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# LEGAL POSITIVISM RECONSIDERED†

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## Prefatory Remarks

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## Prefatory Remarks

In 1952, Prof. Eberhardt Schmidt concluded his speech by saying: "Positivism died. Positivism ought to live (Der Positivismus ist tot, es lebe der Positivismus)."<sup>1)</sup> This is a kind of question puzzling us. This is a kind of question, as well, to provoke us to consider the proper scope of legal positivism, in other words, what the died positivism is, and what the positivism worth to live is.

However, it is evident that we tend to use and think of the word legal positivism in accordance with an ordinary connotation which is usually based on a popular impression. A typical example of this popular impression will be found in an idea according to which the only task of lawyers and law scholars is to deal with and to apply positive law in an empirical way. I think such a popular impression is not wrong, but it is still

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† This is a summary of my Japanese paper published under the same title in "The Japan Annual Philosophy of Law, 1963. The Japan Association of Legal Philosophy had a conference to reconsider legal positivism in last spring (1962). This is the reason why the special issue of The Japan Annual, 1963, is published with the heading of "Legal Positivism Reconsidered". As to the content of my paper, it constitutes a part of my main study—"Validity of and Fidelity to Law in the Changing Mass Society". My papers cited below, too, have been written for the same reason.

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vague in its content. The more vague in its content, the more it is open to implications, sometimes, even to extreme interpretations. One of them is a position to identify legal positivism with fetishism of statutory laws enacted by state which would again cause a popular criticism to itself.

But it must be newly wondered why legal positivism should be identified with such a legal feticism. Despite of the popular criticism, I think rather the scope of legal positivism is wider and more extensive, than that criticism expected. Moreover, since discussion on legal positivism at present plays a decisive role on the problem how to make judicial decision and to advance legal study, it seems to be highly urgent for us to reconsider such a popular criticism before unconditionally accepting them. In this paper, I am aiming at to clarify the significance and functions of legal positivism by reference to its four sources. What is legal positivism worth to live will, finally, depends on the judgments of each scholars participating in this discussion. In this respect, however, I would like to show some possible way to reconsider and to judge this question puzzling us. In dealing with this theme, I shall refer to natural law theory, so far as it is necessary to make clear relation between legal positivism and it.

It is interesting to see natural law theory being followed by the popular criticism which imagines it as the extreme opponent to legal positivism. I shall refer here only that same question rises about the scope and extension of this theory as well as legal positivism.

As to the problem of legal positivism we should remember the recent event that an international conference on this theme was held at Bellagio located near Lake Como, Italy, under the aid of Rockefeller foundation, Sept. 1960 and that many famous representatives like Prof. N. Bobbio, A.P. d'Entrèves, H.L.A. Hart, Alf Ross, G. Gavazzi joined the discussion there approximately during two weeks. Whenever I refers to this suggestive discussion below, I usually cite it from the review done by Prof. R. A. Falk and S. I. Schuman.

## I. Four Sources of Legal<sup>1)</sup> Positivism

### The First Source — Positive Law Position

What make legal positivists their main object of study? According to general impression, it is positive law (positives Recht). Legal positivism in this sense is *positive law position*. As to the word positive law, however, there are so different implications that they show us a striking contrast. For in common law countries, judicial precedents

are generally accepted to be one of the main sources of positive law besides statutes, while the latter, particularly, statutes enacted by state has been often considered to be a most decisive element for characterization of positive law in civil law countries. Indeed, A. Merkel who acted as pioneer of legal positivism in the latter half of the 19th century Germany mentioned to positive law by reference to the civil law point of view. "As state has been developed, law making process based by state, too, is getting to be in action. In corresponding to this process, there develops the law which, according to the content of its idea, owes the validity to the will dominant in state, therefore, to the enactment by human action, so far as divine nature is not attributed to it. In other words, there develops the 'positive' law which is accepted as such".<sup>2)</sup>

Another type of illustration seems to be afforded by J. C. Gray in U.S.A. Emphasizing the significance of judicial precedents and the role of judges (judicial court) in making these precedents, he showed the feature of positive law position from the common law point of view. "The Law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties...Judicial precedents have been the chief material for building up the Common Law, but this has been far otherwise in the systems of the Continent of Europe".<sup>3)</sup>

The word positive law, so far as we have examined above, has at least two different types of implications: the law made by human action in an empirical way (see the second source section) on the one hand and standard for judicial court to apply as well as to make laws in order to decide cases on the other hand. Besides, I would like to add a few words on the positive law position of Gray. For Gray himself did not use the word positive law in his famous lectures, "The Nature and Sources of The Law". But, since he aimed in these lectures at to analyze and reconsider the Austinian theory of law and yet he repeatedly cited the word positive law used by Austin, he is naturally supposed to be acquainted with it. Moreover we have a very good reason for believing this presumption. It is the fact that he was deeply interested in the criticism of natural law, in other words, meta-positive law (nicht positives Recht), particularly achieved by Karl Berbohm, and he frequently cited it in an appreciation to Bergbohm's effort. Then, why didn't he explicitly use the word positive law? The possible reason is that as he made an effort to separate *the Law* and *the Sources of Law*, he didn't refer the word positive law, but he made *the Law* his subject of lectures. Now *the Law*, according to Gray, "is the whole system of rules ap-

plied by the courts", while "Law which the courts do not follow" is "*nicht positivisches Recht*" or "the Law of Nature". On these grounds, I feel *the Law* is equivalent to positive law.

Turning now to positive law position, we shall pay attention to two different types of aspects underlying two different types of it said above. On the one hand, the very nature of *decision* of state power (including judicial decision — though this may not be general aspect applicable to even civil law system) has been considered to be a decisive element in making positive law. Thomas Hobbes is naturally the person who placed stress with great boldness on this aspect of the matter in the modern intellectual history. John Austin who defined the law to be command of sovereign, as we know, followed, too, to this aspect. To use his words, Every "positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author."<sup>4)</sup>

On the other hand, there is another aspect of the matter to consider *rule* or *norm* to be basis of positive law. The most striking illustration of this is afforded by the old saying that what governs in the modern state, is not a man or men, but rule or norm. H. Krabbe has been referred to as a typical representative who emphasized this aspect of the matter. In a sense, Gray, too, seems to be close to this aspect so far as he pointed out as follows: *The Law* is "the whole system of rules applied by the courts. The resemblance of the terms suggests the inference that the body of rules applied by the courts is composed wholly of the commands of the State; but to erect this suggestion into a demonstration, and say: — The system administered by the courts is 'the Law,' 'the Law' consists of nothing but an aggregate of single laws, and all single laws are commands of the State — is not justifiable."<sup>5)</sup>

We may call each of these aspects *decisionism* or *might theory*, and *normativism* or *rule theory*. The former sees the decisive element for enactment and validity of positive law in the decision of state power or naked might (power), while the latter asserts emphatically rule or norm forming the last basis of positive law. Therefore, whenever we use the word Hobbesean positivism of law, it may be used in the context of decisionistic legal positivism. The term legal positivism of conceptual jurisprudence (*Begriffsjurisprudenz*) in Continental Europe, on the contrary, carries usually the implication of normativistic legal positivism.

