AN INTERPRETATION OF "NATURE" UNDERLYING THE LAW

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1 Mysterious Word, "Nature"

Our life under the law directly or indirectly is based on and conditioned by nature like the saying "we can't go beyond the limits imposed upon us by nature". The word "nature", however, has at least double meanings. Certainly, it has been used to connote matters of a wider range from uniformity, unchangeability, inflexibility to universal or objective validity, eternal beauty —— which lie and extend behind and above our daily life. Poets, scientists and others referred to it from this aspect.

But, it has also another aspect which may well be symbolized by coolness, brutality, violence, and so on. It may be enough for its understanding to cite the following passage:

> "In sober truth, nearly all the things which men are hanged or imprisoned for doing to one another, are nature's every day performances. - - - - - Nature impales men, breaks them as if on the wheel, casts them to be devoured by wild beasts, burns them to death, crushes them with stones like the first christian martyr, starves them with hunger, freezes them with cold, poisons them by the quick or

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> slow venom of her exhalations, and has hundreds of other hideous deaths in reserve, such as the ingenious cruelty of a Nabis or a Domitian never surpassed".[1)]

Our life under the law, whether we dislike to recognize it or not, is unavoidably placed under nexus of nature in these double aspects. Such a fact, being recognized, must influence our knowledge including of law. My theme fundamentally concerns with this fact.

Law as a part of culture

Law is said to be a part of *culture* which means here creative products of human being concerning several ideas and institutions. Culture, though based on, has often been contrasted with *nature*, as well as custom with nature in the earlier period. But, culture increasingly in the course of history of ideas has been given a position originally given custom, and often culture in contrast with nature has been understood in terms of "ought" versus "is", or "value" versus "fact". The contrast of this sort may come from the idea that brutal nature must be placed under control through highly developed human knowledge, that is, culture, or cultural effort to reshape it according to the purpose of human utility.

Thus, law has been given a role as a means of social control in the modern society. It is for this reason that modern writers in the Western world have pointed out the very meaning of the positive law as a part of culture in contrast with nature in terms of methodological distinction of value — fact, ought — is, that is, methodological *dualism*. I think the dualistic approach in the theoretical study and discussion principally useful, in order to avoid possible confusion of ideal, or own personal wishes with reality or something like.

Law's place in the is-ought relation and the dualistic approach

But, I know in fact how ambiguously the word law or positive law has been used in regard to *is* and *ought*, and there is, I feel, a slight question to examine about its usage. On the one hand, positive law made by human

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1) J. S. Mill, Nature, in: Essays on ethics, religion and society, Collected works of John Stuart Mill, vol. X, ed. by F. E. L. Priestley and J. M. Robson, p.385, 1969. Cf. also J. Frank, Courts on trial, p.354, 1949.

political power indicates *ought* by contrast with *is* of laws of nature, e.g., laws of gravitation. On the other hand, positive law is often identified with *law as it is* as markedly distinguished from *law as it ought to be*, like morals, natural law, higher law, etc.

First, it shows us complexity of the word positive law in the context it is used. According to F. S. C. Northrop, it may well to call positive law normative "is"[2] in this meaning.

Second, it also shows us incidentally a double usage of the word law, that is, laws of nature and natural law.

Third, idea of laws of nature and natural law show us commonly something like human aspiration to find *objectively* or *universally valid standards* independent of as well as immanent in our reality, inspite of each own different character of the former *is* and of the latter *ought*. That is why positive law is figurativelly called normative "is" in terms of such a middle position between both.

It is often said as if self-evident that these standards are located and function above and under the positive law. We have a great deal in common with recognition of certain types of laws of nature, while not of natural law. Especially in modern civilized society, it came to be felt more difficult to recognize natural law besides the positive law, man-made law, partly due to the demystified mood of this period.

