THE WORD LAW AND MATTERS LEGAL

Mitsukuni YASAKI*

Law and Its Limits

It sounds familiar for us to conceive law as the limited one distinct from the non-legal, like morality, etc. The socalled legal positivism in particular stands for this concept of law. The typical example is offered by H. L. A. Hart in its characterization as the second criterium of the legal positivism: "that there is no necessary connexion between law and morals, or law as it is and law as it ought to be".[1)]

Even though not standing on the positivist point of view, it has been generally repeated, that to maintain such a distinction has become the tradition for certain purposes in legal practice as well as in legal theory since the modern period. Then, for what purposes? In understanding them, careful notice should be paid on the historical differences between the common law and civil law systems in their administration which are apt to prevent us from putting them together. But, several common conditions, still may well be accounted as such purposes, that is, to prevent judge's arbitrary decision as well as to exclude arbitrary legi-

* Professor of General Jurisprudence, Department of Law, Osaka University. J. D. Tokyo University, 1968.

1) H. L. A. Hart, The concept of law, 1961, p. 253. Cf. W. J. Uren, Criteria of legal positivism, ARSP, LVI, No. 56, 1969, pp. 189 ff.

slation under the name of morality, so and so, in other words, to secure citizen's liberty and right in the better condition. It is, partly, due to these purposes that modern great writers such as like Montesquieu, C.Beccaria, J. Bentham, A. Feuerbach stressed the idea of mechanical application of law through syllogistical process. The similar situations still remain today, and the distinction seems necessary to maintain in a considerable degree. But, the more getting close to present, the more it becomes difficult to do so in the original style. Mr. Justice O. W. Holmes' idea would provide us with a good example.

As it's well known, opposite types of opinions have spread around from the interpretation of his idea. Against the older view criticizing its morally nihilistic, or morally indifferent aspect, the defense for his idea has been offered according to the following way of reasoning : Holmes indeed gave an emphasis on studying law apart from the non-legal (including morality). It does not follow from this emphasis that he disregarded moral elements in law. On the contrary, both in "*The Path of The Law*" and "*The Common* Law", he definitely spoke of the fact of moral influence to law in regard to the process of law-making and law-functioning.[2)]

Nevertheless, in the case of study of law, law students are to pay their attention to the law itself. To cite a phrase, he spoke with an emphasis : "The first thing for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law. ····· When I emphasize the difference between law and morals I do so with a reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks, and it is

2) O.W.Holmes, The common law, 1881, Belknap press ed., 1963, pp.128, 107 f.

for that I say you for the moment to imagine yourselves indifferent to other and greater things ".[3] So far, he certainly stressed the meaning of the distinction, but he did so only to this extent.

At first glance, such a defense is plausible. Further questions, however, may be raised in the following way : **1** What does it mean to learn and understand, that is, to study the law? It is truly the law — the subject of study which has been made and administered through the influence of the non-legal (including morality). Then, could be the law strictly or purely distinguished from the other even on the level of the study? This is the first question. **2** The study of law will be continued on the theory level. Theory and practice concerning law, as elsewhere, theoretically are to be separated. But this is not easy to do in practice, and yet, still less easy in the common law countries where, as it is said, routine of theory of law is more deeply connected with the legal practice. So, the second question again would be raised that one may find any feed-back relationship, rather than the distinction between the law and the non-legal. In this respect, the limits of law does not seem so easy to maintain as the defenders argued. But this is simple acknowledgment of how is situation around law coming. Therefore, what is essential at the moment is not merely to condemn or give up the separation, but to consider it more in detail. For this purpose, my main concern is, at first, to take two illustrations in which law and the non-legal, *i.e.*, what is legal and what is not appear to be used in close connection as standards for judicial decisions, and then, to examine the word law according to its usages involved in these illustrations.

3) Holmes, The path of the law, 1897, in: Law and philosophy, ed. by Ed. A. Kent, 1970, p. 7.

