PHILOSOPHICAL FOUNDATIONS OF THE APPLICATION OF LAW: ORIGINS OF UKRAINIAN DOCTRINE

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Summary

The article unveils philosophical underpinnings of application of law. The author begins with general concept of law application provided by Ukrainian legal doctrine and proceeds with showing its origins – these are dogmas of dialectical materialism and theory of reflection. The author demonstrates that actually the whole mechanism of legal regulation – and law application as its essential element – are subject to general purpose that is materializing the logic of social and first of all economic relations. The weaknesses of this approach is being analyzed.

Key words: application of law, economic relations, truth.

Аннотация

Статья раскрывает философские основания применения права. Автор начинает с рассмотрения общего понятия применения права, которое встречается в украинской правовой доктрине, а затем переходит к анализу ее истоков, которыми являются догмы диалектического материализма и теории отражения. Автор демонстрирует, что в целом весь механизм правового регулирования и применение права, как его определяющая составляющая, подчинены общей цели, которой является материализация логики общественных и, прежде всего, экономических отношений. Проанализированы уязвимые положения такого подхода.

Ключевые слова: применение права, экономические отношения, истина.

Introduction. Application of law is one the most important concepts of the general theory of law. As other questions of this regard, application of law has attracted attention of many scientists in the field of law. But none of them actually tried to appreciate philosophic dimension of the issue. It is not even a well-established fact that any philosophical analysis of this phenomenon are actually possible.

Article's objectives. Given this initial data, this article unveils philosophical foundations of the application of law. We shall start with general concept of law application provided by Ukrainian legal doctrine and proceed with showing its origins – these are dogmas of dialectical materialism and the theory of reflection. Then we are going to demonstrate that actually the whole mechanism of legal regulation – and law application as its essential element – are subject to the general purpose, that is materializing the logic of social and first of all economic relations. Despite the fact that this is a strict output of the initial premises, I shall argue that the sense of the application of law was hugely misconceived by Soviet general theory and Ukrainian legal theory inherited this misunderstanding.

I. Application of law, being a shared phenomenon for different legal systems, cannot be analyzed in a universal way as it reflects particular features legal systems. That's why we'll focus on application of law in those systems which meet the following requirements outlined by J. Wroblewski:

(a) The system of law is composed of rules. Abstract and general rules (statutory in origin and form) are the materials applied through judicial application of law. Such abstract and general rules together with more concrete and specific rules consequent upon them, constitute the legal system.

(b) In the system in question there is a normatively stated opposition between law-making (the creation of abstract and general rules) and law-application (the making of concrete and individual decisions). This opposition is manifested in the functional separation of parliament as a statute-enacting agency from the courts and the administrative branches of government as agencies engaged in law-applying activity.

(c) The model of statutory law systems is instantiated in those concrete legal systems in which condition (b) is fulfilled, i.e., where creation of law is not included in the practical activity of the lawapplying agencies. The opposition between law-making and application of law is controversial both in theory and in ideology (Ch XV), but for systems of statutory law such an opposition is presupposed as based on the distinction between abstract and general rules and concrete and individual rules or decisions.

(d) Law-applying organs have a duty to decide any properly presented case according to those legal rules which are valid and applicable. That is, they must in each case state whether the facts of the case have determinate legal consequences («positive solution») or have no such consequences («negative solution»). This condition implies an assumption of the existence of a «closing norm» of the system, on account of which the system becomes a «procedurally closed system».

(e) In their application the valid rules of system determine the consequences of facts specified in them as operative facts [1, p. 4, 5].

So let's start with brief sketches of what is the point for this article. Application of law, its rules and principles were obviously not a neglected theme. It is enough to be said that prominent representatives of the Soviet legal theory – N. Alexandrov, I. Duragin, V, Lazarev, P. Nedbaylo – devoted their fundamental works to the question at issue. These works reflected the spirit of modern state and society – this was the epoch of the Khrushchev Thaw that entailed softening of the totalitarian regime and its exuberant pressure on the society and person. The doctrine of law application, developed at the late 50s – 60s, offered a kind of response of the general jurisprudence to the demand of that time – to restrict the tyranny and arbitrariness in performing the state power. And as the analysis of the modern literature persuasively demonstrates, the invented concept of the application of law remains pretty unchanged for the time being.

N. Krestovska and L. Metveyeva define application of law as the activity of authoritative bodies and officials that provide the application of law by adjudicating on a matter [2, p. 286]. These authors point out the following features of law application:

– authoritative (official) character – as law may be applied only by authoritative bodies and persons;

– individual attitude – as application of law provides a decision for a certain case, and hence defines rights and duties at issue;

– procedural form – as application of law runs through a number of stages and is conveyed under a procedure established by law;

– is made up in a formal legal act – an act of law application [2, p. 286].

