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SIGNIFICANCE OF "LEGAL CONSCIOUSNESS" IN REGARD TO SOCIAL FACTS AND SOCIAL INSTITUTIONS*

Mitsukuni YASAKI**

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I Foreword

What do people feel, see, and speak of legal institutions in their surroundings? They say, I have a right to ..., we can utilize law for a purpose ..., I bring a suit against X for —. According to such usage of expression, rights and duties, obligations, and law, court, and so on, look like certain, clearly existing. These existing in our social life world resemble to natural or physical objects such as like mountain, houses, desks, chairs, and so on. I tentatively call this way of seeing stationary, natural, objective.

It is so familiar way for our ordinary people that they are accustomed and tended to treat such legal institutions as fixed, stable, and unchangeable object. According to Professor P. S. Atiyah, "In modern developed societies, law and legal institutions are so pervasive, and have in general such stability, that we come to think of many legal (or 'institutional') facts as though they were physical facts".[1] They are, in this respect, easily to connect with a trend of status-quo value ideas, which in turn may often become somewhat obstructions to institutional change.

This is the case with lawyers, too. Most lawyers at present know what

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* This paper is partially connected with my paper (in Japanese) entitled "An essay on legal consciousness", 30 The Sociology of Law, 1984. Originally, it is that paper which I presented to and upon which I made a report at the Symposium on Legal Consiciousness held by Japan Association of the Sociology of Law, 1983.

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1) P. S. Atiyah, Law and modern society, 50, 1983.

socalled "realistic approach" to the judicial process contributed for us. So far, they are certainly different in their view of law from ordinary people. Nevertheless, as Atiyah pointed out, we may perhaps trace in them still now some, but considerably strong tendency to look on law as a kind of "entity". Referring to both, ordinary citizens and lawyers, Atiyah impressively characterized these way of seeing as way of "reification",[2] which I will return later to consider briefly. The problem I would like to confront beforehand is that popular or lawyer's way of feeling and seeing of law, a part of which constitutes legal consciousness.

In this paper, I shall at first examine a term legal or social "consciousness" in its several implications, then consider its significance in regard to social facts and social institutions as often called reified.

II Image of Legal Consciousness

What do we image of "legal consiousness" ?

First of all, it means that man brings law into clear consciousness and then that law lies in the stream of consciousness. The former concerns with an active orientation (according to Ed. Husserl noesis), the latter concerns with the oriented, stationary (noema).[3]

Consciousness in both aspects is accustomed to be treated and mentioned to as located in the i n t e r n a l sphere of human being. Certainly, recent developments in social or political psychology, cultural anthropology, and so on, make it possible for us to do research this phenomena in terms of science, but not metaphysics.

But it does not deny, I think, that there still now remain several problems

2) "But although most lawyers would today agree that the law is not a brooding omnipresence in the sky, there is still a tremendous temptation to reify it and think of it as though it were an entity of some kind. To take a simple example, lawyers would be very loath to admit that there might actually be *no law* on a point. They would readily admit that on such and such a point the law is doubtful, and that until the courts have decided what it is, nobody can say for sure, or advise his clients what they are likely to decide. But they would reject the idea that this somehow means that the law has a gap, a hole. There *must be* some law to cover everything that happens. This is a reflection also of the way lawyers tend to think of law as something that 'exists', a tendency powerfully reinforced by the ease with which we identify physical objects like printed Acts of Parliament, or law reports, with the law itself. For most ordinary purposes it is quite harmless to think of the law in this sort of way — indeed, perhaps it does some good, as will be suggested below. But it can also lead to confusion for the person who seeks a deeper understanding of the nature of law". 1) 52.

3) I think I need not make a much citation due to a familiarity of the topic of this kind.

concerned with how and to what extent an external observer can grasp, understand, and clarify that internal aspects of legal consciousness held by others.

It is a popular and customary way for us to say that we sincerely take other's idea into consideration, or in accordance with other's intention, or we do respect .... It gives us an impression of mutual understanding very easy. Others, however, have their each own ego (alter-ego), as well as I have ego. As far as such a problem is concerned, what does it mean to look in at the window of other mind? A possible way at most is that as I feel and think in such and such a way, probably others also will do in the same way, that is, a way of analogy, guess, presumption, certainty of which is not always high and clear. A scepticism or pecimism of this sort, as far as it is sound, may well to serve as a warning to optimistic believers in scientific investigation.[4]

III Why do We study Legal Consciousness ?

