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# LEGAL POSITIVISM IN JAPAN†

## —Prefatory Remarks—

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Legal Positivism Criticized

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and Socio-Cultural

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## Legal Positivism Criticized

A term “legal positivism” is not popular or familiar to citizen in Japan, but a special technical term for law scholars and lawyers. In speaking of it, moreover, they have very often used it in some special connotation. For instance, ideas that one need not be afraid of condemnation by others whenever he strictly observes any given laws, or that lawyers and scholars of law can sufficiently resolve all possible legally involved problems wherever any definite system of laws is presented before them, may fairly serve as its illustrations. We have been very accustomed to see them cited under the name of legal positivism, and yet confronted with special criticism, “that’s why legal positivism is to be swept out.” Such a usage of the term, according to the connotation above, rather seems to imply something like, legal mind or legal thinking which believes in laws and orders given by state or political power as almighty,

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† This is a part of translation, though a bit modified in the content, of my article, Legal Positivism (Hōjishhōshugi), in: Series of Law in Contemporary World (Gendaihō-kōza), Iwanami-shoten, vol. 13. As to the legal positivism, I have written a book and several articles, by changing aspects to deal with the subject (cf. Note 1), 3), 9), 10)). At this time, the article is particularly concerned with legal thinking in Japan.

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which is, consequently, to be named "confirmed" or "hard boiled". It particularly resembles the usage in modern France, "culte du texte de loi", or "fétichisme légal". Actually, I wonder if the term legal positivism might be exhausted in this way of usage.<sup>1)</sup> But, as it is the usage mentioned above which has been generally found in the field of law in Japan at present, I would like to examine this hard boiled or confirmed legal thinking in regard to its logic and socio-cultural background underlying it, with reference to a few cases, at last to reconsider whether this usage is really adequate to express the term legal "positivism" or not, in order to clarify its significance in our contemporary world.

### A Few Cases

One of the most striking cases as far as I remember is a writer, Miss. Taiko Hirabayashi's remarks in newspaper, May 9th, 1957.<sup>2)</sup> Her remarks were made twice in the same day, morning and evening, and yet on the ground of diametrically opposed arguments. As it was a great issue that the Public Corporation, Etc., Workers Union's strike in that Spring came to be strictly regulated by government with the pressure of dismissal, warning, etc. of the leaders, her remarks naturally were directed to this issue. While she pointed out in morning that Public Corporation, Etc., Labor Relations Law (Kōrōhō), as referred by government as rationalizing governmental decision is still law, even though it might be unreasonable in the content, consequently law is to be observed, her opinion in evening was that law is not to be observed, only if it may be unreasonable. As we see, it is very surprising that she changed her opinion from one extreme to the other in the same day. Especially, what interests us is her morning opinion that law is strictly to be observed, regardless of its content — whether reasonable or not —, and that strict observance of any given laws is the thing to do for us, since we are under the rule of law. It is probable that such an opinion itself implies the confirmed or hard boiled legal mind. Only her remarks have been often cited as a surprising case, because she criticized for

1) As to the detail, see Yasaki, Legal positivism reconsidered, written in English, Osaka University Law Review, No. 11, 1963, p. 18 ff.

2) Taiko Hirabayashi, Law is to be observed even though it may be iniquitous in the content (Akuhō mo shitagawanebanaranu), Tōkyō newspaper (Tōkyō-shinbun), May 9, 1957. Iniquitous law is to be overcome (Akuhō to tatakau hokanai), Yomiuri newspaper (Yomiuri-shinbun), evening edition, May 9, 1957. Why have I changed my opinion in a single night (Watashi wa naze ichiya de setsuo kaeta ka)? Tokyo newspaper, May 14, 1957.

herself her confirmed legal positivism in evening, while she convincingly held it in morning.

To consider it a bit more deeply, however, it is not only the case for her. A term "Rechtsstaat", or "rule of law" does not necessary mean that people ought to obey laws given there, regardless of its content, and I think, there may be a possibility of "critical" observance of any given laws.<sup>3)</sup> Nonetheless, such an idea of "strict" observance of any given laws which insists people strictly to obey any laws as far as they were given under the name of Rechtsstaat or rule of law is tended to be dominant, that is actually problematic.

