LEGAL FORMALISM RECONSIDERED†

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I Recent Trends of Studies on The Subject

I happened to notice that references to "legal formality" or "legal formalism" recently have been increased than before, with some concrete analysis and contention in several articles or a part of book like D. Kennedy's, M. J. Horwitz', R. M. Unger's, and others'.[1] Since the late nineteenth and the early twentieth century, as it well known, severe criticism was made against the socalled conceptual or mechanical jurisprudence which may be considered as an extreme partner of "legal formalism" or "legal formality." If so, why recent trends of criticism have newly appeared and what kind of treatments to this problem been made, must be worthwhile to consider.

One possible course of its reasons and ways is to see in legal formalism or legal formality one of expressions enough to show predicaments law and legal theory being faced with in the modern society, to use Unger's term, the postliberal society, so that examination of formalism may lead to possible cure of such predicaments. What is done, at the same time, by these attempts

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1) D. Kennedy, Legal Formality, 2 The Journal of Legal Studies 351, 1973.
M. J. Horwitz, The Rise of Legal Formalism, 19 The American Journal of Legal History, 251, 1975.
R. M. Unger, Law in Modern Society, 1976.

is that an opportunity has been given to reconsider several different though interrelated aspects of the term legal formality or legal formalism through their examination. Below, I shall simply deal with a few problems, that is, complexed ways to use these terms, depth or scope of problems underlying them, and treatments directed to each different ways or aspects.

II Complexity of Term of Legal Formality or Legal Formalism

Some scholars pay attention to a significant difference of two aspects seen in using the term above. Unger marked off the most general sense from a narrower: "In the most general sense, formality means simply the marks that distinguish a legal system: the striving for a law that is general, autonomous, public, and positive. The idea of formality emphasizes the deeper motives that inspire this quest for government under law. ---- A system of rules is formal insofar as it allows its official or nonofficial interpreters to justify their decisions by reference to the rules themselves and to the presence or absence of facts stated by the rules, without regard to any other arguments of fairness or utility. ---- In a narrower sense, formality is the willingness to allow the rights and duties of the parties to be determined by the presence or absence of external solemnities like the seal. Both formality as rules and formality as ceremony appear to make it possible to ascertain entitlements and obligations without evaluating the goodness or badness of particular results."[2)]

Such a difference, however, was noticed by D. Kennedy a little bit earlier. He stressed a meaning of "model of formality" for ascertaining liberal idea of justice in modern society by carefully distinguishing it from another aspect of legal formality. Another aspect? It is quite similar to Unger's in a narrower sense. He refered to it as follows: "For example, the problem of formality in contract law can be conceived as that of the relations between parties who have unanimously agreed to a set of rules, a judge, and those same parties appearing to challenge or defend the rules as they have worked out in practice. Likewise, one can approach the institution of

2) Unger, *supra* note 1, at 204f.

"procedural formalism" (the writ system, the Roman *formula*) and "formalities" (the seal, the Statute of Wills, recording statutes) as attempts to deal with the same fundamental problem of legal order."[3] On the other hand, he approached to the problem of the model of formality by reconstructing "that version of the liberal theory of justice which asserts that justice consists in the impartial application of rules deriving their legitimacy from the prior consent of those subject to them."[4] The concept of formality according to him comes from three sources: "the contractarian political doctrine of Hobbes and Locke, the tradition of legal positivism from Bentham and Holmes through H. L. A. Hart, and the welfare economic analysis of writers like J. S. Mill and Coase."[5]

We can trace back in history the jigsaw course of the sruggle for formality to control human conduct and for formfree principle of conduct. Common law tradition on formality, consideration, and equity in private law,[6] or Roman stipulatio, legis actio and magistrate's, especially praetor's formulary system as law of edicts, and furthermore, process of settlement of disputes in the earlier period will give us illuminating examples.

As to the case of the magicians, the prophets and the priests in the earlier period they want to get answer *from above,* for instance God they believe in. In some sense they can get proper answer only if their question is properly, in other words, in accordance with certain *formula* required for this purposes made.[7] Since magicians, prophets and priests in such cases are considered as charismatically qualified persons, their answer finding process, law finding process may well be said *irrational*, though *formal*. As to the case of legis actio form is found in certain sterotyped words and

3) Kennedy, *supra* note 1, at 353. See also Kennedy, Form and Substance in Private Law Adjudication, 89 Harvard L. Rev. 1691ff., 1976.