There are at least two possible ways to use this word — narrow and wide. Legal consciousness in a narrower sense is directed to the modern formal law of state which is artificially made by the state authorities, and if necessary, ready to impose sanction against its violation. Legal consciousness in a wider sense, on the contrary, is directed not only to the state law, but a wider range of standards or principles of social action, which serve as a kind of guidance for members of various social groups, and simultaneously control them, such as like "living law" as pointed out by E. Ehrlich, or „ausserstaatliches Recht" by M. Weber.[5]

It is clear in this connection that different usages of a word legal consciousness partly depend on such different usages of a word law. Although I also pay attention to this difference, I shall use hereafter a word legal consciousness both in a wider and narrower sense according to the purpose of examination. But, it must be remembered here that a narrower sense of legal consciousness is to some extent similar to law as a part of second layer of institution, while a wider sense equivalent to first layer of institution as I state later. I only mention to

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I only mention to a few names: Ed. Husserl, W. James, A Schutz (Schütz) ....

4) An interesting discussion can be seen in: A. Schutz and T. Parsons, The theory of social action — The correspondence of Alfred Schutz and Talcott Prsons, ed. by R. Grathoff, 1978.

5) E. Ehrlich, Grundlegung der Soziologie des Rechts, 1913. M. Weber, Rechtssoziologie, herausg. und eingeleitet won J. Winckelmann, 1960.

"right consciousness"[6] being often used and spoken of in a similar context.

Another point I would like to call attention to is that all members of social groups, still less society, not always have legal consciousness day by day. Sometimes, some day, some of them may become absentminded, or behave merely along their habitual way, and indeed, all of them do sleep. Therefore, I use a word legal consciousness here in a losse connotation.

Then, to guess from the usage above, it appears not difficult for us to understand why we are interested in the topic of leagal consciousness and what is a purpose of its study.

IV How to use a Word Legal Consciousness ?

We have a kind of tradition of research in legal consciousness in Japan. The purpose of this research is mainly practical, and it originally started with field survey. For instance, it was done for the purpose of effective realization, or enforcement of law relating to economic regulation during the Second World War period, and also done on the ground of acute demand of rapid and yet adequate enforcement of a series of postwar legislation of socalled democratization and demilitarization. It is easy to understand that the latter was urgent only if we remember the strong social bond lying at that time within rural communities, mountain villages, and fishermens', all located at country-side. It is the social bond of this type which came to be certain barriers against democratization and its law, and which had been a real basis of members of rural communities, and so on, in their social conduct and judgement, to speak figurativelly, "living law" in social settings.

Situation since 1960 has raised so impressively big problems for the present formal law to adapt new demands brought from varieties of fields, such as like medical treatment, environment, social welfare, and so on, that it come also urgent to do research on a popular consciousness in connection with formally valid law and their real demand.

By these experiences we have at first to be faced with a kind of question why not modern Western law imported was getting to be effective within Japanese,

6) This topic was also much discussed in the Symposium 1). Classical study was done by T. Kawashima during the post-war period. Cf. Kawashima, Dispute resolution in contemporary Japan, in: A. von Mehren(ed.), Law in Japan, 1963. It may be worth noticing that recent controversy about Japanese right consciousness or legal consicousness in the process of modernization of Japan a part of which I mentioned at III in this paper has been partlv made about propriety of the issue raised by Kawashim's pioneerwork.

why are not such legal consciousness, or right consciousness dominant, in other words, why traditionally followed established standards, living law, still now so powerful to modify or reduce a significant role of the Western supposed to play in modernization of Japan. And then, a further question how at present we are properly to treat with triplet of the Western styled Japanese law (consciousness), the traditional standard of action-judgement, and newly raised demand by ordinary people for responsive law, or by decision-maker for policy-oriented law.[7]

V Stratification of Legal Consciousness in Time, Space, and Actors

When we say that individuals have their own legal consciousness, several stages will be presupposed. The first stage is that they bring law into their consciousness and are conscious of it — dynamic, subjective in a sense stated above —, and the second that law, once having been conscious, is coming to anchor in consciousness, then lying there, or deposited at its bottom to become a part of subconsciousness — stationary, static, objective as stated above —, and the third that law again comes up to the surface of consciousness like a leaf or a piece of branch to the surface of stream of a river, and the fourth that legal consciousness as such supports and is supported by external social action, or legal action of the same individual.