Nevertheless, we can even now hear some whispering that one must look behind paper law to reach to, or to gain firmly established standards underlying it, for example, human nature, nature of things, rerum natura, etc. As it well known, their role and significance in theory and practice have been stressed from ancient to modern, or present. Is it anachronistic at present to stress them, or to endeavor to get them? It depends on how to search for them. In a limited sense, I think, there is a good reason to do it even in our highly civilized or demystified world, and here is a task of my simple paper. I would like to trace some causes of why repeatedly such attempts have been made by so many different scholars of different periods in a similar way of thinking.

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2) Cited in a little bit modified way. Cf. J. Cohen, R. A. H. Robson, A. Bates, Parental authority: The community and the law, pp.15 f., 1958.

2 Ulpian's Natural Law in Justinian's Code

Justinian's Code will offer an interesting example for this purpose. It includes Ulpian's statement of natural law. This statement was inserted by the compilers as a legal provision in the Code, Digesta (or Pandectae), and also in another Code, Institutiones. It says that "Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. hinc descendit maris atque feminae coniunctio quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius peritia censeri".[3)]

The provision curiously stimulates us in its strange or unique feature in treating both human being and animal as if the same or equal before "nature", especially under natural "instinct" planted by nature.[4)] I shall call it tentatively *instinctive* natural law. Then, it raises several issues worth to notice.

First, the provision or Ulpian's statement in regard to its originality was doubted by scholars in the later period and often held as compilers' interpolatio.

Second, apart from this suspicion, the provision is said to be isolate. Natural law in Digesta, or Institutiones, being principally identified with ius gentium or "rule of the Law common to all Nations"[5)] as exemplified by Gaius, in contrast with civil law, ius civile, is based on dichotomy against Ulpian's trichotomy (natural law, ius gentium, civil law).

Third, despite of this difference, word "natural" in both usages commonly indicates certain matters or the state of affairs independent of and immanent in human creative activity which I tentatively call *latent* natural law, while it does not indicate something like universally valid value standards independent of or, transcendent from human creative activity which is merely seen in the other statement or provision of Ulpian referring

3) Digesta, I. 1. 1.3.
4) Cf. Austin's opinion, below.
5) H. S. Maine, Ancient law, 1861, 362 The World's Classics, Oxford, p.41, 1931.

to equal liberty of human beings before nature[6] and the provision of natural law originating from divine will[7] (said to come from the Christian ruler, Justinian, and compilers), and which I tentativelly call *normative* natural law.

Fourth, in the panoramatic scope of Justinian's Code, three types of natural law I named for the convenience may serve as models for showing each own relation to divergent levels of fact and value, is and ought. Only I can suggest here transition from *instinctive* through *latent* to *normative* natural law almost parallel to change from is to ought, from fact to value.

Fifth, in this connection nature of things, rerum natura may well be said closed to the *latent*. One provision in the Code, Institutiones says as follows: " - - - - - iure naturali, quod, sicut diximus, appellatur ius gentium - - - - palam est autem vetustius esse naturale ius, quod cum ipso genere humano rerum natura prodidit - - - -"[8]

3 Critical Comment

It is no wonder for scholars to attack the idea of *instinctive* natural law in regard to its alleged improper confusion of human being with animal since they believe in human being's distinct quality of reason or rational knowledge. For instance, H. Grotius made a criticism from this point of view: "Discrimen autem quod in Iuris Romani libris exstat, ut jus immutabile aliud sit quod animantibus cum homine sit commune, quod arctiori significatu vocant jus naturae, aliud hominum proprium, quod saepe jus gentium nuncupant, usum vix ullum habet. Nam juris proprie capax non est nisi natura praeceptis utens generalibus - - - -"[9]

J. J. Rousseau made a similar criticism from more refined point of view of "nature": "Without speaking of the ancient philosophers who seem to have tried their best to contradict each other on the most fundamental principles, the Roman jurists subject man and all the other animals

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6) Dig., I. 1. 4.

7) Inst., I. 2. 11.

8) Inst., II. 1. 11. Cf. R. Weigland, Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus, S. 16, 1967.

