

Title	FORMATIVE ELEMENTS OF AMERICAN LEGAL THEORY : An Impressionistic Note on the Subject Developed a Harverd Law School
Author(s)	Yasaki, Mitsukuni
Citation	Osaka University Law Review. 1976, 23, p. 1-14
Version Type	VoR
URL	https://hdl.handle.net/11094/10420
rights	
Note	

Osaka University Knowledge Archive : OUKA

<https://ir.library.osaka-u.ac.jp/>

Osaka University

FORMATIVE ELEMENTS OF AMERICAN LEGAL THEORY

— An Impressionistic Note†
on The Subject Developed
at Harvard Law School —

Mitsukuni YASAKI*

- I Foreward
- II American Legal Theory and New Generation
- III Some Comments
- IV Significance and Limits of The Western Legal Tradition

I Foreword

This is a very simple note which aims at to deal with, so to speak, “going concern” of scholars about how they are theorizing in studying various fields of legal problems, how they then reach to obtain their framework to be named “Legal Theory”,¹⁾ and how they in the end contribute to reconstruction of “General Jurisprudence” or “Legal Philosophy” whether they explicitly reco-

† This note is originally based on the report which I made at the monthly meeting (Dec. 1975) of Kansai Horigaku-Kenkyukai (The Association of interested scholars in general jurisprudence in Western area, Japan), and somewhat revised in this English version.

* Professor of general jurisprudence of Faculty of Law, Osaka University. L.L.D. Tokyo University 1968.

1) Scholars except specializing in general jurisprudence or legal philosophy in a considerable degree like neither to call their work doing general jurisprudence or legal philosophy, nor to be called so by others, even if their work came quite similar to the framework of this sort in connection with some way of abstract formulation and generalization. This may be the same case with American scholars. They are rather tended to call their work “Legal Theory”. Though there are several reasons, it may be a favored reason that “legal theory” sounds indeed a course of theorization in accordance with actually social needs and practice, but not a mere abstract formulation. This may be, I think, a problem of user’s taste or choice on that word. But such a tendency is relevant. Here, I shall search for a few issues by taking account ideas expressed in a form of legal theory developed. See M. Yasaki, *Legal Philosophy* 155-7, Chikumashobo, (1975).

gnize it or not. As an illustration for this aim, I shall take ideas suggested and developed by some scholars at Harvard Law School where I did research for a while in the last year.

Admittedly this is merely a partial note, but not a fully considered paper, it has a decisive weakness in connection with its primary sources, because it mainly consists of a kind of materials I happened to gather orally through questions to and answers from scholars there, in other words, hearsay evidences, but not firmly recognized and reliable evidences as books, articles, etc. But such an impressionistic approach may have a merit to report immediately and introduce how their sharp interest awakened, deepened, and spreading out in regard to some common subjects. I shall make, from this point of view, a few remarks on my impression there.

II American Legal Theory and New Generation

Recently I visited Harvard Law School for two months in the fall, 1975.²⁾ The most impressive to me during this period of stay is a specific topic of New Generation suggested by M.J. Horwitz.³⁾ He comes to the examination of this topic after having paid careful attention to the developing process appeared in American legal theory as the preceding problem. The process is shown by

2) I did research at Harvard Law School from Sept. to Nov. 1975. As general jurisprudence course or seminar incidentally are scheduled to open in the next spring session, apart from the short limit of my staying period, so I decided to learn within the short limit by asking and listening to some scholars there who seem to be interested in various topics of jurisprudence. It was Prof. J. Cohen who suggested me this way, and I am grateful to him for such a helpful advice. The text, as it shows, is written mainly on the basis of what I learned from Prof. M.J. Horwitz in his office, and of my comment. Then materials, too, come from hearing, but I made often simple notes in order to supplement the text and to show some scholarly interests in Japan. Though I am afraid if I would misinterpret Prof. Horwitz' idea and intention, I am very obliged to him for giving me this opportunity. In this short note I scarcely mentioned to Prof. L.D. Sargentich's idea. But I enjoyed with his stimulating discussion and his well considered utilitarian approach based on the modern analytical jurisprudence. Besides him, I now remember Professors with my gratitude who suggested and helped me in doing the plan: R.M. Unger, H.J. Steiner, H.J. Berman, A.M. Sacks, A. von Mehren, C. Fried, L.L. Fuller, J. Shklar (Government), J. Rawls (Philosophy).

