Research on Hohfeld's Theories about the Concept of Law

Sijie CAO
Ph.D. Candidate of Civil, Commercial and Economic Law School, China University of Political Science and Law, Beijing, CHINA

Abstract: During the development of the research on law, the basic concepts of law seem usually neglected by common people and even great masters in academic law. However, Hohfeld's unique analyses about the concept of law are not only praised highly by western jurisprudence, they also gain the concern and rethink of Chinese legal scholars. This thesis introduces the significance of concept of law and manages to distinguish the difference between right and privilege. And then the thesis briefly analyzes the right of visiting specified in Chinese Marriage Law with the help of Hohfeld's theory of right form.

Keywords: Concept of Law; Right; Privilege; Right of Visiting

1. Introduction

Wesley Newcomb Hohfeld is a famous jurist in America and one of the representative figures of analytical jurisprudence. He divided right and duty, two terms well known by common people, into eight legal concepts that are distinguished and related to each other through his unique legal thoughts and analytical methods. He also used two patterns, opposite relation and correlative relation to express their internal relations. At the beginning, I found his method obscure. But when I continually read and think them, I felt curiousness and interests and found his theories is thought provoking.

2. The Significance of Concept of Law

Martin Heidegger said: "Language is the home of existence." And law is built by language. So in a sense, you cannot learn or explore law without language especially the legal language. And the main part of legal language is the concept of law that cannot be ignored as a basic unit building law. In my opinion, the significance of concept of law can be analyzed from the following contents.

Firstly, the significance of concept of law is based on the features of concept of law. The first feature of law is vagueness. During studying law, some legal terms have similar meaning in law in different forms. For example, there are disagreements that if "□利(right)" is equal to "□益(rights and benefits)" among legal scholars. "Law is vague and this situation is so general that the stipulation in law is not certain in some special cases. And the vagueness and the nondeterminacy caused by the vagueness are the basic features of law. Although not all of the law is vague, inevitably there are vague laws in different legal systems. When the law is vague, in some cases (not all cases), people's legal right, duty and power will become uncertain."[1] Justice Strong said in case of People v.Dikeman that the term "right" contains multi-meaning created by the author of dictionary such as property, interests, power, priority, immunity and privilege. But in law, this word mostly refers to the property in a narrow sense and often refers to priority and privilege [2]. So generally we consider the "right" in law has vagueness and multi-meaning. When "right" is explained to different meanings in different legal cases, the cases may be solved but the uniformity of law may be challenged and even the authority of law may be lost. Just because of the vagueness of concept of law, Hohfeld, the representative of analytical jurist, divided right and duty into eight more exact legal concepts and called them "least common denominator". Secondly, law has nondeterminacy. In China, in different legal systems, the same legal term contains different meanings. A typical example is "close relative". This term exists in General Principles of the Civil Law, Marriage Law, Law of Civil Procedure and Law of Criminal Procedure, but the ranges of its meaning are different according to the purpose of the law. Such phenomenon sometimes may make students in law major puzzled. Why different legal branches have their own structure? In German der Begriff means the concept. And the concept of an object will list all the features of this object [3]. If we abandon the features too much or too little, the range of its meaning will become too narrow or too wide. So we should adjust its meaning by explanation or supplement [4]. Because of the nondeterminacy of law, it is very important to make every concept of law and their bounds clear. And it is necessary to understand the purpose of application of the concept of law.

Furthermore, the significance of concept of law cannot separate from the development of law. In the history of development of law, people tend to focus on the solution of juridical practice and the specific establishment of

legal system instead of the basic concept of law. People realized the significance of concept of law until the development of law encountered the obstacles. Professor Wang Yong has written in Analytical Jurisprudence and Methodology: "Since 18 century, American and British common law whose basic principle is 'stare decisis' developed into a law case as vast as sea like coral. But the whole legal systems seem messed up and obscure without an exact legal concept or a systematic logical structure. Many jurists were aware of the hard obstacle caused by this situation in the development of capitalism before they started to clear the common law." Throughout the history of law, Jeremy Bentham, John Austin, Salmond, Hohfeld and Hart and other famous scholar's achievements are closely linked with the deep exploration of legal language, especially Hohfeld. In 1913, he published the thesis The Basic Concept of Law Applied in Judicial Reasoning and then gained worldwide fame and his analytical method of basic concept of law had a profound influence on later generations. Then, more and more legal scholars paid attention to the significance of concept of law. In China, famous legal masters such as Shen Zong-ling in the field of jurisprudence, Wang Yong in the field of civil law and many other scholars have denoted into the understanding and applying of the concept of law. Besides, the establishments of related legal lesson make more legal scholars be aware of the significance of concept of law.