To speak figuratively, the difference between decisionism and normativism will be found in the way how to view the fundamental structure of positive legal order. For instance, what is the ground of validity of laws or statutory enactments? It is a constitution or constitutional law. What is the basis of validity of constitution? According to Prof. Hans Kelsen, it comes to be basic norm. Then, what is the last basis of validity of basic norm? Here is a trap we often are caught in. If we are on the hypothetical assumption that basic norm has apriori validity, the ultimate basis of its validity comes to be found in norm or rule. If we are, on the contrary, not satisfied with such an assertion, but we assert that what actually supports basic norm is might, power or any sociological determinants similar to these, this assertion may well be understood in the context of determinism or might theory. Prof. Kelsen, so far as his way of thinking before his visit to U.S.A. is concerned, seems to show an interesting dualism, so to speak, in his basic norm theory, that, while accepting fundamentally normativism, his way of thinking is still open to decisionism by acknowledging a moment "*transformation of might to law*" (*Transformation der Macht zum Recht*)<sup>6)</sup> as to the content of basic norm.

The difference between the aspects of this sort could be also, I believe, found in the common law point of view to regard judicial precedents or case law as a main source of positive law. Aside from the question on fundamental structure of positive legal order said above, let us cite one example in regard to the problem how to understand character of judicial decision in a chain of judicial precedents. As we know, there are two dominant theories. The one is the "declaration" theory. According to it, judicial precedents are nothing but confirmations or declarations of a pre-existing law, in other words, only "evidence"<sup>7)</sup> (Blackstone). So far as this pre-existing law or judicial precedent is concerned, however, it retroactively presupposes another judicial precedent pre-existing before it. If we trace back to origin of judicial precedents by examining each of their basis step by step, we come to reach a *hypothetical assumption* that such a precedent or pre-existing law should having had existed.<sup>8)</sup> Viewed in this light, the logic of judicial precedents is *normativistic*, as far as it ultimately presupposes rule or norm pre-existing. The other is the "making" theory which forms a striking contrast with the "declaration" theory. The term *judge-made-law* which was used first by J. Bentham and yet becomes the customary term for characterizing of the common law at present, affords a best illustration of the fact that case law is law which judge makes through the means of judicial decision. For the reason above, this theory implies a *decisionistic* implication.

But, finding links of connection between the fact that only after law is decided to make and enacted by people who are in power, the law decided in this way, that is, rule or norm comes to be in valid, and the fact that even if people are actually in power to decide everything, they can not still disregard meaning of rule or norm in regard to their decision making, it is quite obvious that normativism has not been diametrically opposed to decisionism at least in the course of their historical development. What is dominant factors in promoting the historical course in development, is the formation of modern civil state (supported by capitalistic civil society) on the one hand and the formation of the modern law and rule of law on the other hand. First of all, postulate and effect of centralization of political powers into the sovereign state raises an idea that sovereign power *decides* everything. It is T. Hobbes who drew in an impressive way the Leviathan with its sovereign supremacy from such a historical background. Despite of this fact, he assigned to rules of prudence the role to control, though implicitly, an exercise of sovereign power. Rules of prudence are, as a matter of course, natural law. If so, it is possible to well conceive of idea of Hobbes in such a way that normativism of natural law is given by him the role to control over tyranny of decisionism even though it plays the role merely in an implicit way.

It is certainly interesting to imagine what kind of feeling Hobbes would have had on the contemporary totalitarianism, if he would have lived in that period. An idea given by Prof. C.J. Friedrich seems to be deserve attention in order to clarify the context mentioned above. "The policy of a Hitler or a Mussolini would have been condemned outright by Hobbes, for the simple reason that these totalitarian dictators neglected in a senseless fashion the prudential rules, that is, the 'laws of human nature'."<sup>9)</sup>

What happened, then, in the process of modernization of legal thought from Hobbes to present? To speak generally, its modernization reminds us of the great change from normativism of natural law to normativism of positive law which was made still by retaining decisionism to some extent. In this connection, the parliamentary sovereignty was, so to speak, a milestone in establishing the idea: government by law, not by men, in a modern sense. On the other hand, as state in its survival is getting in jeopardy, there again appeared and appears decisionistic positivism. As to the fate of this decisionism under the Nazi regime, we shall refer to it later. Before, let us pay attention to the very familiar, but so important source of legal positivism which especially appeared in 19th century. It is empiricism.

## The Second Source — Empiricism

One of the most remarkable results of the new method which science, particularly natural science has developed is the fact it awakes the public to a sense of empiricism as a part of modern way of thinking. In modern times, when the capitalistic production has been getting to be dominant form in the civil society, accordingly industrial enterprises on a large scale have been developed—Remember the Industrial Revolution period! —, technological problems how to develop production, have created considerable discussion which again requires participants to reconsider whether their approach adapts to these problems. Here develops methodology of natural-science. This methodology as we know, constitutes of the positivistic operation (or casuistic investigation) of hypothesis and varification, theory and experiment. On the other hand, it is deemed an essential feature of the methodology that it eliminates from its frame of investigation what is beyond the demension of human action and varification, that is, metaphysical way of thinking. We may call here such a methodology followed by those features *empiricism*. If so, it is no wonder that one should have applied it from the investigation of natural phenomena to social phenomena or social relations. “*Cours de philosophie positive*” (A. Comte) presents a good example for this transformation. For several features immanent in the empirical methodology is equally found in the field of social science as well as of natural science so that they make possible modern way of thinking to develop. What shows, more or less, this trend in the field of legal thinking is legal positivism, because legal positivism actually deals with positive law made (enacted) by human action in an empirical way and yet it is diametrically opposed to metaphysical way of thinking of law.

According to the empiricism of legal positivism, it is necessary at first to pay attention to sociological or psychological approach to law. The first type of the empiricism, therefore, is *sociological* or *psychological positivism of law*. We have enough founders for this type of legal positivism — so far as criminal phenomena is concerned, E. Ferri who emphasized to investigate social causes of the phenomena, R. Garofalo who developed its socio-psychological study, F. von List who developed positive scientific study of the criminal phenomena by observing it from social side as well as individual side, and so far as relatively recent trends are concerned, E. Ehrlich who made an attempt to clarify the social foundation of law by introducing the concept of living law immanent in social groups into the scope of sociology of law, M. Weber who, viewing



"*rationalization*" as one of the peculiar phenomena to occidental Europe, made an exhaustive study to analyze modern law embodied with its predictable or rational function in an adequate connection to modern capitalistic society, the Sociological Jurisprudence of U.S.A. which lays special emphasis on the element of social interest and social control through law in the study of law, Realist group who are very much interested in the behavioristic approach to law. These so many founders or representatives, as a matter of course, has taken and take so various directions like sociology of law, pragmatism, legal realism, such and such. Frankly speaking, however, to maintain a positive (positivistic) attitude is a minimal condition in order to have a sufficient knowledge of law, and yet for this purpose it is necessary to analyze the law in the social context where it functions and under the psychological condition which it appeals to. This is, so to speak, a common denominator which establishes a link connecting between so different trends.

