SOME CONCEPTS ON LAW IN WESTERN PHILOSOPHY IN THE PRE-MODERN PERIOD

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Abstract: *Apart from the achievements and outcomes, the reality of building a socialist rule-of-law state in Vietnam today also reveals many inadequacies and limitations. One of them is the theoretical lack of building a rule-of-law state, as well as the confusion in practical activities. Therefore, it is essential to study the concepts of law in Western philosophy in the pre-modern period. With that in mind, by using the system of research methods of material dialectic, this article mainly clarifies some basic issues in the concept of pre-modern law, such as the origin, the role and the nature of the law with the recognition, respect and protection of human rights; and the law is an expression of a common will.*

Keywords: Rule-of-law sate, law, philosophy, Western, pre-modern period.

1. Introduction

The idea of the rule-of-law state appeared quite early in history from ancient times, but it only really reached its peak as a complete theoretical theory in the pre-modern period and continues to be developed by modern Western philosophers in the new conditions. One of the important contents of that reasoning system is the legal issue in the rule-of-law state - a universal criterion that plays a role in ensuring the movement and development of the rule-of-law state in its regularity.

2. Origin, role and nature of the law with recognition, respect and protection of human rights

The study of the ideas of the rule-of-law state in Western philosophy in the pre-modern period shows that the concepts of the law in this period mainly focuses on the origin, role, nature and content of the law in combination with the guarantee of human's natural and political rights. However, to truly protect those rights, the contents of laws and regulations in the legal system of the rule-of-law state must express the common will of the people in the rule-of-law state. This is deeply and systematically demonstrated in the minds of some of the typical philosophers in this period.

Originating from the natural rights of human, Thomas Hobbes, one of the first natural rule-of-law theorists of the pre-modern period, explained the origin and the role of law in the close relationship with the recognition, respect and protection of basic human rights. These inherent rights include the right to live, the right to self-preservation of life, the right to liberty, equality and ownership. It is rooted in human practices, closely linked to the biological and social needs of human.

Hobbes argued that the first natural law was formed by the need to "preserve one's life". Because nothing is more precious than life, it is indispensable, in every way, individuals must protect their own lives. Furthermore, it is from this cause that motivated

people to sign the social contract, forming the second law as the law of social contract. Thus, according to Hobbes, the law originates from the objective needs of the human in search of tools to protect their rights and life. Nonetheless, the law will be meaningless without a parallel force or state institution to ensure the effectiveness and enforcement of the law in reality; therefore, the law must be closely linked to the state in its suitability. Next, he argued that the use of the law by human was an important step forward in history, marking the transition of people from a state of instinctive to rational life. Moreover, Hobbes asserted that the role of the law is to tackle disorder, suppress, and ensure the existence of the state. Consequently, to ensure the rights of freedom, equality and control of our instinctive traits, all citizens must obey the laws of the state.

It can be seen that, in the materialist position, Hobbesian concepts have contributed to asserting the practical origin of the law and the state, in opposition to the concept of medieval laws and created a basis for deeper and more complete interpretations of the laws of the pre-modern and modern periods.

Continuing to argue about the supremacy of the law in ensuring human rights, John Locke explained the cause and purpose of the birth of state and law from protecting the natural rights of human. He asserted the sacred rights of human including: freedom, equality and private ownership. These are the inviolable rights of citizens that cannot be taken away and need a state to protect them. Accordingly, the state was born as a result of the common consensus of everyone in order to unite and create the strength to preserve the security order for the community - that is “social contract”. He explained the great and essential purpose of the link that formed the state, the government's rule stemming from the need to protect assets such as life, property and real estate. And the state has to use tools that are the law to protect those assets.

From these needs, he thought that the promotion of the law in the state is inevitable. This indispensability shows if the law is lacking or taken advantage of, it will be harmful to the development of the society. He argued that: “Where there is no law, there is no freedom. Because freedom is freedom from the control and encroachment of others, which would not be possible in the absence of the law” [1, p. 93]. Thus, the law is the basis and the tool to ensure the preservation and expansion of human freedom from arbitrary infringement and dictatorial will of the state power and the ruling person.