Finally, the significance of concept of law comes from its status. If legal system and legal study is like a great building, concept of law must be the foundation of the building. Actually the construction of legal system standardizes each legal relationship formed by different concept of law. The status of concept of law is foundation. The study of law needs distinct and exact concept of law. And the formation of legal system is reconstructing and applying concept of law. As we all know, all academic and technical fields need terminology especially in law. It is one of the foundations of learning law that learning and correctly understanding the legal language and concept of law [5]. Generally, to learn knowledge of any major cannot separate the study of special language. It is an introduction to learn its special language in the learning of the special field. As a student in major of law, the concept of law is like our eyes. Only through our eyes, can we observe the complicated and changeable legal world. So the status of the concept of law is very significant.

3. Privilege and Right in the Theory of Hohfeld's Right Form

The first people who research for the legal "least common denominator" are not Hohfeld. The worldwide famous jurists had their own thoughts in the analysis of concept of law like Austin. However, the most profound one is Hohfeld. He thinks that when we want to have a clear logic or effectively solve the legal problem one of the most obstacles is considering all legal relations just as the relation of right and duty. And Austin, a great master of analytical jurisprudence had also used a vague concept of law including many meanings [6]. With the help of his unique legal analytical method, Hohfeld divided "least common denominator" into eight basic legal concepts in two groups:

Concept of correlative relations in law:

right privilege power immunity
duty no-right liability disability

Concept of opposite relations in law:

right privilege power immunity
no-right duty no-right liability

When he analyzed these eight basic legal concepts, Hohfeld followed a principle that is "Do not separately consider the basic legal concepts". He explained each basic legal concept's nature oppositely and correlatively and distinguished them clearly and exactly.

In these eight basic concepts of law, I find the most interesting concepts are right and privilege. The research of right is profound and meaningful. The connotation of right is never stopped in any school. The modern theory of right can be divided into three categories: the analytical theory of right, the value theory of right and the social theory of right [7]. Hohfeld is one of the advocates of legal analytical method who focus on the analytical theory of right. He signed contracts with Stanford University and Yale University respectively with the concepts of right and privilege. When he signed with Yale University, he proposed that he could have the right to be lifetime professor in Yale University and have the privilege to teach in Stanford University after one year; while he signed with Stanford University, he proposed that he could have the privilege to leave Stanford University within one year and have the right to keep his position in Stanford University after one year. And in the end, both of universities agreed with his requirements [8]. This example attracts much envy and tells us that after knowing the difference between right and privilege, you can apply law easily and reasonably.

Hohfeld thought that right, the right of claim in a most strict sense, is opposite to no-right and correlative to duty. He used the connotation to define the right. Duty means what one should do or should not do. Namely if A has right to B, so A has the right to or not to do something to B and when and only when B has the duty to do or not to do the thing to A. Hohfeld thought that in English in a strict sense the right should refer to claim while privilege is opposite to duty and correlative to no-right. In his opinion, the exact legal meaning of privilege is the freedom of someone to do something. For example, A signs a contract with B in which B has right to enter into A's land freely, that is to say B doesn't have the duty not to

enter into A's land. Hohfeld thought that in English privilege refers to liberty.

As for the distinction of the legal concepts between right and privilege of Hohfeld, I have a deep impression of the Shrimp Salad Problem in The Nature and Origin of Law written by Gray. A, B, C and D are owners of Shrimp Salad, they tell X "if you are willing to eat Shrimp Salad, you can. We allow you to do that, but we don't promise that we will not to intervene." This famous story reflects the privilege. Firstly, X has the freedom to eat Shrimp Salad, so nobody including A, B, C and D can ask X not to eat it. Besides, if A, B, C and D stop X eating Shrimp Salad successfully, they also never violate X's right.

From Hohfeld's analysis of right and privilege, right must be opposite to duty, and accompany with duty. This duty combines the duty of non-action negatively and the duty of action positively. Only the duty is performed, can the right exist and have practical meaning. And privilege refers to the freedom allowed or the freedom of one who can do something freely to some extent. In real life, if someone only has privilege and do not have right to reject others' intervention, this privilege will not have practical value. That is to say, the legal freedom can reflect the nature of privilege with the right requiring others not to intervene. However, because of this we cannot deny that privilege and right in a strict sense are totally different logically. So we can say that the privilege proposed by Hohfeld is the real liberty, which should include privilege and the right asking for no intervention.

