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THEORY, INSTITUTION, AND PRACTICE AS A
TOPIC OF LEGAL CULTURE:
A COMMENT ON PROFESSOR R.B.PARKER'S PAPER*

*Mitsukuni Yasaki***

Let me summarize Professor Parker's fundamental question as follows: Why and how has Japan developed as a huge industrial modern state in East Asia without any aid or support of modern law and trained lawyers as in the West, especially in the U.S.?

His answer to this question is that there must be factors which made it possible for Japan uniquely to develop herself. To imagine such factors, it is sufficient for us to give a few examples from human relationships of a delicate nature among the Japanese, that is, *giri*, *ninjō* or *aidagara-teki*, "contextual" human relationships, and so on. Japanese are accustomed to see these social practice of everyday life as natural, and in this respect reified. Japanese have succeeded in developing in terms of such attitudes, that is, by giving special emphasis to people's social roles in their daily life which makes a great contrast to the American's attitude of a special emphasis on the law and trained lawyer against a low emphasis on their social roles.

This is, I think, a clearly sketched picture sufficient to show where there are problems for our legal-cultural understanding between Japan and the West, especially the U.S. I would like to appreciate his effort and the success he has reached in his paper. The more clear it is, however, the more it stimulates me to discuss and to propose my ideas and to reserve a few standpoints for myself. I shall do it from both the Japanese and scholarly points of view. For this purpose I refer to Professor Parker's paper¹ in this volume and to other materials,² including his remarks in classroom discussion.

1. CONCERNING THE FRAMEWORK OF CONTRAST

He certainly did not forget to notice one incidental similarity of both countries, the U.S. and Japan are unique in different ways in our contem-

porary world. But, as indicated above, he beautifully draws a picture of contrast between them. The focus of his attention in making such a contrast seems to be directed in the case of Japan to the people's role in everyday life, while in the case of the U.S. to formal law and the lawyer. In other words, the aspects to be compared seem to belong to two different layers. If I cite figurative terms which I used in my preceding paper, "institution as the first layer" may well cover people's social roles in everyday life in Japan, while "the institution as the second layer"³ covers the formal law and the trained lawyer. To cite Chie Nakane's terminology, "social structure" and "social organization" may work as "the first layer" and "the second layer" in my preceding paper do.⁴ A question in my mind is how we can make a clear cut on such complex interwoven socio-cultural phenomena.

It can not be denied in Japan that the institution as the second layer has had a considerable impact on the first layer of institution. Modern formal law has been imported from the West and accepted, modified, and used in Japan. It has not only a nominal validity at "the second layer", but "the first layer" as well. As is often pointed out, the law's influence on people's ordinary life is not as strong as in the U.S. But it is a fact that people must depend on and use contractual means in order to continue to live in their everyday life, and contract is contract, although the way of contract is substantially and variously conditioned. Thus the second layer is to some extent interrelated with the first layer, and *vice versa*.

2. CONCERNING THE METHOD OF COMPARISON—REIFICATION

According to Professor Parker, the Japanese reified their social role or practice — at the first layer, — while American reified the law and trained lawyer — at the second layer.— He used this term "reification" with an adjective, "unjustified". "According to my definition, reification is necessarily an unjustified attribution of concreteness, impersonality, objectivity or independence to something".⁵

"For Americans, what seems to be reified in Japan are social practices determining what is appropriate behavior in everyday social situations. Rather than follow principles articulated in abstract terms, Japanese in everyday life situations feel compelled to act in socially appropriate ways with socially appropriate feelings. There is little interest in general moral, religious or political theory to justify action in accord with these felt compulsions be-

yond a vague reference to what is natural".⁶

If Japanese see their practice as really natural, why does it look reified and yet unjustified? It is reified from the observer's point of view, especially from the Americans. Even though it appears reified from the American point of view, how can they say it is unjustified? It is certain that such a practice in everyday life appears to them somewhat ridiculous, or extraordinarily mysterious. By what way of justification, however, they can reasonably say unjustified?

Professor Parker, as far as this is concerned, seems to reject so-called cultural relativism by referring to R. Rorty and R. Dworkin's idea.⁷ I myself have no intention to defend it. But if we read his remarks on possible great Japanese contributions⁸ to future life planning in the post-twentieth century world being deeply connected with such a Japanese way of social life or practice, we feel somewhat of a leap in his argument and we are tempted to wonder on the change from "unjustified" to "justified".