For the supremacy of the law to be truly guaranteed, he said that the law should adhere to the following principles: objectivity of laws; recognition of personal freedoms; transparency of the legal system; implementing the principle of power division to avoid abuse of power and need to regularly supplement the content of the law to catch up with the reality. Individuals in the society have the freedom to act according to the will of the individuals without depending on the will of others, which are inherent human rights that natural law must conform to. Therefore, human natural rights, such as the right to physical protection, the right to personal ownership and the right to respect social contracts must be protected by the law and thus the laws of the state must conform to the natural laws.

However, the natural law as well as the natural rights are inherent and eternal in association with the existence of humankind while the provisions of the law are only the concretization and realization of human natural rights in a certain society. Therefore, it is often necessary to adjust and supplement the state laws in accordance with the reality. These ideas of John Locke have contributed to opposing the regime of extreme feudalism, where the king's will is the supreme law and can rape and violate human rights at any time.

In addition to the role of protecting human rights, the law also exists as a common code of conduct that regulates relationships in society. By enacting laws and regulations defining the duties of the people and limiting the power of the regulators to maintain the stability of the society. This is the social function of the law. He wrote:

Laws are formulated and enacted formally, through which not only do people know about their duties, get the safety and security within the limits created by the law, but regulators can also prevent themselves from being tempted by their power, and use it for such purposes and by such tools, once they are ignorant and are not willing to restrict themselves [1, p.191].

As such, John Locke affirmed that inevitability of upholding the role of the law in its humanity and coercion. The law that wants to be supreme must ensure the objectivity of the laws, respect and protect individual freedom and acknowledge the division of state power to avoid abusing power. This has also been raised to the limit principle that the state can only do what is permitted by the law and expand the rights of freedom for citizens that they will be able to do everything that the law does not prohibit.

For Montesquieu, the law was approached by him from its spirit and nature. In his opinion, that spirit and nature is due to the inevitable relationships prescribed within things. Law exists in an inevitable and universal way in all things. When considering the law in relation to things, he gives an understanding of the law as follows:

In the broadest sense, law is inevitable from the nature of things. In this sense, everything has its rules. The spirit world, the material world, the superior minds to the animals and humans have their own laws [2, p. 37].

Montesquieu has traced the origins of the law from the need to maintain the existence of the state. He thought that the state is primarily a community of people in which relationships between people and between people and things are subject to the provisions of the laws and specific norms. The law is a tool for the state to resolve conflicts among people in the society. And to perform well their functions, the laws must ensure two factors: nature and compulsiveness. The natural spirit of the law requires that the laws of nature go into the nature of things and are conveyed into the law as the spiritual driving force that drives the law towards the highest values and humanity, but one of the inherent values is fairness. As such, Montesquieu has affirmed the history and the unity of the law in close association with the state.

The history of the law is also reflected in his concept of the division of law types. Corresponding to the natural and social period of the mankind, there are natural laws and

practical laws. He said that peace is the first natural law of mankind, followed by the law that humans must seek to support themselves, the third law is the natural appeal that men and women desire together and the kind of law from the people who want to live in the society. In his opinion, when humans live in the society, there are practical laws. However, in the society, people will lose equality, competition and war will arise, firstly among ethnic groups. Therefore, there must be a law that regulates relations among human communities, that is *international law*. International law must be based on the following principles: “Every nation in peace must do the best, in war must try its best to do the least evil for the real interests of the mankind" [2, p. 43]. To maintain social order, it is necessary to clearly define the relationship between the ruler and the ruled, which is *political law*. Besides, it is indispensable to have rules on the relationship between citizens, which is *civil law*. There are also religious and moral laws. In which, political law and civil law are closely related to each other. The ruling law is the law that creates a rule and civil law is required to maintain such rule. Political and civil laws remind people of their obligations to the society, while religious and moral laws remind people of their Creator and themselves. He wrote: "Living in a society, to maintain the order, it is required to clearly define the relationship between the ruler and the ruled. It is *political law*. Relations between citizens must be also specified. It is *civil law*. [2, p. 42].

It can be affirmed that Montesquieu has seen the factors that govern the types of laws. It is derived from the purpose of adjusting the relationship between objects in the society, from the nature of the legal system.

