汕大法学丛书
Shantou University Law Series

刘国福◆主编
Edited by Liu Guofu

法律与善治
亚太比较法研究

LEGAL RELEVANCE AND GOOD GOVERNANCE: IN THE ASIA PACIFIC REGION
COMPARATIVE LAW STUDY

中国经济出版社
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Legal Reform and Good Governance:
A Comparative Law Perspective

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Preface

Legal Relevance and Good Governance: Comparative Law Study in the Asia-Pacific Region is the collection of some presented papers in the First Asia Pacific Law School Dean Joint Conference at Shantou University (STU), Shantou, China. The Conference was held from 19 to 20 May 2007 to enhance the development of and the cooperation on legal education and comparative law study in the Asia-Pacific Region. Each paper follows an internationally acceptable format and an expanded treatment of law, good governance and legal education issues looking at examination topics in depth.

On a personal note, the idea for the publication of some presented papers came in 2007 with the encouragement of my Dean, Professor Du, Gangjian at STU and the support of all participants of the Conference. During the completion of this book, I was greatly assisted at STU by Dr. Yan, Shenghua, who had subsequently become the head of the Department of Public Administration, STU.

This book is also part of the *Shantou University Law Series*. The books in the series constitute a unique publishing venture for China in that they are intended as a helpful revision aid for the hard-pressed Chinese law reform.

The authors are all Asia Pacific law academics who bring to their subjects a wealth of experience in academic and legal practice.

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PART ONE

LEGAL PHILOSOPHY

The Study of Anglo-American Law: A Philosophical Approach

*Hidehiko, Adachi*①

中文摘要:

日本金泽大学法学院足立英彦教授的论文题目是《英美法研究:哲学视角》。该论文从批判的角度论述了如下问题:法学教育的目的,英美法的范围,英美法的研究和讲授方法,对法律的批判和重新思考,法律渊源,法律的权威和功效,法治和越权行政行为,立法权与行政权博弈,行政机关与法院的互动,司法决定的权威和功效,审判前程序,审判程序,以及审判后程序等。本文不是要摧毁法律的体制和权威或者在读者心中播下质疑的种子,只是要挑战人们习以为常的观点,提出一些更现实、更严谨的理解和研究法律的方法。本文实际上是作者《学习英美法》一书观点的汇粹。

I. Introduction

One of the most perceptive and penetrating remarks ever made on the importance of legal philosophy is penned by Lon L. Fuller who sees "the object of legal philosophy is to give an effective and meaningful direction to the work of lawyers, judges, legislators, and law teachers."②

It would be more meaningful, challenging, and in fact fully in line with Fuller's philosophy to enlarge or expand Fuller's definition of legal philosophy to include a similar direction to the work of all people concerned in the optimum ordering and organization of the normative relations of the public life of men. Citizens who take an internal viewpoint of the law and make internal statement of the law no less need the effective and meaningful direc-

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② *"The principles of social order: selected essays of Lon L. Fuller"*, Edited with an introduction by Kenneth I. Winston. Durham, N. C.: Duke University Press, 1981. p. 249

tion of legal philosophy as envisaged by Fuller.

From this expanded perspective, it is reasonable to submit that we are all legal philosophers consciously or unconsciously. The view that legal practitioners are not interested in legal philosophy and belittle its importance in their decisions and actions is unfortunately misguided. Legal practitioners act and decide in fact on the basis of certain philosophical assumptions just the same in their works and public life. It is generally believed that most practitioners adopt the positivist view and attitude of law as a given, a sort of default jurisprudence.

All laws, normative propositions, and legal scholarships are philosophy informed and motivated. All readers of law ascribe to certain philosophical assumption, view, or approach that can be classified and labeled according to some existing or known schools of law or some other imaginative ideas. (To profess otherwise would amount to the recognition of a self-inflicting "cognition dissonance" that one is not conscious of what one is doing.) This is no less true for the authors and critics of law. All jurisdifications imply an ascription to certain legal theory based on personal conviction of political morality. To put the matter plainly, liberalism, conservatism, communism, socialism, republicanism, legal positivism, natural law, sociology of law, economic analysis of law, to name just a few, are all philosophies of political morality.

Of course, this does not entail that every work of legal scholarship has a fully developed and articulated philosophy of law, particular or general. And with respect to works on specific subjects or issues rather than fundamental inquiries of legal philosophy, it would not be always easy to discern the underlying, informing philosophical thinking, assumption of the authors.

On the other hand, whenever the philosophical idea or view of a work can be ascertained, it should be read and made explicit for the purpose of assessing its normative quality.