Besides, there is the second type of empiricism of legal positivism. This is *logical* or *analytical positivism of law*. As far as it makes an empirical treatment of positive law main subject, it is very similar to the sociological or psychological positivism of law. How to find a guaranty for an empirical treatment of positive law, that is, whether should we find it in the sociological or psychological approach, or in the logical or analytical investigation, however, seems to raise a variation in the scope of legal positivism as empiricism so that it offers a chance for two types of the empiricism to deviate from each other. This may be much more understandable if we refer to Prof. W. Friedmann's idea that modern empirical approach is divided into three main classes, empiricism, pragmatism and logical positivism.<sup>10)</sup>

When we regard the matter in this light, we see obviously that logical or analytical positivism is what often with legal positivism in general has been identified. It is represented by the conceptual jurisprudence in Continent, and Austinian school of analytical positivism in England. If we may summarize main task of analytical positivism of law as "an analysis of legal terms, and an inquiry into the *logical* interrelations of legal propositions",<sup>11)</sup> we may call logical positivism of law such a way of legal thinking which begins by analyzing and classifying legal concepts and propositions, and leads to a hypothetical assertion of a logical completeness of legal system. Carrying it to the furthest extreme, the way of legal thinking of this sort seems to be natural to be named legal positivism of conceptual jurisprudence, or legal fetishism, so far as it performs "calculation with concepts" (*Berechnung mit Begriffen* — R. von Jhering) and it believes in the dogma of legal system without contradictions and gaps. That is why logical or

analytical positivism of law is easily connected with the normativism of positive law position said above.

Let us take a few examples to serve as an illustration of the legal thinking laying a special emphasis on logic and systematic knowledge in law. "Systematic knowledge is only a complete one as to the law, especially it is complete in an external side. For the systematic knowledge gives merely the guaranty that it subsume certainly all parts of law...What is complete in an internal side, too, is only systematic knowledge. For, since the law itself constitutes a system, only such people who see the law in a system come to ascertain the nature of law. Moreover, to obtain a systematic knowledge is possible for people who have mastered the interrelations of legal propositions. In other words, people who begin by studying the similar interrelations of legal propositions, and thus, come to acknowledge in both ways of going up and going down the fact that each concepts come from the intermedia which have participated in to construct these concepts." Thus said G. F. Puchta in the term of "Genealogy of Concepts".<sup>12)</sup> Following Puchta and Historical School of Law, there appeared representatives of legal positivism, or conceptual jurisprudence in an extreme case in 19th century Germany like K. Bergbohm, P. Laband, B. Windscheid etc. Jhering himself shows us an interesting personal history in this stream, because he criticized the role and significance of the conceptual jurisprudence, after he started in life as a scholar of this trend of jurisprudence.

At last, let us cite F. Neumann's idea in order to know relations between logical or analytical positivism of law, normativism and interpretation of law. "The legal system of liberalism, therefore, was regarded as a closed system without gaps. All the judge had to do was to apply it. The juridical thinking of this epoch was called positivism or normativism, and the interpretation of the laws by the judge was called the dogmatic interpretation (in Germany) or exegetical interpretation (in France). Bentham, too, in order to achieve complete intelligibility and clarity in the legal system, recommended the codification of English law".<sup>13)</sup>

As to the origin of the logical or formalistic positivism of law developed in Germany, as we know, there are several suggestions. Some one has suggested that the scholastic theology in the middle age (hence, the glossarists too) bore some resemblance to legal positivism of this sort, since it believed in its capability to put completely an interpretation on any theological problems by reference to a system which God

stands at the top of.<sup>14)</sup> The other has suggested that conceptual jurisprudence of legal positivism, so far as it made the law monopolized by state main subject, is similar to "the legal thought viewing as absolute the state law" (E. Ehrlich).<sup>15)</sup>

But, logical or analytical positivism of law in modern times, including English type of it, seems naturally to have developed under several conditions, especially the development of modern capitalistic society on the one side and its demand on the law as minimal means for social control, in other words, the law embodied with its predictable or rational function on the other side. Seen in this light, it has a character of empiricism as well as sociological or psychological positivism of law. I am, in this respect, for the idea which Prof. E. Bodenheimer sets forth. "Legal positivism has manifested itself most conspicuously in a jurisprudence of an analytical type, here designated as analytical positivism...Legal positivism, however, may also take on a sociological form. Sociological positivism undertakes to investigate and describe the various social forces which exercise an influence upon the making of positive law. It is concerned with analyzing not the legal rules produced by the state, but the sociological factors responsible for their enactment. It shares with analytical positivism a purely empirical attitude toward the law and a disinclination to search for and postulate ultimate values in the legal order".<sup>16)</sup>

### **The Third Source —**

#### **Position Placing a Special Emphasis on Law as It Is**

To separate *law as it is* from *law as it ought to be* is thought at present as a main task of legal positivism. The third source, therefore, is position placing a special emphasis on law as it is. This position aims at to eliminate from the framework of (investigation of) law *law as it ought to be*, that is, law which can not be acknowledged in an empirical way, including natural law as well as empiricism of legal positivism tends to be diametrically opposed to metaphysical way of legal thinking. As I have used the word *including* natural law, however, natural law is merely a part of law as it ought to be. Since morality, religion, etc, too, have insisted "it should be so, it ought to be so", these are naturally included in the category law as it ought to be. Such is also the case with demands of politics-policy. One may surely wonder whether the demands of politics-policy are included in that category, but we shall consider them to be included in law as it ought to be, as far as they are means reflecting always certain political ends. Viewing in this light, legal positivism, after dealing with political demands, insistence on ought to

be, still more, natural law, as constituting the content of law as it ought to be, seems to separate and eliminate them altogether from the framework of law as it is. Here is a position placing a special emphasis on law as it is, or positivism of law as it is.

At first we shall distinguish between two sides, positive and negative side as to the positivism of law as it is. A good illustration of the positive side will be found in the Kelsen's idea. According to Kelsen, pure theory of law is theory of positive law without impurities, hence, theory of pure law. In my opinion, it is positivism of law as it is. This theory made an effort to escape from the intervention of impurities, especially totalitarian politics to investigation of law, and it was indeed so, as far as its subjective intention is concerned. To speak in a paradoxical way, such a purism of law as it is was actually followed by somewhat liberal attitude, that is, impurities. The more liberal attitude was immanent in his theory, however, the more it switched the purism to sound course, and assigned it a role to resist — even though this might be a trivial effort — against the tyranny of totalitarianism.<sup>17)</sup> Viewed in this light, it is not so hard to find positive side in the positivism of law as it is.

