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SOME COMMENT ON LEGAL POSITIVISM AND LEGALISM

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“Not To see A Wood For A Tree”

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“Not To See A Wood For A Tree”

We have had quite a lot of allegories in Japan which are expressed by “as if” phrases. For instance, a phrase: it is so and so “as if not to see a wood for a tree”¹⁾ means that we should not forget to grasp the matter as a whole (a wood), by merely satisfying to gaze at its parts (a tree). This may be applicable to the problems we now are faced with, that is, those of legal thinking at present. As we know, so many trends of legal thinking that can not be numbered: natural law and legal positivism, pragmatic and marxist theory of law, etc., have been developed in the contemporary world of law, in competing with each other. Moreover, quite a few of them are making an effort to set logically their own working fields in order and to define borderline with one another. In this respect, it is perhaps undeniable that *partial* analysis and logical arrangement of such *parts* are a primary concern for each legal thinking at present.

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Whatever this first impression of the present situation seems true, however, it must go to excess to assume that there were no *common* link or ground connecting each different parts. Doesn't such an assumption actually bring on untoward consequences that "not to see a wood for a tree"? In this connection, the West or the Western world in modern period seems to furnish a key to the better understanding of the common link.

To take a familiar example, natural law thinking may well be to serve as an illustration. It is obvious that natural law coming from Greek philosophy have had a long history as though having lived *sub specie aeternitatis*. However, only after the coming of the modern West based on civil society and its modern division of labor, situation around natural law too has been changed. As natural law thinking has been confronted with such a new situation, it can not escape from adapting it and modifying itself, because it comes to be the very nature of natural law thinking, let alone legal thinking in general at that time, that it more or less deals with problems raised by positive law, namely, the law enacted by civil state power or by its agent (i.e. judicial courts). Here, we can find a change of meaning, accordingly, a renewed characteristic of natural law thinking in the modern period. That is why the West from modern to present is particularly relevant to its understanding. But this is not an isolated and unique example. The relevance of the West to legal thinking is the same with legal positivism, pragmatic and marxist theory of law as products of modern way of thinking.

Seen in this light, it appears that each different legal thinking characterized by the partial analysis at present have come from the common link of the modern West. Why then has it been so only in the world of the West, not of the East or Orient so and so? Does actually the modern West have maintained enough tradition worthwhile to be the common link? If so, what is a main character of such a tradition? In what manner each legal thinking is faced with such a tradition? If it may be diagnosed that each of them differentiated and extraordinarily interested in the partiality is seized with a sickness, what is a real way to cure them in connection with the tradition? The more not only to see a tree, but a wood as a whole, the more it is necessary for us to approach the problems of this sort. The problems of this sort is certainly the problems to be analyzed only by taking up a stand on wider scope, in other words, on macrocosmic view — the problems such as those named by K. Popper "Wholism".²⁾ It becomes, however, the urgent necessity, so far as we are intended not only to deal with legal thinking as such, but to grasp it in connection with social system and popular behaving way chiefly underlying it on the one hand.

On the other hand, this does not imply that what is most important here is merely to see a wood as a whole. Rather, a grove, a tree, branches and leaves to some extent are worthwhile to see as well as a wood. Otherwise, we might go further to the other extreme, as it were, which in turn may well be phrased: as if "not to see a tree for a wood" (not to see a part for the matter as a whole). For at present, when several trends of legal thinking have been developed by providing serious problems in detail concerning to the contemporary legal problems, to clarify each of them in regard to their particular meaning and role too must be highly considered.

One way to see a wood, without excluding a tree may well be called the way to approach macrocosmic field (below, I shall cite it as a macrocosmic approach), the other way to see a tree, without excluding a wood the way to approach microcosmic field (below, microcosmic approach). Taking account of the common sense saying that a wood, a grove and a tree such and such are in the chain of inseparable circulation of growth and decay, it is obvious that both approaches, macrocosmic and microcosmic too are really indispensable for our enterprise to do. To consider both approaches in detail, however, there happen not a few difficulties about, for instance, from what kind of point of view and in what manner we shall perform our enterprise, and to what kind of points we shall give a special attention.

It may be useful for the better understanding of the matter, to refer the Chinese character used to designate it. For instance, a word Ki or 木 designating *a tree* being a keyword in Chinese character, a word Mori or 森 designating *a wood* is composed of three Ki or trees, and a word Hayashi or 林 designating a grove also, of two Ki or trees.