3. LAW IN SOCIETY

Professor Parker thinks that the place and role of the law in Japan is very low by contrast to the very high place and role of the law in the U.S., that is, in Japan there is little reification at this — second layer — level, in the U.S. there is overwhelming reification. From my point of view, the contrast made in this way is very illuminating, but considerably misleading. Rather, it appears more natural and closer to reality, if we could treat this contrast in a bit softer and more weakened way. As mentioned above, we should remember that even Japan located in the East wants to be a State under the rule of law in the Western sense. Viewed from such a modified and moderate perspective, law and legal system in each Japanese and American society may well be sketched in Figure 2, as cited in my preceding paper.^{9,10} To see the matter in this way, it becomes clearer that Japanese formally act in accordance with the law and governmental measure while in daily life, if it necessary, they are ready to act to a considerable extent in accordance with the standards of the everyday life situations or social practice.

So far, the law as a part of institution as the second layer is both inter-related to the social practice as a part of institution as the first layer¹¹ and yet *relatively* independent of any similar institutions from the second layer to the first, for example from policy, ethics, morals to social morality, cus-

tom, folkways, mores, and so on, as shown in Figure 3. Such a characterization of the Japanese law in opposite directions of interrelatedness, dependence, and relative autonomy, independence is ambivalent and particular fields of the law may give us a much more complicated impression if we look at each of these at the different stages of the period and the various aspects of the society when and where they are expected to function. But it can not be denied, I think, that Japanese law in general may well be grasped from the perspective I described above. Let me continue to examine a few points.

4. LAW AND MORALS

The U.S. is very unique in regard to morals as well as to the law and legalism. The reason for this, Professor Parker points out in classroom discussion, comes from the fact that American have been accustomed to live in accordance with the Christian belief in an omniscient God (and for non-Christian people in accordance with moral scorecard) on the one hand, and belief in freedom or equality of any person before God or a moral scorecard leading to the modern idea of each person's liberty and equality before the law on the other hand. The American Constitution really embodies such ideas as universal but incomplete morality. Therefore here is a phenomenon of law and morals always being merged, there is no rigid borderline to separate law and morals which allows for so-called legal positivism to work.

Morality of freedom or tolerance — as embodied and guaranteed by that Constitution — is, I think, a kind of framing principle. Any civilized country would explicitly or implicitly admit it or something like it as an underlying morality or principle for law. What is worth noticing here is that the law is expected to function at a considerable distance from each social group's own morals or moral values such as like Italian or Catholic or Irish. These are morals or moral values, ideas which Professor Parker also treats in a form of the statement that Federal court is disinterested or reluctant to handle local, matters, in other words, not to introduce these into judicial judgement.¹² As far as this aspect of the issue is concerned, law and morals are not always merged, but are different with each other to a considerable degree.

To take an example from the Baileyville, Maine, case which Professor Parker liked to discuss in the classroom. Mr. Sheck made a law suit against School Board members who wanted to move a book from the school libra-

ry's bookshelf which they thought not good for students to read. School Board members were split in their opinions whether or not to move it, but attitudes of some members who took an initiative to do so reflected their tendency to consider the problem in favor of local traditional moral values. Even Mr. Sheck, the appellant, was asked again and again by his mother and relatives why do you dare to sue in this small neighborhood community and was asked by them to withdraw the lawsuit.¹³ If so, the surroundings here are not decisively different from those in neighborhood litigation in Japan. The only remarkable point is that he did it and his idea was to considerable extent supported.

To take the post-sixties situation as another example, "Viewed from the steps of Sproul Hall on the Berkeley campus, the horizon appeared alternatively darkened by threatening clouds and brightened by promising lights. There emerged a conception of the responsive polity, an idea that captured many legal and social aspirations of the day and was offered as a sharp contrast to the repressive idiom of "law and order". ----- What began as a modest stirring among law professors, social scientists, and foundation officials soon took on a larger significance. The politics of the time placed justice high on the agenda of public concern. Civil rights, poverty, crime, mass protest, urban riots, ecological decay, and the abuse of power gathered unprecedented urgency as social problems. They strained the political community to its limits. The legal order was asked to take on new burdens, find new expedients, and examine its own foundations".¹⁴ The citation above draws a picture vividly of how the formal structure, institution as the second layer, that legalism is based on, is starting to pitch and roll to grate and shake. Is not it possible to think that many desired, demands carried by movements within a hot atmosphere, express a new aspect of that formal second layer being transformed by the heavy pressure of informal structure, institution as the first layer?

A contrast of the older with the new aspect of informal structure, too, may give us a number of hints for our study of legal culture in our contemporary society.¹⁵ So-called "community"^{16,17} problem in Japan would be analyzed better if we take both old and new aspects of the informal structure in each societies into consideration.