But the positivism of law as it is in an ordinary sense tends to be understood in its negative side. What does it mean is the position which easily accepts any laws only if they are given by state, without reference to value standard of right and wrong or law as it ought to be. It is a kind of opportunism opposed to Kelsen's intention. The tragic illustration of this negative side is afforded by legal positivism during Nazi period. The legal positivism here has been condemned by reference to the grounds that under the shield of slogan "law is law," "rule is rule", lawyers and law scholars accepted and applied Nazi laws so that they served to maintain Nazi regime. Late Prof. G. Radbruch criticized it by saying as follows: "do not believe that we can answer the ultimate problems of law and master any most difficult problems of law merely by reference to values like objectivity (*Sachlichkeit*) and legality — How worse it is if justice is concerned with to maintain secondary values like legality and objectivity under the influence of legal positivism which had forgotten the highest one of all legal propositions that man should obey God, rather than people."<sup>18)</sup>

Unbelief in legal positivism at present, too, seems nearly to come from the negative side (judgement) of this matter. Admitting it to be relatively right, we shall take regard also of two entirely different types of the positivism. One is decisionistic positivism of law as it is. What does the term decisionism means during the Nazi period? It is to observe decisions made by Leader as law. Certainly, "Hitler did not come to power by a violent revolution. He was Chancellor before he became the Leader. The ex-

ploitation of legal forms started cautiously and became bolder as power was consolidated" (Prof. Lon L. Fuller).<sup>19)</sup> As a matter of fact there were so odious secret enactments and measures or directions that they had really a function to injure a large scale of people. Why did many lawyers and law scholars accept them? One can find here opportunism or decisionism which does not pay any attention even to objectivity and legality, still more value standards. If this is one of the extremes, we can not forget the other extreme, that is, conscientious lawyers and law scholars acted against this dark stream. They made an effort to maintain the independence of judges by eliminating the political interference to interpretation and application of law. Their attitude shows clearly the light side, therefore, the positive side of positivism of law as it is, even though it had only a trivial meaning in reality. In pointing out both sides, the negative and positive side, late Prof. Radbruch is still great scholar, although he has been often misunderstood as a passionate critic of legal positivism. "Despite of the fact that the highest judicial authorities has been deeply fallen, even in such dark years flame of justice has never completely overcome in our judicial practice. The Nuremberg decision, too, has recognized this fact. It divides judges in the Nazi period into two categories. On the one hand, there were judges 'who with enthusiasm realized the will of the Party in such a strict way that they encountered no difficulties and interferences caused by Party officials'. On the other hand, however, still there were judges who dared to maintain the ideal of the independence of judges, and decided cases with certain objectivity and self-restraint attitude. Their decisions were putted aside by the procedure of the claim to void them or of the complaint of extraordinary nature, and yet the defendants sentenced by these judges, after the end of the term of their punishment, were entrusted to the Gestapo to be shot or to be sent to the concentration-camp. The judges themselves were criticized, threatened and often fired.

Besides of all odious decisions made by the administration of justice in the Nazi period, the heroic, but modest figure of this another type of judges should be never forgotten."<sup>20)</sup>

At last, turning to the starting point of positivism of law as it is, let us again pay attention to analytical positivism in England. It insists on the separation of law as it is and law as it ought to be. Therefore it is similar to logical, formalistic positivism of law in Continent, particularly in Germany. As we saw, the German legal positivism acquired a sinister character in the Nazi period. But the English one did not so, but it "went along with the most enlightened liberal attitudes". Then, why does the English way differ from the German way? As to this question, Prof. H.L.A. Hart

sets forth an interesting idea by distinguishing carefully between two problems: valid law and fidelity to law. According to him, if laws or rules are enacted in accordance with the procedure of enactment, they may well be said law or rule. But this does not mean that such rules or laws ought to be obeyed, as problem of fidelity to law is a moral question. If so, it is indeed necessary for him to offer "the moral criticism of institutions" from the English Utilitarian point of view—not from a disputable philosophy—even though laws may be law. Prof. Hart seems to think that such a utilitarian attitude make sound the English way in opposition to the German sinister way.<sup>21)</sup>

This idea is very suggestive to think of two different ways of positivism of law as it is. For English analytical positivism prompts us again to investigate its proper scope, as far as it finds itself on the *borderline* between value fields and law field by reference to the moral criticism of institutions.

Prof. E.V. Rostow, however, criticizes Prof. Hart for his self-contradiction that he failed to develop his idea of moral investigation in his another paper.<sup>22)</sup>

In U.S.A. we can naturally find great figures like Gray, Justice Holmes in regard to such an idea. Gray is plainly positivistic, as he tried to exclude non-positive law that is, natural law from the framework of the law. But, after he carefully distinguished the law from the sources of law from which the law arise, he gave the sources of law a role to aid the law and jurisprudence to dynamically develop. It "is the failing of many advocates of codification to regard the Law too much as a fixed product of statutes, precedents, and customs, and not to take into sufficient account the growth and change of the Law. This growth and change is not a more weaving of spider webs out of the bowels of the present rules of Law; a source of the Law, not the only source, but a source and a main source, is found in the principles of ethics."<sup>23)</sup> Oliver W. Holmes has been often thought as a founder of legal positivism in U.S.A. I think the positivism of Holmes is true, as far as he emphasized to distinguish law and morals. In the famous lecture "The Path of The Law", he pointed out as follows. "For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought."<sup>24)</sup> It

is however, necessary to consider why he insisted on the distinction. He insisted on it merely for the students who were interested in learning and studying the law on the one hand. On the other hand, he was surely very careful to the interference of authority of old fashioned morals to the framework of law. But these reasons do not prevent us to view Holmes as a sensible person to morals. Rather, I think, he told us that morality is one of relevant sources of law from which the law develops, as Gray did it. Prof. Hart's idea of moral investigation of fidelity to law remind us of such forerunners.

Recently, there has been an interesting discussion at the Belaggio Conference which shows the similar trend of legal thinking as to the moral investigation. It is worth noticing that some of participants (Prof. Alf Ross, G. Gavazzi, U. Scarpelli) suggested to deal with fidelity to law as moral responsibility of individuals or psychological facts by separating it from legal duty.<sup>25)</sup> Implications of positivism of law as it is are so various. After recognizing that such a position is much more closed to the borderline between value field and law field, than we imagined, we shall now turn to the last source. This is a problem of belief underlying legal positivism.

#### **The Fourth Source — Its Belief**

As to its belief, we may well tentatively divide it into two types. One is belief in *certainty*, the other in *probability*. The first type is to believe in the law to be secure, steady and certain. Therefore it is only right to say that wherever modern positive law has been developed, we can easily find subjectively a belief in certainty of the law as well as objectively a nature of certainty as immanent in the law itself. In this connection, a good illustration is afforded by the conceptual jurisprudence of legal positivism in the latter half of 19th century Germany. For its fundamental dogma that the law is a self-consistent system without contradictions and gaps is actually followed by belief in the law to be certain and steady. That is why this belief, presupposing positive law as it is, tends to get a contact with normativism and logical positivism of law.

