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Бан Чжи Э

Магистр 2 курса Юридической школы
Дальневосточного федерального университета,
Россия, г. Владивосток,
bbangzhi@naver.com

Научный руководитель:
Иванов Александр Михайлович
канд. юрид. наук, доцент кафедры теории и истории
государства и права Юридической школы
Дальневосточного федерального университета,
г. Владивосток
Ami_25.07@bk.ru

ABOUT CONCEPT OF PHILOSOPHY OF LAW

Jee-Ae Bang

2nd year master's student of the Law School
of the Far Eastern Federal University,
Russia, Vladivostok

Aleksandr M. Ivanov
Dr. of Law, Associate Professor
of the Chair of Theory & History of State and Law,
Law School of FEFU,
Russia, Vladivostok

АННОТАЦИЯ

Поиски правильных подходов к пониманию сущности права основываются на представлении о природе права. Исследование путей развития правовой мысли связано с

путями развития мировосприятия граждан. Отсюда понимание сущности права представляет возможность выстраивания общественных отношений с учетом картины мировосприятия. Тем самым снижается риск конфликтов во взаимоотношениях, полагают авторы, приглашая читателей к осмыслению этой темы.

ABSTRACT

Looking for the proper approaches to the definition of the essence of law is based on the understanding of the nature of law. Studying the ways of development of legal thought is combined with the ways of development of world view of the citizens, as well. So, we get an opportunity to adjust social relations taking into account the picture of world view. Thus, the risk of conflicts in our interrelations can be reduced, suppose the authors of the article, inviting the readers to consider of that topic.

Ключевые слова: философия права; правовая мысль; гражданское общество; социально-политическая мысль; правовая политика.

Key words: philosophy of law; legal thought; civil society; social and political thought; legal policy.

1. Introduction

Philosophy of law is a field of philosophical research that creates concepts and theories to elucidate the essence and origins of law. In general, it deals with the fundamental issues of the relationship between law and society, law and state, as well as the concept, nature, ideology and effect, based on the basic theory taken by philosophy. In other words, it is a philosophy related to how to explore and find out what the right law is. **[3,3]** This article presents one of the approaches to the understanding of the essence of philosophy of law. It examines the ways of defining the law critically and in the end, it attempts to explain why the enterprise of defining law has not been very successful.

2. Concept of Law

What is the law? This is a question upon which whole libraries have been written, and written, as their very existence shows, without definite results being attained. In

the process of exploring the philosophy of law, the first step is to reveal the identity of the law and itself. The concept of law is both the starting point and the ending point in the legal philosophy.

Looking at the essential elements of the law proposed by Thomas Aquinas, he holds "will" and "reason" as two essential elements of the law. "The *lex* is an order of practical reason, determined by the authority that governs the political community. The concept of the *lex* includes three elements: First, it is derived from natural laws. Second, the *lex* is a norm that aims to realize common good. Third, the *lex* is determined by the sovereign who rules the political community." **[10]** As we can see, the law here is associated with some norm or rule of behavior. Although it is not a complete answer, but as a tentative starting point, the following common elements can be extracted from this viewpoint to interpret the concept of law.

1) Element of norm

Norms consist of forms that dictate, prohibit, or permit human behavior. In other words, the norms to be used as laws in a society are made in three ways: dictate, prohibit, and permit to govern the conditions of people's coexistence. This norm directs and guides the people's behaviors and serves as the basis for a justification in conflict. Also, people try to make the foundation of mutual coexistence and cooperation stable by acting according to these norms. **[8, 20]** Therefore, the description of the social system of law as "the total of efforts to place people's behaviors under the control of general norms that contain the contents of dictates, prohibitions, and permits" also it indicates that the law has the attributes of norms.

2) Coercion and social effectivity

The legal norm should be able to enforce through the coercion to ensure that the people comply with what they are trying to discipline. The element of coercion is enacted by the state powers and its enforcement is guaranteed. The element of effectiveness lies in the enforcement by the state power as well as the approval of social members as norms governing their actions.

3) Procedural elements of authorization

Law is a system of ordered norms. Laws to regulate the people's behaviors and system inevitably lead to a certain order or system. The minimum requirements that any norm to be legal are the legislative process for enacting laws, the court proceedings to be resolved in the event of a dispute, and the procedure to confirm what is a valid legal entity. A procedure in which certain normative contents (dictates, prohibitions, and permits) are enacted and declared as legal norms and used to resolve disputes can be called "authorization procedures". **[9]**

Summarizing the points outlined above, concept of law looks like an aggregate of the norms that forms a certain hierarchical order, consisting of primary norms that recognize and impose rights and obligations on members of society, and secondary norms that identify and empower primary norms and prescribe procedures for enactment, recognition, alteration and abolition.

3. Legal Positivism and Natural Law Theory

Once the answer to question "what is the law" is complete, naturally the following question arises "what should the law be". Two large positions emerge to answer this question - legal positivism and natural law theory.

