

Distinction of Legal Philosophy and Jurisprudence: Enlightenment From Legal Philosophy Principle of Hegel

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Abstract

The problem of relationship between right philosophy and jurisprudence is a chronically debated issue in the academia, and clarifying their relations will not only benefit to define limits between subjects and promote subject research and development, but also can provide knowledge guarantee for the implementation of rule strategy by law. Hegel is the first man who wrote the monograph on right philosophy, and his *Legal Philosophy Principle* could bring some beneficial enlightenments for the definition of right philosophy and jurisprudence. Through reading up relevant contents of *Legal Philosophy Principle*, this thesis presents the distinction of right philosophy and jurisprudence from the levels of research object, research level and research method, and provides a brand new angle for distinguishing their relations.

Key words: Legal philosophy; Jurisprudence; Hegel; *Legal philosophy principle*; Distinction

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INTRODUCTION

The problem of relationship between legal philosophy and jurisprudence is a chronically debated issue in the academia, and no consensus has been reached yet to this day. Although disciplinary development presents the trend of chiastopic fusion

increasingly, clarifying their relations will benefit to define limits between subjects and promote subject research and development. In China, without a favorable legal tradition, the deep research on legal philosophy and jurisprudence also can provide knowledge guarantee for the implementation of rule strategy by law. Hegel is the first man who wrote the monograph on legal philosophy, and his *Legal Philosophy Principle* could bring some beneficial enlightenments for the definition of legal philosophy and jurisprudence.

1. RECOGNITION SITUATION OF THE RELATIONS BETWEEN LEGAL PHILOSOPHY AND JURISPRUDENCE

Before the presentation of the relations between legal philosophy and jurisprudence, it is necessary to describe the historical origins the both names first.

The complicated relation between legal philosophy and jurisprudence lies in the particularity of the name origin of jurisprudence. According to the research, the word

“jurisprudence” was initiated in 1881 by Professor Hozumi from Law faculty of Tokyo Imperial University in Japan, and was spread to China. Hozumi ever studied in England and Germany, deeply felt a strong atmosphere of subjective metaphysics about the name of “legal philosophy” (German: Rechtsphilosophie)

that was popular in Japan at that time, and was deeply affected by the popular ideological trend of historical positivism at that time, and he created the word “jurisprudence” between continental law system and anglo-american law system, aiming at differing from the traditional legal philosophy of the west, especially the legal philosophy from Germany. In brief, the jurisprudence in Hozumi’s heart should reduce, or even abandon the philosophy connotation of metaphysics, and return its specific science field of physics for jurisprudence. *Shuo Wen Jie Zi* says, “Texture can be used to carve jade.” It means carving uncut jade upon its unprocessed natural texture, which can be expounded as “law”, and specific science is the subject that reveals and researches the principles, so it is often named as “Li” in Chinese, such as physics, geography and psychology. So when the name jurisprudence spreads to China, it was quite popular in China then. Although after the establishment of new China, jurisprudence had ever been treated as the dross of western bourgeoisie, since 1990s, the name of jurisprudence has become popular again, and has been set as one of the core compulsory courses of law major by Ministry of Education. At present, jurisprudence in our nation mainly explains the general theory of laws, and is often taken as introductory course of law science.

The name of legal philosophy appeared in New Teaching Method of Law Science from Leibniz at the earliest, while Hegel was the first man who wrote legal

philosophy monograph first with the name of legal philosophy. This action from Hegel, was adopted widely by many scholars, especially those scholars from civil law countries, such as German modern scholar, Arthur Kaufmann, Radbruch et al., and they all published their works on legal philosophy.

Furthermore, the word, Jurisprudence of anglo-american law system increases the complexity of relations between legal philosophy and jurisprudence. In a broad sense, Jurisprudence includes the contents both of legal philosophy and jurisprudence, but since 1832, an English analysis jurist, John Austin published *Range Restriction of Jurisprudence*, and proposed the saying of “General Jurisprudence”, which advocated to research Jurisprudence within the scope of positive law, thereof, the implication of Jurisprudence became more narrow, closer to the implication created by Hozumi. So, the concept in China mostly is translated as Jurisprudence.