Considering historically, however, to say law is certain presupposes, moreover, certain conditions established that function of the law is not to be decided by an arbitrary will (of an absolute monarch), but it is to be predictable, calculable like machine, hence, rational. It is Max Weber who pointed out such conditions as relevant to understand fate of the modern law and society.<sup>26)</sup> In reality in Germany, the predictable or

rational law had been to some extent realized by setting positive law in order, mainly by means of codification beginning from the latter half of 19th century — Remember German Civil Code (BGB)! — If so, it seems to be obvious that such conditions offered a historical basis for belief in certainty of the law to develop in connection with the dogma viewing as a self-consistent system positive law.

Late Prof. F. Neumann outlined the relation between the predictability of the law and the capitalistic society characterized by free competition as follows. "The rule of law is, moreover, necessary as a pre-condition of capitalist competition. The need for calculability and dependability in the legal system and in administration was one of the motives for restricting the power of the patrimonial princes and of feudalism, leading ultimately to the establishment of Parliament with the help of which the bourgeoisie controlled the administration and budget while participating in the modification of the legal system. Free competition requires the generality of law because it is the highest form of formal rationality. — A high degree of certainty of the expectation that contracts will be executed is an indispensable part of the enterprise. However, this calculability and predictability, if the competitors are approximately equal in strength, can be attained only by general laws. These general laws must be so definite in their abstractness that as little as possible is left to the discretion of the judge. In such a society the judge, therefore, is forbidden to have recourse to *Generalklauseln*." <sup>27)</sup>

The similar belief will be found also in the common law system. The central part of the English law, as we know, still at present is the case law, in other words, a system of judicial precedents, although it has certainly a system of statutory law. What develops the case law is the principle of precedents (the precedent doctrine). If this principle is "the principle of treating like cases alike", it is natural for us to have an image of certainty of judicial decisions (precedents). Indeed, late Prof. W. Geldart wrote like this. "Certainty.—The fact that decided cases are binding authorities for the future makes it certain or at least highly probable that every future case which is essentially similar will be decided in the same way. People may therefore regulate their conduct with confidence upon the law once laid down by the judges." <sup>28)</sup> Thus it become obvious that belief in the certainty is also underlying normativism of common law as well as common law itself.

In this connection, English common law looks like closed to Continental civil law. But how to consider the relation between them is still under disc-



ussion. For instance there is a discussion about the way of law-making. Mr. N. S. Marsh, after thinking M. Weber as a scholar who developed his theory of law making in the contrast between a rational way of making law in Continent and its irrational way in England, found somewhat exaggeration in Weber's theory and proved the contrary — I don't go further here to examine whether this criticism is right — "There are, for example, in the law of delicts sections of the Code Civil, and, to a lesser extent, of the German Civil Code, which leave important questions to be decided irrationally in Weber's sense by the courts. There are, on the other hand, even in the English law of torts, cases which could be appropriately decided as mere questions of fact by reference to admitted principles."<sup>29</sup>)

Belief underlying legal positivism, however, obviously not the only belief in the law to be certain and steady. Rather, the law is, as a matter of fact, changeable, and sometimes, even flexible and uncertain. Here rises the second type of belief in the law to be *probable*. Who emphasized this fact in a drastic expression was late Judge J. Frank. He called the first type of belief that the law is certain the "basic legal myth," by finding its reason not only in the practicing lawyers, but in the layman's childish desire to substitute the Law for "the Father as Infallible-Judge" It is as a natural result that he criticized such a myth and he considered the law to be uncertain, indefinite and variable, especially in the judicial process. What is interesting in this connexion is that he proposed two formulas to clarify the very nature of judicial judgement. According to the conventional theory how courts operate, judicial judgement is schematized by the formula  $Rule \times Facts = Decision$ . In reality, there are several factors preventing to realize such a formula in the judicial process. One of the main factors will be schematized by another formula  $Stimuli \times Personality = Decision$ . This is only the simple illustration. But, only if we compare the former formula to the first type belief in certainty, the latter to the second type of belief in uncertainty, it becomes evident how Frank is deeply concerned with uncertainty of the law and its belief.<sup>30</sup>)

Now one may wonder if Frank was not a legal positivist, but he was diametrically opposed to legal positivism, at least in his intention. In a sense, it is right. Intentionally, he plainly denied mechanical jurisprudence, his approach is certainly opposed to normativism, logical or analytical positivism of law. As we have seen above in the section empiricism, however, sociological or psychological positivism of law is a part of legal positivism in a wider sense. Frank's realism seems to belong to the positivism of this sort. If so, it is no wonder that we think of belief in probability as underlying

legal positivism. Besides, the fact that such a belief in probability is opposed to normativism of legal positivism and its belief in certainty is not surprising, even if it looks funny at first glance.

Mr. Justice Holmes, too, is suggestive in regarding this problem. To use Frank's word, he is a "completely adult jurist".<sup>31)</sup> But he is a very cautious jurist, as well, in judging role of logic in the law. "The training of lawyers is a training in logic — The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions."<sup>32)</sup>

As we know, Holmes' idea is so much open to interpretation that we can easily find many Holmes with different faces like positivist Holmes, pragmatist Holmes, realist Holmes or totalitarian Holmes. But, the more various interpretation, the more his figure is impressive. Because, while recognizing the significance of logical or analytical positivism of law, he predicted with keen eyes future of sociological or psychological positivism, he appealed us strongly that the law is flexibly made in our daily experience — "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"<sup>33)</sup> — therefore, the law is not certain, but probable in the judicial process.

Belief in probability of the law appears to be peculiar to the English legal system. Even Mr. Marsh who raised a question against Weber's theory of law making recognized certain limits of certainty, in other words, flexibility in the English law making.<sup>34)</sup> On the contrary, it is highly understandable that the civil law with its predictable or rational function in Continent has constituted an insuperable barrier to the desire of flexibility of the law. That is why the Free Law movement which showed the belief in the law to be flexible and probable went often further to the extreme reaction.

## II. Reconsideration

### Core and Penumbra of Legal Positivism

Sources of legal positivism are various as above stated, and yet most of views of the law, except law as it ought to be like natural law, comes to be involved in this positivism. This way of approach to legal positivism may be right, if the fact is so. It is obvious, however, that legal positivism has been criticized in general by impression so that the core of it was getting clear merely by touching such a criticism, apart from whether the criticism is right. Then, what is core and penumbra according to the criticism by this impression? Here rises a core-penumbra problem of legal positivism.

What is under the word legal positivism meant is, surely, the viewpoint of law which is only interested in positive law and deals with it in an empirical manner on the one side, rejects to deal with law in valid beyond positive law, that is, law as it ought to be on the other side. In this context, we may say that the positive law position, especially normativism (but decisionism in Anglo-American countries) and position placing a particular emphasis on law as it is as to the object of legal positivism, empiricism, especially logical, or analytical positivism of law as to its method, certainty as to its belief — all these constitute the *core* of legal positivism.

