaltung) in any direction and a certain uncertainty about the fundamental issues (Wellspacher, 1906). It is clear that Wellspacher is not content to grasp the idea of publicity at the abstract level, but to analyze it in depth in various concrete situations. This is not only consistent with the task that Wellspacher had earlier set for himself - to demonstrate the scope and meaning of the idea of publicity and to grasp its legal manifestations doctrinally (Selter, 2006); it is also in line with his practical work in *Reliance on external constitutive facts in civil law*: to specifically examine the systems of bona fide acquisition, apparent agency, assignment of claims, registration of associations, and registration of marriages in the German Civil Code and the Austrian Civil Code, and to prove and describe a unified legal idea in the context of the protection of transactions under the law.

On the level of private law history, Wellspacher accumulated historical materials by examining the private law history of the idea of public disclosure. At the level of legal philosophy, the "cognitive theory" of Kant's philosophy was transferred to his own theory, and he tried to construct it as the legal-philosophical foundation of the "theory of reliance on external constitutive facts". In the doctrinal level, Wellspacher doubled his admiration for Kant's "identifiable" feature in his arguments on acquisition by prescription and followed the doctrine of "external identifiable signs" advocated by natural law scholars before proposing the "theory of reliance on external constitutive facts" based on the idea of publicity implicit in possession and registration.

3. The Specific Structure of "External Factual Reliance Theory"

3.1 The Three Elements of the "External Factual Reliance Theory"

The theory of reliance on external facts consists of three main elements: external facts (äußere Tatbestände), reliance (on external facts), and assistance (Zutun). The positive liability for reliance. Since the element of reliance only requires a causal relationship with the external constituent fact, there is little controversy in the academic community, so only the other two elements will be discussed in detail in this article.

External constitutive facts occupy a central place in Wellspacher's theory, and in 1900 Hermann Ramdohr proposed two cognitive sources of legal protection of reliance (Erkenntnisquelle): those created by legislators for the purpose of cognitive protection, including real estate registers and commercial registers; and those that already generally recognized states of fact (anerkannter Zustand) that already exist in life, including possession and certificates (Ramdohr, 1900). Wellspacher inherited this typological model of the division of "cognitive sources" and proposed his own classification of external constitutive facts based on possession and registers|: one is the artificial (künstliche) external facts created by legislation or transactions, including association and marriage registers in addition to real estate registers, and the other is the external facts created by legislation or transactions. registration, and marriage registration, and the other are external facts created in legal life (im Rechtsleben) and natural (natürlichen), such as possession (Wellspacher, 1906). It is thus clear that Wellspacher's classification of external constitutive facts draws almost exclusively on Ramdoll's division criteria.

In Wellspacher's specific analysis of agency, bona fide acquisition, assignment of claims and succession certificates, the following characteristics of external constituent facts can be summarized: Firstly, the external constituent fact must arise with the assistance of the person who should be disadvantaged by the protection of reliance, e.g., the appearance of agency in the case of agency must arise from the assistance of the agent, whether such assistance is by act or omission; secondly, the external constituent fact is removable. Second, the external constitutive fact is eliminable. For example, if an agent grants internal agency to an agent and then notifies a third party by way of special notice or public announcement, the appearance of agency is eliminated by notifying the third party in the same way that the agency has been extinguished. Thirdly, whether there are sufficient external constitutive facts and how long the protective effect of the external constitutive facts lasts should be determined in the specific case according to the concept of the transaction.

Assistance plays a role in limiting reliance liability in the "external constitutive fact theory of reliance". Both artificial and natural external constitutive facts must be created with assistance. The subject of such assistance must be the person who suffers the disadvantage of positive reliance liability, such as the agent who gives the appearance of agency in the case of representation, or the true owner who gives the appearance of ownership to the disposer in the case of bona fide acquisition. Although Wellspacher has always emphasized the important role of assistance in getting rid of the positive reliance liability, he himself has not discussed the specific features of the concept of assistance in depth, but only advocates defining the act of assistance in the context of the concept of transaction or statutory circumstances in specific cases (Wellspacher, 1906). Therefore, some later scholars argue that Wellspacher's "theory of reliance on external constitutive facts" is a kind of no-fault liability or resultant liability without considering imputability at all. This view is justified because the concept of assistance only expresses the factual causal relationship between a person and the creation of an external constituent fact, i.e., the external constituent fact is caused or triggered by that person, without any further legal evaluation of the act: is the act that caused or triggered the external constituent fact legally imputable to that person?

As seen above, the construction of a systematic theory of external constitutive facts in private law was the central task of Wellspacher, which indeed also influenced later scholars' classification of the appearance of rights (Rechtsschein); however, his treatment of the concept of assistance was too crude and did not break through the factual level of causation to the legal level of attribution evaluation, thus, later scholars criticized that his theory would lead to the justification of liability for results or no-fault liability.