Legal consciousness in a narrower sense may be only connected with the former three stages. But, viewed from social perspective, it is much more convenient and meaningful to understand legal consciousness in terms of a loose set or connection of internal three stages and external factual action, the latter fourth. Indeed, it will be really significant when we are to deal with problems of institution like law. For this purpose we shall tentatively classify several varieties of legal consciousness by using three different scales of time, space, and subject related to it, or actor. A legal consciousness, timely, has been established

7) On this problem, cf. P. Nonet and P. Selznick, Law and society in transition, 1987. G. Teubner, substantive and reflexive elements in modern law, 17 Law & Society Review, 1983. H. Rottleutner, Theorien der Rechtsentwicklung zwischen Empirie und Geschichtsphilosophie, 11 IVR World Congress paper, 1983. Casba Varga, Macrosociological theories of law, 11 IVR World Congress paper, 1983. R. M. Unger, The critical legal studies movement, 96 Harvard L. Rev., 1983. W. H. Clune III, A political model of implementation and implications of the model for public policy, research, and the changing roles of law and lawyers, 69 Iowa L. Rev., 1983. M. Yasaki, Model-change or role-change of law in the *end* of this century (Hō-moderu, Hō-kinō,ron to seikimatsu), Shisō, Sept., 1982.

and becomes dominant for a long period, and seeing from space, within this Japanese society, or in England, and from subject, supposed to be held by most people or ordinary actors. Then a question will be raised here is to what extent such a type of legal consciousnes, though looking like stationary and static, is able to have a potential force within people or actors.

A–(1) One is a case in which sterotyped certain legal consciousness appears generally appealing and powerful, and actually it is so.

A–(2) Another is a case in which different types of legal consciousness compete so much each other to press us consciousness in splitness or pluralism there, resulting from, or related to struggle, opposition, and competiton between class-consciousnesses in our contemporary society.

B Furthermore, there is a chance for new type of legal consciousness, timely, coming to be apparent only now, and viewed from space perspective, from within that interest group, or this intellectual circle, and from subject, starting with a movement of tiny grass-roots group. It may well be called rather flexible and dynamic than static.

Though powerless at present, it eventually may reach to the top-level of social public morality due to its stimulating feature of self-presentation which is apt to attract general interest by means of destructing older tradition, or taming it to other seemingly possible directions.

C Individual I made a simple illustration in regard to social group level, either large, or small. But, what constitutes each social groups is nothing but an individual. It is an individual who has been emphasized as a subject of right within a framework of modern Western law. An individual is really a unit of great importance. What is remarkable here, however, is the fact that there is a loose, but inseparable relationships of individuals to social groups, where they live or to which they always refer. This is not only the relationship in medieval society,[8] but even in modern society we can find a similar though different situation, and yet it is much clearly apparent in our society at present.

C–(1) Generally speaking, individual is tended to be seen and spoken of as subject of legal consciousness to be described, for instance, in a way of "Japanese-like", or "American way". This indicates a definite view or image existing to speak of each as Japanese in general or American as a whole. It indicates simultaneously that only one legal consciousness—Japanese-like—is do-

8) It is better for understanding general feeling in community to recall our mind on John Donne's famous verse "For whom the bell tolls?", a meaning of which I learned from Prof. Atiyah during his stay in Japan in last September, 1983.

minant in Japan. C–(1) is in this sense another side of A–(1). As far as we pay attention to history in a very shorter period by hypothetically stopping so rapidly changing huge stream of history, and as far as we give an emphasis on one country like Japan by contrast to others, it is not difficult and unreasonable for us to speak of and imagine one stable, internally well integrated, period, society, and legal consciousness therein.

C–(2) Even in such a period, society, however, each individuals according to the social stratification are able to have, and indeed have had their own unique, therefore each different, sometimes conflicting legal consciousnesses, and it is much more possible and actual in such a period, society, when and where new energy of a group of individuals take a form of new social value against older traditional (istic) values to lead to a social change.

In addition, other factor making the matter complicated is a speciality in Japan. She is located in the East Asia. She has been developed under the very strong influences of the Buddhist, Confuzianist, and Christian religion and cultural tradition of this sort.[9]

It is no wonder for us to refer to Japanese legal consciousness in general so far as we are in Japan. But, reality of the matter is not so simple as we imagined from the first impression. From a part of the complex matter I wrote above follow further problems of implication.

