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Title	Legal Positivism and Authoritarianism in Japanese Legal Tradition (Cont.)
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Citation	Osaka University Law Review. 1969, 17, p. 1-7
Version Type	VoR
URL	https://hdl.handle.net/11094/6483
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LEGAL POSITIVISM AND AUTHORITARIANISM IN JAPANESE LEGAL TRADITION† (Cont.)

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The View of Omnipotence of Law and The Positivism of Law
— Positivistic Study of History and Its Two Dimensions — Conclusion

† This is the third part of translation, though a bit modified in the content, of my paper, "Hōjisshōshugi" (Legal Positivism) in Japanese language, in: Series of Law in Contemporary World (Gendaihō-kōza), Iwanamishoten, vol. 13. Each of the first and second part of that paper, translated and entitled, "Legal Positivism in Japan" and "Legal Positivism and Authoritarianism in Japanese Legal Tradition" appeared in this Osaka University Law Review, No. 14, 1966, and No. 16, 1968. As to the legal positivism I have written a book and several papers in Japanese, by changing aspects to deal with the same subject, as indicated in the preceding papers mentioned above. At this time, the paper here is particularly concerned with legal thinking or attitude of this sort in Japan.

The View of Omnipotence of Law and the Positivism of Law

I have given above a very brief outline of the topic, by standing on the presupposition that the legal positivism is almost synonymous with the view of omnipotence of law, or the "hard boiled" legal positivism. It is really an outline simple and yet trivial, only if remembering the fact that the period of Japan under Occupation, on the observation of which I gave a special emphasis, is merely a part of approximately twenty three years of postwar Japan. But, when we regard the period above to have given birth to the socalled "Peace

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Treaty" system[1] (coming from the Treaty of the same name between Japan and the U.S.) which in turn is giving us decisively important effects, we see that it is still relevant in such a sense.

By the way, our presupposition is beyond any question, that the view of omnipontence of law indeed is a most proper expression of the legal positivism? Rather, it is open to question, because, while it was my task to clarify what a legal positivism is, I have merely traced a trend of the outlook arguing that laws, as far as based on the political authority, are nothing but commands of sovereign, and that decision deduced from such laws is satisfactory as well as conclusion deduced from the syllogistical reasoning, to sum up, the outlook to leave the matter to the socalled "Begriffshimmel" (Jhering) under the name of logic. So far, it is only one-sided, and it does not seem to make any clarification of the "positivism". Even if we may admit this outlook be synonymous with the positive law oriented outlook, we still doubt its relation to the legal "*positivism*".

Actually, quite a few ordinary citizen in Japan, excepting specialists in this field, does not regard the view of omnipotence of laws in connection with the word, legal positivism. At most, they may perhaps find "positivism" of law in that word. Seen in this light, an implication of the legal positivism, more or less, differs from the context said above. Furthermore, it must be also observed that the word legal positivism in English or Rechtspositivismus in German sometimes has been implicated and cited in connection with the "positivistic" approach to law. That is why the controversy on this word has been so much complicated and troublesome.

Then, what is a "*positivism*" of law? First of all, there seems to be at least a frame of ideas of "positivistic" method to deal with the law. What is this positivistic method? It is, so to speak, the method which is to propose a hypothesis on the law in action, to verify it through the experimental process, in order to meet social needs with scientific exactitude, thus a method based on to a considerable degree empirical or pragmatic attitude. As it well known, the "positivism" in this context was getting dominant in Europe since 19th century, by making a sharp contrast with the decline of huge systems of meta-

1) As to the problem concerning to the period of the Peace Treay system, I shall only refer to a work, such as: Yōzō Watanabe, Constitution and contemporary law (Kenpō to Gendai hōgaku), 1963, Iwanamishoten, p. 156 ff.