3.2 Refutation of the Theory of Disposition Authority as a Source of Theory

Firstly, Wellspacher does criticize Legitimationstheorie, but his criticism is qualified. Within the limits of the external constitutive fact of possession as a right, Wellspacher agrees, and he also believes that possession is a sufficient proof of right (Sohm, 1905), because the protection of bona fide transactions is linked to the state of possession, and possession in bona fide transactions proves (declares) the possessor as owner (Wellspacher, 1906). This is consistent with Wellspacher's view of possession as an external constitutive fact that can be relied upon. Beyond these limits, the doctrine of dispositive authority further holds that the possessor acquires a legal power (rechtliche Macht), or legal authority (rechtliche Befugnis), by which the possessor enables a bona fide third party to acquire ownership (Gao, 1986).Wellspacheris against this: he considers that the dispositive authority (Legitimation) of the possessor is only a reflex of those legal norms that link the protection of good faith to the objective basis of possession(Wellspacher, 1906), and not the dispositive authority that is claimed by "legal power or authority". The reason is that the dispositive power theory does not satisfactorily explain the provision of bona fide acquisition: if the possessor has the "legal power or authority" to dispose of another's property, why can't the buyer acquire ownership when the possessor sells the property to a bad faith buyer? At this point, "the so-called right of disposition (Verfügungsmacht) of the possessor melts like wie Butter in der Sonne" in the face of the buyer's malice (Regelsberger, 1904), and can it still be called a right of disposition? Therefore, although Wellspacher criticizes the right of disposition, he still agrees with the view that "possession is sufficient proof of right" to a certain extent.

Secondly, Wellspacher 's criticism of the doctrine of dispossession does not occupy a central position. It is true that Wellspacher uses "possession and register" as the starting point to discuss the "theory of reliance on external facts", but it cannot be considered that the criticism of dispossession is the source of the "theory of reliance on external facts". However, it cannot be considered that the criticism of dispositive authority is the source of the theory of "external constitutive reliance". The reason for this is twofold: Firstly, from the perspective of the entire chapter, the criticism of dispossession is only one of the arguments, and Wellspacher also criticizes the provisions of the German Civil Code on bona fide acquisition by change of possession and bona fide acquisition by transfer of right of return, because in both cases the transferor is only in indirect possession, and indirect possession cannot carry the public function of possession (Wellspacher, 1906). He also emphasizes that "the useless system of indirect possession also undermines the idea upheld by the drafters of the German Civil Code - the equalization of possession with the public function of the land register". Secondly, from a macro perspective, as analyzed in Chapter 2, the background of Wellspacher's "theory of reliance on external constitutive facts" covers the examination of the private law history of the idea of publicity, the transposition of

the "theory of cognition" in Kant's philosophy, and the discussion of natural law scholars on "external identifiable facts". The theory of external identifiable signs is followed by scholars. The criticism of the doctrine of dispositif is only one of the starting points for the development of Wellspacher's theory at the doctrinal level. To consider this criticism of the doctrine of dispositif as the source of the doctrine of reliance on external constitutive facts would be to completely ignore Wellspacher's work in the history and philosophy of law.

4. The Re-Evaluation of Wellspacher

4.1 The Theory of Appearance of Rights Is not Original or First Created by Wellspacher

Long before Wellspacher, the theory of appearance of rights had been gradually developed, and many scholars' works had already dealt with the theory of appearance of rights.

Firstly, the idea of appearance of rights was already embedded in the Germanic law theory of possession (Gewere). In Germanic law, possession was regarded as the outer garment of property rights (Kleid des Sachenrechtes) and as the expression of property rights (Gierke, 1905). Such an idea was inherited by German jurisprudence, and legal dictionaries use "der blinkende Schein des Recht" to discuss the appearance of property rights involved in possession (Weiske, 1843); Huber, in his study of possession in German property law, uses "Erscheinung der Herrschaft ", as a way of expressing the fact that possession is not a right in rem, but only a fact, an expression of control (Huber, 1894). So, the appearance of rights (Rechtsschein) developed like an undercurrent hidden for a long time under the Germanic theory of possession.

Secondly, the theory of appearance of rights extends to the level of registration. Huber and Kirk developed the theory of publicity (Publizitätstheorie), and registration took on an increasingly important place at the level of appearance of rights. Kirk expressed before Wellspacher that registration has the function of appearance of rights. In the case of patent registration, for example, the appearance of patent rights (der Schein eines Patentrechtes) arises in the case of wrongful registration or in the case of registration despite the invalidity of the patent, and the external appearance of its validity has legal effect for everyone (Gierke, 1895). Here, the appearance of rights embodied in the registration is no longer limited to the traditional field of property rights.

