

Consideration of “Creation” in Legal Finding—from the Perspective of the Application of Law and the Judicial Power

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Abstract

Legal finding, which limits the free discretion originally, is out of the shape under the deduction of Jurisprudence of Concepts. Teleological Jurisprudence, the Jurisprudence of Interests and Jurisprudence of Free Law etc. ie with each other to analyze and reduce the “soul” of judicial process on this condition. Even though “creation” has been elevated to the height of “life” of the law, it’s very essential to look through and consider “creation”, which is the key point of clearing the origin, from the standpoint of the limitation of statute law, activity judges possess themselves, understanding of law’s creativity and jurisdiction operation.

Key words: Legal finding; Creation; Jurisdiction; Judge

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Legal finding, which limits the free discretion originally, goes to extremes under the deduction of Jurisprudence of Concepts. It is exactly because of this, Teleological Jurisprudence, the Jurisprudence of Interests and Jurisprudence of Free Law etc. are given birth to rise, but the latter runs to another extreme in the way that statute is completely excluded from legal process. Similarly, the positive law school represented by Hart holds that the law has open structure and center significance from semantic analysis prospective -- when the rules are powerless or when they have the loopholes, we have to seek help from no legal things. Free discretion has been eroding the “Rules

building” constructed by rules with great efforts and introduces the “creation”. In the eyes of some scholars, “creation” is raised to the height of law’s life. In author’s view, creating law and finding law accompany each other, but the proportion of creating law in justices just is increasing progressively with clarity of rules decreasing. “In learning legal process, the theory of creating law must be considered as the most general common view, although there is still divergence among the volume and the scope of judicial legislation.”

FINDING LAWS IS TO UNDERSTAND, EXPLAIN AND APPLY LAWS

In judicial process, the job of the judge is to find laws and combines it with the case to make chemical reaction to make a conclusion. Statute cannot judge the cases itself, the initiative of the judge (thought-processing) is needed, “even it is the simplest law-identification”. There are generally two results coming after the law-identification. First, “compared with law rules, if the fact is a typical case, the judge may discover specific laws, therefore, the direct reasoning of the judge can be governed by law.” Second, “if it is a difficult case, the judge will find another two situations that undefined laws and there isn’t any regulation of law in this area, so the leaks of law appear.” Subsequently, here comes the decorative job of explanation and leak-replenishing. Therefore, when discovering the law, the judge “should understand law version and fact ‘version”, so discovery in reality is to understand, explain and apply the law. Meanwhile, the subjectivity and even creativity of the judge are inevitable.”

Except the primary cause that the quality of the law itself, the judge’s understanding and cognition to the law also leads to judging cases by law. The delegate of Philosophy Interpretation, Gadamer thinks that the understanding “is not only a kind of copy, but throughout a

kind of creative behavior. We could say: if we understand generally, we always understand in various ways and it's enough." Of course, understanding also needs premise and "prejudice" is the beginning of understanding. However, previous theory is different that understanding is "the subjective activity which eliminates all prejudice and whether it can achieve this point has a direct ratio to that the recognizer eliminates the limits of his visual threshold by an effective historical way." The job of the interpreter is to surpass the scene at that time and get himself rid of "historical bind and the prejudice that accompanies it" to obtain accurate comprehension. However, the critical focus of Gadamer is the "prejudice" resulting from the explanation of its own historical quality and currency. In his point of view, recognizer's historical quality is not an accidental and subjective factor but an ontological condition. Consequently, "the understanding process naturally includes the present scene of the recognizer himself." Thus, Gadamer has surpassed Schleiermacher and Dilthey and "regards that the recognizer's limited by present visual threshold and the interval between the recognizers and heir targets as the creativity base, not a negative factor or barrier that must be overcome." In such an understanding process, prejudice gets rid of the role that for fear that it is too late to avoid and becomes "the source of endless significance possibility."

After admitting the status and role of the "prejudice" in the understanding process, the appearance of the creativity can be easily resolved. Heidegger thinks that understanding means the ability of individual holding the possibility existed in his own self and is the existence form of life. While the key to the understanding is "previous opinion" or "prejudice". One cannot choose his or her living environment, and their expectations of future affected by various environment represents differently, which cannot makes the subject get rid of self-bias. The "prejudice" coming from the history is sure to be open to the future, thus formulates the new "prejudice" and becomes the history. The understanding process just like this infinite circulation "continuously provides the people's existing with new possibilities". In this sense, "the real understanding and explanation lie not in knowing about the thoughts existed but committing to explain the unknown, and enlarging people's living areas as well as its possibilities. In a view of human existing, the explaining activity itself is to increase the creativity of human life." For this reason, in the process of understanding, the wide gap between history and reality disappears, and the scope of history and reality merges together. Thus the newly-produced "prejudice" has made a preparation to combine with future and reality in the next understanding process.