Two Illustrations

The Naien-relation

"Modernization" of Japan, though strongly advanced since Meiji era (1868—), has left considerable rooms for traditional elements based on customs in the community. The Naien-relation is one of them in the field of law. To cite Kuki's proper term, "Naien is the relation between man and woman which is not legally admitted to be the lawful marriage"[4] for the failure of the *registration* as requested by the Family Registry Act. Indeed, there has been a remarkable distance between the custom and the legal provision. According to the former, man and woman become the formal couple by celebrating their marriage whether or not performing the registration. According to the latter,[5] "no marriage, without registration". One of the urgent problems was presented as to the damages rendered when Naien was breached wrongly. To construct the provision literally, no legal protection should be given to Naien? But, how about the reality of practice? The main trend of the judicial decisions changed from rejecting to giving legal protection. It has been established since 1915[6] that Naien is a precontract (or quasicontract) to the marriage, so the damage caused by its breach is to be treated on the ground of a non-performance of obligation. In 1958, in addition to them, it was held possible, by the Supreme Court,[7] to make claim for damages caused by unreasonable breach of the Naien-relation on the ground of a tort. All that has been established by paying a deep consideration to the social custo-

4) T. Kuki, Naien : One problem in Japanese marriage law, Osaka Univ. L. Rev., No. 12, 1964, p. 9.

5) The main provision of Japanese Civil Code says :
"The lawful marriage comes into effect in consequence of the registration requested by the provision in the Family Registry Act" (§739).

6) Judgment of Jan. 26, 1915, Daishin in (former Supreme Court). 21 A Collection of Civil Daishin in Cases 49.

7) Judgment of Apr. 11, 1958, the Supreme Court. 12 A Collection of Civil Supreme Court Cases 789.

m, *i.e.*, social practice which at first was treated as the non-legal, then taken into the framework of law by means of judicial legislation or law-making, thus acquired the character, legal.

Riggs v. Palmer

In 1889, Court of Appeals of New York held "that [defendant] Elmer E. Palmer and the administrator be enjoined from using any of the personalty or real estate left by the testator for Elmer's benefit ; that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him ·····".[8] It is this unfortunate case which originally was caused by the fact that the defendant, while he murdered his grandfather who made his last will to give the grandson, defendant a considerable part of his estate, claimed then the property.[9] The case is well known with in the common law countries, and it has called for serious consideration. Mr. Justice Cardozo in his lecture spoke of it as teaching us necessity of choice between possible principles for the judicial decision.[10] A. L. Goodhart made a remark about it because of an overstatement of the principle involved in it : that "no one shall be permitted to take advantage of his own wrong, or to found any claim cpon his own iniquity, or to acquire property by his own crime'".[11] R. M. Dworkin referred to it as an example of the typical use of maxims, principles, standards, etc., in the judicial decision as well as another case of *Henningsen v. Bloomfield Motors, Inc.*[12] Here, it woud be enough to mention that

8) Riggs et al. v. Palmer et al., 22 N.E. 191 (1889) .

9) idem 22 N. E. at 189.

10) B.N. Cardozo, The nature of the judicial process, in : Selected writings of B. N. C., ed. by M. E. Hall, 1947, p. 121.

11) A.L. Goodhart, Determining the ratio decidendi of a case, Yale L. J., vol. XL, No. 2, 1930, p. 166.

12) R.M. Dworkin, Is law a system of rules ?, in: Essays in legal philosophy, ed. by R. S. Summers, 1968, pp. 35ff. M. Yasaki, Philosophy of law and sociology of law, 1972, pp. 137 ff.

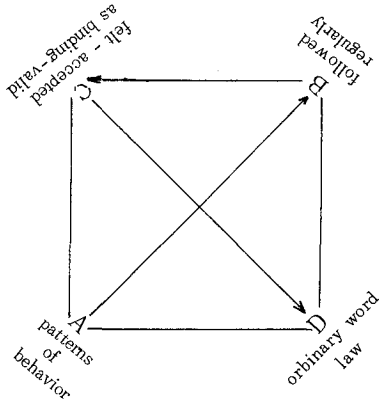
several standards offered possibilities to make decisions from each different point of view about this case, that is, statute, judicial precedent, and common law maxims which will be referred below.