3) See (a) M.J. Horwitz, *The transformation in the Conception of Property in American Law, 1780-1860*, 40 *The Univ. of Chicago Law Rev.* 248 (1973). (b) *The Historical Foundation of Modern Contract Law*, 87 *Harvard Law Rev.* 917 (1974). (c) *On the Rise of Legal Formalism*, 4 *American Journal of Legal History*, Nov. 1975 (I don't read it yet). "Legal Theory and the Regulatory State" is a book he is planning to write.

the following periodical order, that is, 1 Legal Formalism through 19th century, 2 American Legal Realism since 1920-30, or Sociological Jurisprudence of Dean Pound, 3 Institutional Formalism since 1950, 4 New Generation from 1965 to present. At first, I shall refer to these three stages necessary for further understanding of the crucial topic of the fourth stage, that is, New Generation.

1 Legal Formalism

In the 1820's and 1830's in the U.S., the codification movement gradually appeared with its argument that the judges do not have the legitimacy to make the law in a democratic society, the only form of legitimate law making is statute or code made by the legislature backed by popular opinion. This argument is evidently opposed to the Common law tradition. A response to this argument, in turn, can be seen in the treatises tradition in the early 19th century. Its first major expression is Chancellor, J. Kent's Commentaries, 1826, which have had a tremendous influences through the 19th century. The basic assumption about law and legal treatises is that law is a science. It has been repeated not only in the treatises, but addresses or auditoral occasions, etc., it has become the rethorical tradition of the law within the legal profession beginning in the 1820's and 1830's. But scholars at these days didn't talk about scientific method of law, until C.C. Langdell has treated law as a science in a sense of natural science. In this context it is fairly clear that the treatises tradition stands in a dialectical relationship to the codification movement. That is, it attempts to demonstrate the major argument of the codification movement that the Common law system is political is wrong, and it also attempts to demonstrate that logic, reason, system of inter-related legal concepts are not political. Legal Formalism will be traced in the idea as reflected in this tradition. It has taken over gradually the state court since around 1850, and at last it becomes the prevailing idea even in the Federal Supreme Court until the late 19th century. In the sense, then, Legal Formalism is the normal, ordinary, regularly usual possession of the legal profession in the U.S. Legal Formalism in this way attempts to treat one of the central problems in the American law which is how can we justify in a democratic society the vast law making power that is given to the judge. This is a constant, recurrent issue.

The explanation above, so far, may well show a necessary condition for the rise of Legal Formalism, but not a sufficient conditon. Because, when we look

at the legal opinion in the 1830's and 1840's, we don't see Legal Formalism there, even though we see it in the early period of treatises tradition and more and more formalistically minded legal scholars and legal elites. The decisive change can be observed in the 1850's. Let us cite an example from the contract law.

The 18th century doctrine of contract law was tended to pay an attention to results of contract, and to realization of objective values to be expected from this point of view. In the sense, whole series of doctrine allows the judge's or jury's intervention into the bargaining system. The doctrine of this sort is, so to speak, based on a view of "substantive" exchange, mainly concerned with a distribution of wealth. In the course of the 19th century, however, it comes to be regarded as more and more impermissible to do that. The question is raised as follows: As values realized by means of contract are only subjective,⁴⁾ so it must be abstained from to concern substantially outcome of contract as well as to intervene in the bargaining system. The intervention is only justified in terms of process, form, neutral criteria, so and so. Under the market economy, such a concern with the outcome is regarded as an essence of political act. The approach in this way is formalistic, and contract law is formalized in terms of the approach as well as property law. Such is Legal Formalism.⁵⁾ Then, what is the remarkable in the latter half of the 19th century is that Legal Formalism appears as a kind of adequate legal ideology for the demanded extension of the market economy.