9) H. Grotius, De iure belli ac pacis, lib. 1. 11. p.6, CIↃ IↃC XXI.

indifferently to the same natural law (*loi naturelle*), because they consider under this name the law that nature imposes upon itself rather than that which it prescribes; or rather because of the particular sense in which those jurists understand the word law, which on this occasion they seem to have taken only for the expression of the general relations established by nature among all animate beings for thier common preservation. The moderns, recognizing under the name law only a rule prescribed to a moral being, that is to say, intelligent, free, and condidered in his relations with other beings, consequently limit the competence of natural law to the sole animal endowed with reason, namely man; but each defining this law in his own fashion, they all establish it upon such metaphysical principles that even among us there are very few people capable of comprehending these principles, far from being able to find them by themselves".[10] Both, Grotius and Rousseau are the modern writers. How about the situations in the premodern periods?

4 Rearrangement

We must recognize new situation increasingly appeared according to the development of the Christian tradition which in a considerable degree was connected with an orientation to universally or objectively valid value standards, that is to say, *normative* natural law above mentioned. It must be, however, more interesting to see those different types of natural law, seemingly conflicting with each other, sometimes peacefully rearranged in order. Preceding the Christian period, M. T. Cicero, too, did it,[11] and the

10) J. J. Rousseau, Discours sur l'origine et les fondements de l'inégalité, Pref., transl. by and quoted at R. D. Masters, The political philosophy of Rousseau, pp.77 f., 1968.

11) "First of all, Nature has endowed every species of living creature with the instinct of self-preservation, of avoiding what seems likely to cause injury to life or limb, and of procuring and providing everything needful for life — food, shelter, and the like. A common property of all creatures is also the reproductive instinct (the purpose of which is the propagation of the species) and also a certain amount of concern for their offspring. But the most marked difference between man and beast is this: the beast, just as far as it is moved by the senses and with very little perception of past or future, adapts itself to that alone which is present at the moment; while man — because he is endowed with reason, by which he comprehends the chain of consequences, perceives the causes of things, understands the relation of cause to effect and of effect to cause, draws analogies, and connects and associates the present and the future — easily surveys the course of his whole life and makes the necessary preparations for its conduct". M. T. Cicero, De officiis, I. 4. 11 (vol. XXI in twenty-eight volumes, transl. by W. Miller, p. 13, 1913). J. Higginbotham, Cicero on moral obligation, pp.42f., 1967.

similar attempts may be seen in the following. Here, I shall cite an idea given by Thomas Aquinas.

Within the wider framework of Thomas' idea of law, that is, eternal law, natural law, human law, divine law, custom, attention is to be paid to natural law. According to him, it is the first precept of the natural law "that *good is to be done and ensued, and evil is to be avoided.* All other precepts of the natural law are based upon this". Then, he proceeds to explain natural inclination, and accordingly three different precepts of natural law commonly based on that first precept, the second of which is surely relevant to our topics:

"Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law. Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, *which nature has taught to all animals,** such as sexual intercourse, education of offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination".[12] His attention to Ulpian's natural law is evident in his Note, *

12) Summa Theologica, Quest. 94, transl. by S. Parry, Thomas Aquinas: Treatise on law, pp.60f., 1965.

Pandect. Just. I., tit. i. We shall again notice its interesting rearrangement in his frame of reference.

Surely, we know other examples of this attempt besides Thomas'. Commentators, for instance Azo in Italy, Bracton[13] in England, and others mentioned to the topic, *instinctive* natural law in connection with *normative* natural law. Ch. St-Germa(i)n,[14] Montesquieu,[15] S. Pufendorf,[16] W. Blackstone, etc., also concerned with it. Blackstone in a passage of "Commentaries" said as follows:

"LAW, in it's most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whethere animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey".[17]

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13) Bracton, De legibus et consuetudinibus Angliae, transl. by S. E. Thorne, 1 Bracton on the laws and customs of England, pp.26f., 1968.