Diagrammatical Explanation

The cases above will show how complicated situations arround law are. They, in turn, make an influence even to our usage of the word law. Whenever the word law is used, cited, and criticized, it often has been given a role to designate too many things each of which, being conceptually to be separated one another from the analytical point of view, are put together without any reference to some difference between ordinary and theoretical usage of the word. —— one of the causes of controversies concerning the word law. —— So I shall describe, next, certain characteristic usage of the word law in connection with their designation by means of two diagrams. Both of them include four different stages classification of which may not be delimited to four, but is made as a matter of convenience.

Diagram 1. This is an illustration of the field of matters legal. The square styled diagram is to be utilized for two purposes, *i.e.*, for understanding both of the law-making and law-functioning process. The law-making process in an ordinary sense proceed from A→B→C →D. A. Certain patterns of behavior has been established within a community of certain scale. B. It is not only followed generally, ——C.—— but also felt or accepted as binding or valid. D. It is sometimes said that certain legal lule about certain pattern of behavior is established in this way on the one hand, and the ordinary word law is applied to this

Diagram 1.



ordinary matters, especially the rule on the other.[13] Seeing in its functioning process, the word law (D) is now related with and react to other three directions, A.B.C., while originally is conditioned by them. (B.C. themselves may have the same functioning to others, which is not mentioned here) To switch our focus of attention from Diagram 1. to Diagram 2., there spread around somewhat different prospects of the legal world.

Diagram 2.

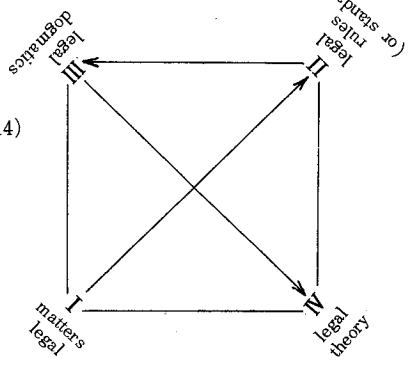


Diagram 2. This is an illustration of what the word law designates. The twofold processes are also the case with this diagram.[14] The matters legal which constitute Diagram 1. as a whole, is here put together to the stage I. How the law—making process proceeds from there would be more concretely clarified by means of the two cases or illustrations above mentioned, concerning customary law, statutes, and judicial precedents.

Custom

The stage I — matters legal. What are customs in a community will differ according to the different practices of each communities or countries. For example, it has been the custom in the western countries to give a tip for taxi-driver but not in Japan. This may be the case with the problem of the Naien-relation said above. Whatever the scope of patterns of behavior identified as customs, however, they are accustomed to be called customary law in an ordinary sense. By the way, the ordinary usage of the word is not always the same with legal treatment of these customs as law. The stage II. appears thus as a screening stage. Screening them

13) We may perhaps find at this Diagram a prototype of various ideas, such as like those of Ehrlich's *lebendes Recht*, Hart's *primary rules of obligation*.

14) K. Llewellyn, A realistic jurisprudence — the next step, in : Jurisprudence, 1962, p. 5.

through legislation or judicial decision to legal rules becomes an important task at this stage. One example of their legislative treatment is as follows :

"A custom, not violating the public order or good mores, has the same legal validity, as legal enactment does, in regard to matters, to which any provision of laws or regulation permits to it to relate, or matters to which no provision of laws or regulation is to relate." (Hōrei, § 2)

The judicial precedent based on a series of judicial decisions needs not to repeat as it's indicated before. Legal rules concerning customs, whether provided by Code or presented in precedents, are naturally to be applied and operated in legal practice. In that occasion, the legal dogmatics, in other words, constructive approach plays an important role between them. The stage III. The role of legal dogmatics[15] in a considerable degree is to clarify meanings legal concepts involved in legal rules according to their context and in the light of socio - legal practice, then, eventually to eliminate from or add to them some meanings. Here could be seen both, certain constructive or juristic approach and the word law (customary) corresponding to that approach. The stage IV. Legal theory. It becomes major subject at this stage how theoretically to use the word customary law, either to reserve it only at the stage II., or to include the stage III. and I., besides II.