2 American Legal Realism

It is the well known Legal Realism from the 1920's to the 1940's which appears as one of the critic to Legal Formalism. Sociological Jurisprudence in this respect has also similar trends, but it is needless to say that both of them have quite a few differences in regard to their each own arguments. For the rise of Legal Realism, the following reason shall be referred. Legal Formalism indeed fairly corresponds to the autonomous economy and desire for its confor-

4) See note (3) (b) 918 ff.

5) When Horwitz uses a word Legal Formalism, meaning of "formality" is not always clear, and it appears to need a further clarification. M. Weber's classical analysis of the problem in terms of "formal-rationality" may be useful for this purpose, validity of which in Anglo-American law, however, is doubted by Horwitz. In addition, see D. Kennedy, *Legal Formality*, II 2 *The Journal of Legal Studies*, 351 (1973), and note (1) 201-3, 221-2.

mity, predictability. According to the 19th century idea, law is regarded as distinct from policy, economy, and as a science. But enormous change raised by economic relations, class structure in the U.S. from the 19th century to the 20th century, for instance, more and more prevailing trends in the economic concentration made the principle of freedom of contract and the underlying idea of Legal Formalism out of fashion. By contrast, private law suffers a greater change by means of a series of new legislations, for example, those for the guarantee of the consumer, the poor, etc. Thus, the governmental regulation of the market economy becomes one of the great issues, and it reminds us of an image of the bureaucratic, regulatory state. It is Legal Realism, and other similar arguments which appear in this setting as typical legal ideology in those days. In the sense, Legal Realism can be called "Jurisprudence of the Bureaucratic, Regulatory State". It plays a theoretical role in corresponding to the intervention of the state into the distribution of wealth as really an internal problem of the social system. But what we must notice is that Realism is not social philosophy, or theory of social justice. Only facts are relevant to Realism, then it is tended to lead to worship of facts. Viewed in this light, Realism is forced to be conservative. Here again, Horwitz pays a special attention to the changing phase of American legal theory. The third is Institutional Formalism.

3 Institutional Formalism

America in the 1950's politically shows very conservative cast of mind under the influence of the MacCarthyism, ideologically she is characterized by the lack of idea of social conflicts. It is interesting to see the analytical philosophy as known by G. Ryle and others being prevailing under that circumstance, at the same time the notion of law as fundamentally right and as unrelated to politics. The *Legal Process* of H.M. Hart and A.M. Sacks is a symbolic work during this period.⁽⁶⁾ It was printed as a tentative edition, 1958, and it has been still circulated in that mimeographed form until now. Many similar works on the legal process has been published with constant reference to it. In the sense, the book is an unknown masterpiece, it is given a position of a kind of bible in

(6) See review by Japanese Scholars: Hideo Tanaka and Hisashi Tanigawa, *Legal Process*, 225, 227 *Jurist*, and H. Tanaka, *Courts and Professions in England and in the United States* (Eibei no Shiho), *Todai-shuppankai*, 1973.

that field. The major topics are legal reasoning, construction, justification of law. It attempts to clarify fundamental differences between law and policy, though admitting their interaction to some extent. It stresses on institutions rather than theory, and procedures rather than values. For this reason it comes to be characterized as "Institutional Formalism". The result is its attitude tended to overlook social conflicts and to look at social identity, so coming to be uncritical to such a delicate situation. Meanwhile, several devices such as like "neutral principles", "reasoned elaboration" are added and joined to the whole series of this sort. Again under the changing situation, scholars especially under 40 ages who don't see law any more in the self-consistent unity, or body, begin to show their disbelief in the traditional, established legal theories and to go out the way. In regard to the disbelief we may well call them "New Generation".

4 New Generation

The expression itself is very attractive. But it is more stimulating for me as I have been a bit troubled about how to imply and allocate American legal theories after Legal Realism. The expression "New Generation" indeed impresses me strongly as well as Institutional Formalism, nay, more strongly than this. Then, what is New Generation? Now we come to the place to answer the original question.