For instance, a way of expression of Japanese legal consciousness in general — A–(1), C–(1)—. It implies that Japanese are generally accustomed to see and to be conscious of law in such and such a way, to sum up, it is the fact that they see and are conscious of .... We may tentativelly call this "is" level legal consciousness.

We must take a notice on the process of mixing up in which "ought" level legal consciousness such as like "law ought to be such and such", or "there ought to be such and such law" sometimes makes an opposition to, or sometimes interwoven into "is" level legal consciousness, to lead to be harmoniously blended.

Of course there is another type of mixing-up process in which an actor (or actors) speaks of a clearly cognitive legal consciousness being objectively in existence by secretly changing or replacing his or her (their) own subjective conviction, wish, desire for it, that is, subjective ought-level legal consciousness for objective is-level. It will be done either negligently or intentionally, purposivelly. This negligent or intentional way of dealing with the matter, however, is not

9) Cf. Yasaki, Legal culture — past and present (Hōbunka — dentō to genzai), Shisō, Nov., 1983.

hypothetical, but really possible, and yet often can be seen in the various fields of value consciousness, norm consciousness, social consciousness, and legal consciousness.

To pick up not unusual examples, there may be cases like political use of the present situation (statistics) of social consciousness, or purposive use of socalled "common morality", "public morality" (in Japanese "shakai-tsūnen") by judge, public prosecuting attorney, twelve men and women in jury box in the court, or some similar use by officials and politician. Such a series of examples indicate us a latent, but considerably high degree of danger existing in our life-world that value consciousness, ideology of a partial social group tend sometimes to be secretly and intentionally changed for social consciousness in general at that time. By the way, legal consciousness apt to differently reread, understood, changed, and manipulated in this way, so to speak, must be a miniature copy of our comtemporary society, state in a gradual or rapid change.

VI Legal Consciousness and Reification

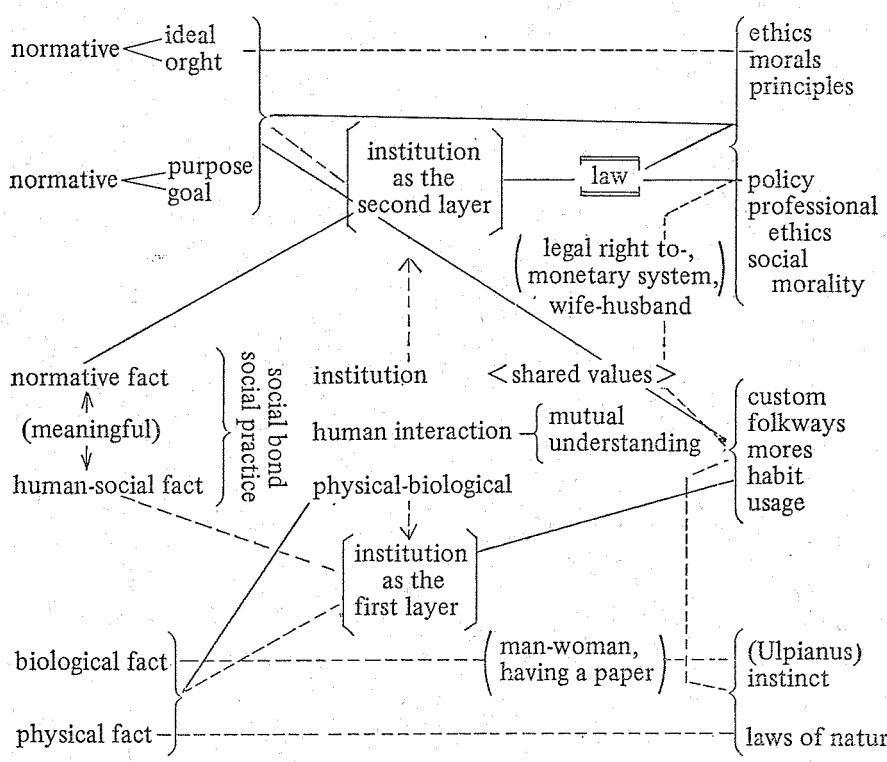
And then? The consideration above again brings us to the starting point, that is, a problem of reification. Actors communicating with each other are necessarily connected with both social facts and institutions. "Connected" means both to be influenced and controlled by social facts and institutions and to utilize them as guidance and means for actors. For the purpose of actors these appear as a convenient and reliable tool for their ordinary life, and as to their influencing and controlling role these appear as objects being unable to disregard and forced to follow from the popular point of view on the one hand, and as objects useful to justify their use of power from official point of view on the other. Anyway, according to general or official feeling, image, consciousness, social facts and institutions are mirrored as if these had real existence, and in this sense, as stated above, are "reified".[10]