Similarly, if there were no understanding and cognition, discovering law would be impossible. If a man with little law knowledge goes to do the work of a judge or lawyer, the consequence is obvious. Especially in the area of social division of labor becoming increasingly

careful and professional knowledge becoming profound day by day, not to mention those out of this area, even the experts and scholars penetrating so long into the law dare not ensure that they will be proficient in the law knowledge out of their major. Law education in university and the entrance examination to the judge, prosecution and attorney focusing on what is that cultivate the law workers' consensus and cognition and in the later practice, uniformed and legal prejudice can be formed to ensure that treat the same case fairly. Although "prejudice" makes it possible that law profession group understand the law, but if proceeded by the way philosophy explanation formulated, the creativity of the understanding and explanation make the atmosphere nervous again. After all, understanding is employed on the sense of existence ways of human. Therefore, the creativity of law-discovering is applied from philosophical layer. Aims to ceasing argument and making people's lives harmonious, the law will eventually come back to the worldly practical layer. The understanding and explanation to the law should not be aimless and random, for government by law is to restrict the "strict curse" caused by behavior above. We cannot deny the sense of the creativity to the law-discovering, because on "prejudice", no law-discovering. But the existence of the proposition of government by law and the ideal of government by law make us not amplify endlessly extension; the base of all the behavior associating to the law should be "government by law". Therefore, to the creativity in the law-discovering, it is can be understand in the way that "law-defined creativity is used only on the understanding sense and it doesn't allow judges to creatively understand far away from the law."

OBSERVE THE CREATION IN LAW FINDINGS FROM THE ESSENCE OF JUDICIAL POWERS AND MODE OF OPERATION

In grammatical structure, law finding belongs to object-fronted. Putting "law" ahead of "finding" is not the general way to find law. Firstly, it emphasizes standing for government by law when finding law; secondly, it highlights that the judge is the major body of law findings and only the law judge finds can be the standard of judging case; thirdly, it explains that we should find the law with jurist's thinking way. It shows that the field of law findings should be positioned in judicial process and it is another way for the judge to practice the powers.

Seen from the idea of authority, it can indeed satisfy the will and wish of people and brings abundant material resources and great spiritual joy. Simultaneously authority has two sides. Problems and malpractices also exist in authority itself: The abuse, wronged-using and corruption of authority multiply increasingly. Especially, in the old,

dark and integrated society, authority become the sword that dictators tormented the people and grasped benefits selfishly. Former and present saints have made great efforts to unveil the nature of authority. Since Greece, there are Roman "Ability Theory", Hobbes' "Cause and Effect Theory", Weber's "Possibility Theory", Bertrand Russell's "Cause Theory", Sartor's "Power Theory", and Duverger's "Effect Theory". Domestic scholars also have penetrating judgments in unveiling the nature of authority. Based on studying and absorbing the benefits in the power area, Prof. Zhou Wangsheng proclaims that authority, in fact, is a kind of resource, which exists in social relations and shared by certain social subject and dominates relevant social subject and resources. So to speak, authority is a kind of asymmetric dominated force that a party controls another. Thanks to the rareness of this resource and mighty appeal and attractiveness, a great many heroic figures are submitted to it. The asymmetry and domination of authority supplies the dictator with more room to freely control another party. "In such a space, authority can be used as this as well as that. The space that authority can choose offers enormous possibility for authority to express the creativity." As a kind of authority, judicial right itself possessing creativity will be understood with few difficulties. If the creativity of the judicial right is based on the consideration and endowment of authority nature, the passivity of the judicial right is the result that compared to the legislation and regime, and that ensures the judicial procedure and conclusion to be accepted by the two parties as well as the public image obtains social trust. As long as we admit the judicial right is one of the authorities, the creativity produced by its domination is inevitable; meanwhile, limits of judicial power to the role and significance of the judge decides that it cannot have the same freely-judged limits of power as bigger as the regime. As a result, here we cannot extensively define the creativity of the judicial process, for its passiveness compresses the activity space of the creativity.

As what mentioned before, judicial process was not the sided and mechanical legal application process supposed in the conceptual jurisprudence but something produced in the common effects many parties involved. Particularly, judicial organ cannot operate unilaterally whether it is a substantial judgment to decide if the defendant should bear legal responsibility or a procedural one to decide whether the lawsuit action is legal and proper or not. It will happen when both prosecution and the defense are included in this process and by listening to burden of proof cited by all parties in a debate way. In judicial process, the leading judge has to listen to the voice from different levels, for the participation of lawyer, procurator and litigant parties. It is not strange in Anglo-American Legal System which focuses on defense and the judge in continental law system also cannot make decisions directly with ignoring participants' appeals. The existence of many litigant participants and openness in litigation process make the judicial process of gunpowder and misgiving. Judge cannot hold himself aloof from this fight and game. In metaphor, this process is a rather creative field that how judge guides other members in legal group according to the law. It is in this situation that the application of judicial powers becomes a creative art; it is in this sense that judge can be an artist of great creativity but not only an artisan applying the law to the case simply.

In conclusion, understanding of applicable laws is the process of creating a legal process. The essence of judicial powers also asked the judge to create laws. Therefore, it is necessary for judge to create the law in the judicial process.

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