First of all we must be careful in taking New Generation as a single unit. As Horwitz admits it, there are at least two wings of serious meaning of which we have to take account later. One has been strongly developed by G. Calabresi and R. Posner, another is going to be developed by Horwitz, J. Steiner, R.M. Unger and others.⁷⁾ Much stimulating issues come from the economic analysis

7) Economic utilitarianism referred by Horwitz find its typical examples in G. Calabresi, *The Costs of Accidents*, 1970, and R. Posner, *Economic Analysis of Law*, 1972. In this Note their theories are referred in an extremely simplified form. It needs a more detailed supplementary explanation and I will do it in another chance. Some Japanese scholars have been interested in Calabresi's theory. See Koichiro Fujikura, *Development of Liability of Torts* (Fuhokoi Sekinin no Tenkai), 107 *Doshishahogaku* 1, and Akio Morishima, *Calabresi's Theory on Liability Rule for compensation* (Songaibaisho Sekinin Rule ni Kansuru Calabresi Riron), in: *New Trends in Private Law Theory* (Shihogaku no Aratana Tenkai), *Collected Papers in Memory of Late Prof. Wagatsuma, Yukikaku*, 1975.

Within another wing of New Generation, see below note (16) as to Unger. G.P. Fletcher, *Fairness and Utility in Tort theory*, 85 *Harvard Law Rev.* 537 (1972) may serve as an interesting sketch of the problem.

of legal problems, and reach to a level of ethical theory of law, that is, a favorite topic of general jurisprudence. Let us take briefly a very simple example from the bargaining process of private individuals in the marketing system. According to the classical utilitarianism, people are "rational maximizers of satisfaction" and minimizers of cost. Under the present, highly complicated situation, however, they may suffer very different kind of, and often unexpected damages or costs as typically exemplified by automobile accident.

"The function of legal remedies, viewed in an economic perspective, is to impose cost on people who violate legal rules —,"⁸⁾ and to deter them from such acts. But in many cases it is not enough to impose costs directly injurers on one to one basis for several reasons. That is why now it comes to be insisted that not only those, but a wider range of people who are likely to be injurers, or others should pay costs. For this purpose, not only private insurance, but social insurance, enterprise liability, and so on, are carefully taken into consideration, to say nothing of methodological problems such as policy, goal, etc. Indeed, it is a delicate problem whether we want costs deterrence or loss spreading in connection with distribution. It may be interesting to see that according to Horwitz, Calabresi shows a positive attitude to admit some intervention of the state into market whereas Posner is negative in this connection, and he only admits the state's intervention within a limit of maximization of sole national products. Though differing in their each own contentions, Horwitz continues to point out, both stand for the same utilitarian point of view, and both lack of further insight of problem of distribution. Especially this is true for Posner. He appears to conceive law as a means of policy, his idea in the sense ideological. Consequently, it results to conceal a very nature of bargaining power being unequal in reality.

Thus Horwitz criticizes them though admitting himself as another wing of New Generation. He certainly recognizes a very meaning of the marketing system. But he very carefully looks at increasingly changing power-relationship between bargaining parties, and points out the dangerous direction that the relationship is now regulated by the regulatory state. In addition, as he thinks it impossible to reintegrate economy merely by means of minimization of the state's intervention into it as Posner thought, still Horwitz emphasizes a direc-

8) See note (7) Posner, 357.

tion of economic reintegration and thereby a fair distribution by means of paternalistic⁹⁾ regulation through the state. He thinks there is no more way than this. Then, how does he think of fair distribution problem? Does he have any concrete idea for its realization? Without depending on the utilitarian point of view, on what basis can he develop his argument? Here, he refers to J. Rawls' Theory of Justice.¹⁰⁾

Rawls' theory itself is not really a new one. It is, so to speak, an attempt to make together many different types of theories into one framework which mainly consists of two elements, that is, natural right theory and egalitarianism. The utilitarianism, viewed in a whole context of American culture, becomes increasingly unsatisfactory, perhaps generally for the reason that it doesn't offer any theoretically proper consideration for sacrificed people under the principle of maximization of interests. It is clear that if we look at American culture and whole series of American ideals, natural right theory and individualistic tendency for two hundred years are very strong and have to come to surface. Rawls, recognizing this tendency, attempts to accommodate utilitarian premises of any large scale of industrial order with some conceptions of natural right. His theory thus includes two tiers system. Tier No. 1 is basically absolute natural right conception mostly revolving procedural guarantees. Tier No. 2 is utilitarian principles limited by natural rights. R. Nozick's idea¹¹⁾ may serve here as a contrast. That is a right wing attack on Rawls'. He argues most forms of interventions are illegitimate, and he argues against Rawls' attempt to some egalitarian distribution.— It is worth noticing that Nozick's general way of thinking in this context is to a considerable extent similar to Posner's—. But both, Rawls and Nozick have begun to attack the bureaucratic state. This convergence must not be overlooked.