B. Malyshev and O. Moskaliuk define application of law as an administrative activity of state bodies, its officials that results in producing individual adjudications under which one person has a right and the other has a duty [3, p. 10]. Following are the elements of law application:

– law enforcer;

– matter for law enforcement;

– act of law application.

The authors conclude that among all these features its official character is most essential [3, p. 10].

P. Rabinovych provides the following definition: «Application of law – is an organizing activity of authoritative state bodies, its officials and authorized bodies of local self-government … that consists of establishment of personified prescriptions aiming to create due conditions of law enforcement» [4, p. 169]. That means that in contrast to the described above interpretation of law application the author adds one more essential feature – under-normative property of the application of law. Here's implied that legal norm is only applied but not crated by judge or any other law-enforcer.

Summarizing the abovementioned information, we may now point out features of application of law:

– this is the activity of state bodies:

– it is aimed to fulfill normative statements;

– it is conducted under well-established procedure to prevent arbitrariness in administrating state powers;

– this activity is essentially organizing;

– the result of this activity is made up in a formal legal act – an act of law application.

As we shall see, these insights were inspired by Soviet legal doctrine and have its philosophic foundations.

II. The issue of the application of law was always conceived in Ukrainian literature as a part of a more general concept of law realization – process of bringing law to life. Application of law was however regarded as a very special form of law realization. Soviet legal doctrine set the priority of legal norm in regard to application of law, stressing that law can never be created by a judgement. As P. Nedbailo noted: «Legal norm is chosen and applied on the ground of important legal facts. Estimation of the facts' importance, their analysis and evaluation are conducted on the basis of legal norms. That is why the very process of estimation of legal norms' importance must be conducted in the light of legal norms» [5, p. 137]. So as we can see, application of law consists of searching and finding a norm in the light of a previously interpreted fact. That's why the application of law is a kind of interlink between fact and norm.

The process of application of law runs by stages. The first stage is the establishment of facts. Not all the facts matter, but only those which are important. Importance of fact is designated by a norm. The second stage is often called legal qualification. Here the law enforcer considers how the norm regulates a certain case. The first appreciation of case may be false and that is why it must be clarified and specified. Finally, the third stage contains resolution of the case, embodied in a formal legal act – an act of law application.

Besides, every stage is subject to truth: first, legal norm must correctly reflect the civil relations; second, all the important facts must be investigated and proved correctly (that means statement of the facts must reflect the fact). Third, a suitable norm must be interpreted correctly to reflect the true meaning of the text. Finally, the cohesion of fact and norm must get along together.

Given these insights, we may now point out the philosophical underpinnings of the application of law.

Premise I. The material truth of the legal norm (norm fits the economic relations at hand)

Premise II. Objectivity of investigation and the founded out facts.

Premise III. Objectivity of statutory interpretation.

Premise IV. Logical accurateness of decision.

The mechanism of legal regulation accomplishes its aim if and only if all four premises are valid in case: the norm correctly (truthfully) reflects current economic relations, fact are established beyond any doubt, the norm is correctly (truthfully) interpreted i.e. according to real intent of the framers and finally, the judge succeeds in applying a true norm to a true fact. Of only one of these elements is not fulfilled, the adjudication of a matter is false. A shared feature for all the stages of the application of law is that something must be reflected correctly, i.e. economy in legislator's intent, letter in the norm. Law enforcer makes his path in the opposite direction, moving from the text to final point – economic relations which are reflected in legislator's intent. This all resembles process of pulling a nest-doll up and down.

And now we'll address question what philosophical theory provides philosophical foundation for this insight on application of law. This is Marxist-Lenin reflection theory, under which: «The material world is knowable through consciousness because consciousness reflects material reality and test of truth is practice (praxis). … Like Hegel, Lenin is opposed to subjective idealist view that 'sensation' constitutes the world. He argues instead that sensation is the connection between consciousness and the external world, such that they constitute a single entity. Sensation is, for Lenin, the subjective form of appearance of thing in itself, (the form in which the thing in itself is manifested to consciousness). The thing in itself is transformed via sensation into the apparent thing in itself. There is no dualistic barrier, rather there is a constant process of transition and transformation of one into the other. … Lenin is aware that both forms of dualism must be rejected and argues that sensations are not merely mental entities but are also 'physical' in some way. Consciousness, via processes of brain, becomes an internal state of matter. For Lenin, all reality is material.

It is matter in motion. Consciousness is matter organized and acting at its most complex and developed level» [6]. Given this reasons that is no wonder why national jurisprudence appreciates application of law in terms of reflection and truth.

