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法官自由裁量权寻租与危害分析

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摘要: 在阐释法官自由裁量权及其规制蕴含意义的基础上, 首先分析了其应然性: 法律的概括性与普遍性、法律的滞后性与局限性、司法的判断性都要求一定程度的自由裁量权; 接着分析了寻租理论适用于自由裁量权的逻辑与路径, 指出司法的专门性是自由裁量权寻租的前提条件, 而委托代理理论是权力寻租的重要原因。最后论述了法官自由裁量权滥用的危害: 租的耗散、社会风气与道德的滑坡、社会矛盾的激化、司法公信力的丧失。

关键字: 自由裁量权; 寻租; 租的耗散

On the rent-seeking and harm of discretion of the judge

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Abstract: Based on elucidating the definition of discretion of Judge and its regulation meaning, the author firstly analyzed the necessity of discretion of the judge: the recapitulation and universality of law, the lag and limit of law, the judgement of judicature, all requiring discretion to some extent; then the author analyzed the logic and path from which the rent-seeking applied to the discretion of the judge, and pointed out that the technicality of justice was the premise of rent-seeking for the discretion of judge while Principal-Agent theory was an important cause for rent-seeking. At last, the author illustrated the harm of the discretion of the judge when it had been abused: decrement of rent, the degeneration of social ethos and morality, deterioration of social conflict, the loss of judicative credit.

KeyWords: the discretion of the judge; rent-seeking; decrement of rent