4. A Brief Analysis of Chinese Right of Visiting based on Hohfeld's Theory of Right Form

Right of visiting, the visiting power in foreign country, means that one side of the parents who are not rearing child directly can visit child or take child back and live with he or her in a short time [9]. This right comes from the Anglo-American law system, mainly solving the problem that after divorce the one side cannot visit child who is reared by the other side. Right of visiting is gradually stipulated by every country's law. In Germany, this right has been stipulated clearly in German Civil Law, the third term of 1626th article and the first term of 1685th article. In Japan, right of visiting is called the right to meet and communicate which is created in Tokyo family court in 14th of December in 1964. In the United States, the forth term of tenth article in Children Act and the 407th article in Uniform Marriage and Divorce Act have stipulated the right of visiting. In Taiwan province, the fifth term of 1055th article stipulated the performance of right of visiting.

In China, right of visiting has become a basic provision in our Marriage Law. In 2001, the 38th in the amendment of Marriage Law: "After divorce, one side of the parents who are not directly rearing child has right to visit child and the other side have duty to assist. The form and time of performing right of visiting are consulted by two sides. If the consultation is failed, People's Court will judge it. If this side's visiting endangers child's physical and psychological health, the right of visiting will be terminated." This law's intentions are: first, based on the genetic connection, parents have right to communicate with their child which can continue and improve the positive development of parenthood; second, to clarify the duty of parent to rear and educate child that will not be given up by divorce; third, under the principle of maximizing the protection of child's benefit, in a beneficial and effective way to perform right of visiting and then to protect child's physical and psychological; forth, to promote harmony of divorced family and then to safeguard country's stability and unity.

From the point of theory of Marriage Law, Chinese people have differences to understand the nature of right of visiting. Overall, there are three views. One is the right theory of right of visiting. It can be subdivided into the broad-sense one and narrow-sense one. The broad-sense one thinks that right of visiting is a bidirectional right which means that both parent and child have this right. Child who is reared by one side also can initiatively visit the other side. The narrow-sense one thinks that right of visiting is a unidirectional right that only one side of parent has right to visit child who is reared by the other side. And China applied the latter one. Second is the duty theory of right of visiting which is aimed to parent. One side of parent who does not rear child has duty to visit child. Third is right-duty theory of right of visiting which advocates that this right is not only a right also a duty to the side who does not directly rear child. The three views above, I agree with the third one more. Because right of visiting exists with parental right that means parent have specificity. It is a right and a duty created to protect child's benefit after divorce based on the termination of pair bond. Because of the intentions of this law, as an identity right of law of descent right of visiting can help the side of parent who does not rear child directly continue communicate with his/her child and nobody can deprive this right with a non-statutory reason; as a duty, right of visiting can make the side of parent who does not rear child directly continue care and educate his/her child.

With the help of Hohfeld's theory of right form, I find that the right of visiting can be analyzed in following two ways. On the one hand, as for the one side who live with child and the other people, the right of visiting of the other side is privilege. The basis of right of visiting is parenthood and right of visiting is formed because of the termination of marital relations. So right of visiting is not a given right but an identity right. There are two levels of meaning of right of visiting in Marriage Law: one is that after divorce the side of parent who does not rear child directly has freedom to visit child without intervention

from the other side or anyone else; two is that after divorce the side of parent who does not rear child directly can require the other side or anyone else not to intervene or stop his/her performing the right. Unless child's physical and psychological health is endangered, this right will be terminated after People's Court's judgment. On the other hand, as for the child, the right of visiting of the one side who does not rear child directly is duty. After divorce the one side that does not rear child directly has duty to continue to rear and educate child. This duty will not be influenced by marital relation and will not be given up. It is a legal duty based on personal status relationship. If one does not fulfill this duty, he/she will bear the corresponding legal responsibility. The system of right of visiting has not a long history in China. There are so many disputes about its nature and this system remains to be improved. Hohfeld's theory of right form is conducive to research for the value and nature of right of visiting, and to stipulate a localized legal system of right of visiting keeping with international law.

5. Conclusion

Though some people find inadequacy of Hohfeld's analytical theory of right form, they cannot ignore its profound influence. Hohfeld's analytical method is indispensable to judge and lawyer that can use the method to deal with daily legal problems effectively [10]. I think that methodology of jurisprudence can lead us to study legal problem from a brand new view. Hohfeld's analytical method reminds us not to ignore the study of basic concept of law. Just like Professor Wang Yong's words: "In the recent study of Chinese law, the society-oriented research and analytical-oriented research are not developed. But owing to the urgent requirement of social practice, the former research is more than the latter one obviously. The jurists use methods of sociology and economics into the research widely. So in recent achievements of legal research, more are from the fields of sociology of law and economics of law. But there are few researches about basic concept and logic of law [11]. When we want to escape from the stereotyped model thoughts on law, and correctly use Hohfeld's theory analytical jurisprudence, we will find surprise in researching for new achievements in legal study.

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