But, what we have to pay attention is a relation of such feeling, consciousness with them. Social facts and institutions themselves, on the other hand, are directly or indirectly a kind of artificial products of actors with feeling, con-

10) Cf. G. Lukács, Die Verdinglichung und das Bewusstsein des Proletariats, in: Geschichte und Klassenbewusstsein, Luchterhand, 1968. This is a kind of classics. But, in this paper I merely deal with "reification" as a word to describe the popular or official way of seeing institutions including law — according to my idea, through screen of "as if", or fiction —.

sciousness, and are spoken of as if reified. I shall add a few words as a tentative conclusion, by referring to a map–1 as shown in page.

[Map-1]



1. Social facts certainly imply a very wide range of matters in our life-world. But, basically these concern with the fact that we are living together whether we like it or not. It follows from this fact that we communicate with each other through language, exchange idea, goods, and so on. A relationship between a man and a woman, and a practice of exchange of goods with symbolic equivalents of values like beautiful stone, shell, gold are also connected with the facts above. We can perhaps illustrate these social facts by changing time, space, and subjects like primitive society v. contemporary society and actors therein.[11] For this purpose it may be convenient for us to cite different scales, A–1, A–2, B, C–1, C–2, stated above.

Social facts are interwoven with our customary or social practice[12] on the other

11) 9)

12) cf. H. L. A. Hart, The concept of Law, 1961, R. Dworkin, Taking right seriously, 2nd imp., 1978.

hand, in which we find again we live, act, judge, and evaluate according to a nexus of internal consciousness and external action. Viewed from this perspective, social facts, at least in a sense of A–1, C–1, appear certain, stable, and really existing on the ground of general consensus or popular consciousness. In this respect social facts, we may say, are reified, and constitute a first layer of institution, in other words, institutional facts as to be mentioned soon after.

2. Institution, however, has different meaning from the first layer of institution. It rather often indicates social arrangements of a more complicated, artificially elaborated type from religious sects, social clubs through schools, labor unions, corporations to law, society, and state as a whole. We tentatively call them a second layer of institution.[13] As stated above, these institutions, certainly including law, look like certain, reliable, stable, useful, objectively existing on the one hand, and controlling, repressive on the other, and accordingly reified.

3. A relation between social facts and institutions, too, must be carefully examined. It is sure that social facts supply very important materials to social institutions. But it is institutions (second layer) which give naked facts social meaning. That is why I called above first layer of institution institutional (second) facts.

The fact someone killed another is surely important and relevant fact to law, but it is the penal law provision which deals with the fact as legal or legally relevant fact. So far, facts and institutions are intimately connected with each other like feedback relation. It may be, however, much more proper expression, if we call this relation a "spiral" from the following reason.

4. Social facts and institutions are both always directly or indirectly have been formed, ascertained, established, developed, and modified by actors though their consciousness. While they see generally in facts and institutions certain

13) I used tentatively technical terms like first layer or second layer of institution. Sources of such technical terms, as it well known, are many, for example, Kulturnorm und Rechtsnorm, Handlungsnorm und Entscheidungsnorm, primary rules of obligation and secondary rules .... A way of expression in this paper is rather close to Atiyah's, though considerably modified. For instance, he puts it as follows: "Many of us think we have 'money in the bank'. But that isn't a physical fact at all. Strictly speaking, as has been well said, the only person who has money in a bank is the bank itself. What the customer has is a legal right to obtain money from his bank in various ways, and subject to various limitations. Many ordinary words in everyday use (for instance, 'wife' or 'husband') can only be fully understood by reference to a complex and interwoven network of law and regulation. In some societies the word 'wife' or its equivalent, for instance, might just mean 'the woman I live with'. But in a developed society it does not mean that: your wife remains your wife even if you don't live with her, and the woman you live with doesn't, by that fact alone, become your wife". 1) 51.