Thirdly, the theory of appearance of rights was extended to other levels of legal relations. Behrend, in his 1886 work on how to determine the status of an employee, also emphasized the importance of appearance, arguing that it was sufficient to have only the external appearance of an employee (der außere Schein des Angestelltseins) in order to determine whether a person was employed in a store or store (Behrend, 1886). In the discussion of apparent agency, Seeler, even before Wellspacher, argued for the protection of reliance on external facts. Seeler argues that the right of apparent agency derives from the idea that if the agent by his conduct creates or contributes to an external fact (einen äußeren Tatbestand) which makes the third party believe that the agent is authorized, then the agent is considered authorized to the third party, i.e., the legal effect of the actual existence of the agency occurs (Seeler, 1906).

Fourthly, the existence of a theory of appearance of rights is also evidenced by the fact that special legal concepts or fixed expressions of the theory of appearance of rights were developed long before Wellspacher. In terms of special legal concepts, Fischer used the term "Rechtsschein" to express the appearance of rights since 1900 (Fischer & Henle, 1896), not "until 1906, as some scholars argue, when Jacobi in the term "Rechtsschein" has been used to express the appearance of rights since 1900 (Fischer & Henle, 1896), not until 1906, when Jacobi first used the term in Das Wertpapier als Legitimationsmitel, as some scholars believe (Ding, 2009). In terms of fixed expressions, Hartmann and Kohler also studied the problem of the nastiness of real legal states such as false representations and apparent alienation in relation to the legal state of appearance (appearance) before Wellspacher (Gustav, 1882). Wellspacher (1906) himself admits that there were scholars before him on the aforementioned special legal concepts and fixed expressions.

Therefore, the theory of appearance of rights existed before Wellspacher, but it was not "first or original" by Wellspacher; the research on the theory of appearance of rights at this stage was scattered in specific areas such as possession, registration, and representation, and no general theory or principle had been developed.

4.2 The Establishment of the Framework as the Greatest Historical Merit of Wellspacher

Firstly, among the many specific provisions of reliance protection, Wellspacher abstracted a clear principle - reliance on external constitutive facts should be protected. As mentioned above, against the background of the intertwined development of theories of appearance of rights and publicity, Wellspacher develops the study of reliance on external constituent facts. He dogmatically examines specific provisions of the German Civil Code and the Austrian Civil Code, such as good faith acquisition, representation, assignment of claims, registration of associations, and registration of marriages, to prove and describe a unified legal idea (einheitliche Rechtsgedanken) in the context of the protection of transactions under the law (Selter, 2006): A person acts reasonably in reliance on an external fact which, according to the law (Gesetze) or the idea of transaction (Verkehrsauffassung), constitutes the expression of a particular right, legal relationship or legally relevant element (Erscheinungsform), and if that fact arises from the assistance of a person who

suffers disadvantage as a result of the protection of reliance, then a person The above-mentioned legal principle, as Wellspacher himself says, is not a specific legal provision, but a heuristisches Prinzip from which additional legal provisions can be deduced.

Secondly, the principles condensed by Wellspacher provide the basic framework for later generations of liability for the appearance of rights. Among the principles abstracted by Wellspacher, there are three core elements: external constitutive facts, reliance, and assistance; and auxiliary elements, the actual law and the transactional concept, which are used to determine whether external facts are external manifestations of a particular right or legal relationship; and to determine more precisely the establishment of assistance (Wellspacher, 1906). Nowadays, the general theory of liability for appearance of rights consists of three elements: appearance of rights, reliance by the opposite party, and imputability (Zurechnung) (Canaris, 1971), which does not depart at all from the basic framework established by Wellspacher. The modern theory of the appearance of rights replaces the element of assistance advocated by Wellspacher with the element of imputability, which actually fills the loophole of the "external constitutive fact theory", i.e., it only considers the causal relationship on the factual level, and does not evaluate the legal norms. Therefore, the modern sense of liability for appearance of rights is based on the basic framework established by Wellspacher.

In summary, the view that "Wellspacher created or first proposed the theory of appearance of rights" is not appropriate. In this paper, we prefer to evaluate Wellspacher's theoretical contribution by " a connecting link between the preceding and the following ": on the one hand, he took over the idea of appearance of rights already existed in the theory of his predecessors; on the other hand, he condensed and abstracted the general principles in the more scattered legal provisions, namely, "the theory of reliance on external constitutive facts", which provides a basic framework for the further development of the theory of appearance of rights.

5. Conclusion

Wellspacher further developed the theory of reliance on external constitutive facts based on Kant's philosophy of law and following the doctrine of "external identifiable signs" advocated by natural law scholars, based on a private law historical examination of the idea of publicity. This theory did not originate from the criticism of the doctrine of dispositive authority, which was only one of the starting points of the doctrinal work in this theory and did not take a central position. Wellspacher's theory of appearance of rights was not the first or original creation of Wellspacher, but existed before him; Wellspacher is credited with distilling and abstracting the general principles from the more disparate legal provisions, and establishing the basic framework for future generations of appearance of rights liability.

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