4) Kennedy, *supra* note 1, at 351.

5) Kennedy, *supra* note 1, at 352.

6) As I don't mention to Anglo-American examples in this paper, see L. L. Fuller, Consideration and Form, 41 Columbia Law Review 799, 1941, and D. Kennedy, *supra* note 3, at 1685ff.

7) R. v. Jhering, Geist des römischen Rechts, zweiter Teil, zweite Abteilung, 1 Aufl., 1858, 8 Aufl., SS. 398, 400. M. Weber, Wirtschaft und Gesellschaft, 4 Aufl., besorgt von J. Winckelmann, 1956, S. 403 (below, S. means citation of German text's page). Max Weber on Law in Economy and Society, transl. by M. Rheinstein, 77, 1954.

gestures prescribed by lex,[8] and lawfinding process here is *formal* as well as *rational*, insofar as it requires merely specialized but not extraordinary, that is, noncharismatic ability for operation. As to the formulary system situation is a little bit complex. On the one hand, use of formula as newly devised means results in nonformalization of, that is, deviation from the older civil law tradition.[9] Thus it is often said that Roman legal formalism was declined, then appeared here a tendency from ius strictum to aequitas. On the other hand, the new practice of praetors through edicts and formula becomes gradually to be utilized and adopted by praetors thereafter as means of trial instruction.[10] Though in this respect more careful attention is to be paid to various aspects of the matter I don't go further at this time, the latter tendency means formalization of praetors' lawmaking and lawfinding process.

Examples above show, despite of their each own different connotations, some common tendency to rely on any formal criteria. The more older formality doesn't respond to actual necessity, the more newer nonformal practice is desired and realized. Nevertheless, formality in any sense doesn't vanish, and even after its decline, it seems to me, there emerges again and often new type of formality. Is this phenomenon, to use Unger's term, "circulation", or a "spiral"[11] development? I think the latter is plausible.

"Formal rationality" used above means according to M. Weber's classification "formalism of the external characteristics".[12] But the course of historical development in the West (including emergence of an idea of body of law as constructed by legal scholars of the Glossing School in medieval Europe) and the capitalistic development there increasingly makes the law predictable, calculable in its function in both Continent and England, America, and yet formal rational in Continent in the sense of "formalism which use logical abstraction," or that of "logical rationality."[13] It may

8) Gaius, Institutiones, 3 · 92, 4 · 30. F. Schulz, History of Roman Legal Science, 20ff., 1953.

9) H. F. Jolowicz- B. Nicholas, Historical Introduction to the Study of Roman Law, 199ff., 1972. Schulz, *supra* note 8, at 50ff. J. P. Dawson, The Oracels of the Law, 101ff., 1968.

10) M. Weber, *supra* note 7, at S. 463ff., p. 213ff.

11) Unger, *supra* note 1, at 213f., 238–241.

12) M. Weber, *supra* note 7, at S. 397, and p. 64.

13) M. Weber, *supra* note 7, at S. 397, and p. 64, 63.

well be said from such historical perspective that law in the West, whether civil law system or common law system, has been conceived as a body of *universalistic* value. It forms the context which makes several ideas or ideologies possible like socalled legalism, the rule of law, and Rechtsstaat, etc. This also offers some means for the rise of its extreme partner, conceptual or mechanical jurisprudence. Legal formality or legal formalism surely has been often understood in its closed connection to them, though there doesn't exist always necessary connection between both. In this respect I shall take a few examples about legal formalism in the modern period.