It can be seen that, regardless of how abundant the division is, it still has the most basic purpose which is to recognize, respect and guarantee citizens' rights. This was shown when he not only argued and reaffirmed the principle of restricting the power of the state and expanding the rights of citizens, but also said that the laws of the state could only be realized in practical scope of human physical life. Therefore, the law only punishes the actions that are expressed, rather than the thoughts. This has contributed against the tyranny of the law.

Thus, Montesquieu has deeply approached the view of the spirit, the nature of the law and considers it the legal basis of the state. With that personality, he discussed quite deeply from the origin, nature, and content of social relations adjustment to the division of laws in the state on the basis of conformity with the natural rules of human. He is also a great contributor in approaching and setting the principles for international law. That is the noble human code of conduct that is applied by countries in the world today in their foreign policy. With these implications, the concepts in the rule of law of Montesquieu are of great value in the study of theory and practice of building the rule-of-law state in the world.

3. Law is expression of common will

When it came to Rousseau, the content of the law was uniquely interpreted on the basis of a spiritual contract of the society. These are the best governing rules a human being can achieve in their course of existence, the law he deems in its true sense. He wrote: “I

want to find out whether there is some rightful and firm rule in the civil order, that it treats people as human beings; and whether the laws are exact as their true implications" [3, p.51].

The basic element to creating a law with its true implication, according to Rousseau must be the common will of the people, it is conveyed into the content of the law and generalized to everyone. As an object that exists in society, people use their inherent natural rights to negotiate to create a common will where everyone finds their own interests and wills. In a civil society, no one but the people can make laws: “Each of us places ourselves and our power under the supreme control of the common will and we receive every member as an inseparable part of the whole” [3, p.68].

Therefore, the content of a social contract must reflect the common unity of the individuality of individuals so that they will not feel free to participate in this convention, because of their willingness to join the convention does not destroy the natural equality of human beings, it also brings about more spiritual and legal equality. That helps people: “Although not equal in body and intellect, they are still completely equal” [3, p.78]. In that sense, in Rousseau's opinion, the inner self of the true law is to contain the consensus of the common will in order to carry out a noble task, “The law is just to ensure, support and adjust natural relations” [3, p.117].

The consideration of the content of the law must express the common will in the society that has shown the ideology of democracy, equality and liberty of the society when escaping from the imposition of the will of the ruling force before the era of Rousse, at the same time it opened up a new social order in which the true power of the state was just an expression of the power of the common will to reflect the common good of the community. In that capacity, the common will becomes a supreme power. It is like a mental body created by the unity between parts of the body, which is the unity into the common will of every people in the society and is the connection to form a collective ego or a public person. Regarding this issue, Rousse wrote:

We will see that one should not ask who the law-maker is because the law is the terms of a common will. It is not advisable to ask the head of state whether he views from the perspective of law because he is only a member of the state. Nor should one ask that whether the law is unfair or not, because no one is unjust to himself. Nor should one ask how we are free and subject to the law, because the law only records our will [3, p. 96].

Thus, the law is the product of the crystallization from the public will of the public proclaimed and it is the supreme power or the sovereignty of the people and the indispensable foundation for surviving and developing a legitimate state. However, in reality, that common will can only be truly realized in practice through certain state forces. Meanwhile, in that state, there must exist principles that ensure the common will not be seduced or distorted by personal ambition, leading the people to find the right path in the complexity of reality. In order to do this, lawmakers are required to redefine the contents of the common will and interpret it in the rules of the legal system.

4. Conclusions

It can be affirmed that the law is one of the basic characteristics of the rule-of-law state. It is not only a key tool for social management, but also a balance of power that governs and regulates all basic relationships of the society. On the one hand, the law must ensure human's natural and political rights, such as the right to live, the right to freedom, the right to pursue happiness, the right to vote, the right to run for election, and the right to supervise the activities of the state agencies. On the other hand, it must be really effective in expressing and promoting the people's will. These are very important theoretical contents in the pre-modern Western philosophical ideology system that we need to research, recognize and properly apply in the process of building a communal rule-of-law state of the Socialist Republic of Vietnam based on the democracy. This article is just about systematically analyzing some concepts about the pre-modern Western law. In the following publications, we will further clarify the application of the above points to the current practice in Vietnam (4).

References

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