Let me cite another example. On May 12th, 1964, one sent a telegram at Beppu telegram office in Kyūshū to his family, saying that "as I am going to die today, please take care of everything after my death". Indeed, two and half hours later, he made a suicide by diving under the running train. A newspaper reported this accident under the title: "Which is more important, either sanctity of human life or secret of correspondence?"<sup>4)</sup> What was at issue is whether the suicide might be beforehand prevented or not, if the office, in doing its business, informed beforehand the matter to the authority. In other words, as far as life of human being is concerned, the crucial point is why the office could not do its business not only from the viewpoint of formal logic of law, but from moral point of view. The office, however, rationalized its treatment about the matter under the name of observance of Art. 21, Consitution of Japan concerning secrecy of communication and of Art. 5, Law of Public Business of Communication by Means of Electricity concerning with the same content. The implications of this case are surely delicate. It is obviously misleading if we might conclude from this case that people participating in public busuness of this sort should anytime inform the content of each communication to the authority. In this sense, the office in their argument and rationalization has somewhat reasonableness. But, it must be still a bit doubted if there might not be a kind of opportunism, "It's all right only if observing laws." Therefore, even though we need not find a typical hard boiled legal positivism in this case, but it is still relevant to us that there is an idea to suggest the existence of

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3) H.L.A. Hart, Positivism and the separation of law and morals, Harvard Law Review, vol. 71, 1958, p. 618 ff. As to the recent discussion on the subject, see S. Hook (ed.), Law and philosophy, 1964, p. 3-101. Yasaki, Legal positivism, written in Japanese, publ. by Nihonhyōronsha, 1963, p. 204 ff.

4) Asahi newspaper (Asahi-shinbun), May 14, 1964.

bureaucratic opportunism concerned with the thinking above.

On the other hand, there may be another type of illustration for such a legal thinking, saying "because of no legal provision". It is the cant which is often used when the public office rejects citizen's reasonable and sincere ask or argument. Such an idea also may well be called an idea of the reverse side of a coin, that is, the hard boiled legal positivism.

As an illustration, let me cite a Supreme Court's decision,<sup>5)</sup> 1959. It is the case concerning with the result of the labor movement of the Whole Public Business of Correspondence Workers Union, the central issue of which is how to treat the matter of discovery and raised the keen difference of opinions between the practicing attorney and the public procurator. While the practicing attorney required the procurator to show him all kind of evidences in the procurator's possession, the procurator rejected this requirement on the ground that as he showed the practicing attorney all materials which are supposed to be presented and examined as evidences relevant to this case in the court, he needed not do furthermore. In front of this conflict, the District Court judge advised the procurator that he is better to show the practicing attorney materials which may be possible to examine as evidences on the ground of Art. 321 and 328, Law of Criminal Procedure, even though the procurator at present was not intended to do so. But, the situation was not still changed. At last, by using his competence to conduct as a chief judge, he made a order, saying that the procurator ought to make the practicing attorney to look at all kind of evidences in his possession in order to find material justice. It was very unacceptable to the procurator. That is why there happened the special appellation of the procurator and the Supreme Court's decision.

The Supreme Court's opinion involved, to sum up, is as follows: The decision of Ōsaka District Court is against to the judicial precedents, and yet it is not appropriate to give the procurator a duty being not prescribed by existing Law of Criminal Procedure, accordingly, it is to be repealed. To refer the context a bit in detail, the following part is relevant. It is sure that the procurator have a duty to realize material justice, in cooperating with the judge as well as being a participant in this case. But, it is to be judged by legal propositions of Law of Procedure whether he furthermore is obliged to show beforehand the practicing attorney materials as

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5) Decision of Dec. 26, 1959, Supreme Court. A collection of criminal Supreme Court cases, vol. 13, No. 13, p. 3375. Y. Nakabu, Discovery, in: Series of Law of Criminal Procedure, vol. 2, 1964, p. 263 f.

evidences regardless of his actual intention to present them as evidences or not, but since there is no legal provision providing such a duty, the District Court can not duly make the decision in such a way mentioned above. The opinion, therefore, is reduced to the conclusion that because of no legal provision, the decision comes to be unjust. What amounts to the same thing, only considering it from the other side of a coin, the conclusion means that we can't help to do so due to any prescription of legal provision, and that, speaking in an extreme way, we can do everything only if based on the prescription of legal provision. Supreme Court decision, certainly, doesn't express such an opinion. But, examining its opinion, I think, there may be a possibility of implication of this sort. If so, we may well say that within the opinion lies a kind of the hard boiled legal mind.