Again, Riggs v. Palmer

The stage I. One may perhaps assume several features of matters legal in this way, that is, a) patterns of social behavior to make a will, b) patterns of social behavior about and against murder, c) common sense styled judgment of a) and b), d) the ordinary word law, etc. The stage II. Legal standards in treating the case are

15) I borrowed the word legal dogmatics from the german notion *Rechtsdogmatik*. It might be a bit unfamiliar for common law countries. But, to refer Holmes, The path of the law, p. 7.

the statute on will on the one hand, and the judicial precedent (understood broadly) on the other. The stage III. The judicial court, using the technique of "rational interpretation" and deviating itself from *Owens v. Owens*, reached to the conclusion, that the defendant was not entitled ····, by standing on the "general fundamental maxims of the common law" (No one shall be permitted ·····). It will immeadiately remind readers both, the way of judicial law-making or legislation and wider aspects of the word law as so far presented as its material standard. The stage IV. The same problem will be raised in regard to what extent the word law theoretically is to be used to.

One of the most interesting stage within Diagrams 1. and 2. should be the stage III. Whenever certain legal rule, whether customary or of precedent, statutory, is treated in reference to certain cases it originally or provisionally expected to come, no sharp interstice between this stage and the others could appear. By contrast, if certain legal rule (*e .g .*, statute on will) is treated in reference to cases at least unexpected to come or put aside, then, several innovations may have to be devised and introduced, such as like " *interstitial* law-making ".[16] To be sure, the process of administration or operation of law always brings before us somewhat new factors, *e .g .*, deviation from judicial precedents, such and such, in which feed-back relation of any sort would be apparent between the stage III. and I., which may moreover catch our interest.

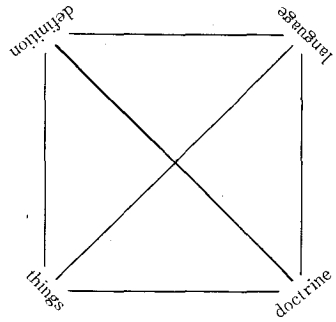
The Word of Law and The Word about Law

The problem of law, as far as the usage of its word is concerned, is reduced to what shall be understood under the word of law, or the word about law. Whether to limit it to the stage II, or to extend

16) Cardozo, *op. cit.*, pp. 134, 146 .

it to the others, too, has been seriously disputed between participated users, and each of their assertions proposed as the well-known subject of "definition of law". This is really an important subject to be pursued in some proper way. The main purpose in this article, however, is not to provide for certain definition of law, but merely to clarify several topics of the usages of the word from the theoretical point of view(including philosophy of law and sociology of law) at the stage Ⅳ.

Diagram 3.



To simplify some aspects of definition of law, it may well be permitted to summarize as follows. According to Diagram3.., some scholars use the definition(Ⅲ) solely at the stage II., while the other does not contend this way, but try to make definition of things themselves at the stage I. At first glance, there appears a great distance between them. Is it really so? Partly, not. The former, perhaps doing so only for the purpose of "definition", does not lead to the disregard of things, and *vice versa*. My concern is merely to give a notice on the backgroud of the matter : As we know, there are three components about it, that is, speaker - language - designata.[17] To make a definition, a user of definition(or speaker) uses it in referrence to words (or language) from his own aspect according to which he finds in things an interest to do so, which is expressed in Diagram.3.as legal " doctrine " (including both, legal theory and legal dogmatics) .

The simple distinction at first should be noted here, that is, the word of law and the word about law both of which will perhaps serve for the purpose above as an illuminating example.

17) R. Carnap, Introduction to semantics and formalization of logic, 1959, pp. 9 ff.