All theoretical criticisms and approaches entail explicitly or implicitly certain disciplined, systematic, organized, or consistent ways of viewing the subject. Unless ones' writing is full of cognition dissonance, contradictions, gaps, etc., it cannot defy systematization and theorizing. To defy such characterization may imply the unscholarly or incomprehensible nature of one's work. For one cannot write anything beyond contemporary intellectual capacity to understand, however esoteric, convoluted, complicated the term, concept, or language used and the unconventional, strange, or original

ones' thesis.

[The theoretical web (matrix) weaved by the various, often competing schools of law feeds on, and is further compounded not only by the diversities in philosophical ideas, concepts, notions and views as testified by the debates between the normative (prescriptive) jurisprudence and the declaratory(descriptive) jurisprudence, the law as it is and the law as it ought to be, law in book and law in action, the internal statement of the law and the external statement of the law, authority and efficacy, formal validity and substantive validity, etc., but also the rich opposites and contradictions in society and life itself. Though we may not all be realists, our actions and decisions are heavily influenced by pragmatic considerations.]

Teaching and study of law, Anglo-American law included, is heavily and inherently philosophy informed. The materials we consult, the sources we refer to, the doctrines we cite, and approach and methodology we take, and the conclusion we reach are all informed and shaped by the philosophical ideas or assumptions we subscribe to.

The study of Anglo-American law and any law for that matter is concerned primarily with three distinct basic elements: what, why and how. The main purpose of this paper is to demonstrate that the answer to these is as much a philosophical one as a practical one.

The paper further suggests that what is deemed to be practical is necessarily entangled in or based on certain philosophical ideas or assumptions. In other words, it is always one's philosophical assumption or orientation, or ascription that determines what, why and how Anglo-American law is taught and studied.

All legal problems or issues, especially conflicts or controversies of a deep political moral nature involve two aspects: the factual and the normative. The factual is commonly relegated to the domain of a descriptive jurisprudence or requires the help of social theory while the other is mainly the concern of prescriptive jurisprudence, and cries for the help of political philosophy.

Unfortunately, such dichotomy of fact and norm, is and ought, social theory and political philosophy, and descriptive jurisprudence and prescriptive jurisprudence, and many other opposites of a similar nature seems more a juristic or academic expediency or is crafted for the purpose of analytical study and intellectual enlightenment than a true reflection or presentation of what goes on or operates in the real world. In fact, these opposites are intractably interwoven: fact is always theory-laden and theory fact

informed and shaped, norm arising from fact and fact informed by norm. And so on.

Viewed thus, the debates, discourses, processes engaged by jurists with respect to either or both of the opposites are invariably self-referential, auto-instified(of self-righteousness), and regressive as well as imperialistic and repressive.

This paper is not designed to undermine the institutions and authority of law or to sow seeds of doubt in the mind of readers. It simply purports to challenge some of the conventional wisdom, and to suggest and advocate some more realistic and prudent approaches to the understanding and study of law. In essence, this paper is both an extension (expansion), and of the contents of my book Learning Anglo-American Law and a summary of its main themes.

II. Objectives of Legal Education

Legal education in university is never purported to the training of legal practitioners alone. An integral part of the objectives of modern law schools is a commitment to the cultivation of jurists and to enhance their intrinsic qualities. Legal education needs to become both more practical and more philosophical. Far from being incompatible, the practical aspects and the philosophical insights are in fact mutually complimentary.

Nowadays, works on philosophy of law or legal theory occupy an important place in the law school curriculums. Lawyering or the law job is nowadays much broadly perceived. The law job in this broad conception is a full realization and appreciation of the importance of the philosophical insights, approaches, methodologies, and legal reasoning. A curriculum structured in conformity with this expanded vision of the objectives of legal education is simply a logical development in taking serious of the reality of what counts as law in the comprehensive process of authoritative and effective decision-making.

Perhaps the most popularized image of a lowyer is the one who serves as an officer of the court, and passionately argues a case before the judge. But the role and function of the lawyer reaches much beyond this restricted characterization. The view of lawyers to identify their work with established state power is the most serious deficiency. "It falsifies and dis-

torts the services that lawyers are actually rendering in our society. ③

Anglo-American law comprises much more than that grows out of the decisions of the court. All sites and arenas of authoritative and effective decision-making are the proper and right concern, and require the service and competence of the lawyer. Legislature, legislative committees, administrative and regulatory agencies, boards, commissions, corporate and school boardrooms to mention just a few, are all places where lawyers should play an active role. The functions and tasks of a lawyer in these arenas and processes are varying and multiple. These would include lobbying, advocacy, negotiation, drafting, counseling, among other functions. McDougal and associates at Yale University enumerate the following functions in the authoritative and effective decision-making process: intelligence (information), recommending, invoking, applying, prescribing, appraising, terminating. Arguably, most if not all of these are the proper domain of a lawyer.