Rawls' theory of Justice sounds the most attractive and clearly has had the influence on scholars, including those at Harvard Law School. The latter is another wing of New Generation, and their legal theory developed under that

9) "Paternalism" has a wider range of meaning. For its proper use, it needs to be more precisely explained.

10) Precise review of Rawls' *A Theory of Justice* (1971) has been made by Japanese scholar. See Shigeaki Tanaka, *Theory of "Justice as Fairness"*, *The Annual of Legal Philosophy*, 161 (1972), *Justice, Liberty, and Equality*, *The Annual of Legal Philosophy*, 69 (1974). Moreover, note above (3) (b) 260 f. will show an aspect of Horwitz' criticism to utilitarianism.

11) R. Nozick, *Anarchy, State and Utopia*, 1974.

influence is "Jurisprudence of the Bureaucratic, Regulatory State". The term repeated here is originally used for designating Legal Realism. Two theories in this respect appears common and same. But, while Realism was a theory of *justification* for the bureaucratic state, legal theory of the New Generation is a theory *critical* to that state.

III Some Comments

Horwitz repeatedly calls attention to the problem: how to justify the democratic society which permits judge's law making power — really a central issue, to which American legal theory have had again and again to return. In taking account of such a recurrent issue, he traces the jigsaw styled changing process of the legal theory, as if an expert of calligraphy at one effort writes a long sentence with a beautiful contrast of black and white. Thus he points out so impressively that we are tended to accept his idea hitting the mark, his way of explanation good reasoned and persuasive. Now I shall again examine the first impression said above. It may be our common experience to be bound ourselves too much by so strong impression to overlook another side of coin. How about this case? There are a few points to be noticed, except further problems to be omitted here.

1 As to the basis of his argument

The main course of his argument clearly has been connected with his critique on the utilitarian approach made by Posner and Calabresi. While their works have been made public through books or articles, Horwitz' argument has only been suggested in his articles concerning rather historical study of property, contract, and so on. As I wrote it in the footnote above, I am afraid if my note on his unpublished idea on the way of formation might be different from his original intention. But I really hope to have his argument published in the near future to make more easy to understand the underlying problems.

2 As to the concept of law

According to Horwitz, New Generation doesn't believe in the traditional

legal theory. Let us assume the traditional as including the three types mentioned above. The legal theory of New Generation is different from them. But it is not unrelated with them in a sense that both of them have been brought up on the common background, the U.S. This may be especially case with a wing of the utilitarian approach, because it is criticized by Horwitz for its negative attitude to introduce morals into law. That wing's concept of law, so far as this aspect is concerned, is very similar to the legal positivist's. Then, how about an idea of Horwitz himself in criticizing that opponent wing? Is it his real intention to remove such a distinction? It isn't true, however it looked like so at first glance. He admits as a matter of fact certain formality of the law in a considerable degree and its possibility in formally functioning sometimes to check and limit the originally interested dominant people (in making that law) against their interest, and so on. It may well be said from this that so far as law functioning process is concerned, he doesn't conceive law as a mere amalgam of different social phenomena, but he still maintains, so to speak, "an idea of law as a functioning unit". Even though this doesn't make his idea very close to positivist's position, there remains much interesting task of how to examine and allocate it within a context of various legal theories.

3 As to the bureaucratic or regulatory state

What is an impressive figure underlying the contemporary legal theory is the bureaucratic or regulatory state. It may be presumable for another wing of the New Generation including Horwitz to take the state as a target of their criticism. It appears plausible when we remember his remarks on the transformative process of legal theories from Legal Formalism through Realism, Institutional Formalism to New Generation, and the appearance of the latter with its critical characteristic to that state. Indeed, such a presumption may come true when he treats his approach on the changing succession of these legal theories as a "pessimistic" note. But he is, here too, very careful in the criticism. Clearly finding out some dangerous directions immanent in the modern bureaucratized regulatory state, he still seems to think it possible to reintegrate the economic system in terms of the paternalism within a framework of the state of this sort. His approach may well be said pessimistic, but it looks not always so to the end.