14) "DOCTOURE) Fyrste it is to be vnderstande/that the lawe of nature maye be consyderyd in two maners/that is to saye/[4b] generally and specyally/when it is consyderyd generally/then it is referryd to all creatures/ as well resonable as vnresonable/ for all vnresonable creatures *when unimpeded and not disordered* lyue vnder a certeyne rewle to them gyuen by nature/ necessarye for them to the conseruacyon of theyr beynge/ *They preserve their kind; they nourish their young and their offspring by natural instinct, and by nature fear what is contrary to their being; and according to John Gerson the natural law of animals is that law which every animal has unless impeded or disordered*, but of this lawe it is not our intent to treate at this tyme. The lawe of nature specyally consyderyd: whiche is also called the lawe of [reason]^{2} pertayneth oonly to creatures resonable that is man/ whiche is create to the Ymage of god". C. St. German's Doctor and Student, First dialogue, Ch II, originally 1528, Selden Society's Publication, vol. xci, ed. by T. F. T. Plucknett and J. L. Barton, p.13, 1974.

15) See Montesquieu's passage quoted and criticized by Austin below.

16) "The Roman Jurisconsults used to define the law of nature as 'what nature taught all animals', not, therefore, what it peculiar to man alone, but 'what other animals as well are supposed to know[1]'. ----- Now although many actions of men and beasts are very much alike, by the performance of which a man is said to have satisfied the law, as a matter of fact there is a great difference between them, since among beasts they come from the simple inclination of their nature, while man performs them from a sense, as it were, of obligation, a sense which brutes do not have. ----- Those, however, who like to give the designation of 'a law of nature in lower animals' to the endowment of brutes whereby they perform specific actions, needlessly misuse the term 'law'. But there is no lower animal which performs all the duties expected of man, and there is no duty of man the opposite of which many animals do not perform; although in general the popular feeling is greatly aroused against some crime, if it be shown that even the lower animals avoid such deeds". S. Pufendorf, De jure naturae et gentium, 1688. The law of nature and nations, transl. by C. H. and W. A. Oldfather, in: The Classics of International Law, rep. Book II, ch. 3, pp.180f.

17) W. Blackstone, The commentaries on the laws of England, Introduction, vol. 1, p.38, 1765.

This passage has a character seemingly close to *instinctive* natural law idea while having another character akin to the socalled imperative theory of law seen in T. Hobbes and J. Austin. "No passage in the Commentaries has been more severely criticised than this" wrote W.G.Hammond, the editor of the Commentaries in the latter half of 19th century America. He again cited in the Note another writer's opinion to that passage. "The writer of the article on Sir William Blackstone in the ninth edition of the Encyclopaedia Britannica, vol. 3, pp. 800–802 - - - - evidently refers to it when he speaks of B. as "falling into the common error of identifying the various meanings of the word 'law'," and says that "he has only the vaguest possible grasp of the elementary conceptions of law. He evidently regards the law of gravitation, the law of nature, and the law of England as different examples of the same principle, as rules of action or conduct imposed by a superior power on its subject" ".[18] Hammond himself, though negative in recognizing the imperative theory of law, appears positive to Blackstone's idea of law in a limited sense. In a limited sense? Yes, he shows us the principle of order. "If this be true, we must accept Blackstone's view of all law as essentially the same, so far as it represents the principle of order, of definite effects from definite causes, whether we find it in the realm of physics, of social science, or of law in the narrowest sense of the term in which it is used for the rules that govern the enforcement of human rights and duties".[19]

His idea of "principle of order" may imply three types of natural law (*instinctive, latent,* and *normative*), in other words, various levels from *is* to *ought*, from *fact* to *value* in the same word. So, it is necessarily to be criticized by scholars of dualistic trends for the confusion of both opposites. As it well known, the dualistic trends in theory and discussion including the field of law became in a considerable degree dominant in the modern West. But *instinctive*, or *latent* natural law idea still remain somewhere in that same world. I shall again refer to two responses to the Ulpian's natural law statement. One is C. F. v. Savigny, another is J. Austin.