1) Legal positivism

Legal positivism is a legal theory with distinguishing law from kind of rules (morals) which considers that laws are the result of social construct and are made by the legislature which must be obeyed. It is the ideology that the existence of law is only dependent on social facts and not upon virtues of morality, regarded as a scientific study of law. Legal positivism excludes morality from the definition of the law. The British positivist John Austin expressed this idea in his book as "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry." **[1, 184]**

The formal criterion as positive law can be specified through the three types of

elements:

i. Norms established by state powers: the fact that certain norms were established and promulgated by state powers, which is legislative.

ii. Socially effective norms: the fact that certain norms are being followed by citizens or applied and enforced by state agencies, in other words, social effectiveness.

iii. Norms accepted as legal norms: the fact that certain norms are in fact approved by the national authorities on the one hand and citizens on the other hand as guidelines for action, in short, approval. **[8, 77]**

Legal positivism appeared in various flows depending on how to combine the three types of the positive law mentioned above. 1) Imperative legal positivism: As legal positivism that identifies the law as the sum of the sovereignty (e.g. Austin or J. Bentham took this position). 2) Approval legal positivism: German philanthropist E. R. Bierling or G. Jellinek took this position as legal positivism trying to find the validity of legal norms in the approval of the legal community or in the approval of law enforcement officials. 3) Statute legal positivism: a legal positivism that grasps the law as the sum of legislation enacted by legislators (e.g. German philosopher K. Bergbohm or G. Radbruch the 1920's before the Nazi regime was taken). 4) Legal Realism: A legal positivism that identifies the law as the sum of the individual decisions made by courts and administrative agencies (e.g. O.W. Holmes, J. B. Cardozo, and K. Llewellyn). 5) Pure Law Theory: As a normative system that is enforced by law enforcement agencies and observed by criminals and is effective as a whole, the validity of its effectiveness is derived from a single highest standard, which is taken by H. Kelsen or A. Merkl. 6) Hart's legal positivism: a legal positivist who sees law as a system of primary and secondary norms, advocated by the British philosopher H.L.A. Hart. **[8, 79]**

In addition, legal positivism is roughly constituted by following three theoretical commitments:

(A) Social Fact Thesis

This thesis asserts that it is a necessary truth that legal validity is ultimately a function of certain kinds of social facts.

Hart's legal positivism system consisted of two types of rules. Primary rules, which were rules that told people how to act circumstances, and secondary rules that were the supplementary rules to the primary rules that provided rules of recognition, change and adjudication. According to Hart's view of the Social Fact Thesis, a proposition is legally valid in a society if and only if it satisfies the criteria of validity contained in a rule of recognition that is binding in society. **[7, 30]**

(B) Conventionality Thesis

The Conventionality Thesis emphasizes law's conventional nature, claiming that the social facts giving rise to legal validity are authoritative in virtue of some kind of social convention. This thesis implies that a rule of recognition is binding in society only if there is a social convention among officials to treat it as defining standards of official behavior. **[7, 31]**

(C) Separation Thesis

The separation thesis (or separation of law and morals) is introduced by H.L.A. Hart, indicating that 'there is no necessary connection between law and morals or law as it is and law as it ought to be'. **[6, 601]** This thesis considers a social norm is a law if it satisfies the formal standard as a real law, regardless of the legitimacy of the content.

Although there are deviations, Hart's theorem presents the following five basic principles of legal positivism.

i. the contention that laws are commands of human beings

ii. the contention that there is no necessary connection between law and morals or law as it is and ought to be

iii. the contention that the analysis (or study of the meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other

social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, "functions," or otherwise,

iv. the contention that a legal system is a “closed logical system” in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards,

v. the contention that moral judgments cannot be established or defended, as statements of facts can, by rational argument, evidence, or proof (“noncognitivism” in ethics). **[6, 601-602]**

This basic view of legal positivism is not applied to all the theories of positivism, but it is meaningful as a starting point for understanding positivism.

2) Natural Law Theory

The term ‘natural law’ is derived from the belief that human morality comes from nature. Natural law is a legal theory that maintains a connection between law and morality. In general, natural law is considered to represent the ideology of judging the law, the immutable basis in the law, or the ethical justification of the law.

Natural law has inevitably confronted legal positivism since the modern era. If legal positivism advocates ‘separation thesis’, then natural law theory conversely suggests ‘thesis of the necessary connection between law and morality (verbindungsthese)’. The thesis of the necessary connection between law and morality (verbindungsthese) is based on the idea that law necessarily makes a claim to correctness. This thesis explains that this is the value of the concept of law and must necessarily be related to the moral justification criteria.