Around this core, the penumbra field is formed. There are mainly three sections of this field. At first, we can find the decisionism as an element in making positive law according to voluntarism, next, the sociological, psychological positivism of law which concerns with the law in the context of social relations or psychological situations where it functions as means of social control. At last, moral criticism of fidelity to law as to the problem whether man should obey a law. The concept of this criticism is worth to notice so far as it appeals people to morally reexamine on fidelity to a law while still standing on the position placing a particular emphasis on law as it is. These are a simple outline of the *penumbra* field. To confirm a meaning of the core-penumbra above outlined, we shall cite here the classification which Prof. H.L.A. Hart made in his polemical paper. He shows us five meanings of positivism bandied about in contemporary jurisprudence:

- “(1) the contention that laws are commands of human beings,
- (2) the contention that there is no necessary connection between law and morals or law as it is and ought to be,
- (3) the contention that the analysis (or study of the meaning) of legal concepts

is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, 'functions,' or otherwise,

(4) the contention that a legal system is a 'closed logical system' in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards,

(5) the contention that moral judgements cannot be established or defended, as statements of facts can, by rational argument, evidence, or proof ('non-cognitivism' in ethics)."<sup>35)</sup>

Comparing these meanings with four sources of positivism stated above, we can find several links connecting between them: the contention (1) is equivalent to the decisionism as a part of the positive law position, the contention (2) to the position placing a special emphasis on law as it is, the contention (3) (a) and (4) to the normativism as a part of the positive law position and the logical, analytical positivism of law as a part of empiricism. In other words, Austinian theory of law, that is, analytical positivism especially involves the contention (3) (a), while conceptual jurisprudence in 19th century Germany typically embodies the contention (4). Moreover, the contention (5), though corresponding, to some extent, to the position placing a special emphasis on law as it is, is much more aiming at to clarify nature of moral judgements in contrast to statement of facts. We may say that statement of facts is descriptive, moral judgement is prescriptive. Anyhow, as moral judgement is dealt with as hard to verify, this contention (5) is rather related to ethical noncognitivism, as Hart remarked, and to relativism, as Prof. W. Friedmann pointed out.<sup>36)</sup> Therefore, it seems better to exclude the contention (5) in order to decide the proper scope of legal positivism.

Thus it is possible to conclude that the contentions established by Hart correspond *mainly* to the sources of legal positivism stated above. Because, as to the contention (1), though we at first stated it as belonging to the penumbra field of legal positivism, it seems better to deal with it as being quasi to the core of that positivism, whenever recalling to our mind decisionistic view of Austinian positivism and Nazi legal ideology that law is nothing but decision of leader (Führer).

Despite of this fact, there are no contentions equivalent to some sources which we have pointed out. These are belief in certainty of law as a part of the core on the one hand, the sociological or psychological positivism of law and the moral criticism of fidelity to law as parts of the penumbra field on the other hand. On looking at the

latter, it is observed that there is an interesting contrast. As to the moral criticism, Prof. Hart seems naturally to take account of it since he emphasized this criticism being a merit peculiar to the English analytical positivism, in contrast to the German legal positivism with its sinister fate. On the contrary, it actually is necessary to give attention to the fact that he distinctly excluded the sociological and psychological inquiries into law and other phenomena from the task of legal positivism in the contention (3) (b).

His idea on this last problem itself is not surprising and shocking, but right, in accordance to the dominant approach to the legal positivism up to now. Because this approach used to distinguish from the legal positivism in a narrow sense (logical and analytical positivism of law) the sociological and psychological inquiries on the ground that these inquiries were originated from the founders who were not always interested in legal problems (like: A. Comte) and yet, even so, investigated legal problems from the aspect of sociology or psychology. However these inquiries in their origin were different from that positivism, but it is incontrovertible fact that these are treated as a type of positivism of law at present. Moreover, sociology of law, pragmatic jurisprudence and legal realism has their great merits, so far as they analyze social background of the law, social relations where it functions as means of social control so that they prevent the law isolating from social reality—the isolation which is a famous defect of the legal positivism considered in its core. Taking all these facts into consideration, there is no positive reason, I believe, to prevent us to classify the sociological or psychological positivism of law as a constituent of legal positivism in a wider sense.<sup>37)</sup>

I have made a classification of the core-penumbra field of legal positivism in accordance with a popular impression for convenience of illustration. It does not mean, therefore, that the core would be more valuable than the penumbra and yet relevant at present. Rather, to accurately judge legal positivism, we should beforehand clarify meanings of four sources of this positivism and think over under what situation each of these characteristic positivism is called for and consequently functions.

### **Judgement of Legal Positivism under Logic of Situation.**

The core of legal positivism has been often condemned by popular criticism as if it brought evils on the world of the law. The case of German legal positivism during the Nazi period is one of the typical illustrations criticized in this manner. Here, in

this period, the position placing a special emphasis on law as it is, combined with the normativism and logical or analytical positivism, reached the tragic conclusion, so far as it asserted to observe any laws whenever these were given by state power, regardless of their content which happened to be immoral and unhuman. Besides, when this legal positivism in connection with the decisionism accepted unconditionally decisions made by will of leader as laws and willingly adapted them, we can see nothing but the caricature of history. Judging legal positivism from such a experience, situation emanated from the Nazi period, it seems natural, to some extent, to condemn it as the most odious view bringing evils on the world of law.

But, However there might be a natural reason, we can not, I think, pass over it as it is. Let us investigate the contention that Nazi laws were so iniquitous in the sense contradicted to humanity or justice or natural law that these were not law. Whenever man contends in this manner that Nazi laws are not to be called law, it would be inevitable that certain value judgement is introduced into the statement whether or not they are law—value judgement like expressed in the term of humanity, justice or natural law. In other words, by introducing value judgement into the statement of what is law, such a contention would bring about worse results to confuse simple statement with value judgement. Here is a danger of persuasive definition according to Prof. C.L. Stevenson.<sup>38)</sup> For the reason above, Prof. Alf Ross is afraid of a danger of this sort by reference to late Prof. Radbruch's view of *übergesetzliches Recht* (law beyond positive laws).<sup>39)</sup>

This notion of Prof. Ross seems to be relevant. In dealing with such a problem, there should be careful consideration to present a plain statement of law as it is, that is, to make the statement objective (intersubjective) by restraining subjective value judgement, and after that, it may be reasonable to present a value judgement whether or not the statement is justified, as Prof. Hart did it. The logical or analytical positivism of law, so far as making such a consideration, aims at, at least, to present the objective statement. In this respect, it is still suggestive and we may well say that it offers us minimum guaranty to operate objectively (though in a relative sense) in defining and developing legal concept and legal dogmatics.