A good lawyer is a drafter of private constitution and an architect of social structure purported to promote and enhance harmonious, cooperative, workable, cost-efficient, just and productive relationships among men and to minimize and avoid as much as possible the intervention of coercive state power. ④ The role and function of both law and lawyer in society must be broadly as opposed to narrowly conceived. They must extend beyond intelligence, analysis, invocation, and application, etc., to embrace actively the positive, the creative, and the purposive just as their brethrens in the fields of the social and policy sciences do.

The objectives of legal education must be rich in content and comprehensive in coverage in order to prepare students to take on the challenges and responsibilities in all of these areas as mentioned above. And one would not be out of steps in structuring the curriculum if one is to emulate as much as possible what are offered in elite law schools in major Anglo-American law countries. At the same time, one must be reminded of the fact that objectives of legal education and the content and modes of instruction at a law school are heavily informed and shaped by the dominating philosophical idea at the law school. Yet within the dominant forces in any given school, there are still a rich and healthy multiplicity and diversity in course content and instruction offered by individual teachers. It has been aptly ob-

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③ The Principles of Social Order: Selected Essays of Lon L. Fuller. Edited with an introduction by Kenneth I. Winston. Durham, N. C., Duke University Press, 1981. p. 252

④ Fuller, op cit at 253

served that the Harvard Law School fails on its success on the case method orthodoxy. Critics may rightly deplore that the policy science dogma at Yale renders the distinction between law and other disciplines hardly visible. In his inclusive conception of the role and function of lawyers in society as architects of social structures and autonomous ordering by utilizing both forensic facts and managerial facts, Fuller embrace what he called "total decision." Fuller calls attention to live (managerial) facts, not just frozen (forensic) facts and to include extralegal considerations. No doubt, the responsibility and efforts required in designing a curriculum of this nature to prepare students to meet head on the tasks involved is extremely challenging. ⑤

Of course, when law is perceived in terms of authoritative and effective decisions and when the process of political morality decision-making is viewed to be multifaceted and indiscriminatingly inclusive encompassing all conceivable segments of a society where normative ordering and organization take place, the picture comes to look much like Fuller's total decision and even Yale's policy science. ⑥

And the tasks of curriculum design therefore takes on a wider horizon and new perspective, and become even easier to manage. A concomitant transformation of such an outlook is to view all active moral agents as lawyers. From this perspective, it is to be expected that we are all legal philosophers and we are all lawyers.

Of course, when Anglo-American law is offered as a foreign law, both the choice of courses and the scope of the content thereof may be specifically designed to serve certain particular and limited purposes.

III. The What

Anglo-American law can be either narrowly or broadly defined. The narrow definition that stresses the common law as the main stock of Anglo-American law is however intractably intertwined with the laws of other

⑤ Frozen and forensic facts are associated to adjudication, while live facts are more suitable for legislation. See, "On legal education" in: *The Principles of Social Order: Selected Essays of Lon L.* Fuller. Edited with an introduction by Kenneth I. Winston. Durham, N. C., Duke University Press, 1981. at 271 et al

⑥ Yale's policy science jurisprudence is exposited in all the works authored by McDougal and associates.

origins and sources which constitute no less an integral part of Anglo-American law broadly defined. This is especially evident because the courts are increasingly taking an activist role on matters of conflict of a broad political, social, economic, and moral nature——matters that traditionally belong to the exclusive concern or domain of legislation and regulation. Thus, in both form and substance, the body of the common law is necessarily informed, shaped and sustained by laws of other origins and sources, if not infested or corrupted by them.

No matter how it is conceived, broadly or narrowly, what constitutes Anglo-American law is the most crucial question that remains to be explored and ascertained. And the crux, pivotal point for this inquiry, and ascertainment consists not so much in the geopolitical and juridical tradition of Anglo-American law as in the very nature of the normative phenomenon of law itself. Therefore, what is or counts as law is our primary concern. Unless we are able to ascertain what is the law or are absolutely certain on this overriding question, we may simply miss-direct the focus and object of our study and teaching. For the study and teaching of Anglo-American law is not just a matter of using all relevant sources and materials to find the binding or persuasive authority, but more importantly to engage in the authoritative and effective decision making process in order to shape both the form and the substance of the law.

IV. The Why

The reason why Anglo-American law is studied and taught mainly depends on one's aim, purpose or mandate. This is true regardless of one's status, position, profession, or social status; a legislator, a regulator, a judge, a professor, a lawyer, or a layman.

One of the most apt and comprehensive ways to envisage the purpose or mandate of man engaging in the enterprise of the law is to cast it in terms of the function one performs in the process of the enterprise. In their insightful yet rather esoteric language, McDougal, Lasswell and associates of the Yale Law School classify the functions performed in the decision making process of the legal enterprise as intelligence, invocation, application, prescription, appraisal, and termination. Translated into a more familiar legal language, these are the function of information, advocacy, legislation, regulation, interpretation, adjudication, implementation, etc.

Law is constitutive of both authority and reason. We may study law