The relations between legal philosophy and jurisprudence, can be divided into two types in general, which are identity theory and separation theory.

Identify theory thinks, legal philosophy is jurisprudence, for example, in the 14 edition of Encyclopaedia Britannicaj in 1973, the entry of Jurisprudence was explained as, “the usual meaning in English of this word and the meaning referred in this thesis, generally correspond to law philosophy”. The meaning of Jurisprudence in the 15 edition of this book in 1977, was expressed as, “in English-speaking countries, the word of Jurisprudence is used as the synonym of law philosophy, and as the subdiscipline that summarizes realm of jurisprudence”. *JURISPRUDENCE: THE PHYLOSOPHY AND METHOD OF THE LAW* has its Chinese translation version, which is meant to express the viewpoint of identical both relations. Some inland scholars also hold this opinion, “Western legal philosophy is only one branch or course of Western law science, and its content correspond to the basic theory of law science.” “In Western countries, due to their historical traditions, jurisprudence is often named as law philosophy, and both of them actually refer to a same subject. However, some minority jurists think they have some differences.” (Shen, 1990, p.16)

The separation theory thinks these two theories have significant differences. Those inland scholars and professors, like Li Buyun, Yan Cunsheng, and Wen Zhengbang, all think that jurisprudence is the general theory of organon, while legal philosophy refers in particular to the research on legal phenomenon with the method of philosophy; Jurisprudence is the branch of law science, while legal philosophy is the scope of application philosophy. German modern scholar, Arthur Kaufmann also thought the both theories are poles apart, for those essential issues and legal puzzles, “rethink, discuss and resolve if possible in the way of philosophy”. In brief, “jurists ask questions, and philosopher give answers.” Jurisprudence generally correspond to “legal theory” by Arthur Kaufmann, which refers to legal personality philosophy”, “to liberate themselves from philosophy, legal personality would like

to resolve some philosophical problems related to laws by themselves in the way of “legal personality philosophy”. Maybe influenced by the opinions of Arthur Kaufmann, some scholars advocate that jurisprudence is the legal philosophy for legal personality, and legal philosophy is for philosophers. Although the cognition is not totally exact, it indicates that these scholars accept separation theory at least.

2. THE NECESSITY OF CLARIFYING THE RELATIONS BETWEEN LEGAL PHILOSOPHY AND JURISPRUDENCE

The German scholar, Arthur Kaufmann said, “legal personality takes the basis subjects—legal history, law philosophy and legal sociology—as something ‘luxurious’ that he cannot afford. That explains those excellent legal personality becomes less.” (Kaufmann, 2011, December) Throughout the inland research status of legal philosophy, it may be said it cannot be heard. Very few scholars research legal philosophy, and the course of *Legal Philosophy* is barely set in universities. Many inland scholars even have many false arguments about the cognition of legal philosophy. The most typical is that explains legal phenomenon ponderously with the several principles of Marxism, and then concludes that legal phenomenon is contradictory with some conclusions about development, etc.. Those scholars who are short of philosophy academic background attempt to read cursorily legal philosophy, they will inevitably be caught in this kind of dilemma. Moreover, inland jurisprudence tries to enlarge its domain, and often intrudes into the research field of legal philosophy. Many university test book of *Jurisprudence* always state axiology and ontology, and the fundamental theory of law—*Jurisprudence* for freshman year will get those new numerous students lost in law field, some *Jurisprudence* is divided into two parts, respective for freshman year and grade three in some universities, maybe it is a helpless coping strategy.