Moreover, it is natural necessity, too, to investigate logic of law itself. For instance, it is worth noticing the remarks of E. Ehrlich on this problem: "deduction of judicial decision from legal rules plays in reality a very limited role. Besides of this, generalization, analogy, induction, treatment of indefinite conceptions, of principles of general legislative policy and legal techniques,

construction which is made by procedure of abstraction founded on systematic and dialectic methods, all of these can be done always only under the condition when judges proper interest is taken into consideration, even though it would not reach the most unpleasant consequence. Here, task of judge is the same as that of legislator, accordingly, it presupposes the same discretion of judge as much as legislator supposed to have it."<sup>40)</sup> To use carefully logic of law, it seems at least necessary to refer to the contribution of logical positivism in the field of law at present.

Significance of logic and analytical method in law or judicial process, however, is naturally to be admitted within certain limitations. The view of Mr. Justice Holmes under which he recognized limitations of logic as well as its sound scope, should be referred here, too, in order to estimate proper significance of the logical and analytical positivism of law.

Then, how about role or function of legal positivism of this sort? It has been severely condemned in its role or function as we have seen above. But is it very reasonable if we would apriori judge the legal positivism of this sort to be wrong on the mere ground of such a situation or experience happened in Nazi Germany? Here is a fundamental issue. In fact, even under the Nazi regime when at the height of its power, there was actually an effort to maintain the independence of judges by taking an intelligent stand of the normativism against their regime. However the effort looked poor or vain against such a tyranny, the normativistic positivism of law, at least in the light of this effort, is, I think, to be rightfully appreciated in its plus (progressive) role. That in Italy, too, the legal positivism of this sort played and plays a role to defend the law against the interference of the Facism, later the pressure of Catholic Church — sometimes in the name of natural law — has been reported at the Belaggio Conference.<sup>41)</sup>

Therefore, if we would come to the conclusion that the legal positivism of this sort in general plays a minus (negative) role precisely because it did so merely under a few situations or experiences, the wisdom of this course must be doubted. Rather, it is desirable here to judge legal positivism in accordance with the situation where it is called for and the role which it plays under the situation.

Such is also the case with the penumbra field of the legal positivism. Let us consider the view of moral criticism of fidelity to law. This view, though it presupposes the position of law as it is, that is, the position to deal with the law as valid law so far as it is enacted in accordance with the procedure of statutory enactment, emphasizes to adopt careful attitude toward the problem whether or not we should morally obey that

law. We can sympathize with such a view so far as it plays in reality a critical role against the cynicism of the Nazi or Fascistic theory of law while maintaining the position of law as it is. On the other hand, we can not deny that it leaves a hidden canal to justify political interference or religious pressure to the law in the name of moral criticism. That is why most Italian scholars attended at that Conference are negative to this view inspite of the fact they are very much concerned about the relevance of the moral criticism.

The same is the case with the sociological positivism of law as a part of the penumbra field. For instance, sociology of law at present, as mentioned above, seems to be really important for progress of the law and jurisprudence, since it offers the keen perspective to prevent the law isolating from social reality by dealing with the law in the social context where it functions. But as a matter of fact we can not deny the fact that there is a chance to loosen a framework of the law to be strict by giving a free, sometimes subjective discretion to judge in the name of sociological approach — Remember the Free Law movement in Germany — Here, too, it raises in a case question of political interference or social pressure such and such.

Above all, it is now obvious that the role of legal positivism in its penumbra field should be judged in the light of the situation where it is called for as well as it functions.

What is the situation is a next problem to examine. Let us cite again the phrase used by Mr. Justice Holmes in his decision. "But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*, 195 U.S. 194, 205, 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect force. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."<sup>42)</sup> If we substitute the word situation for the circumstance used above, an outline of the situation seems to be getting clearer. The word situation itself, however, is vague and permits several implications. Whether we are living under the democratic regime or the tyranny like Nazi and Fascist regime, constitutes also one of the distinct features of the situation. The other feature would be found in socio-economic background of the law as suggested by K. Marx or M. Weber. We may understand them as offering a wider scope of the situation. But the socio-cultural tradition of each nations and several types of ways



of thinking conditioned by it, constituting a central feature of the situation, seems to afford the key to a judgement of legal positivism in connection with its role. For instance, the reviewer of the Belaggio Conference shows us some contrast of ways of thinking immanent between Anglo-American and Italian participants in that Conference: "the Anglo-American approach to legal philosophy stresses analysis as an intellectual enterprise quite independent of the history of philosophical thought...The Anglo-American conferees preferred to organize discussion on a point-to-point basis, narrowing discussion to the consideration of a very specific question. The Italians seemed to prefer a position-by-position approach in which a more extended presentation by a speaker raises a series of specific questions which are then responded to in a statement of counter-position — We feel that the position-by-position way of doing philosophy exhibits a broader philosophic tendency to rely upon highly abstract concepts in the course of reasoning and analysis. Such a tendency is crystallized on the Continent in *Begriffsjurisprudenz*, a jurisprudential approach explicitly rejected by the Italian participants, but nevertheless implicitly active in their thought, exhibited by the search and acceptance of unanalyzed broad organizing categories."<sup>43</sup> Viewed in this light, certainly here is a contrast that the former prefers to analyze individual legal terms and concepts, the latter prefers to pursue the historical study of the law in its causes and effects and yet to deal with the law in the manner of the conceptual jurisprudence, notwithstanding that both of them are on the same ground of the legal positivism.

In addition, Prof. H. J. Berman has clarified a characteristic of American way of thinking on the matter of legal philosophy. Legal philosophy or philosophy of law is at least familiar for Continental scholars or the scholars who learned in the civil law system. According to Prof. Berman, however, "many Americans, on the other hand, distrust legal philosophy altogether. It is often said that American law, like English law, is highly empirical in its method, that it proceeds from case to case and from problem to problem, seeking practical solutions without reference to a systematic set of doctrines or a comprehensive theory."<sup>44</sup>

Moreover, the political situation invites consideration. Taking the political situation into consideration, it may well be said, though in a paradoxical way, that what in U.S.A. is viewed progressive, is viewed, as reactionary in Italy. This is illustrated by reference to the American Realism. According to the Reviewer of the Belaggio Conference, "what is regarded a liberal theory in the United States might operate in a reactionary fashion in Italy"<sup>45</sup> where the urgent task is to give the judiciary an effective shield against the political and ecclesiastical pressures.