reified existences, at the same time they see fact sometimes from each different points of view, and interpret institution like law differently. Perhaps we are better to use scale B, or C–2 for this occasion, and a very familiar example may be a judicial process. Professor R. M. Unger illuminatingly puts it as follows:

"Can judges make use of a method that purges their decisions of personal whim? If we admit that words lack self-evident reference, that meaning must ultimately be determined by purpose and context, and that the intent of prior lawmakers is always more or less incomplete, it becomes doubtful whether a truly impartial method of judging could ever be fashioned within the conditions of liberal society. The sense of the precariousness and of the illegitimacy of consensus makes it difficult for the judge to find a stable authoritative set of shared understandings and values upon which to base his interpretations of the law. Hence, every case forces him to decide, at least implicitly, which of the competing sets of belief in a given society should be given priority. And it requires him to rely on an accepted morality that, even if it can be identified is increasingly revealed as the product of a social situation itself lacking in sanctity. To this extent, adjudication aggravates, rather than resolves, the problem of unjustifiable power".[14]

Not only judges, but public officials, even legislators, more or less, have to be faced with similar problems. Furthermore, within a field of law interpretation and application lawyers, prosecuting attorneys, parties, and ordinary people are also involved according to their each own different, though interrelated, senses of justice.

5. The judicial process as just mentioned above is only a facet of the present age where we are thrown into a heavy stream of value splitness or moral pluralism. The mood of our age is tended to spread. It covers not only private world of human life, but public sphere, and brings us rather a world with fresh impression by mixing up with each other. So far, the matters under such a mood appears subjective, flexible, and flowing like A–2, B. C–2. Once any of various value ideas after severe fight between them to be described „Götterkampf" (M. Weber) has occupied the premier position, it comes to be stable, certain, dominant, and objective like A–1, C–1, thus reified, and spreading over social facts and institutions.

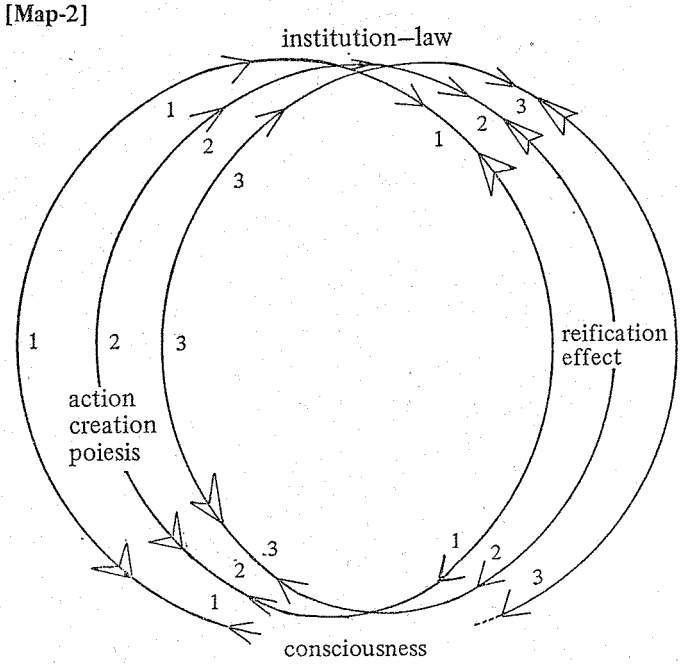
Referring to map–2, it is understandable that 1) actors with consciousness (more or less) in daily life create a first layer of institution through their *poiesis*, 2) they surrounded by first institution come to act and gradually create a second

14) R. M. Unger, Law in modern society, 180f, 1976.

layer of institution surely including law, 3) a third layer of institution .... This way of reading map–2 may be c a u s a l because it proceeds from cause or origin to effect. If so, we may reread the map from an opposite side, to sum up, from the third institution through the second to the first. For this purpose I use an arrow sign in the map–2. This way may well be called f u n c t i o n i n g.

I use an arrow sign in the map–2. This way may well be called f u n c t i o n i n g.

[Map-2]



Though there is third way of reading map which probably makes it possible for us to understand a highly complicated interrelatedness between them, I must be content in this paper merely by pointing out an interesting «spiral» development, despite of first impression of feedback relation, taken place between actors, consciousness, act, fact, institution, and reification. I also have to leave it till next time to examine model change or role change of law in a light of reflexion which has been said since 1960.[15]

15) Partly I treated this problem in my paper 7).