The author thinks, clarifying the relations between legal philosophy and jurisprudence are the demand for subject research and development for one thing. It is undeniable that cross-over study of subjects is a significant tendency, but it definitely does not mean that limits between different subjects have been canceled. Legal philosophy should be the scope of application philosophy, and “law science (mean legal philosophy here—quoter marks) is a section of philosophy.” (Hegel, 1961, Introduction p.2) Therefore, to make metaphysical research on legal phenomenon with the research method of philosophy is the job of legal philosophy. Jurisprudence is a subject that researches the common mechanism of laws, which reveals generality law of law science from different sections, and is constituent part of law science, within the scope of specific social sciences. Both have essential differences in research methods, research objects and basic tasks. Therefore,

clarifying their relations will benefit to the exact consideration of the problems of selecting research methods and confirming research ranges for scholars, to promote the research and development of subjects.

Clearing the relations between legal philosophy and jurisprudence are also the knowledge guarantee of the implementation of rule strategy by law in our nation. As everyone knows that rule strategy by law of our country is legalization progress dominated by government, and lack of a favorable legal tradition is the inevitable national condition. Hence, people don't really generally identify the necessity of building a legal state. Legal philosophy is right the fundamental basis to research the existence of laws with the method of transcendence, it can explain why people need the lives of laws. To declare it, legal philosophy declares that the rule of law is the inevitable rational choice for modern society in the way of metaphysics. Clarifying their relations will benefit to the deserved status of legal philosophy, and play its proper social functions. There is no doubt that jurisprudence should not and cannot replace legal philosophy. Legal philosophy is the source that Western legal civilization keeps tending to civilization progress, and China's law rule flourishing can't be achieved without the prosperity of philosophy research.

3. SEVERAL ENLIGHTENMENTS FROM LEGAL PHILOSOPHY PRINCIPLE OF HEGEL

As mentioned above, for the definition and relative dispute between legal philosophy and jurisprudence, scholars are unable to decide which is right. But explicit definition of both relations will have significance to academic research or legal practice of rule by law. To open a book is always beneficial, Hegel, as the first man who wrote monograph about legal philosophy, read up that *Legal Philosophy Principle* can inevitably give us some beneficial enlightenment.

3.1 Research Object: The Distinction Between the Idea of Law and Substantial Law

There is no denying that legal phenomenon is the research object of both the legal philosophy and jurisprudence as a whole. However, the latter simply concerns the study of substantial law and even focuses mainly on the native substance law. Just as Hegel said, "the jurists are also clinging to existing things" (Hegel, 1961, p.14), which exactly explains the fact that jurisprudence mostly deals with the present legal system. While the study object of the former is the idea of law, in other words, "the concept of law and its actualization" (Hegel, 1961, Introduction p.1). It is due to the different understandings of law, which is the research target, that answers on the basis of legal existence can be figured out within the law system in jurisprudence, such as the necessity of legislative action and adjust of interest arrangement. In other words, there is no doubt of the basis of substantial law in

jurisprudence, besides its validity is recognized. On the contrary, legal philosophy, as a branch of philosophy, is bound to adhere to the philosophy way of thinking. It means that the legal phenomenon should be observed in a reflective and critical way. Thus, the final basis of existence of law and the most abstract essence can be obtained through questioning and criticizing substantial law. “The provisions of the law could be well-founded and consistent from the perspective of various situations and the current legal system, yet it is possible to be illegal or unreasonable”. (Hegel, 1961, Introduction p.5) So, Hegel thought that substantial law might well not belong to the real law because of the inconformity to the idea of law, though chances are that it compromises the legal phenomenon. The real law is “the uniform of law concept and inner meaning” just like the unity of body and soul. Substantial law without the idea of law will be a body without soul which lacks the eternal essence.

Laws will change according to the prevailing circumstances, state system as well as current benefits and problems that should be solved. In nature, laws are in no case invariable. Since these laws contain meanings and adequacy in accordance with the situation of the period, they only possess the general historical value. Because of this, not only are they positive but also temporary. Lawmakers and governments do what they should do in consideration of the current situation, and establish what should be established. Their wisdom of this field is just one case which deserves to be evaluated in the history. Once this evaluation happens to receive the support of the philosophical viewpoints, the historical recognition to their wisdom will be much profounder. (Hegel, 1961, Introduction p.7)

There is no real difference between philosophy of law and philosophy, both of which aim to ascertain the essence of the thing through complicated phenomenon. Such various positive laws are nothing but temporary occurrences in history, while legal philosophy tries to transcend the positive laws in order to grasp the underlying legal concept. Suppose the philosophy of law confines its research object to the positive laws, which are changing times and situations, it will fail to go beyond the positive laws to seek out the essence, that is, Hegel’s “the concept of law”.