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18) W. G. Hammond's Blackstone, Commentaries, editor's note to Introduction, vol. 1, pp. 95 f., 1890.

19) 18) p.101.

5 Savigny and Austin on Instinctive Natural Law

Savigny in his article, "Jus naturale, gentium, civile" spoke of the trichotomy (cf. p.14). According to him, Tryphonin and Hermogenian shared it with Ulpian. Instinctive natural law was summarized as follows: „Es gab eine Zeit, worin die Menschen nur diejenigen Verhältnisse unter sich anerkannten, welche ihnen mit den Thieren gemein sind: das der Geschlechter, und das der Fortpflanzung und Erziehung".[20] Though he knew well a series of condemnation to it, he tried to give it an interesting interpretation.

„Das erste, was an dieser Eintheilung auffällt, und weshalb man sie oft getadelt hat, ist das den Thieren zugeschriebene Recht und Rechtsbewusstseyn. Allein wenn man nur den allerdings übel gewählten Ausdruck preisgiebt, so lässt sich die Ansicht selbst, von dieser Seite wohl vertheidigen. Jedes Rechtsverhältniss hat zur Grundlage irgend einen Stoff, auf welchen die Rechtsform angewendet wird, und der also auch abstrahirt von dieser Form gedacht werden kann. Diese Materie ist in den meisten Rechtsverhältnissen insoferne von willkürlicher Art, dass ein dauerndes Bestehen des Menschengeschlechts auch ohne sie gedacht werden kann; so bey dem Eigenthum und den Obligationen. Nicht so bey den zwey oben genannten Verhältnissen, die vielmehr allgemeine Naturverhältnisse sind, den Menschen mit den Thieren gemein, und ohne welche das Menschengeschlecht gar kein dauerndes Dasein haben könnte. In der Tat also wird nicht das Recht, sondern die Materie des Rechts, das demselben zum Grunde liegende Naturverhältniss, den Thieren zugeschrieben. Diese Ansicht nun ist nicht nur wahr, sondern auch wichtig und der Beachtung werth; nur eignet sie sich nicht zu einer Eintheilung des Rechts, namentlich für das praktische Bedürfniss der Römer".[21]

What does „Nicht so bei den zwei oben genannten Vwerhältnisse" mean? It means „das der Geschlechter, und das der Fortpflanzung und Erziehung", that is, the relationship of male and female, and the relation-

20) C. F. v. Savigny, Jus naturale, gentium, civile, : Beylage zu System des heutigen römischen Rechts, Erster Band, 1840, S.415.

21) 20) S. 416.

ship of male and female, and of intercourse and education of their offsprings.

Austin also referred to the same issue and in a very similar way to Savigny, but differed from Savigny in conclusion. Let me cite Austin's passage. Ius naturale in Ulpian's sense, he pointed out, "is a name for the instincts of animals". He continues, "the instincts of animals are related to laws by the slender or remote analogy ----- It is true that the instincts of the animal man, like many of his affections which are not instinctive, are amongst the causes of laws in the proper acceptation of the term. More especially, the laws regarding the relation of husband and wife, and the laws regarding the relation of parent and child, are mainly caused by the instincts which Ulpian particularly points at. And that, it is likely, was the reason which determined this legal oracle to class the instincts of animals with laws imperative and proper. But nothing can be more absurd than the ranking with laws themselves the causes which lead to their existence. And if human instincts are laws because they are causes of laws, there is scarcely a faculty or affection belonging to the human mind, and scarcely a class of objects presented by the outward world, that must not be esteemed a law and an appropriate subject of jurisprudence".[22)]