By the way, I would like to refer two recent achievements in respect of the problem mentioned above. One is Professor J. Shklar's *Legalism*,³⁾ the other Professor S. I. Shuman's *Legal Positivism*.⁴⁾ Giving a special emphasis on the modern West, the former points out so-called legalism as a basis providing common link between each different ways of thinking dominant in the West, then it analyzes role and limits of legalism within a framework of socio-political system there. It is indeed vital in its insistence and macrocosmic approach in its scope which reminds us late professor F. Neumann's work.⁵⁾ On the contrary, the latter makes an effort to reconsider legal positivism by distinguishing legal positivism properly so-called from analytical jurisprudence, especially developed in England. This is a well arranged and microcosmic approach. Referring to these two achievements, I shall add some comment on difficulties being raised by both extremes of approaches, macrocosmic and microcosmic.

Legalism must be first considered.

Legalism as a Social Ethos

From the outset Shklar deals with the theme itself as I wrote "vital" in its content. "What is legalism? It is the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules". She deems legalism a type of morality. Though it seems vague what a word moral and ethical imply, we shall presume here that "moral" and "ethical" are used in the same connotation. Aside from it, legalism "is also a very common social ethos, though by no means the only one, in Western countries — Its most nearly complete expression is in the great legal systems of the European world. Lastly, it has also served as the political ideology of those who cherish these systems of law and, above all, those who are directly involved in their maintenance — the legal profession, both bench and bar. The court of law and the trial according to law are the social paradigms, the perfection, the very epitome, of legalistic morality".⁶⁾ It may well be observed above that legalism is described in a so wider scope that we tend to think the description lacking a clarity. As to words "a very common social ethos" too, which is supposed to be a kind of keywords in her attempt, there is no satisfying definition to which I shall refer soon later. However, it is not difficult to find legalism in a concept of that morality as rule or rule following morality. From such a core, legalism is furthermore extended to penumbra fields, for instance, to the Western legal system and the political ideology of Western lawyers and legal scholars as its model.

Moreover, what she is to be saying about legalism becomes clearer by noticing to her remarks that when legalism "becomes self-conscious, when it challenges other views, it is a full-blown ideology".⁷⁾ This is relevant to confirm her intention. For, whenever she says legalism being merely a type of morality, or an ideology, it is naturally held that it is nothing but *a* morality or *an* ideology within a lot of moralities or ideologies. The same is the case with our common sense. Despite of the plain fact, however, there are not a few legal scholars as well as philosophers who hold legalism and the law as its expression being prior to other moralities or politics etc. and those who, resting on such an idea, often lead to the sophisticated effort to distinguish the law from non-law, accordingly to construct a formally defined, self-consistent system of law. I think, she finds here the main merits and defects of legalism arising from this effort.

To substitute an expression much more familiar to us for what she has pointed out about legalism, it is, more or less, equivalent to the achievement of analytical jurisprudence and legal positivism. She plainly speaks of the latter as a problem deeply rooted in legalism. But it is more deserve attention that she refers not only to legal positivism, but natural law in regard to it. What then is a relation between both of them and legalism? Here is a next problem to be examined.

Legalism, Legal Positivism and Natural Law

The reason why legal positivism and natural law are related with one another within a common link of legalism, comes from the fact that both of them are based on "rule" conception. According to the common sense of law, however, this is rather unusual, for it is taken for granted that each of them are diametrically opposed. For instance, concerning on law and morals, it has been very often understood that natural law lawyers advocate for the proposition that law and morals come into contact with each other, while legal positivists reject that proposition.⁸⁾ But, if we might imagine furthermore natural law lawyers usually daring to mix up law and morals, it is naturally odd and mistaken. Even natural law lawyers, let alone legal positivists, allow for that there must be some system to distinguish between law and morals, and that morality too is a matter of rule.⁹⁾ As to their allowance, natural law and positivistic lawyers are on the same ground. That is why Shklar sees both of them in their intimate relation. Turning again to legalism, it is also based on the rule conception, whether moral or legal or political. For such a reason, Shklar comes to the idea of legalism as the common link to connect legal positivism and natural law. If we substitute a word "rule theory" or "normativism" for the word legalism, I am principally for the idea which Shklar here has set forth — Once I have treated this aspect of the problem in my work,¹⁰⁾ and I shall refer to it soon later —

