THE STRUCTURE OF ACT IN THE LAW

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I General Conception of Law and Act in the Law

The act in the law, according to the traditional view, is understood as the legal specification which the law renders the legal effect in order to meet the will of a party. On the other hand, some recent theories assert that act in the law is the act to establish the law. Therefore, we must, here, review that if these two views contradict each other, or are compatible and stating the partial truth.

This article intends to solve this question by examining the structure of act in the law.

If we understand according to the assertion of recent theories, act in the law as the act to establish, the relation between the law in general and act in the laws must be clarified. For that purpose, first of all, we must grasp the trincity of the law exactly. Though we can not dewell on the problem about the trincity of the law in detail, legal norm, as examined of its structure, can be defined as follows.

"Our activity of will, that is the life itself, can be devisible to 'for the man himself' and 'for the will of other.' Putting the act of will for the man himself aside, the act of will to others, can furthermore, be classified, according to the author's view, into two groups. Namely, the one is the act which does not inflict the act of will of others, while the other is the act which induces the act of will of others. We can observe, in any case of the activity of the will, alway, the presence of the standard, which we call the social norm.

If, as mentioned above, there are two kinds of acts of will for others, we can, accordingly, understand easily that there must be two kinds of standards for such acts of will. The standard of the second kind is the legal norm, ie., the standard gegulating the act of will of a man for other people inflicting the act of will of others. Here is the fundamental merkmal for distinguishing the law from all other social norms".[1]

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1) Prof. N. Obuchi; On Fundamental Human Rights, Osaka University Law Quarterly, 44. 45.

Legal norm, can be devided, from the point of its structure, into two norms. One is the general instruction which can be expressed in the form of "you must do such and such..." While the other is the instruction, "if you fail to observe above instruction, you must acknowledge, disregarding your will, the will of the other party". The law can come into being by coordinating such two instructions.[2] The law, thus in this sense, is a norm having double-structures. Namely, one legal norm is constituted with coordination of the primary norm of "you must do such and such" and the secondary, "if you fail to observe such an instruction, you must acknowledge the will of other party". The primary norm is the standard for the act of will of a man without inflicting the direct act of will of other party. The secondary norm is the standard which connects the will of one party and the other party. Since the primary norm is presupposing the secondary one to succeed, in case of the will of one party fails to observe the primary instruction, the secordary norm instructs to acknowledge the act of will of other party. The secondary norm is not meant for the actual compulsion but a proposition. Savigny[3] and Kelsen[4] understood, correctly, the trinsity of the law and of its double-structures. It seems to the author that Savigny was, most probably, thinking of this double-structures of legal norms when he explained the trinsity of the right as the domination of the will of man by others. Kelsen also expounds the double-structures of the law from the point of his "pure leagl theory". Laws are always norms of double-structures, but not all norms of double-structures are called laws and dealt actually as legal norms.

Clear-cut distinction must be observed between the facts of "it is actually the law, or it exists as the law" and "we call it the law, or we deal it as the law". It depends on the kind of society that which of norms of double structures we call as the law or deal as the law.

Generally, only the norms of double-structures being applied to all the territory, in the organized society such as the state, are called the laws and dealt as the laws. You can have proofs when you consider the "lebendiges Recht". Such legal norms (of double-structures) can exist in the society of even two persons.

The private person can, even if there is no state, establish the legal norms. The society as organized such as the state, for the purpose of the maintenance and progress, rules the law making act by private persons. There exisits the conceptin of act in the

2) Prof. N. Obuchi; op. cit. p. 4.
3) Savigny; System. Vol. I.
4) Kelsen; Allgemeine Staatslehre, p. 47.

law. First, there exisits the law-making act as the legal fact and then the law-making act is ruled by the supervising legal norms, then the conception of act in the law, is to be found. Legal norms which are established autonomically by private persons are to be ruled by the civil law and other laws of the state. And some legal norms are appreciated and given the sanction of the state, while others are denied, and refused to be given the sanction.[5] Only in act in the law, there is the problem of being either null or valid. And in torts and quasi contracts there are no problems of being null or valid, which is due to that they lack law-making act.

The civil law presupposing the private persons being capable to establish legal norms, acknowledges the act of establishing the legal norms of the private persons themselves within the limit approved by the civil law, and by such legal norms to regulate their social activities, which is so-called private autonomy.

It is evident, since there is the dispositive laws in the civil law system, that the civil law acknowledges such private autonomy. The nature of dispositive law is, when a party establishes legal norm of double-structures which is different from the dispositive law, to refuse the application of itself.

The civil law which gives the legal effect to the legal norm which is established by a private person autonomically, is called the law of authorization. The nature of law of authorization is, within the limit of its permission, only when a private person actually wills the content of legal norms which a private person establishes, to confer the legal effect. In the content of law of autorization, there is no existance of will for the legal effect which is to be given by the law of authorization to a party.