But this is the case concerned with the criminal (procedural) law. It is a well known fact and indeed important to know that interpreter is required more strictly to be bound by frame of legal provisions in the field of criminal law rather than the other. Therefore, we don't blame every type of legal thinking placing an emphasis on observance of laws. Such a thinking may well be said relevant to practitioners and theoreticians of laws in order to secure fundamental human rights from abuse of political power as well as to prevent themselves from their arbitrary discretion of legal provisions. But, how about this case? The central issue here is that the procurator is better to show the practicing attorney the evidences in his possession, for the purpose of *fair* attack-defense to be held between them, and yet to speak principally, for the purpose of finding of *material justice*, which is very basic for Law of Criminal Procedure. Seeing in this light, the attitude of the decision putting aside straightly such a central issue only because of no legal provision to subsume the case is to be reexamined. Here we may find something else, far beyond legal thinking merely to emphasize on observance of laws, that is, the hard boiled legal positivism.

Accordingly, it is remarkable that within the same scope of the confirmed view point of law there is a difference in a considerable degree. For instance, if someone use the cant "because of legal provision prescribing to do so", he is intended to rationalize as possible as extensively by this legal provision whatever he decide, while in the case of "because of no legal provision to subsume the fact", he is intended to reject by this cant whatever most citizen likely demand him to decide. It is, however, as well worth to notice social or intellectual conditions underlying and supporting such a type of legal thinking. To speak of three cases said above, if these might

happen in a society based on somewhat popular attitude of supremacy of civil liberty, meaning of the cases, too, might be largely changed into the moderate direction. These are, however, cases happened in Japan. The more we know here demand of civil liberty having not always and strongly been raised and developed in a spontaneous way within a folk in general since Meiji era, the more we are afraid if the confirmed view point of laws also has not played a worse and dangerous role in modern period of Japan. I think naturally, the point of view may have another aspect of role remote from the worse and dangerous.<sup>6)</sup> If so, it comes much more urgent to examine its social and intellectual background as well as its logic. Then, why has it been blamed and criticized in Japan?

### The Hard Boiled Legal Positivism and Socio-Cultural Tradition in Japan

Late Prof. Izutarō Suehiro in his paper "Problem of Renewal and Reflection on Meiji era" pointed out as follows: "The state was intended to become the sources of morals or folkways, furthermore to unify even religion under its control" so that "people lost all of their original and critical powers under the heavy pressure of the state", because "they came to think of the state and its laws are almighty and the best".<sup>7)</sup> In this short paper his keen insight clearly fitted the central feature of the social conditions in Meiji, which the confirmed view point came from and criticism of which was the task of his sociological jurisprudence. But, as to the origin of this legal thinking, it is worth to pay attention the fact of acceptance of German law and legal thinking in Japan and of codification being advanced. The fact seen approximately since 1900 was very symbolic for direction of development of legal thought in Japan, by showing the rise of the German legal thinking in contrast with the fall of the French and English in Japan which were very influential in the preceding period here.

6) Imagine an emergent situation when judge argues that he can not give a sentence of imprisonment more than ten years for the accused on the ground of legal provision, while a group of leaders want to inflict upon him death penalty only because they dislike for him. See M. Takahashi, Accident of Feb. 26 (Ni-ni-rokujiken), 1965, p. 185 ff.

7) I. Suehiro, A lie is sometimes expedient (Uso no Kōyō), 1954, p. 62. As to details of the matter, see Tetsu Isomura, Modern legal theory in Japan (Shiminhōgaku), in: Series of history of modern development of law in Japan, Keisōshobō, vol. 7, p. 31, 85. To speak exactly, though this excellent article in print is divided into vol. 7, 9, 10, it is numbered consecutively as to pages through each volumes. In citing this article below, I shall use this special page number.

