

The Value of Fairness and Justice of Law Itself and Its Realization*

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Abstract—Fairness and justice as the value contained in law is the spiritual support of people and is the reason why law is sincerely believed by people. As many schools of thoughts have different interpretations on the nature of law, there is an inevitable contradiction between the fairness and justice as value pursuit of law and the stability of law. Through a discussion on Radbruch Formula and Koyev's research on real law and potential law issues, this paper analyzes the value of fairness and justice of law itself and its realization.

Keywords—legal beliefs; fairness and justice; social justice; stability of law; Radbruch Formula

I. INTRODUCTION

Fairness and justice are the highest state that people are looking forward to law. Only by believing in the existence of legal fairness and justice can legal beliefs obtain a solid spiritual support. As an abstract expression covering many value connotations such as freedom, safety, equality, and order, the concept of legal justice is unconsciously enveloped in a sacred aura. The existence of law firstly pursues a safe and stable social order at the practical level, while at the level of value legal pursues fairness and justice. Generally speaking, the order focuses on the formal structure of social systems and legal systems, while the justice pays attention to the specific content of legal norms and institutional arrangements and the value for promoting the happiness and civilization of human beings.

Only if the sacred justice of law breaks through the barriers of the science of law, and truly penetrates into the inner world of people can law get closer and closer to people; and only in this context can it be real and possible to talk about legal belief. Given the very abstractive meaning, if legal justice wants to go deep into people's mind, the premise must be that people maintain that their understanding of legal justice complies with the true meaning of legal justice; only in this way can people proactively go to use and trust law and even treat law as their belief. The reason why people can

use and trust law is because people believe that law has a concept of justice. This concept of justice is not the inherent nature of law, but is given to law by people people's law. In the eyes of people, such justice attribute of law should neither come from the arbitrary will of the ruler, nor be biased towards partial interest bodies, but only be the general will of the public.

II. THE FAIRNESS AND JUSTICE OF LAW AND STABILITY OF LAW

Throughout the history of legal thought, there has always been an endlessly-exploratory puzzle: which is more important between the empirical (stability¹) and justice (fairness and justice) natures of law? To this regard, many jurists and philosophers have given their respective answers. The modern German jurist Radbruch put forward the famous Radbruch Formula with respect to the empirical and justice natures of law on the basis of relativism of laws in Germany.

He believed that "if no one can figure out what justice is, then it is imperative to make a specific provision on what justice should be".²In today's world, it is widely believed that there is no other law than the national statute law. However, this statute law should assume its bounden duty, namely to resolve conflicting legal views through an authoritative absolute order. Therefore, the formulation of law must be subject to a will, and no legal view that runs in contrary to the statute law can prevent the execution of this will: law at the social level is manifested as customary law, while law at the national level is manifested as statute law. At the same time, each individual legal order no matter at social level or national level can be regarded as "valid" law if only it is not "purely written on paper". Furthermore, law still may become a rule for social life even if it is exceptionally violated sometime. "Only this kind of law, also including the laws formulated and enforced by the will

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¹ Since the Chinese version has different way of translation on the stability or security of law, the essence also emphasizes the stability of law from the level of empirical significance. Different translations are quoted respectively, but there is no essential difference.

² [German] Radbruch. (trans.) Mi Jian. Introduction to Law [M]. Law Press, China, 2012: 23-24.