The word of law

The first attempt is to use the word of law as to the limited stage II., Diagram 2, in other words, to apply it to *legal rules* relatively formulated, authorized, and articulated. As to their kind, one can readily refer to those of statutes and customary law in the civil law system, and moreover those of judicial precedents in the common law system. As to their style of statement, they may well be classified as pointed out by Michael and Adler;[18] both into general legal statement and elementary legal statement (such as like legal and judicial decision) .

Further notice shall be paid at this stage :

a) The word legal rules is ordinarily used " to refer to some element of regulation which governs our actions and affairs, and which involves something more than mere moral reprobation if we step outside permitted limits, however these limits may be interpreted ".[19]

b) The word legal norms may well be used in this respect for the word legal rules in order to clarify some normative or prescriptive character underlying them. The limited use of the word legal norms does not lead to the disregard of the presupposition that there still remain wider areas of legal rules (*e.g.*, power conferring rules) , besides of ordinary image of legal norms (*e.g.*, criminal statutes backed by sanction) .

c) The word of law here does not only mean individual legal rules, but their aggregation character of which has become so great at issue that jurisprudents have been invited to discuss in an alternative way, either to imply it strictly closed as one set of legal rules or open sided and subject to change, and which *prima facie* shall be implied as loosely connected one.

---

18) J. Michael -M. Adler, The trial of an issue of fact : I., Columbia L. Rev., 1934, p. 1250.

19) J. D. Finch, Introduction to legal theory, 1970, p. 12.

The word about law

The second attempt is to use the word about law in a wider sense than the word of law, in order to extend its meaning not only to the stage II., but to the stage I. and III. —— the word about law, therefore, is used to refer to wider matters legal than the word of law does. —— The necessity of this usage will be apparent especcially in switching a focus of reference to the legal dogmatics related to the administration and functioning of law at the stage III.[20] For example, the general, fundamental maxims of the common law, the rule or principle of the rational interpretation presented in *Riggs v. Palmer.* and the traditional customs, or the judicial precedents deduced from them in the Naien cases were given a role of material standards for judicial decision whether to ascribe right, title, or duty, obligation, etc. to each party, or not. To put it this way, the word about law will include maxims, principles, standards, and policies, which have been strongly asserted by R. M. Dworkin as entitled to be law.[21]

Those who are intended to conceive law in a broader sense, may propose to use the word of law as overall the word about law by making the former include the stage I. and III., besides II. By contrast, those who aim at strictly to conceive law within the limitted stage II., may reject to identify the two originally distinct usages. It is very plausible, viewed in this light, that the problem of two usages of the word law and their designation would be exhausted in the socalled " verbal question ", or the question of " tastes " each users may prefer to, as pointed out by G.Williams.[22]

---

20) cf. "Permissive" legal sources in Hart, *op. cit.*, p. 247. R. Sartorius, Hart's concept of law, in: More essays in legal philosophy, ed. by Summers, 1971, pp. 153. 156. 161. E. H. Taylor, Jr., H.L.A. Hart's concept of law in the perspective of american legal realism, The Modern L Rev., vol. 35, No. 6, 1972, pp. 618 ff.

21) Dworkin, *op. cit.*, pp. 41 ff. cf. articles involved in The YaleL. J. vol. 81, No. 5, 1972.

22) G. Williams, Language and the law- IV, The Law Quarterly Review, vo 161, 1945, pp. 384ff.

Nevertheless, it still remains to take the following considerations:

1. To consider from what aspect of legal doctrine that problem is treated, either from legal theory or legal dogmatics (constructive approach) .
2. To consider, within the legal theory, either from philosophy of law or sociology of law, so and so —— this article is written from the former aspect ——.
3. To be careful about varieties or differences in each field of law to be considered, like law of tort or criminal responsibility.

Such considerations, whatever looking partial and trivial, will perhaps serve for us, at first, to look at causes of the confusion about the word law used, then, to meet demands for possible ways to their resolution.