physical theories.[2] This characteristic change appeared even in our vocation often pointed out as "conservative" or "Brotwissenschaft", that is, in the field of law and legal thinking. Late Professor Eugen Ehrlich may serve as an good illustration for this. He criticized the traditional ideas of law and judicial process in the continental Europe in the modern period as decisively spoiled by the view of omnipotence of laws. According to this criticism, he pointed out, the law is not reduced to legal rules (Rechtssätze) monopolized by the political power, but to be found in living law, that is, inner order of given social groups which is originally based on the relevant legal facts, and since such a living law serves as a standard of conduct for ordinary citizen as well as for lawyer as a standard of judicial judgment, we need to examine and analyze how deeply the morphology of the law is conditioned and modified by such a social reality. Here, he emphasized the task of sociology of law as a future oriented theoretical science of law.[3] Seen in this light, it may well be said that he was an excellent scholar of law in the full spirit of "positivism". To look at the positivism under the footlight of reality said above, so many ideas different in their contents, such as those of M. Weber, Marxism, Sociological or Realistic Jurisprudence in the U.S. (originating from O. W. Holmes, Jr.), may be similar in appearance, so far as such a positivistic approach is concerned. Japan was no exception to this positivism. Let us recall to our mind late Professor Izutaro Suehiro's idea, who pointed out and overcame keenly the falsehood of the view of omnipotence of law, in order to make a science of law based on a modern mind prevail. He may also well be said as distinguished in the positivistic mind. The more it is true, the more it must be questioned how the positivism of law is related to the view of omnipotence of law. Merely for convenience, both of them have been identified in the incidentally common name of the legal positivism, while in fact diametrically opposed each other? Let me cite a situation concerning the study of history as an illustration, to which a criticism of "positivistic" study of history has become a great issue.

2) As it well known, A. Comte was a founder of the positivism in this sense. As to the change of how to understand a meaning of the socalled "positivism" since Comte, see W.M. Simon, European positivism in the nineteenth century, 1963, and H.S. Hughes, Consciousness and society, 1958.

3) E. Ehrlich, Grundlegung der Soziologie des Rechts, 1913, S. 19 ff.

Positivistic Study of History and Its Two Dimensions

In regard to the method of historical study, too, there seems to be greatly complexed implications of "positivism". Its core, however, must be found in the trend of idea which rejects to proceed from facts-analysis to theoretical construction, that is, which sees the task of historian in a pure confirmation of facts.[4] Though "positivists" condemn others for their intentional work to analyze and interprete given facts in terms of their own personal preferences and yet to justify it under the excuse of theoretical construction, they content themselves, too, with partial examination of historical data as well as one does not see a wood for a tree. Isn't it the case with the view of omnipotence of law which contents itself to play in "the heaven of conception" (Begriffshimmel)? Furthermore, such historians, although being intended intersubjectively to deal with historical data, actually interprete them in a dogmatic, therefore subjective manner, and yet they rationalyze themselves in the name of objective interpretation. Thus, the historical positivism is quite similar to the view of omnipotence of law in regard to their common rationalyzing function. This being so, we see that the historical positivism is reasonably criticized as well as the view of omnipotence of law in the field of law. It does not allow, however, that the task of theoretical or historical construction can be accomplished without any careful analysis of concrete historical data. Rather, one needs, at least, to analyze and clarify historical facts in their cause-effect relations according to the logic of "objective possibility" (M. Weber). The difference of this attitude to the "blind" positivism seems to lie, first of all, in the idea that its work can never be achieved without any presupposition, but in terms of certain clear problem-consciousness, consequently a history based on such a factsanalysis, too, becomes the history constructed by certain orientation.[5]

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4) Professor Sera's survey of a science of legal history is useful to understand the issue above. Terushirō Sera, Science of legal history (Hōshigaku), in: Series of contemporary law, vol. 15, p. 121 f.

5) What I have in mind here is, perhaps as you see, to refer to Max Weber's idea in connection with his category of judgment of objective possibility. See especially, Weber, Kritische Studien auf dem Gebiet der kulturwissenschaftlichen Logik, 1904, in: Wissenschaftslehre, 2 Aufl., herausg. von J. Winckelmann, 1951, S. 256 ff. Moreover, see Eiji Andō, M. Weber in connection with his idea of objective possibility (Weber ni okeru kyakkanteki kanōsei),

In doing it, for example, a legal historian may draw a dynamic feature of the law in the past history from his definite point of view by utilizing achievements of social economic history, political history, intellectual history, etc. If we regard the matter in this light, we see that the same is true in the positivism of law. Figuratively speaking, the historical positivism is almost equivalent to *the view of omnipotence of law* by comparison, while the view of selfconscious historical construction in the field of history to the *positivism* of law in the field of law.