Then, why was it symbolic and decisive? It comes from the fact that the German legal thinking was accepted here, including its so-called legal positivism of conceptual jurisprudence. The term conceptual jurisprudence (*Begriffsjurisprudenz*) which R.v. Jhering<sup>8)</sup> named the specific feature of German legal thinking at that time in a caricaturalized sense, presupposing that each legal provisions as a whole constitute a selfconsistent and less-contradictory legal order (or system), accordingly this legal order comes to be an absolutely reliable means to resolve all legal problems, is usually summarized in the logical formula that by subsuming a fact as the minor-premise under a legal provision as the majorpremise, a conclusion as a decision definitely is deduced in a syllogistic way (as it's well known, the formula resembles to late Prof. J. Frank's  $R(ule) \times F(acts) = D(ecision)$ , which may be very familiar in the U.S.). The legal thinking of this sort, being originated in the former half of 19th century Germany theoreticians or thinkers of law, like C. F. Puchta, C. F. Gerber, was advanced and developed within a circle of theoreticians in the latter half of 19th century there, especially W. Windscheid in civil law, P. Laband in public law, K. Bergbohm in philosophy of law.

Incidentally, however, in the latter half of the 19th century Germany it was an actual necessity to unify the states in particularism under a nation state and to unify their laws into well arranged codes (codification), and yet it was indeed, though partly, realized since Bismarck government so that the theoreticians mentioned above, too, tended to hold a view seeing law and laws altogether as nothing but enactments of a nation state or political power. A typical representative of this idea is mainly Bergbohm, but such is also the case with the others.<sup>9)</sup> It may well be called a positive law minded position which, by placing a special emphasis on the political power, identifies laws enacted by political power as a positive law and yet the positive law as law in general. While it has been generally called "legal positivism", I think here is a cause of misunderstanding as I will refer to it later. The legal thinking of this sort, placing a special emphasis on statute or state laws, is, to sum up, the hard boiled legal thinking — in using Mrs. Shklar's term,<sup>10)</sup> legalistic — The German legal theory accepted in Japan was thus accompanied by such a legal positivism of

8) R.v. Jhering, *Scherz und Ernst in der Jurisprudenz*, 1884, 52 Aufl., 1921, S. 347.

9) Yasaki, *Legal positivism*, Nihonhyōronsha, p. 179 ff. 194 ff. *Legal positivism*, in: *Series of legal philosophy*, vol. 4, 1957, Yūhikaku, p. 219 ff.

10) J. Shklar, *Legalism*, 1964, p. 1 f. Yasaki, *Some comment on legal positivism and legalism*, written in English, *Osaka University Law Review*, No. 13, 1965, p. 4 ff.



conceptual jurisprudence which I cite below, for the convenience, as the hard boiled legal positivism.

### Authority Minded Legal Thought

To examine legal thought in Japan, it must be moreover kept in mind that a tendency to imagine the state being almighty was developed here. Seeing from this aspect, the state was intended to extend its legal and yet powerful control not only for citizen's external behavior, but for their *internal* attitude. Thus, it comes a basic feature for the state to be guardian or *paterfamilias*. Speaking of the law in Japan, it is natural to see that the law was given a role not only to be command of sovereign but to control and lead citizen's behavior even in regard to their internal world<sup>11</sup>). As to this point, I will refer to an idea of late Prof. Shinkichi Uesugi soon later. Here the law's fundamental character is deduced from an authority of the state as a *paterfamilias* as well as its formal character owes its justification to political (or legislative) power. Therefore, it comes to be apparent that legal theory in Meiji era, generally speaking, was based on an authority minded legal thought and it was given a method by the hard boiled legal positivism.

The authority minded legal thought has been explained above with reference to the specific idea of the state of Japanese at that time, but it doesn't mean that European's legal thought of legalistic content has not been accompanied by such an element. To illustrate familiar examples, Roman legal propositions, "*princeps legibus solutus est*", "*quod principi placuit legis habet vigorem*", or Emperor Justinian's attitude prohibiting to make commentaries on *Corups Iuris Civilis* in an arbitrary way seems to show us such elements in existence. As to the modern period, the same is the case with Emperor Napoleon's saying when he was given a chance to see a commentary on the Code Napoleon, "*Mon Code est perdu!*" or Frederick the Greate's attitude to dislike lawyers in Germany at that time, mainly because of their formalistic (or mechanical) interpretation and application of laws. Here we are faced with a series of authority minded legal thought which gives a special emphasis on authority of ruler in order to deduce authority of the law from it. What is more relevant in the modern West, however, is to look at the double