5. THEORY AND PRACTICE

Intellectual history in West tells us that scholars there have had a long tradition of excellent skill in treating matters in the *abstract* terms and *theorizing* everything in this way. Prof. Parker as a matter of course paid his attention to it. He pointed out here phenomenon of "reification" peculiar to the Western thinking, and at the same time made a sharp contrast of the Western with the Japanese. "One Japanese friend of mine, a philosophy professor, observed that the Japanese have *little* interest in abstract theory because theories are most useful to people who like to argue. If you do not like to argue, you have no use for theory".¹⁸

This appears very persuasive. But, is it without any difficulty to say there has been less development of abstract and theoretical thinking in Japan? We immediately meet a difficulty if we look at the process of industrialization for more than a century. It needs a great amount of knowledge at first about technology, then management, furthermore formal law, and bureaucratic administration depending on it, and so on. It is sure that Japanese have learned much about it from the West on the one hand and developed it on the other as seen today. It is also sure that somewhat non-western, Japaneselike knowledge of life (*seikatsu no chie*) has permeated into this process of development. To summarize, we have had both theoretical knowledge like the Western people, and pragmatic knowledge of life the origin of which is probably can be traced back to the Tokugawa period or beyond it.

In addition, the Japanese-like knowledge of life itself may stimulate us to investigate more. Let me tentatively sketch our way of thinking from concrete level to abstract.

1. If A, then B. — ordinary life
2. If x (takes place of A), then y (punishment is to be imposed upon).
3. General categories of thinking
4. Viewpoint — selection, choice
5. Interpretation, construction
6. Abstraction, fiction
7. Generalization
8. Self-restraint, self-reflection.¹⁹

{

{
social
historical
}

boundness

I think this is too rough to explain such a complex matter as knowledge. What I am aiming at is to grasp the way from a birds-eye perspective.

In ordinary life, people feel, talk, and discuss their surroundings through communication. One of most convenient ways is to refer to a series of phenomena in terms of causal relations. It is indicated by 1. In order to think of or discuss complicated phenomena, people may possibly take a course from 1 to 8. It is not the course, but merely an indication of a course, and yet such a course of thinking may vary according to various historical, socio-cultural conditions. Scholars in the West, *generally speaking*, have taken a common course to develop abstract and theoretical knowledge as pointed out. How about Japanese? They may have lacked or had low degree of several points due to those conditions peculiar to Japan. Or, even though they had even before Meiji period, they may have lacked proper way of expression. . . . Here is a problem of expression, language, to be considered at another occasion. . . . If so, is it proper to say that there is no more theoretical knowledge in Japan to be refied?

6. MODERNIZATION

Chie Nakane wrote: "Most of the sociological studies of contemporary Japan have been concerned primarily with its changing aspects, pointing to the 'traditional' and 'modern' elements as representing different or opposing qualities. The tendency towards such an approach is still prevalent; it is their thesis that any phenomena which seem peculiar to Japan, not having been found in western society, can be labelled as 'feudal' or 'pre-modern' elements, and are to be regarded as contradictory or obstructive to modernization."²⁰

Prof. Parker in the classroom discussion named this the "Imitation view", and the reverse side of this "denied imitation view", and then reached to "Convergence theory" as follows:

1. Convergence theory takes it for granted for that each countries A. B.C. has been conditioned by its own way of life and thinking, X.Y.Z. Formations and courses of each X.Y.Z. have been different from each other. The contemporary situation surrounding A.B.C., however, has gradually switched them to accept rather "convergent" direction to run, either Japan, or U.S. or the western Europe — Conv. theory of linear type —.

2. Convergence theory may well be understood in such a way that it has

certainly an aspect of that linear type, but it also has another aspect which would be characterized by factors coming from each X.Y.Z. which still now are remaining objectively in a modified style and, subjectively thinking, to be maintained to some extent — Conv. theory of spiral type —.