This being so, Shklar, on the other hand, does not deny any deeply rooted difference between them arising, when considering their insistence in detail. First, legal positivists tend to think of law as a discrete entity that is "there" and to distinguish it from the other rules like those of moral rule etc, by taking a distinction between "is" and "ought" into consideration. Such a tendency makes their interests concentrate in a formal definition of what is law. She cites analytical jurisprudence, formalism in law, H. Kelsen, W. N. Hohfeld and the other as their representatives. Second, she cites also many groups of natural law thinkers, for example, ontologist, essentialist and

deontologist. But what is most interesting for her characterization of natural law thinking is that she regards it as a thinking placing a special emphasis on agreement or unity, since, in order to insist upon natural law universally valid in a circle of citizen, there must be unified agreement of citizen upon it. For instance, that she points out American realist group being a kind of natural law lawyers modified is strange as it may sound. But it is not strange if we realize her idea coming from the understanding said above.¹¹⁾ Though she recognizes as a matter of fact such a difference between two types of thinking, she does not take it seriously, because the difference or quarrel between them is for her nothing but "a family quarrel among legalists".¹²⁾ It is indeed her way. In regard to her way, however, I shall refer still more to her own view on the legalism which I shall tentatively call "Shklarism".

What Is Shklarism?

Throughout her book, she repeatedly emphasizes a significance of attitudes to be expressed in such a form: do not ignore social diversity and do not miss out on tolerant mind. At a glance, these attitudes may well be summarized to a proposition: leave us alone, accordingly, these look of negative character. To put it precisely, however, there is another type of attitudes to be expressed in such a form: do respect minority groups, particularly, do give an opportunity for moral dissenters to express their opinion. Here we can find the attitudes being attended with somewhat positive character by which I am deeply impressed through her book. Both types of attitudes, being in their mutual relation, construct main characteristics of the book like a web woven together by warp and woof. This being so, however, it is incontrovertible that her attitudes as a whole are still modest and negative.

To remember late professor G. Radbruch as a scholar who pointed out an importance of virtue of tolerance, accordingly of value relativism, it comes to be obvious that Shklarism, partly, is tantamount to that relativism of Radbruch,¹³⁾ and as far as it asserts to protect minority groups for the manifestation of their own opinion or conviction, Shklarism, partly, looks like liberalism. Notwithstanding, I think, her idea is not exhausted to mere relativism or mere liberalism, but she rather suggests to some extent her plain value-orientation while remaining some kind of selfcontradiction.

First, its resemblance to liberalism is found in an attempt strongly to oppose to an idea like that of "unity" or the sole unified purpose — i.e. "national purpose". Let us consider a familiar phrase "freedom under law". It has been for a good long time

used as an ideology to distinguish the West from the Non-Western world. Surely, she accepts the fact as established. But if we further imagine that a political tradition of freedom under law has tied all of the West "into a neat pattern", it is for her nothing but an overstatement which is to be criticized as an nostalgia of liberalism, or as an attempt to ignore any diversity included in the Western history. Therefore, liberalism in Shklar's sense is a liberalism oriented to look to the future, that is, "barebones liberalism" which is conditioned by the attempt noticed above to avoid most difficulties of liberalism merely looking to the past.¹⁴⁾ Then, how about the legalism itself, seeing from such a point of view? Here too, we can find the same answer.

Shklar seems not thoroughly criticizes the legalism. She accepts it as a social ethos which has been established as such considerably adequate to the Western society and which has served to a modernization of legal thinking and the modern law itself.¹⁵⁾ In this respect, it may well be noticed that she refers M. Weber's scheme in his religion-sociology as a typical model of the legalism. Weber, as we know, found the cultural characteristic underlying the Western society in a scheme of rationality — exactly speaking of *formal* rationality, while Shklar does not mention to it — It is the rationality which has developed and in turn has been developed in the Western history as a tendency to find, to construct and to follow "rule". Roman law, professional lawyer, judicial court, capitalist economics, rational social ethics, and puritainism in religion have presented the distinct feature of the West in "glaring" contrast to the patrimonial and kadi justice of China and Islam and the inner-worldly ethic of the Orient.¹⁶⁾ That such a characteristic of the rationality is similar to the legalism in respect of rule following tendency is so plain that we need not again refer to Shklar's saying.