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11) Isomura, *op. cit.*, p. 30 ff. 86. T. Kawashima, *Society in Japan constructed by family character* (Nihon Shakai no Hōteki Kōsei), 1950, p. 19 ff.

character of the matter that while such an authority minded thinking or absolutism was decisive to make the hard boiled legal positivism possible in existence, a trend of assertion on civil liberty based on the growth of civil society at that time, too, had a same role of this sort. What amounts to the same thing, while authority minded thinking did so by believing in laws as an authorized entity without no weakness since these were given from the above (von oben heraus), liberal attitude emphasizing on civil liberty did so by holding a view that the more laws are an expression of general will of citizen (J. Rousseau!), an indispensable means of civil liberty, the more laws are to be complete in order to prevent citizen from abuse of political power.

It was in 19th century when the situation had been step by step changed to give an emphasis on civil liberty. Now, the state comes to be a formally rationalized mechanism (Anstalt) in function, laws themselves, too, had been given a role to function as an order as a part of such a formally rationalized mechanism. Even though the state and its laws had been given a great significance, it is to be kept in mind that, generally speaking, they restrained themselves to interfere in private or internal concerns of citizen. The reason, partly, comes from the fact that function of laws, in other words, functions of administration and administration of justice were required to be calculated like a machine, since modern capitalism underlying them was possible to develop itself only by standing on the ground of rational calculation as pointed out by M. Weber.<sup>12)</sup> If so, it is also desirable for the law to put aside from its function what is hard to calculate like citizens private concern or internal attitude — Remember the so-called *separation* of law and morals — Therefore, there were quite enough socio-cultural conditions in the modern West to make it possible for scholars and citizen to desire for well arranged system of laws in a sense of formal - rationality, accordingly to believe in such laws as command of sovereign or as complete entity without any gaps and weakness (it is indeed the cult of laws enacted by the state), while the idea of the state as a moral or ethical entity and its laws eligible to interfere with private concern or internal attitude of citizen became gradually superfluous and replaced by the liberal attitude arising from the process of rationalization. J. Bentham's idea may well serve as an illustration, because he was not an authoritarian minded, but great utilitarian who earnestly

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12) M. Weber, *Gesammelte politische Schriften*, 1920, S. 142 f.

desired for a complete code of constitution, etc.<sup>13)</sup> But such is not the case in Japan. The idea of the state and its laws decisively influenced by guardian or paterfamilias viewpoint has not been yet died out here, but, furthermore, it was given a considerable meaning by many scholars as relevant elements in their legal thought. This does not make an exception even for late Prof. Tatsukichi Minobe, who is well known as a liberal in regard to his theory and who himself criticized such an idea.<sup>14)</sup> Even viewing the matter from this aspect, it may be apparent how an authority minded attitude has been influential and yet given a strong impact on legal thought in Japan.

### The Hard Boiled Legal Positivism and Modern Capitalism

Thus, the hard boiled legal positivism in Japan has been brought up under and backed up by the authority minded legal thought, but such an involved situation, it is worth to noticing, corresponds to an economic situation at that time. On the one hand, Japan in Meiji era has surely went along the way of capitalistic rationalization, that is, modernization. It is the similar situation to the modern West that there developed freedom of private property and contract in corresponding to goods exchanging relation in capitalism and there was advanced codification which was required to secure such an actual fundamental legal institution. It is also similar that civil liberty has been gradually guaranteed and the hard boiled legal positivism has been developed, in corresponding to the ideology, the "complete" code as it ought to be. On the other hand, there has been still dominant the view seeing the state as almighty and the authority minded legal thought. It was the Imperial Speech on Education (Kyōiku-chokugo) which gave an typical expression for this type of view, control through the state.<sup>15)</sup> In the economic system, too, so-called civil liberty has been admitted to enter in the field of relation for citizens with one another, but it was very hard to do so in the field of labor relation, landlord-tenant relation so that *semi-feudal* relations were still maintained and became obstacles

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13) J. Bentham, Works (Bowring ed.), vol. III, p. 209 f. F. Neumann, The democratic and the authoritarian state, 1957, p. 37.

14) T. Minobe, Essays on recent constitutional problems (Saikin Kenpōron), 1903, Jitsugyō-nonihonsha, p. 320. Isomura, *op. cit.*, p. 59. H. Wada, Judicial decision on administrative problems (Gyōseisaiban), in: Series of history of modern development of law in Japan, vol. 3, 1958, p. 124.