By means of such a contrast, we may perhaps reach to the further understanding of both in the field of law. As mentioned above, it is misleading and erroneous to look on the process of judicial judgment as solely a process of syllogistic operation, because the argument of this sort cannot avoid the result of alienation from social reality in transition on the one hand, it can not avoid an impression of the alleged arguments somewhat cotradictory in itself on the other. As to the latter point, it will become much more apparent when we consider a formal logician of this sort who, being conscious of his alienation from reality, is still intended to obscure his dogmatic or bureaucratic interpretation, by taking shelter in a plausible excuse of the conceptual logical operation.[6]

It does not come from the fact said above that the minimal of conceptual and logical technique is not required in the process of judicial reasoning and judgment.[7] It is indeed required as well as the technique of judgment according to the logic of objective possibility in the standpoint of historical construction. Wasn't it the actual "reaction" of the socalled Free Law Movement or Teleological Jurisprudence to deny even such a minimal element? As to the

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in: Shisō, No. 467, p. 27 ff, May, 1963, and Sera, *op. cit.*, p. 145. As to the methodological connection between law and history, we shall also pay attention to the following notion of late Justice B.N. Cardozo, because he strssed "a selective process" in the historical study: "The historical method was the organon of judgment in each court, but its application led in each to opposite results. One court, in its interpretation of legal history, was satisfied to treat as finalities the precedents of ancient year books. The other found a stream of thought, a tendency, a movement forward to a goal. Which, then, is the truer use of the historical method? — We need a selective process if history is to be read as history, and not merely as a barren chronicle. — An appeal to origins will be futile, their significance perverted, unless tested and illumined by an appeal to ends." B.N. Cardozo, The growth of the law, 1924, in: Selected Writings of B.N. Cardozo, ed. by M.E. Hall, 1947, p. 232.

6) Ichirō Katō, Logic and weighing of interests in an interpretation of the law (Hōkai-shakugaku ni okeru ronri to rieki-kōryō), in: Series of contemporary of law, vol. 15, p. 52.

7) O.W. Holmes, The path of the law, Harvard Law Review, vol. X. No. 8, 1897, p. 460 f.

technique of logic, the time-honored syllogistic logic is no more the almighty, but new trends in the field of logic and philosophy are certainly to be referred.

On a rapid survey, we come to see a trend of the positive law oriented approach in the view of omnipotence of law on the one hand, a basic idea common to a civil liberty minded or sociological jurisprudence in the positivism of law on the other.[8] This being so, most of legal thinkings around us will be included to either one or another, both of which will be in turn included to that common (?) name of the legal positivism. We realize here that a word legal positivism has two sides. It has an advantage to show clearly a contemporary pattern of legal thinkings in a word, while it has a disadvantage to involve necessarily in itself repugnant elements. As to the repugnant elements, moreover, we must pay attention to their evaluation, too, that the former is tended to be judged wrong, while the latter right, accordingly, a word legal positivism might again split up into two groups. Did we reach to the situation like a dog chasing its tail?

Conclusion

For a convenience, we may well to call both together a legal positivism in general. To give a special emphasis on its "prospective" understanding, however, the matter must be treated from the deliberately examined point of view. I shall tentatively call the former, that is, the view of omnipotence of law the legal positivism in a narrower sense, the latter, that is, the positivism of law a "*critical*" empiricism of law, in order to avoid a misunderstanding. A critical empiricism of law, here I called, will be qualified to examine and criticyze the legal positivism in a narrower sense, then to develop a positivism of law to meet the needs of the community underlying it.[9]

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8) Cf. Edg. Bodenheimer, Jurisprudence, 1962, p. 93.

9) The positivism of law, as far as I outlined above, seems to have a good enough signifinance even now in regard to its approach of hypothesis — observation — verification. The word "positivism", however, has had a certain limit in itself since 19th century, tended to be mechanistic or naturalistic partly because of its antimetaphysical attitude. Due to this tendency, the word often has been thought of as an attitude to deny such a great postulate, which, coming from the thought of the enlightenment, tries to resolve problems through human reason as possible as one can. This being so, I have tentatively mentioned to the "*critical*" empiricism of law in the text, in order to avoid such a negative misunderstanding to be involved when citing the word "positivism" on the one hand, and to reconsider positively even my point of view

on the other. As to the detail of the critical empiricism of law, see Yasaki, Legal positivism, publ. in Japanese, Nihonhyōronsha, 1963, p. 240 ff. and Legal positivism reconsidered, in: Osaka University Law Review (English version), 1963, No. 11, p. 27 f.