The same is the case with the word "social ethos" mentioned above. While she does not give any sufficient definition of this word in regard to the legalism, it may be useful to cite again M. Weber's scheme to fill in ellipsis in her explanation. According to Weber, there have been special basic mental atmospheres in history which provoke each economic actions to get their orientation peculiar for each particular social classes or social groups. The basic mental atmosphere was thus called by Weber a "social ethos".¹⁷⁾ For instance, by means of analysis of "die aufstrebenden Schichten des gewerblichen Mittelstandes" in modern period Weber showed us that the class contributed to the development of modern capitalism by believing in puritan ethic which was again adequate to the capitalistic development. Such a puritan ethic, being a basic mental atmosphere of this particular social group as social ethos, presents actually a spirit of capitalism.¹⁸⁾

As a matter of course, it must be presupposed that this mental atmosphere originally is based on socio-economic conditions of each periods. But, once formed, it conversely reactions to renew these conditions one of which is the modern capitalism. Here is a reciprocal relation between them for their mutual development. Seen in this light, the social ethos, as pointed out by professor H. Otsuka,¹⁹⁾ can neither be said only as a thought, or conversely, only as a social condition or social institution. Rather, being located in the middle of them, it plays, as it were, a role as a medium of their circulation. To take account of the social ethos having such a meaning and a role said above, it is very natural to see that Shklar calls the legalism a social ethos by speaking of it in the widest sense, for her approach to the legalism as a social ethos in the modern Western society is mainly the same to M. Weber's.

However, she hesitates to define furthermore the legalism as the sole characteristic of the West. For her it is a *grand* ideological attempt to do so. Therefore, to say that what characterizes the Western history is *not a* tradition, but a social *diversity* is a natural consequence for her way of reasoning. If so, what she seems to be emphasizing on is to accept that the legalism is the social ethos as considerably dominant in the West, as well as to respect minority groups, especially moral dissenters for the manifestation of their own opinion or conviction. If here is a core of Shklarism as above summarized, I am also chiefly for the idea of Shklarism.

There is another aspect of the problem to pay attention, in regard to the Non-Western world. For instance, there developed also various kind of ethics or moral outlooks of the world giving a special emphasis on rule following attitude in the Far East.²⁰⁾ What kind of difference are there between them and the legalism as the social ethos in the West is, I think, the other task to be performed by Shklar.

Then, what do Shklar think of legal thinking at present from such a view point of the West and by means of the basic understanding of the legalism must be brought in question.

Social Diversity and a Problem of Value-Orientation

As she understands both legal thinking, that is, natural law and legal positivism located within a framework of the legalism, it may natural for her to see the merits or defects of both legal thinkings together being reduced to those of the legalism. To outline her idea, legal positivism has began and ended with a definition of the law in a

formalistic way. It may well be said that it intellectually appeals us, as long as it seeks to get an impersonal judgement, that is, an objectivity in regard to judicial process. It does not, however, appeal to that people who can not escape to choose, or to make a preference for himself or for the other under straitned circumstances. In place of legal positivism, there appears natural law thinking by presenting itself firm standard for value judgement in practice the former fails to show. Thus, it lays a special emphasis on a necessity or viewpoint of unity and agreement on rules. While here is advantage for practical decision, but a significance of so-called unity according to (national!) purpose may so much emphasized that we are afraid if social diversity might be lost.²¹⁾ When we regard the matter in this light, a way of this discussion about two contemporary legal thinkings she has shown seems to go round and round like a dog chasing its tail. A dog chasing its tail reminds us, in other words, a moral attitude to speak of every problems in an extremely modest way without deciding what is the best way to answer. It is a relativism in a negative or modest sense.

Then, is this the last answer of Shklarism to the contemporary problems? I don't think so. But, to explain the reason, I must speak of the fundamental underlying her way of thinking which at a glance looks like self-contradictory.