Since the law of authorization is, within the limit of its permission, only when a private person actually wills the content of legal norms which is established by private person, to give the legal effect of civil law to the legal norms which are autonomically established by a private person.

Accordingly, legal effect of the civil law, superficially, is appeared to be given when a party wills the legal effect by the civil law. The intention for legal effect, though contrary to the popular theory, the author understands, is the will to estalibhsh such autonomical legal norms.

Therefore, the intention for the legal effect is, not the will for the legal effect by the civil law, but the will for the effect of legal norms which are to be established autonomically by a party. The trinsity of act in the law, according to the popular

5) Fritz von Hippel; Das Problem der rechtsgeschäftlichen Privatautonomie, p. 91.

theory, is to confer the legal effect by the statutes when a party wills the legal effect of statute. Such conception, however, the author believes, must be revised as above.

II Some Problems

Some problems, if we understand the structure of act in the law as above, about act in the law, the athor believes, can be given the definite solution.

(1) The intention for legal effect The content of act in the law is the effect of legal norms of double-structures autonomically established by a private person within the limit of permission by the civil law.

And the content of act in the law is not the legal effect of the civil law which is to give the legal effect by the civil law to legal norms to be established autonomically. The problem about the intention for legal effect, which has long been disputed, can be solved if we take such a view. There are, mainly, two theories about the content of the intention for legal effect, namely, "the theory of legal effects" and "the theory of economical effect".

The former insists that the content of the intention for the legal effect must be the will for the legal effect by the civil law, while the latter stresses that it must be the intention for the economical and social effect. The theory of legal effect is correct in pointing out that the intention for the effect must be legal. But this theory is overlooking the fact that the intention for the legal effect must be the will for the effect of legal norms to be established autonomically. In other words, it is misleading in the point of stressing that the intention for the legal effect must be the legal effect by the civil law which is the law of authorization.

If the intention for the legal effect, as stressed by the theory of legal effect, must be the will for legal effect which is to be given by the civil law, law-ignorants, as often referred, are not able to contract. This is the decisive weak-point of the theory of legal effect. The theory of economical effect, though it is correct in pointing out that the intention for the legal effect should not be the will for legal effects endorsed by the civil law, is a unilateral view since it overlooks that the intention for the legal effect must be of legal nature intended for the effect of legal norms established autonomically. In case of a party, without having the intention of legal obligation, promises a gift to his friend, as a gentleman's agreement or a social courtesy, such a promise, as to give a gift as generally acknowledged, is defect of legal nature. The theory of economical effect can not explain this case. In this case, the will for the economical

effect is clearly seen. Accordingly, if to have the will for the economical effect fulfill the condition of intention for the legal effect, the valid legal act of gift is to be recognized in the above case.

Laws of authorization in the civil law, as the condition of act in the law, requires a party to desire the contents of legal norms estanlished autonomically. And the civil law, to such legal norms established autonomically, gives the sanction (legal effect) by the civil law. That a party intends the effect of legal norms established autonomically is different from that the party intends legal effect by civil law. There is no direct relation there. From the point of the civil law, it gives the santion, within a certain limit which the civil law permits, to the legal norms established autonomically by a party. On the condition of that a party wills the legal effect by the civil law, an appearance of the civil law giving the legal effect to such declaratory acts takes palce. The prevailing theory tells us that act in the law is declaratory act which is given the legal effect by the civil law on the condition of a party desires the legal effect by the civil law. However, the popular theory is misled, the author belives, by the superficial outlook. The law, also in case of act of the law, can not be applied on the condition of a party desires the application of law. All law is not of the nature that it gives the legal effect when a person instructed by the law desires the legal effect given by such a law. For, a legal norm, in a certain relation as described by law, instructs forcibly to perform a certain act. It is unconceivable that a law permits itself to lose the binding-force.

(2) Error of law If we understand the structure of act in the law above, the author believes, we can get the clear solution to the problem of the errors of law. Though the principle of "error juris nocet" being acknowledged, there is a dispute of its application to act in the law. One stresses that the errors of laws must be not granted to act in the law, while other rebukes that since act in the laws, when the party desires the legal effect given by the civil law, is given the legal effect by the laws, errors of legal effect of declaration, naturally, leads to the errors of contents of declaration of will. Above two views, superficially, appear completely contradicting. However, in author's view, this discrepancy is based on the erronous understanding about the structure of act in the law in the previous theory. As act in the laws is act of establishing legal norms by parties autonomically comprising with two propositions, contents of act in the law be such legal effects established autonomically, and these contents are not the legal effects by the civil law which gives such sanctions to legal norms. The errors of contents of act in the law, therefore, must be the error of effect

of the legal norms established autonomically. It does not matter wheather such errors are derived from the error of facts or errors of law.