M. J. Horwitz discusses legal formalism in the historical setting of nineteenth century America. According to him, legal writers or legal thinkers in the first half of this century gradually show their formalistic cast of mind by giving an emphasis on the apolitical, scientific feature of common law rules in their Treatise Tradition against the Codification Movement. The legal formalism, at first merely a rethorical expression of this legal profession, then becomes every day categories of adjudication after 1850, being combined with economic group interest at that time. It is worth noticing for characterization of legal formalism by Horwitz that "economic pressures towards uniformity and predictability, as well as the efforts to restrict the scope of jury discretion, also ultimately contributed to this shift towards formal and objective legal rules. But it is important to see as well that this trend towards uniformity necessarily required doctrines of greater abstraction and generality, which in turn had the effect of ---- creating internal logical pressure to conceive of the law of contract as a system of disembodied logical interrelationships,"[14] and that he pays

14) M. J. Horwitz, *supra* note 1, at 261. It is interesting to compare his analysis with M. Weber's. Weber seems to deal with English law from its each different aspects, like through his discussion of common law, equity under the limited scope of private law on the one hand, and through his emphasis on considerable distance of the central courts in which judges are contrasted with juries who are conceived as often tended to khadi-justice from the courts of justices of the peace on the other. I only points out here that Horwitz' reference to "the efforts to restrict the scope of jury discretion" — though it concerns with the American case — seems adequately related to the problem of the irrational character of jury's function in English law so that it may be useful for further comparative understanding of Anglo-American law and legal thinking even from M. Weber's perspective concerning the "England problem."

attention to "an intellectual system"[15] as that giving rise to legal formalism which may remind us legalism in the sense of J. Shklar.[16]

From the view point of modern analytical jurisprudence H. L. A. Hart makes a remark on legal formalism. "The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice, once the general rule has been laid down. One way of doing this is to freeze the meaning of the rule so that its general terms must have the same meaning in every case where its application is in question. To secure this we may fasten on certain features present in the plain case and insist that these are both necessary and sufficient to bring anything which has them within the scope of the rule, whatever other features it may have or lack, and whatever may be the social consequences of applying the rule in this way."[17]

Use of the term formal or formalism in the modern period or at present appears a bit different from the older (I shall call for the convenience respectively the former the general sense, the latter the narrower according to Unger's usage). While a meaning of "formal" in the narrower sense still remain within a scope, e.g., of formula required by ceremony, therefore rather conceivable, a meaning of "formal" in the general is often switched from the original or narrower, then it becomes necessary to grasp the latter in conjunction with its use in each different contexts. Here lies a problem of complexity or diversity of meaning of legal formalism in the modern

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It has been often said that Weber's analysis of English law is vague or ambiguous in regard to his famous frame of reference "rationalization" of law in the West. Indeed the problem is how to understand predictability or calculability of English law in connection with socalled "formal rationality" which means here logically formal rationality apart from "formalism of the external characteristics." I think tentatively that Weber finds trends of desire for predictability of the Western law through the rising citizen or people deeply interested in the capitalistic development of society in Continent as well as in England, America, but logically formal rationality in the Continent. Further problems still remaining here is whether or not dichotomy of formal (ir)rationality — material (ir)rationality serves as useful tool for analysis of the Western law, much less of law outside the West which offers much important task for our consideration. As to the England problem, see D. M. Trubek, Max Weber on Law and the Rise of Capitalism, Wisconsin L. Rev. 747f., 1972, and D. Kennedy, *supra* note 1, at 358, *supra* note 3, at 1721. As to the problem of law in the nonwestern world, see Trubek, Toward a Social Theory of Law, 82 Yale L. Journal 1, 1972. As to an outline of Horwitz' idea in the text above, see M. Yasaki, Formative Elements of American Legal Theory, 23 Osaka Univ. L. Rev. 2ff., 1976.

15) Horwitz, *supra* note 1, at 252.

16) J. Shklar, Legalism, 1964, 1ff.

17) H. L. A. Hart, The Concept of Law, 126, 1961.

period or at present.

By the way, legal formalism in the general sense seems to be concerned with a larger scope of administration of law and legal thinking decisively influential to it. Horwitz' analysis on this point is full of suggestions. It is certain that idea of the judicial process as a completely closed and contradictionfree for the reason of authorization through state or of logical deductive method of legal reasoning is an oversimplified view of the process. Authorization of judicial decision through state authority doesn't gurantee appropriateness of its result and deductive method doesn't cover a whole dimension of judicial decision making process, because behind it (process of rationalization or validation) there is a process of discovery interwoven with judge's or participants' psychological or sociological factors. But it is still necessary, I think, to pay a careful attention to a significance of the aspect of rationalization or validation in the judicial process. As an example, let me cite Hart's notice on this matter. "The claim that logic plays only a subordinate part in the decision of cases is sometimes intended as a corrective to misleading descriptions of the judicial process, but sometimes it is intended as a criticism of the methods used by courts, which are stigmatized as "excessively logical," "formal," "mechanical," or "automatic." Descriptions of the methods actually used by courts must be distinguished from prescriptions of alternative methods and must be separately assesed."[18]