having law formulation qualification can be called valid laws."³

Radbruch maintained that the power of legal order is only sourced from the power of the law formulation will; hence the connection between legal effect and moral restraint obtained through the moral purpose of legal order seems to be irretrievably separated again. Thus, the validity of legal rules doesn't depend on the fairness of its content; for people who consider that a legal rule is unjust, the legal rule is merely an absolute order without moral restraint. "People are both legally and morally obligated to abide by any valid law even it is unjust. Meanwhile, law is not a purely absolute order, but a binding norm." ⁴ Therefore, for this moral constraint, and at the same time, even if it is unfair law and judgment-constrained beliefs, Socrates went to death for the belief in law in his deep mind. Emphasizing the unconditional priority of fairness and justice instead of legal security and abandoning the power of statute law and legislation may lead to a standpoint of anarchism which may give distinct view of law with respect to each specific case due to its completely opposite belief. In contrast, there is a profession which intrinsically contains moral obligation, and within which scope, priority is always given to legal safety instead of legal justice: this profession is legal practitioner. Those legal practitioners' own legal sense is subject to authoritative legal orders; they only ask what is legal and never ask whether it is fair, so that a profession that can't be happily engaged in without love for justice can fully work for injustice: this is the mission and tragedy of legal practitioner.

If Radbruch's point of view is attributed to the fairness and justice of law and the safety of law, his preference for treating legal safety as the most basic value is just a split view of his philosophic thought of law. As is known to all, the charm of Radbruch's thought lies in that with the development of the times, he again put forward new opinion on the basis of his legal concept of relativism and dualism as fundamentally advocated by him after World War II. In his famous paper "Illegality of law and super-legal law" (1946), he pointed out that the legal view of positivism believes that law is law which believes that it has proved its effectiveness on the basis of "If only law possess power can it be executed". However, Radbruch pointed out that "maybe only necessity (Müssen), but never ought-to-be (Sollen) and Gelten, is established on the basis of power".⁵ In fact, law is only established on one value and is contained in itself. In addition to stability, Radbruch believes that law also involves other two values, namely, purposiveness and justice. For this sequence of values, he puts the legal purposiveness for public interest in the final position.

³ [German] Radbruch. (trans.) Mi Jian. Introduction to Law [M]. Law Press, China, 2012: 24.

⁴ [German] Radbruch. (trans.) Mi Jian. Introduction to Law [M]. Law Press, China, 2012: 24-25.

⁵ The translation used is shown in "[German] Gustav Radbruch. (trans.) Shu Guoying. Illegality of law and super-legal law (Gesetzliches Unrecht und übergesetzliches Recht)"

Radbruch believes that in fact, justice also has certain conflict with itself, surface justice and actual justice if there are still controversies between the stability and justice of law, between the content arguable nature and substantial nature of a law, and between the justice and unwritten nature of a law. He especially quoted the New Testament Gospel, and illustrated this kind of conflict; namely, on the one hand, it commands that "law should subject to the authorities who control powers"; but on the other hand, it requires that "law should obey the God more than people. But Radbruch believes that the conflict between the justice and stability of law can be resolved, as long as the law that is substantial and guaranteed by order and power is also given priority for this reason, even if it is unjust and not-intended in content; except that the conflict between positive law and justice reaches so intolerant extent that the law as "unjust law" must subject to justice. It is impossible to draw a distinct line between the illegal law and the law which is unjust in content but still valid; but it is still possible to make another delimitation with maximum clarity: namely, wherever justice never pursue, and wherever the equality constituting the core of justice is not recognized intentionally in the process of formulating positive law, the law is not only "unfair law", but even fundamentally lack the nature of law. Finally, Radbruch believes that law including positive law can only be defined as merely such a system and provision that is destined to serve justice based on its original meaning.

III. THE ESSENCE OF FAIRNESS AND JUSTICE OF LAW AND ITS REALIZATION

Just as Radbruch said, if the meaning of justice is unknown, certain provision on justice must be made. If it is difficult to define fairness and justice, the importance of fairness and justice to law is concluded in this research by making comparative analysis between the two major values of law: fairness and justice and stability. According to Kelsen, Hobbes, Bentham, or Austin's way of looking at a question, in a sovereign state, the law formulated upon authorization of the state is the only law that exists in reality. Law is a legal law formulated by the government. Therefore, all laws are positive laws. In this sense, it is meaningless to put it in the opposite position of a natural law or ritual, because a purely potential thing cannot be treated opposite to a real thing. There is no law that can be opposed to the state, because all rights exist only within the law authorized by the state. This law is nothing but the generality of the national legal norms. Government formulates positive law and can also change it in a required manner if necessary.