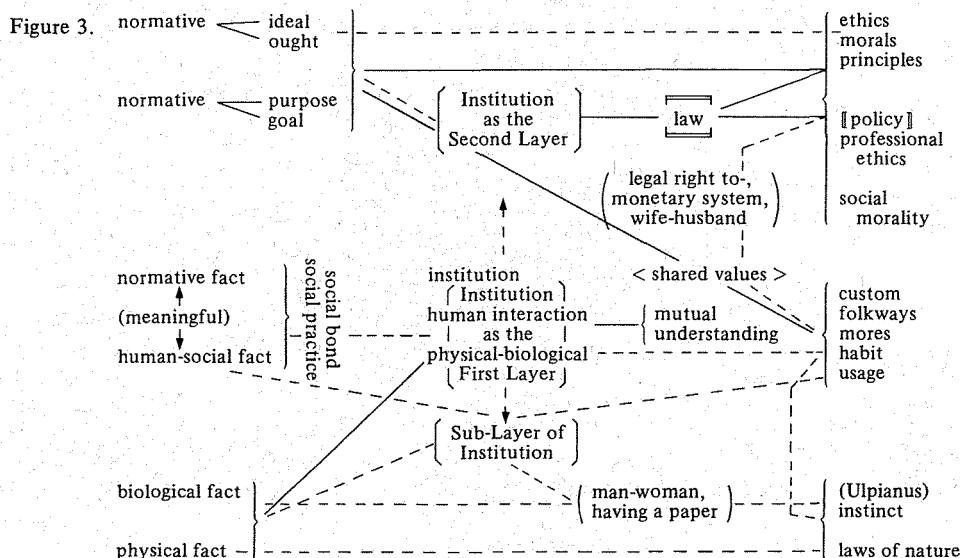
Prof. Parker seems to propose an idea of 1., that is, Conv. theory of linear type, while I am going to deal with this problem in terms of 2., that is, Conv. theory of spiral type.

Is Convergence theory understood and suggested by Prof. Parker in a linear sense consistent with the impressive idea of the contextual human relationship innate in Japanese society pointed out by Prof. Parker? Furthermore, is it consistent with Prof. Parker's following statement? "In this essay, I stress the absence in Japan of elements essential to democracy in America. There are elements inherent in Japanese culture which support democratic institutions".²¹

REFERENCE

* Mr. Parker visited Japan twice for the purpose of teaching American law and of doing research on Japanese law in society. Since 1985 he has taught as a Visiting Professor at Osaka University Faculty of Law in cooperation with Faculty members. I have taught with him Sociology of Law in Graduate Course and often made interesting discussion in classroom. I am very grateful to him on this point.

** Professor of General Jurisprudence, Faculty of Law, Osaka Univ., L.L.D Tokyo Univ., 1968.
 1. R.B.Parker, *Law and Language in Japan and in the United States*, 34 Osaka Univ. Law Rev. 47, 1987.
 2. Parker, *The Authority of Law in the United States and in Japan*, 33 O.U.L.R. 1, 1986.
 3. M.Yasaki, *Feeling and Reason as a Recurrent Topic of Legal Culture: A comment on Professor J.C.Smith's Paper*, 34 O.U.L.R. 37, 1987.



4. "Certainly industrialization produces a new type of organization, the formal structure of which may be closely akin to that found in modern western societies. However, this does not necessarily accord with changes in the informal structure, in which, as in the case of Japan, the traditional structure persists in large measure. This demonstrates that the basic social structure continues in spite of great changes in social organization". C. Nakane, JAPANESE SOCIETY, Tuttle Co. 3, 1984. I am interested in her contrasting use of double or dual technical terms in connection with "modernization" of Japan.

formal structure ----- social organization
informal structure ----- social structure

To take an example, "The general consensus is that, as a consequence of modernization, particularly because of the new post-war civil code, the ie institution is dying". *Id.* at 4. She called this "ideological approach". But, it is much more interesting to find that though "it is often said that the traditional family (ie) institution has disappeared, the concept of the ie still persist in modern context". *Id.* at 7-8.

To cite her former technical terms, ie as the institution as dying or disappeared will be replaced by the formal structure while ie as the concept as persisting even now by the informal structure in Japan.

Though admitting a relatively close relation of these terms to my terms of two (three) layers, here I am going to deal with the topic by paying rather a bit stronger attention to the second layer.

5. See *supra* note 1 at 49.

6. *Id.* at 52.

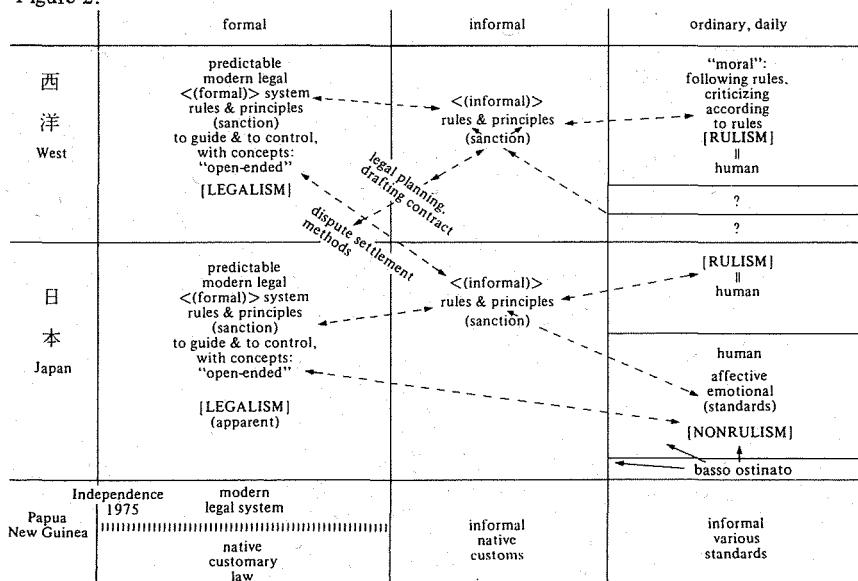
⁷ *Id.* at 50.