Formality in the narrower sense, i.e., formula required by ceremony, surely makes us feel somewhat troublesome as it requires us to take certain delimited type of conduct. It may often appear a kind of obstacles. Without certain means like formula, however, it is also true, we may feel difficult to control our various types of conduct in an accustomed routinework. Formality in this respect may remain a troublesome, but still necessary means for our social life. It is certain that a framework of strict formality was gradually undermined and overcome by "formfree" principle of various types in Continent as well as Anglo-American private law. Nevertheless, it has been also recognized that under or behind such a new situation may

18) H. L. A. Hart, Problems of Philosophy of Law, in : Encyclopedia of Philosophy, ed. by P. Edwards, 269r – 270ℓ.

often appear a demand for certain regularized frame of reference to control private individuals, judges, and officials in their conduct which eventually comes to be transformed into desired or nascent formalities as it was illustrated by the Roman and English law development and as it may well be symbolized by K. Marx' stimulating expression, legal "fetishism".[19]

III Some Suggestions

Letal formality or legal formalism as viewed from actuality of human life are perhaps difficult for us exhaustively to deny or abolish. Unger sets forth, "law is never purely formal, nor can formality ever vanish."[20] But legal formality in either senses at present can't function by itself adequately for the purpose of guarantee of people's freedom and right. Rise and decline of legal formality as deeply related to the formal rationality in the modern society was illuminatingly described by F. Neumann.[21] Then what kind of treatment to this problem has been made? One suggested course was an emphasis on nonformal-law application, still less nonsterotyped law making apart from the older notion of the rule of law. In this respect Unger stresses significance and role of bureaucratic law and interactional or customary law in connection with equity and solidarity, within and outside blackletter law.[22] It is an appealing idea to look at and treat the problem. Seen from historical point of view, however, such an idea seems interrelated with some preceding thinkers', apart from their each own different connotations. It may be enough here to recall E. Ehrlich's idea (inner order of social group or living law v. the authorized state law),[23] M. Weber's (formal rational law-making and lawfinding v. material rational lawmaking and lawfinding, formal justice v. material justice),[24] C. Schmitt's (normativism, decisionism, and

19) K. Marx, Das Kapital, erstes Buch, erster Abschnitt, erstes Kapitel, 4.
20) R. M. Unger, *supra* note 1, at 205.
21) F. Neumann, The Change in the Function of Law in Modern Society, in : The Democratic and the Authoritarian State, 22ff., 1957.
22) R. M. Unger, *supra* note 1, at 241, 205ff., 48ff.
23) E. Ehrlich, Grundlegung der Soziologie des Rechts, 1912.
24) M. Weber, *supra* note 7.

idea of concrete order),[25] so and so. The last problem I can't discuss furthermore is how to, and to what extent to reconcile these nonformalistic types (i.e., bureaucratic law and interactional law, or principles, standards, and policies,[26] etc.,) with the socalled modern legal system or the rule of law notion in the changing society.

25) C. Schmitt, Über die drei Arten des rechtswissenscaftlichen Denkens, 1934. Cf. F. Neumann, *supra* note 21.

26) Discussion about significance and role of principles, standards, maxims, and policies in modern legal system, especially judicial decision making process appears to show another side of the same matter referred here. See R. M. Dworkin, The Model of Rules, 35 Univ. of Chicago L. Rev. 14, 1976. H. L. A. Hart, *supra* note 17, at 128f., and *supra* note 18, at 271ℓ. Dworkin, Hard Cases, 88 Harvard L. Rev. 1057, 1975. R. Sartorius, Individual Conduct and Social Norms, 1975. K. Greenawalt, Discretion and Judicial Decision, 75 Columbia L. Rev. 359, 1975. J. M. Steiner, Judicial Discretion and the Concept of Law, 35 Cambridge L. Journal 135, 1976.