This attitude is also seen in his criticism of Montesuieu's famous passage. He cited and criticized it in the following way. " 'Les lois, dans la signification la plus étendue, sont les rapports nécessaires qui dérivent de la nature des choses: et dans ce sens tous les êtres ont leurs lois: la Divinité a ses lois; le monde matériel a ses lois; les intelligences supérieures à l'homme ont leurs lois; les bêtes ont leurs lois; l'homme a ses lois.' Now objects widely different, though bearing a common name, are here blended and confounded."[23)]

Savigny interprets that instinctive natural law in the light of „Stoff" or „Materie", and Austin in the light of "cause". They are common in such a treatment of the matter. They also look like common in treating it as extra-legal. But, does not appear Savigny's attitude to the material rather positive than Austin's negative? So far, Savigny's perhaps may show us somewhat interesting hold in interpreting *instinctive* or *latent* natural law

22) J. Austin, Lectures on jurisprudence, vol. 1, 5th ed., ed. by R. Campbell, pp.209 f., 1885.
23) 22) p.211.

toward a search for certain firmly established standard (for judgement).

6 Modern Interpretation

Now I shall turn to opinions on the topic expressed by a few scholars who worked or is working in 20th century. They are G. Radbruch, J. Frank, and H. L. A. Hart. At first glance, they appears to have no intimate relation with each other. German, American, English scholars, however, having incidentally expressed their opinions about nature and so on, may be permitted to treat here in the same space.

Radbruch's idea of "nature of things" is repeatedly stated in his books and articles. In the short paper, he treated instinctive natural law in connection with rerum natura, that is, nature of things. „Die großen Urtatsachen und Urverhältnisse, die „Naturformen des Menschenlebens" (VIKTOR HEHN) sind die tragenden Grundlagen des gesamten Rechts, besonders aber des Familien- und Erbrechts: Geburt und Tod, Kindheit, Jugend und Alter, Geschlechtsverbindung und Zeugung, Elternschaft und Kindschaft sind die animalen Tatsachen, auf die ULPIAN das Naturrecht in diesem Sinne gründet: quod natura omnia animalia docuit: maris atque feminae coniunctio, liberorum procreatio et educatio. Aber Stoffe des Rechts sind alle diese Verhältnisse und Tatsachen nicht als rein naturale Rohstoffe, das Recht ruht nicht unmittelbar auf den natürlichen Geschlechts- und Zeugungsverhältnissen, vielmehr auf den Sozialgebilden, deren natürlichen Kern sie bilden".[24]

Frank gives us a very interesting sketch of various interpretatios of nature and affirmatively referred to Mill's conception of nature as brutality (cited at the first part). Frank as a Realist attacks the traditional legal myth especially in connection with the judical process. Idea of objective legal rules, mechanical legal reasoning, and so on are targets of his criticism based on facts-scepticism besides rule-scepticism. It does not mean, however, that he ignores any of value standards of intersubjective or objective validity, but he appears to have searched for them, surely in connection with the judicial process. "Some non-Catholics balk at calling the Catholic Natural Law

24) G. Radbruch, Die Natur der Sache als juristische Denkform, Sonderausgabe, 1960, S.11.

principles and precepts "eternal" or divine in origin. Indeed, to such persons — mindful of man's finiteness, his limited capacity for comprehending, intellectually or emotionally, all that goes on in the vast stretches of the universe beyond his ken — it seems presumptuous to assert that man should know what is eternal, or what constitutes order or regularity, present or future, except within his own small span of experience. But no decent non-Chatholic can fail to accept the few basic Natural Law principles or precepts as representing, at the present time or for any reasonably foreseeable future, essential parts of the foundation of civilization".[25)]

Hart also referred to Mill's criticism on Montesquieu for confusion of descriptive statement of facts with prescriptive statement which is criticized by Austin as well as by Mill as cited above. Hart's idea, however, appears not to be exhausted by simple dualistic approach. Despite of his contention about the separation of "is" and "ought", law and morals, he still pay attention to a meaning of somewhat substantial factor underlying both, law and morals. For this purpose his treatment of a teleological conception of nature is worth noticing.