8. "The dense network of social relationships which constitute Japanese society and the Japanese person seems a survival from mankind's past preserved by an extraordinary history of isolation into the modern age. Japanese society seems to bracket the history of the West, giving us a window into the past to a period before the extraordinary reifications of self and language that have dominated Western thought since Plato, and also a view of the future to show us what a modern industrial society which does not rely on those reifications might be like". *Id.* at 71-2.

Such a conclusive phrase sounds very attractive and pleasant. But from an impartial observer's point of view, if any, it may be an overestimation since that social relationship itself as seen reified and unjustified still involves many problems to resolve. See *infra* text 6 and note 16.

9. See *supra* note 3 at 42.

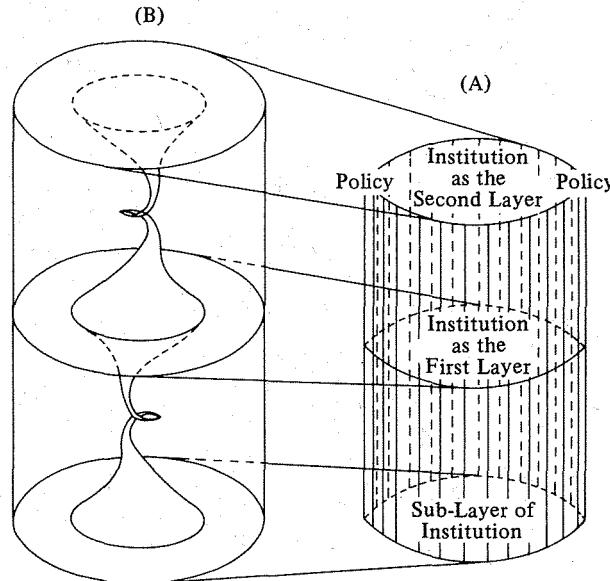
Figure 2.



10. See also Yasaki, *LEGAL STRUCTURE OF OUR DAILY WORLD* (Nichijō-sekai no hōkōzō), Misuzu-shobō, 293, 1987.

11. See *supra* note 3 at 44, and note 10 at 88.

Figure 4.



12. See *supra* note 2 at 8. See *infra* note 13 at 78.

13. "But to oppose the book ban was not necessarily to favor the bringing of a suit against the school committee. Heather Beebe and her mother were for it, but precious few others. The idea of getting a lawyer and taking the thing to court struck most people as a breach of neighborliness. ----- Michael's mother and his Bailey aunts and uncles tried for some time to persuade him not to bring the suit. They told him he did not understand the town. And they were, in a certain way, correct". F. Fitzgerald, *A Reporter at Large: A Disagreement in Baileyville*, THE NEW YORKER, 61, Jan 16, 1984.

But "In the end, Michael's mother gave her approval to the bringing of a suit". *Id.* at 63.

14. P. Nonet and P. Selznick, *LAW AND SOCIETY IN TRANSITION*, Preface V, and 2, 1978.

15. See *supra* note 10 at 85-86, 96-98.

16. Appreciation of Japanese human relation of "contextual" nature through foreigner's eye certainly makes a sense, but often leads to disregard or underestimation of what a reality is. For example, it seems to me that here there is a kind of amalgam of older, traditional, status-oriented, backward-looking factors and newer solidarity-oriented, movement-based, forward-looking factors which is to be observed, separated, and estimated according to different points of issue with a careful attitude. See *supra* note 8, and also note 3 at 46.

17. See Yasaki, *Law and Liberalism in the Process of Modernization of Japan*, 26-27 — A paper read and discussed at SYMPOSIUM ON VARIETIES OF LIBERALISM, Princeton, May 9-11, 1985.

18. Yasaki, *Legal Thought and Its Conventional Context* (Hōshisō to sono kankōteki bunmyaku), 141-2 HAN DAI HŌGAKU (Japanese version of O.U.L.R.), 25, 1987.

19. See *supra* note 4 at Preface, 3.

20. See *supra* note 2 at 15.