4 As to a validity of the classification

The existence of what is called Legal Formalism at the first stage, then Realism at the second are well known for scholars through some similar expressions though a bit different in their each connotation. Therefore, these terms are generally acceptable. Legal Formalism rather may well be analyzed in regard to its further developed consideration. By contrast, the following third and fourth stages of Institutional Formalism and New Generation may raise a series of objections or implications.

At first, We may have objections in a following way: If New Generation is recognized in this way as the contemporary legal theory, how can we treat other trends in that context? In order to understand the objection, it is good enough to mention to their names such as like studies in law and society, sociology of law, or legal theories based on the achievements of cultural anthropology or behavioral science, etc. We may also have another type of objection in defense of the study of legal process. It has been certainly criticized as Institutional Formalism. But, is it meererly concentrated in the analysis of institutions and procedure? Apart from such an analysis as its central task, it pays necessary attention to the problem of legal values in legal theory as well as the relevant problem of law and society. Otherwise, the study of legal process itself would become less meaningful and powerful Thus objections will be raised one after another. These objections are not prejudiced, but natural to be expected generally, therefore by Horwitz, too. It is the next topic to concern with how to imply his analysis of legal theory, especially after Realism.

It is very presumable that he doesn't assert both of Institutional Formalism at the third stage and New Generation at the fourth stage respectively as the sole legal theory since 1950. It is only asserted that as far as the problem of theory and practice about law and marketing system is concerned, both, Institutional Formalism latent in the study of legal process and New Generation have each respectively different trends in each different senses through this period. Isn't this one way of implication?

Of course, there may be much stronger objections unsatisfied with such a trivial implication: there is no necessity or reason to refer Institutional Formalism and New Generation as representing the third and fourth stages. Is

the expression, New Generation itself free from vagueness? Isn't it decisively clear weakness for the New Generation, being separated into two wings, to lack its identity as a single legal theory? The study of law and society or legal process rather are full of richness in their content, and yet useful in terms of outline of the formative aspects in American legal theory But it is needless to cite furthermore hypothetical objections one after another. I shall understand here his treatment of Institutional Formalism and New Generation as one of each relevant trends in American legal theory and as giving each of them the periodical classification of the third and fourth.

5 As to the marketing system and utilitarianism

Horwitz' critique of the theory of Posner and Calabresi is mainly reduced to the argument that they are too much concerned with maximization of sole national products from the utilitarian point of view in regard to the marketing system, to disregard people sacrificed by this attempt. Indeed, the utilitarian idea, as symbolized by the principle, "greatest happiness of the greatest number" since J. Bentham has always had to face severe criticism for its disregard to the people who are eliminated from that greatest number. It is clear that Horwitz develops his idea in accordance of this line of criticism. On the other hand, utilitarianism too, in response to such a criticism, has undergone a considerable change, but not still remains in the original form since 19th century. Moreover, it is inconceivable for Horwitz to argue utilitarian consideration entirely useless to the problem of marketing system. He thinks it possible that theory of justice sometimes and within a certain limit refers to utilitarian considerations and vice versa. It must be a fascinating problem how to confine and confirm a certain limit. This may be the case with Rawls' theory of justice as well as L.D. Sargentich's utilitarian theory of law. According to Sargentich, utilitarianism at present is ready to take and taking suggestions presented by the theory of justice into consideration. It will be much more interesting and necessary to examine such an attempt if we remember his basic course of legal thinking to rest on the so-called modern analytical jurisprudence energetically developed by H.L.A. Hart in England. Seen in this light, it is understandable that the discussion made by Horwitz has a stronger sense far beyond mere outline of American legal theory. The issue here is picked up without any hesita-

tion through his insight of the remarkable trends which come apparent in paying attention to a number of different, sometimes conflicting streams of legal theories from the 19th to the 20th century America, and allocated as a series of specific models of legal theory along the vertical line, so to speak, of the timebase of his investigation. In using them as models, we may, by referring to and by means of investigation of concrete fields of law, for instance torts, come to reach a possible total examination of highly complexed discussions of general nature concerning theory of justice, utilitarianism, and modern analytical jurisprudence, or a meaning of the bureaucratic, regulatory state to the legal theory at present.¹²⁾ This is clearly one of the most interesting task suggested by Horwitz, though it is perhaps inadequate for us to treat and judge the task in an impetuous way.