Koyev thinks that the only way to stop this controversy is to make clear the difference between the positive law and the potential law. The idea or ideal of justice is indeed a legal concept, not an ethical or religious one. It is even the "principle" of law being a rule, and the principle of all laws and thus the principle of all "positive" laws. Without this concept, law can neither be produced nor exist. But first of all, justice is only a "principle", a source of law, not a law. Justice can become a law, namely become a legal entity in full sense, only if it is applicable to whatever kind of social interaction which accepts this applicability. Justice cannot be opposed to a certain law, because the concept of justice is not

given once and for all, but evolve over time. Therefore, a natural law that is effective whenever and wherever cannot be opposed to a certain positive law. Absolute law, as the correct application of the concept of justice conceived, will only exist at the end of a history. Before that time, talking about the "injustice" positive law may only have two meanings: it is either to express that this "injustice" positive law is not appropriately applied to its foundation, namely the concept of justice, or to claim that this concept itself is false and inappropriate. In the latter case, the said positive law is treated opposite to another law based on another concept of justice. Finally, it can be seen that the same concept of justice, which is in and realized by some legal power can exist in reality or potentially. In a society that is incorporated in a country, only the state-authorized law or governmental law substantially exists, namely positive law; positive law is what the government stipulates it to be. But this does not mean that the government has the power and possibility to give anything a substantial or "positive" law. Everything that has already been able to be practically enacted as legal law by the government is legally valid. It is non-sense to treat an effective, state-authorized law opposite to a so-called universal "natural law" or to a particular "ritual custom"; because in the country, all laws beyond substantial and state-authorized laws only and can only exist in a form of potential law.

Therefore, regarding the realization of fairness and justice, Koyev came to the following conclusion: namely, as long as there is a society composed of at least three people, law can be realized as justice, which is only practical in such a society. Therefore, law will never be anti-social. But in order to be implemented in practice, law must be effective, namely the legislator must be backed by judge, the judge must be supported by judicial police, and the police must execute the judge's judgment with a force irresistible in principle. In order to realize this case, no social member can leave the society without its consent. In other words, the society must be independent and must have sovereignty. Therefore, law will attempt to get the society to which it is applicable transformed into an independent society starting with its realization trend; it will also strive to maintain the existing society, provided that the independent society must agree to resolve internal conflicts in accordance with the said law. If the society deviates from the law and becomes "illegal" in law, the law will try the best to bring it back to the "legality" in compliance with the law. On the contrary, if the law evolves for whatever reason, it will certainly try to change the society to adapt to it. But in both of the two cases, the law will both strive to maintain the independence of the society, not only maintain the reality of the law itself, but also maintain the reality of the society itself, namely to maintain the reality of the law itself, which leads to compromise and the emergence of "national reasons". The principle suitable for the relation between law and a non-political independent society, namely a society which is not incorporated into a strict sense of country, is also suitable for the relation between law and a country. This is not say that law has an intrinsic trend to transform society into a country: because the independence of the society has been enough for

the existence of the law itself, and an independent society is enough to actualize the law.

IV. CONCLUSION

Focusing on the legal belief in the context of contemporary China, the first thing is to examine the fairness and justice of law itself. The reason why law can be believed by citizens is precisely because of the value meaning of fairness and justice, which wins the spiritual support of people's sincere faith for law. Based on Radbruch Formula, this paper analyzes the contradiction and tension between the pursuit of justice and stability of law itself and solves it; namely, the priority should be given to the stability of law, even if it is unjust and inconsistent in content. Furthermore, if the contradiction between positive law and justice is intolerable, then the unjust law must yield to justice. Therefore, the ultimate priority of justice over stability is given to the fairness and justice of law from the root of effectiveness. In combination with Koyev's interpretation of the actual law and potential legal issues, this paper provides solutions for the realization of the fairness and justice value of law itself, and thus lays a theoretical foundation for the cultivation of contemporary Chinese legal belief.

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