In this respect, there is a difference between the errors of facts and errors of laws. The view that the errors of legal effects by civil law, entirely, are the errors of contents of declaration, is not understanding the fact that the general principle of "the application of laws, even if there is an error of law itself, must be observed" is also applied in act in the law. The error of law becomes, so far as it concerns with the legal norm autonomically established by a party, the error of content of act in the law. The civil law is comprised with imperative law, despositive law, general interpretation clauses.

i) Error of imperative law

Imperative law, disregarding the establishment of autonomical legal norm by the party, is to be applied imperatively. Error of imperative law can not be an element of error of act in the law. The reason why the civil law acknowledges the complain of error, is to protect the real intention of a party. Therefore, the imperative law, being applied ignoring by the will of the party, does not grant the error.

ii) Error of dispositive law

The dispositive law is to fulfill the defective part in declaration, ie., it is to fulfill the gap when the declaration is incomplete and a gap is to be found in it. The dispositive law, if there is a declaration by a party, irrespective of content of dispositive law being the same or not same, the dispositive law is not to be applied, and in such a case, the norm of double structures is then put into force.

On the contrary the general interpretation clause is, though there is a declaration, to discreet the meaning, in a certain manner as discribed by the civil law, of the declaration when its menaing is obscure. Content of declaration is, as mentioned above, the legal norm established autonomically by a party, which has no direct relation with the dispositive law, therefore, error of dispositive law, naturally, can not be the error of content of declaration. The legal effect of a dispositive law, the will of a party being not considered, is not to be given by the civil law. The civil law does not consider the will of a party by the dispositive law.

The legal effect of a dispositive law is, irrespective of the will a party, an imperative effect accordingly, the error of dispositive law can not be the error of contents of the declaration. In short, the concept of act in the law is derived from the relation between the law of authorization and the legal norm autonomically established, and only the legal norms autonomically established are the contents of act in the law. The error of dispositive law, thus, can not be in no case the error of contents of act

in the law.

iii) The error of general interpretation caluses

General interpretation clauses are, in case of the meaning of a declaration being obscure, to discreet the meaning in a maneer as described by civil law. For example, A concludes a contract to lease a goods to B for five days from today. In this contract, there is no definite description about the initial date, though the period of five days is clearly mentioned.

In such case, the mean of declaration, by the general interpretation clauses of Japanese Civil Law, art. 140, is to be decided.

If the declaration of "five days" by A does not imply the inital date to be included within the period, the content of legal norm established autonomically by A is the period of five days excluding the initial day.

In this case, A has made an error in the legal norm which A is autonomically to establish, ie., the content of act in the law. The error of the general interpretation, thus, becomes the error about the meaning of the declaration. In conclusion, the dispositive law and the general interpretation clauses by civil law, are dealt differently about the error. The law, though there is an error of law, is to be applied to the party. The imperative application of a law is not presupposing that every man knows the law, nor from the reason that every man is regarded to know the law. No body would believe that such a presumption that every man knows the law can be valid in this complicated law-life of today. The reason why that a party can not evade the application of a law inspite of the error of the law, is that the obligatory force of a law can not be influenced by the fact that whether the party knows the law or not.

Accordingly, the error of a law, does not necessarily signify the error of declaration. The error of a law becomes the error of content of a declaration when the error of a law is interrelated with the declaration itself. In other words, the error of a law must be the error of legal norm of double structures which a party autonomically establishes. Thus, the author believes that the problem of the error of the law must be attacked from such an angle.

III The Problem of Revision

A revision can be brought to the Supreme Court only when an infringement of the Constitution or other statutes can be found in the previous judgement (Japanese Civil Precedure Law, art. 394). and it can not be brought of the ground insisting of the er-

ronous judgement of facts. It has a practical significance to decide whether the interpretation of act in the law is a matter of fact or matter of law. As the reader may be aware, this problem is widely disputed. The author believes, though it is regrettable that he can not be allowed to well on this matter in detail, that the interpretation of act in the law is a matter of facts.

Act in the law is an act of eatablishing legal norms, which is, as viewed from the point of civil law, a legal fact, and which is regulated by the civil law. It is because of the purpose of unfied interpretation and unified application of atatutes and orders that the grounds for revision are limited to the legal matters. So-called the law as to the legal matter, is law in a formal sense, and not a legal norm in general. As mentioned repeatedly, the content of act in the law is the legal norm established by a party autonomically, there-fore, the interpretation of act in the law is to clarify the contents of these legal norms established autonomically by a party. We can explain the contents of these legal norms a party from the interpretation of the civil law itself. There, the interpretation of act in the law is a matter of legal facts.

IV Summary

The thought that act in the law is to create the "law", as easily understood from the word, Rechtsgeschäft, is of an ancient origin. The conception of the "Law' in such a thought has not been clear as to the point what sort of structure it beard. The author feels very happy if his article has clarified the structure of the law. The author understood this as the legal norm of double-structures.