IV Significance and Limits of the Western Legal Tradition

“Legal Theory” has a very wide range of extension. Scholars at Harvard Law School, too, are engaged in their work on legal theory from quite different aspects. If I tentatively call the theory summarized above the vertical investigation of law in a sense that it is made along the historical timebase, I shall now make a quick outline on what may well be called horizontal investigation. I shall take it here as attempts to investigate law and legal theory in the modern period within a horizontally or spacially huge dimension, not limited to the West, still less to one country. One of the interesting works, though not popular, is H. J. Berman’s *The Western Legal Tradition*.¹³⁾ He begins to deal with the subject by some genetic examination of the tradition, that is, to point out a notion of “a body of law”¹⁴⁾ appearing under the so-called Glossing School of Gratianus and Irnerius at Bologna, and reaches to investigation of how the modern Western legal tradition was increasingly established and developed through theory and practice of law in England and the Continental Europe, then mentions to American legal education, too. This mimeographed material may

12) In this connection, see R. Dworkin, *Hard Cases*, 88 *Harvard Law Rev.* 1057 (1975). Moreover, K. Greenawalt and E. Nagel, *Seminar in Legal Philosophy, Materials*, privately printed for the exclusive use of students in the School of Law at Columbia Univ., Autumn, 1975 will serve as a material for understanding of such a current trend mentioned in the text.

13) H.J. Berman, *The Western Legal Tradition: its relation to the great revolution of Western history and to the world revolution of the 20th century*, material, 1972.

14) See note (13) 74.

serve as one of the keys for understanding the Western legal tradition in a limited sense.

But further attention is to be paid on such attempts which are not mere byproducts of the study of the Western law, but which directly study the Eastern law and legal theory, and make a comparative study of both. J. Cohen is one of the promoters in this direction.¹⁵⁾ Through his energetic work in theory and practice, he emphasizes how relevant the Eastern law and legal theory are to the legal studies, and he appears to warn, like the principle, "stop, look, and listen", that legal scholars have been too much concentrated on the Western law. Viewed in this context, R.M. Unger's attempt may well be said as a kind of reply to this warning, because he is intended to reexamine a framework of the Western law and liberal legal theory, to introduce somewhat pluralistic investigation of law in connection with Chinese law, Japanese law, Islamic law, and so on.¹⁶⁾

It is needless to say on the one hand, that the Western modern law has played a decisively important role as a standard for our conceptual analysis of law. On the other hand, the Western law has been tended to be identified as "modern law in general", moreover "law in general" as bearing universalistic values.

This is undoubtedly a kind of overstatement we often make, and yet it is much more true if we remember the simple fact that all modern societies are not the Western societies, and outside the Western world, and indeed there, modernizations adequate for each own different social situations have become an urgent necessity. That is a kind of trap most scholars of the Western law easily fall into. There were a few scholars reflecting the matter with keen insight, but recently such a reflection increasingly comes to be shared by scholars with disillusioned eyes as exemplified in Unger's view.¹⁷⁾ What I should like to mention at last is that both, the horizontal as well as the vertical investigation have been actively advanced forward, not only within a certain limit of legal scholars at Harvard, but in a form of mutual exchange of scholarly opinions within a wider scale in the U.S., furthermore through the world.

15) J. Cohen, *The Criminal Process of Law in the People's Republic of China 1949 — 1963, 1968.*

16) R.M. Unger, *The Place of Law in "Modern" Society*, 1971, on file in Harvard Law Library. *Law in Modern Society, Toward a Criticism of Social Theory*, 1976. *Knowledge and Politics*, 1975.

17) See D.M. Trubek, *Toward a Social Theory of Law*, 82 *The Yale Law Journal* 1 (1972), moreover, note (1) 222 ff.