But it is deserve attention that there is a contrast not only between the different areas like Anglo-American and Continental, but even within the Anglo-American circle. The contrast rising from the English and American way of thinking on the matter of law has been recently pointed out by Prof. E. V. Rostow in regard to the Wolfendon Report: "In Great Britain, the suggestion that law has a moral content seems to raise theocratic ghosts in many quarters, perhaps in most; and clearly, theocracy is 'Conservative.' In the United States, however, it is just the other way around. Every American schoolboy — or at least every American law student — considers Austinian positivism, and the strict separation of law and morals, to be certain hallmarks of a position labelled 'Conservative,' 'Rigidly Technical,' 'Reactionary,' or worse. And the view of law as an instrument for carrying out the moral purposes of its own tradition, and those of the society it rules, is a familiar touchstone of orthodox 'Liberalism.'"<sup>46)</sup>

"The Wolfendon Report" referred above is the "Report of the Committee on Homosexual Offences and Prostitution" set up by the Home Office under Sir J. Wolfenden as Chairman which was presented to the House of Commons, 1957. In dealing with the problem of homosexual offences and prostitution, the Report asserts to separate crime from sin, positive law from moral law and private morality (private immorality too) from interference of the law. Such an assertion raised naturally severe controversy about morality and function of criminal law. It is no wonder in England where the traditional idea of separation of law as it is and law as it ought to be, is still dominant, that the assertion is viewed as liberal, while the opposite assertion to restraint private immorality by means of statutory enactment to enforce public morality, that is, Devlinism is<sup>47)</sup> thought as conservative. On this issue, however, Prof. Rostow, as we have shown above, made critical remarks on the following ground: "In the popular sport of classifying all positions on all subjects as either Liberal or Conservative — there is an intriguing difference between the rules of the game as it is conventionally played on the opposite sides of the Atlantic."

For the reason above, we should strictly avoid to condemn or appreciate legal positivism in general simply because of judgement of certain type of the legal positivism under the special situation of experience. As far as we see as relative at each times our knowledge and we think that our judgement depends on the condition under which it is desired to make, the logic of situation, cultural tradition of each nation, ways of thinking of lawyers and legal scholars, several political situations included, is decisively relevant in order to judge legal positivism. This does not mean, however, that we

avoid to be confronted with and to judge legal positivism itself merely by groping the logic of situation. It would be nothing but a relativism to withhold value judgement in the Pilate's manner. This defeats my own purpose. Besides the logic of situation, we need a minimum of frame of reference to examine and criticize it if necessary, in order to get out of a trap of sceptical relativism hidden in the logic of situation. By outlining this frame of reference and the problem of basic value, I would like to finish off my paper.

### **Logic of Situation, Frame of Reference and Basic Value**

If the logic of situation, figuratively speaking, shows us a dimension located at the lower side of the vertical line which legal positivism ought to take into consideration, it is frame of reference, basic value, which, as a dimension located at the upper side, brings such a consideration under control to give the right orientation. What is, at first, worth noticing is that frame of reference is to be sought as rooted in the action radius and way of action of citizen according to the given situation. Therefore, frame of reference in an ordinary sense is standard of action under which they have acted within a community in for years. We may find many examples, either consistent with society like rules of formal etiquette and of social clubs, or inconsistent with society like rules of Mafia or Mura-hachibu (in Japan). In this context, standards of citizen's action are various and pluralistic. Since modernization of society and state have had an important effect to awake people to a sense of their own common interest and common way of action, however, it is a matter of universal knowledge to citizen that various standards of action have been levelled to some common reasonable standards which offer a real basis of frame of reference. It may be called rules of way of autonomous action and association of citizen. The principles which late Prof. F. Neumann mentioned afford a good example of frame of reference in the field of law.

I. "The legal equality of all men ... II. All laws affecting life and liberty must be general in character ... III. Retroactive laws, that is, *ex post facto* legislation depriving man of life and liberty, violate the principle of the law's universality ... IV. The enforcement of laws affecting life and liberty must be entrusted to an organ separated from the decision making agencies of the state."

"These four statements seem," in his view, "to embody the minimum political content derived from the proposition of man's rational character."

"These minima...are thus valid, regardless of the political system, valid against

any political system, even against a democracy."<sup>48)</sup>

These principles, even at a glance, will show us how they are ordinary and natural. Such principles, however being ordinary and natural, are not nonsense and valueless as basic values, but they show us themselves so much for valuable, since they are brought up in daily lives of our civil society. They may remind us, on the other hand, the fact that they have been developed under the suggestions, mainly given by modern natural law theories. This course of development is definitely recognized by Neumann himself. But we don't need to be anxious about the course, too. For "what modern natural law scholars called natural law (Naturrecht) corresponds principally with the law living in the social structures, opposite to the law enacted by the state,"<sup>49)</sup> hence, these principles are nothing but an ideological expression of desires immanent in the civil society in the name of natural law.

At last we shall refer to basic values like dignity of human being or human being of dignified bearing. Basic values here are, so to speak, enriched of their contents by logic of situation and frame of reference as well as they do give them certain limits or direction as polestar. If so, they have no connection with values having apriori validity. The conclusion we temporarily arrived at is that we may accept the legal positivism with its contentions under certain conditions: that is, to modify its core in the way stated above and to reserve the penumbra fields for it as substantial means to keep in touch with peripheries of the law, by reference to basic values, frame of reference and logic of situation. This is, I think, one of the possible way to answer questions about legal positivism, particularly raised by Prof. E. Schmidt.

If my attempt to understand legal positivism in such a wider scope might be still open to needless discussion, I am ready to substitute *critical empiricism of the law* for the word legal positivism. What does the word critical means here is a position to examine use of empirical approach and its limits, hence to pay close attention to value problem, notwithstanding that basically accepting empiricism itself. But this position naturally does not permit even the fact that value in the name of natural law has apriori validity. Even though we would suppose so, there remains an unavoidable trouble that in a case of concrete decision, value in the same name of natural law would be defended for its priority against the value in the name of natural law so that both of these two values would be brought into an ideological conflict which knows no end. Actually this is not an imaginary case, but a real trouble post-war Germany has faced with<sup>50)</sup> to solve. For, here in this country, the acute task to punish

people who, to drive out their personal enemies, or to get rid of unwanted spouses, informed the Nazi regime against their victims for their spiteful or provocative remarks about the Nazi leaders, raised a necessity of ex post facto legislation in the name of justice or natural law. This assertion, however, caused necessarily a opposite assertion that the ex post facto legislation, as we know, is against the principle, that is, *nulla poena sine lege*. On viewing broadly such a discussion, we observe that the problem whether or not ex post facto legislation should be enacted broke natural law party up into diametrically opposite camps. This is why I have made an effort to avoid to be caught in a trap of needless discussion by setting a chain of logic of situation and frame of referene before getting into the problem of basic value.

Moreover, here is a difference of the frame of reference from the natural law theory that frame of reference, as far as it is viewed within a framework of experience, is conditioned by expeience-situation as well gives it under control to afford the right orientation. For instance, the ex post facto legislation stated above, or the Control Council Law No. 10 as its criminal enactment may naturally be considered to be against the third principle postualted by Neumann and it comes to have to be rejected from our frame of reference. But, in reality, it is the evident fact that this course of criminal legislation was retroactively realized under the special circumstance for the cleanup operation at that time by sacrificing that principle. If so, it still raises a question how far the frame of reference can be and should be accepted in reality. But I shall refer it in another paper.

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