Although there are various theories of natural law, Sang-young Lee, a Professor of Philosophy of Law in Korea, summarizes the arguments that are generally held by discussions pertaining to natural law theory with reference to explanation of Gustav Radbruch:

i. Natural law identifies the nature of the law as an ethical measure

and standards of behavior.

ii. This standard of behavior comes from universally valid sources, which are nature, divine revelation, and human reason.

iii. The standard of behavior can be perceived objectively.

iv. The positive law derives from such natural law. The natural law justifies the binding force of the positive law corresponding to it, and breaks the contradictory law. **[8, 119-120]**

From the perspective of the times, the natural law theory can be classified into two groups:

(A) Traditional Natural Law Theory

The standards against which law is judged have sometimes been described as a "higher law", a law which is like standards that have been stated in or can be derived from divine revelation, religious texts, a careful study of human nature, or consideration of nature. Traditional natural law theory offers arguments for the existence of a higher law, elaborations of its content, and analyses of what consequences follow from the existence of a higher law. **[2, 211]**

Among the various natural law theories in history, Thomas Aquinas' theory is considered to have the most sophisticated logic and content. He identified four different kinds of law: the eternal law (lex aeterna), the natural law (lex naturalis), the divine law (lex divina), and human (positive) law (lex humana). According to Aquinas, the eternal law forms the basis of the other three kinds of laws, and includes what God recolonizes, plans, and commands as the ruler of the universe. All reasonable laws or principles of all kinds are derived from this eternal law.

Natural law applies only to human beings and appears in the form of the fundamental principles of rational action. Natural law is directly rooted in the fundamental principles underlying human practical reason. The essence of the ideal of action, which is concerned with human behavior, is to seek good things for humans and

avoid harm things. If so, the content of natural law depends on what the nature of this 'good' is. If universal natural good is the one that everyone is trying to acquire, the first principle of natural law is that what is good for humans must be done and pursued, and what is harm for humans should be avoided. From the first principle, the second principles emerge, first of all, the principle of preservation of life (prohibition of murder and suicide), the second principle of reproduction (request for marriage and child rearing), and the third principle of truth and common life (request of religion, prohibition of harm to others). The other principles of natural law are those that embody this first principle, which is achieved by pursuing basic human good and harm. **[8, 140]**

(B) Mordern Natural Law Theory

The modern set of approaches to natural law arises as responses to legal positivism. It contains theories specifically about law, which hold that moral evaluation of some sort is required in describing law in general, particular legal systems, or the legal validity of individual norms.

The most prominent advocate of the traditional approach in modern times is John Finnis. His work is an explication and application of Aquinas's views: an application to ethical questions, but with special attention to the problems of social theory in general and analytical jurisprudence in particular. **[2, 216-219]** Finnis extracted human basic goods from objective values that contribute to making life desirable for all individuals. A basic good is a value that is evaluated as having its own unique value, not because it is a means to achieve something else. He held the following list of basic goods: (1) Life, (2) Knowledge (for its own sake), (3) Friendship and Sociability, (4) Play (for its own sake), (5) Aesthetic Experience, (6) Practical Reasonableness, i.e. the ability to reason correctly about what is best for yourself, and to act on those decisions. (7) Religion i.e. a connection with, and participation with, the orders that transcend individual humanity. **[4, 85-90]**

(1) Lon Fuller argued against a sharp separation of law and morality, but the position he defended under the rubric of "natural law theory" was quite different from the traditional natural law theories of

Cicero and Aquinas. Fuller offered, in place of legal positivism' s analysis of law based on power, orders, and obedience, an analysis based on the "internal morality" of law. **[2, 219]** The internal morality of law consists of eight following requirements which Fuller asserted that a system of rules must meet:

(2) Laws should be general;

(3) They should be promulgated, that citizens might know the standards to which they are being held;

(4) Retroactive rulemaking and application should be minimized;

(5) Laws should be understandable;

(6) They should not be contradictory;

(7) Laws should not require conduct beyond the abilities of those affected;

(8) They should remain relatively constant through time; and

(9) There should be a congruence between the laws as announced and their actual administration. **[5, 36-91]**

Ronald Dworkin is influential legal theorist. Though his theory has little resemblance to the traditional natural law theories of Aquinas, Dworkin has occasionally referred to his approach as a natural law theory. In particular his later work, he states that there is no simple description of law "as it is"; describing law "as it is" necessarily involves an interpretative process, which in turn requires determining what is the best interpretation of past official actions. Law "as it is," law as objective or noncontroversial, is only the collection of past official decisions by judges and legislators. However, even collectively, these individual decisions and actions cannot offer an answer to a current legal question until some order is imposed upon them. The ordering involves a choice, a moral - political choice among tenable interpretations of those past decisions and actions. **[2, 221-224]**

4. Conclusion

Philosophy of law, as the name shows, is a general concept and a confrontation between law and philosophy. The study began from ancient period and developed under the influence of various philosophers until nowadays. As a result, various schools were created with different theories in law. The reason for the conflicting and contradictory theories in law philosophy surrounding the essence of the law is that it is the essence that makes the law as law, each taking one of a number of important and objective factors, and advocating that it is superior.

Despite the contradictory theories, nobody can deny that the philosophy of law has been developed based on their studies. Due to their studies, the nature of the law and the basis of the validity of the law were clarified, the ideology of the law and perception of the law were developed.

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