3.2 Research Field: The Distinction Between the Value and Function of Law

Penalty and criminal law have the effect of reprimand, menace and rectification in the light of jurisprudence or the theory of criminal law. In Hegel’s view, however, “the theory of criminal law is one of the most unsuccessful theories studied by modern positive laws” (Hegel, 1961, p.101). It is common sense that harsh laws and severe punishment will be used to restore order in troubled times. But why was Hegel so dissatisfied with the jurists’ cognition of penalty’s influence? As far as I am concerned, the fundamental reason lies in the differences of the research field. What the jurisprudence and FXC focus on is the actual function and effect of substantial law. In this way, the conclusion can be drawn that laws play a role in guidance, warning, education of evaluation and coercion, together with the social function of

safeguarding the ruling class's interests and the execution of public affairs. Legal philosophy is aimed at inquiring the positive effect brought by law. Briefly speaking, jurisprudence refers to the effect at a relatively lower level, while philosophy of law goes deeper to the value. The following paragraph has clearly revealed the reason of Hegel's dissatisfaction.

The premise of menace is that people are not free. However, law and justice should search for their basis under the conditions of freedom and willingness rather than constraint. If we based reprimand on menace, it would be like shaking a stick at a dog. Treating people like that is against human dignity and idea of freedom that each and every man deserves to receive. Psychological compulsion (quoter's note: menace) is merely related to the differences of the degree and times of crime (Hegel, 1961, p.102).

Hegel's dissatisfaction depends on his idea that the most significant aspect of law should consist of justice and liberty. People, in essence, should enjoy freedom. "Law is a natural existence of volition." The menace-oriented theory negates individual freedom and ignores that of the criminal. In other words, not treating a criminal as a human being apparently violated justice. In addition, we can infer that if the crime is not a human being or a free person, he will not necessarily bear the criminal responsibility. For example a dangerous dog will not be imposed on harsh penalties even though it attacked a person. Therefore, in Hegel's philosophy of law, the value of penalty is not menacing or reprimand agreed by the jurists, but justice and freedom.

Another one of the powerful examples involves the classification of civil rights. Ancient Roman law categories them as personal right over body and right in *ven* according to the different nature of the objects, which is used for reference of civil legislation by substantial numbers of countries all over the world. It is a scientific and feasible classification from the perspective of jurisprudence and civil law, which is also beneficial to the application of law. For example, personal rights shall not be transferred, while transference of property rights is permitted. It's puzzling that Hegel regarded the achievement of Roman law as "classification which constituted the foundation of Roman law by personality rights and real right is absurd and speculative. (Hegel, 1961, p.49) Why does Hegel's opinion greatly differ from others'? Distinctions between personal rights and property rights can be made clearly due to their respective objects, which is also helpful for protection of rights. For example, moral damage compensation will be demanded when there is violation of human rights, but property tort will generally not. How can this classification be warp and lack of speculation? The answer is related to Hegel's idea of legal philosophy. The essential value of law lies in freedom. Everything including body and life is exterior compared with freedom. "Things like this refer to the general meaning, that is, the stuff outside liberty, even my own life included." (Hegel, 1961, p.49) "Life is dear, love is dearer. Both can be given up for freed." The saying perfectly illustrates Hegel's reason. Property, as well as life is not as important as freedom without the basis and significance of classification. To put it another way,

though the division of property rights and personal rights is feasible in functional application, yet it is inaccurate from a standpoint of legal philosophy.