At first, he explains it as follows: "The doctrine of Natural Law is part of an older conception of nature in which the observable world is not merely a scene of such regularities, and knowledge of nature is not merely a knowledge of them. Instead, on this older outlook every nameable kind of existing thing, human, animate, and inanimate, is conceived not only as tending to maintain itself in existence but as proceeding towards a definite optimum state which is the specific good — or the *end* (τέλος, *finis*) appropriate for it".[26)] Then, he proceeds to point out its similarity with and difference from modern secular thought.

"The stages by which a thing of any given kind progresses to its specific or proper end are regular, and may be formulated in generalizations describing the thing's characteristic mode of change, or action, or development; to that extent the teleological view of nature overlaps with modern thought. The difference is that on the teleological view, the events regularly befalling things are not thought of *merely* as occurring regularly, and the questions whether they *do* occur regularly and whether they *should* occur

25) 1) Frank, pp.364f.
26) H. L. A. Hart, The concept of law, p.184, 1961.

or whether it is *good* that they occur are not regarded as separate questions".[27]

On the one hand, he clearly recognizes one of difficulties in understanding teleological point of view in the minimization of differences between statements of what regularly happens and statements of what ought to happen, or human beings with a purpose of their own and other living or inanimate things. By maintaining and modifying such a point of view, on the other hand, he looks at natural fact as well as purpose of survival, especially *human survival.* According to him, teleological elements still alive in ordinary thought about human action. "It will be rightly observed that what makes sense of this mode of thought and expression is something entirely obvious: it is the tacit assumption that the proper end of human activity is survival, and this rests on the simple contingent fact most men most of the time wish to continue in existence".[28] Though he continues to develop his idea to more refined "minimum content of natural law", its hold, I think, is to be found here in that treatment above.

7 Concluding Remarks

What do such attempts newly suggest us at present? I partly explained their meaning above. In addition, I shall pick up a few points below for sociocultural perspective on this issue.

The dualistic approach in theory and discussion, symbolized by the separation of is and ought, fact and value, I think, is still now useful and meaningful. Apart from the practical matters requiring each own value judgement, however, we even in that field do not only work on fact-analysis, its description, but sometimes work explicitly or implicitly from normative point of view based on certain ultimate value. It is for this reason that problems of value standard are worth to attention in the field of law, still more in the field of jurisprudence or philosophy of law.

But it does not mean that problems be reduced to believe in and assert only one absolute value valid in the field of theory and discussion, too. If so, it leads to *non-naturalistic* or intuitive theory of ethical values. Hart's

27) 26) p.185.
28) 26) p.187.

attempt appears to show his commitment to this course of thinking by appealing to that end: *survival.* On the other hand, he treat it as end in a very close connection to contingent or natural fact of survival. So far his attempt also appears to imply contextual approach to reconsider value or end under its context which in turn suggests us a modified idea of *naturalistic* theory of ethical values.[29)]

Naturalistic tendencies are seen in Japan at present in various fields. One comes from certain reflection of and reaction to our environment increasingly destroyed, and the other from attitude to reexamine the socalled relativism or *noncognitivism* in theoretical knowledge, and the third from an interesting discussion about interpretation or construction of the private law mainly related to contracts, torts, etc., in which naturalistic interpretation seemingly is made in terms of historical or sociological understandings of matters in contrast with interpretation based upon objective value standards or relativistic attitude.

As a matter of fact, the dualistic approach can not be ignored by such trends of attempts. As to problems of ultimate values to choose or prefer, however, both, naturalistic and non-naturalistic approach are again to be kept in mind in addition to dualism, or noncognitivism. Three types of natural law, instinctive, latent, and normative, may be older fashioned conceptions. But they still may offer some useful tools for reconsideration of the issues above in this respect.

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29) Cf. also Hart, Positivism and the separation of law and morals, 71 Harvard L. Rev., pp.622f., and, Problems of philosophy of law, in: Encyclopedia of Philosophy, ed. by P. Edwards, p.273, 1967.