Conclusion. Our basic objection to this theory is that law cannot be reduced to economic relations. First, this position breaks down with any moral foundation to law, giving, actually, no foundation to it unless we regard interests of ruling class as a good reason to obey the law. Second, even if we admitted the letter premise, we would still be unable to justify the statement that economic relations may be reflected correctly in one and only true way. Third, as law is often applied to changing social conditions, it is almost impossible to get the desired cohesion of true law with a true fact. This is most obviously seen with regard to application of law in the context of social change.

References:

1. Wróblewski J. Judicial Application of Law / J. Wróblewski. – Dordrecht : Kluwer Academic Publishers, 1992. – 357 p.

2. Крестовська Н.М. Теорія держави і права / Н.М. Крестовська, Л.Г. Матвеева. – Видання друге. – Х.: ТОВ «Одіссей», 2008. – 432 с.

3. Малишев Б.В. Застосування норм права (теорія і практика): Навч. посіб. / Б.В. Малишев, О.В. Москалюк: за заг. ред. Б. В. Малишева. – К. : Реферат, 2010. – 260 с.

4. Рабінович П.М. Основи загальної теорії права та держави / П.М. Рабінович. – Вид, 10-е, доповнене, – Львів: Край, 2008. – 224 с.

5. Недбайло П.Е. Применение советских правовых норм / П.Е. Недбайло. – Москва: Госюриздат, 1960. – 511 с.

6. Harvey Lee. Reflection theory / Lee Harvey; [Electronic resource]. – Access regime: http://www.qualityresearchinternational.com/socialresearch/reflectiontheory.html.

ИНСАЙДЕРСКАЯ ИНФОРМАЦИЯ КАК СПЕЦИАЛЬНЫЙ СУБЪЕКТ ОБЕСПЕЧЕНИЯ ИНФОРМАЦИОННОЙ БЕЗОПАСНОСТИ ПРЕДПРИЯТИЙ

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Summary

This article discusses the current issues relating to insider information. On insider information in administrative and legal sense, the author proposes to consider information that is not published or made public, and it is an unknown number of potential investors. The author notes that in addition to information transparency, there are restrictions on the disclosure of inside information. This may be due to the acquisition or disposal of financial instruments of the entity. It is proposed to allocate three key elements that characterize the insider information, in particular with: the status information, the nature and content of the information.

Key words: insider information, disclosure of information access to information information medium.

Аннотация

В статье рассматриваются современные вопросы, касающиеся инсайдерской информации. Под инсайдерской информацией в административно-правовом смысле автор предлагает рассматривать информацию, которая не опубликована или не обнародована, и является неизвестной кругу потенциальных инвесторов. Автор обосновывает, что наряду с информационной прозрачностью существуют запреты на разглашение инсайдерской информации. Это может быть связано с приобретением или отчуждением финансовых инструментов предприятия. Предлагается выделить три ключевых элемента, характеризующих инсайдерскую информацию, в частности это: статус информации, характер и содержание информации.

Ключевые слова: инсайдерская информация, раскрытие информации, доступ к информации, информационная среда.

Постановка проблемы. Неправомерное использование инсайдерской информации – явление, которое увеличивает риск, связанный с утечкой информации, существенно повышает стоимость привлечения капитала, дестабилизирует равенство инвесторов и добросовестную конкуренцию, создает информационную асимметрию. В конечном счете, это может крайне негативно сказаться на деятельности субъектов хозяйствования или привести к их полному исчезновению. Злоупотребление инсайдерской информацией заставляет государственные органы жестко подходить к раскрытию предприятием информации о своей деятельности, а также к использованию непубличной информации [1, с. 9]. Учитывая то, что серьезные негативные последствия возникают на предприятиях при потере информации, без которой дальнейшее продолжение бизнеса становится проблемным, защита инсайдерской информации становится актуальной проблемой.

Актуальность темы. Проблематика инсайдерской информации как специального субъекта рассматривается в научных работах как отечественных ученых: Н.Т. Белухи, Ф.Ф. Бутынца, Н.И. Дороша, Е.А. Петрика, В.В. Саенко, Г.Г. Почепцова, С.П. Росторгуева, М.Я. Швеця, Б.Ф. Усача и др., так и зарубежных: С.Н. Бычковой, Я.В. Соколова, Р. Адамса, А. Аренса, Дж. Лоббека, Дж. Робертсона, Т. Бу-Пеоу (Nanyang Technological University), М. Нелсона, С. Смита и др. В работах этих ученых анализируются факторы информационной безопасности предприятия, вопрос ответственности за распространение недостоверной информации, правовые проблемы информатизации и т.п. В то же время дальнейшего исследования требуют проблемы защиты инсайдерской информации на предприятиях, что и является целью данной статьи.

Изложение основного материала. Инсайдер (от англ. Inside – внутри) – любое лицо, имеющее доступ к конфи-