15) T. Ishida, Studies of history of political thought in Meiji era (Meiji Seijishisōshi Kenkyū), 1954, p. 37 ff.

to the capitalistic rationalization passing into. That is why, and it is very presumable that, the state as a *paterfamilias*, by depending upon the semi-feudal relations themselves, tended to delimit the scope of civil liberty as possible as he could. It is the striking fact that the hard boiled legal positivism has been strongly influenced by double character, civic or liberal on the one side, semi-feudal on the other.

Under the circumstance of this sort, even though it has appeared to make the rule of law possible, the hard boiled legal positivism actually has been forced to serve as an ideological instrument for control through the state as *paterfamilias*, so to speak, for rationalization of bureaucratic discretion of the office there. We may find now its typical expression in the legal thought of late Prof. S. Uesugi who took for granted the interference of the Emperor State government with citizen's internal attitude, while he was proud of himself as a successor of legal positivism of conceptual jurisprudence in Germany (especially Laband's).<sup>16)</sup> Certainly he worked in the field of public law, such is also the case principally in the field of private law though there are a few features making exceptions which may come from a speciality of private law and legal thinking. Here is a historical limits of the hard boiled legal positivism in practice as well as in theory in Meiji era. The situation, however, changes with the times, especially during the Taishō era. The reason mainly comes from the fact that the double aspects of the economic system, by passing through the economic crisis, have been gradually faced with contradictions in the capitalistic society, especially labor problems and tenant problems (both of them are called together a social problem) which in turn have come to shake fundamentally the society itself. It comes more and more difficult for lawyers and scholars of law merely to deal with logic and concept of laws regardless of an actual reality in change, as done by the hard boiled legal positivists. Before directly examining the problem of this sort, however, I would like to cite a case happened at the end of the Meiji era as an epilogue of this paper.

### Ichirin Case

The case is often cited as "Ichirin" case. Ichirin is a special term to express a minimum amount of money within a monetary system at that time, which we have

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16) S. Uesugi, New lectures on constitution, (Shin Kenpōjutsugi), 1925, Yūhikaku, p. 50-3, and its Introduction (Jobun), p. 13. Isomura, *op. cit.*, p. 19.

no more, far less than a coin in the U.S. It is the case concerning a person who was accused on the ground that he consumed for himself tobacco leaves equivalent to Ichirin, against the legal provision of the former Tobacco Monopoly Law (invalid at present) prescribing that who cultivates tobacco leaves is to serve the government with leaves, and unless doing this, he is liable to a fine. The accused also acknowledged the fact. While the Kōso-in (the former Court of Appeal) gave a judgement of guilty about this case on the ground that consumption of tobacco leaves for himself is clearly against the law, regardless of any amount of consumption, large and small, the Daishin-in (the former Supreme Court) acquitted of the charge by annulling the judgement.<sup>17)</sup>

As far as the Kōso-in adhered to the view that the consumption is still the consumption violating the legal provision, accordingly the accused is liable to a fine, it reminds us immediately the hard boiled legal positivism placing a special emphasis solely on laws given by state, and yet it also resembles the national (or state) interest minded legal thought as far as adhering to the presupposition that the consumption against the Tobacco Monopoly Law is at the same time an act violating the state in regard to its right to make profits. In this sense, this is an example of the hard boiled legal positivism based on the bureaucratic, authority minded legal thought. The Daishin-in's judgement, however, exhibits a striking contrast to this. According to its judgement, it is rather against the spirit of tax laws to punish such a mere trifling violation with a fine even by wasting time and money. It asserts moreover, such is also the case with misdeed of human being. Since, the more misdeed is light, the more harmless, this is well to put out from a control of laws. An idea or attitude underlying in this judgement is very interesting. It reminds us, to some extent, an utilitarian or empirical approach to the law. After that, we may perhaps imagine a series of critical approach following, like civil liberty minded jurisprudence, furthermore sociological jurisprudence. What is relevant to consider here, however, is the fact that even such trends of legal thought have been very often in Japan accompanied by an unexpected companion, that is, the hard boiled legal positivism based on the authority minded legal thought.

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17) Judgement of Oct. 11, 1910, Daishin-in. A collection of criminal Daishin-in cases, vol. 16, p. 1620.