3.3 Research Methods: The Distinction Between Speculative and Empirical Analysis

Historical study is one of the generally used methods in jurisprudence, a subject concerning the law of development. A series of conclusions on the regular patterns of law is generalized with this method that the legal system came into existence under the background of gradually-formed private ownership and social class, developed and established along with the national organizations. Legal system's formation is a procedure transforming from a single adjustment of behavior to a general one. There has been a long period before the legal system turned custom into common law and finally written law. Social norms like law, morality and religion bifurcate gradually into many independent standardized systems from the chaotic one. (Zhang, 1999, October, pp.138-139) However, Hegel showed his attitude towards the historical analysis in his book, *Elements of the Philosophy of Right*. "It is a research only based on the history to observe the time of emergence and development of various legal regulations. Although there are some effects and value within the respective field by means of doing such research and recognizing these regulations' reasonable verdict, it has nothing to do with the philosophical study. Because of the development based on the history must not be confused with that of the concept". (Hegel, 1961, Introduction p.5) A popular idea may well express Hegel's view: Empirical analysis will cause philosophy to weaken and die. Philosophy will not exist without speculation and metaphysics, that is, ideology, on which the philosophy as well as legal philosophy depends. On the contrary, jurisprudence is a metaphysical subject, in other words, technique. The abstract subject of ideology cannot be authenticated or falsified, while the concrete one can be proved, so the research methods of them will be totally different. One of the most important reasons why Hegel's masterpiece, *Elements of the Philosophy of Right*, is impenetrable is that he deduces the idea of law in a way of speculative dialectics which develops from a thesis, antithesis to synthesis. From Hegel's point of view, the concept of law is substantial. "Substance means principal part". The concept of law is inevitably to gain actualization, for example, developing from universality and abstractness to specialty and specification. The first phase of actualization of legal concept (inner meaning) mostly refers to the objective field—abstract law, including property rights, contract and illegitimacy. Then objectiveness is sublated with laws of subjectivity—morality, ranging over dessein and responsibility, intention and welfare, good and conscience. Finally here comes the law with the uniform of objectiveness and subjectivity—moral principles, namely, family, citizen society and country, whose deduction based on regular "triad" is fairly puzzling.

Another example reflecting the different research methods of legal philosophy and jurisprudence is the dissimilar understanding about forbidden conditions of marriage. It is common practice in today's world that consanguineous marriage is prohibited. The legislative basis of jurisprudence and marriage law lies in the application of empirical analysis, for the technology of biology and medical science has proved that consanguineous marriage will cause physical defect like malformation, or some other serious inherited diseases. It is obvious unfavorable for prepotency and will accordingly place a heavier burden on families and society. Thus, it is necessary to be explicitly prohibited in legislation. Hegel holds the belief that "marriage comes into being due to the sacrifice of the two sexes' distinctive and personalistic freedom. Consanguineous marriage just goes against this idea of marriage, so as to breach the natural feeling. Marriage is a free and ethical action, not a combination of natural instincts and any impulse". (Hegel, 1961, p.148) Hegel thought of the prohibition on consanguineous marriage as the violation of the idea of marriage. Differing from the definition of specific science, idea, as the core domain of Hegel's philosophy, is a metaphysical abstraction. His reasons of personality are free, ethic and the like show the way of speculative thinking. When it comes to the study method of legal philosophy, Hegel said to the point, "As for the scientific method of philosophy, logistics in philosophy (remarked by the quoter: the speculative logic different from Hegel's formal logic) has been expounded, which is the premise here as well". (Hegel, 1961, Introduction p.8)

As a philosopher of objective idealism, Hegel is one of the most prominent figures in German's and even the Western philosophy history. There remains undeniably a strong dimension to his thinking which is well worth respecting and studying, in spite of the significant fallacies in his philosophical views as well as Marx's criticism of his book, *Elements of the Philosophy of Right*. It is the first book on and entitled legal philosophy, which still plays an irreplaceable role to accurately comprehend the connotation and extension of legal philosophy. (Zhang, 2001) It will greatly benefit the development of this subject and do well to the legal system construction, for a new perspective to clarify the relationship between philosophy of law and jurisprudence is interpreted in this book, which exactly accounts for the distinction of the two from the beginning.

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