Shklar, in the former half part of her book, has certainly clarified her idea about what is her contribution to the problem of ideology. Her contribution actually comes again from the attitudes mentioned above: do respect minority groups, particularly, do give an opportunity for moral dissenters to express their opinion. I have called it above a relativism in a negative sense. But, to consider once more the same matter from its another side, that is, from its hidden meaning, her own belief or value-orientation though still looking negative, seems to appear, so far as Shklarism implies that it is *worthwhile* and *valuable* to maintain a social diversity or to retain an opportunity for moral dissenters to express their own conviction etc. This is not a mere value relativism, but, we may say, a value absolutism in a negative sense, even though it may sound so strange that it reminds us *contradictio in adjectio*. It is the belief which is found in her former half part of the book. How about the latter half part? Here is a real problem to be explained more.

In this part, she deals with a problem of a political trial, especially trial of war-crimes as a test case for examining the legalism. Within two cases of the Nuremburg and Tokyo Trial, she appreciates significance of the former for its prosecution of war crimes against humanity.²²⁾ But, doesn't the crimes against humanity itself presuppose a value: humanity? To consider that it is valuable for that trial to have prosecuted

the crimes against humanity may lead to the consequences to accept a value: humanity too and to maintain an ideological insistence in this sense, attended naturally by some political considerations. If so, real orientation underlying Shklarism in this part seems to come further to value-absolutism in an original or positive sense far beyond that negative sense — It must be noticed that Radbruch made a great contribution as to this issue²³⁾ —

On the contrary, in the former part, where she is afraid so much that to accept universally valid end and unified value leads to rejection of a social diversity, she brings serious demands of value clarification made by M. S. McDougal, or F. Cohen into question and hesitates to accept it for the reason above. This attitude means nothing but a value-relativism, or at most, a value-absolutism in a negative sense. Isn't there logically any difference between to emphasize on a meaning of a social diversity and to speak of humanity being a firm standard to prefer X to Y within a framework of a social diversity, while there seems *prima facie* to be a similarity between them? In this respect, I feel, there appears a weakness of Shklarism arising when it proceeds from the first to second part.

It is, however, much more natural to think that the weakness is not due to Shklarism itself, but to a dilemma contemporary legal thinking has been faced with. Therefore, Shklarism, despite of such a weakness, still stands out with great effect to emphasize thoroughly a significance of a social diversity and to develop her idea under liberal mind. She does so because, partly, she is an outsider to the field of law as did S. I. Benn and R. S. Peters in their steady and honest cooperative work.²⁴⁾

To consider the matter again from an insider's view point, however, it is incontrovertible that a trend of her analysis is on the whole of character of macro-analysis, so that it does not necessary persuade us in several points in detail. For instance, it is a well reasoned argument that she points out "to stop classifying law and morals as blocks and to treat them instead as a continuum". Looking up law and morals as means of social control, there may be no objections to it and no sharp discrepancy between them as to their enforcement or sanction. This being so, we can not ignore even today a significance of modern state and its power (or judicial power as its part) still functioning as minimum means of guarantee for the modern law and for citizen's liberty through it — Two great scholars, E. Ehrlich and M. Weber are better to be referred here, for, while the former, opposing to the conceptual jurisprudence at that time, looked to actuality, especially inner order (living law) of social groups to be valid indifferent to state power and state law, the latter, in giving allowance for this fact, still emphasized signi-

ficance of modern state and the modern law enacted by this state power in regard to the formal rationality said above²⁵⁾ — In this connection, it seems still now necessary for us to take account of a meaning of the separation of law and morals. This may be really a trivial or subordinate concern as if not to see a wood for a tree. But, whatever the matter looks trivial and subordinate, only a tree, its branches and leaves as the subordinate make it possible for a wood as such to grow up and to grow thick. With all this in mind it becomes apparent that the micro-approach as well as the macro are indispensable for our problems. Now we shall switch the subjects from the first to the second to be treated by the micro-approach as I have proposed at first.

Possibility of Distinction between Analytical Jurisprudence and Legal Positivism

What Shuman deems relevant is to distinguish analytical jurisprudence from legal positivism. Then, in what way is he doing so? To put it shortly, analytical jurisprudence is for him "a way of doing jurisprudence", while legal positivism is "a theory about the nature of law", resting on some definite viewpoint of ethics. If this is only a whole content of his argument, it looks very simple. Shuman, however, does not propose the distinction in an aprioristic way, but in an empirical way. By adopting an empirical method of test according to preestablished criteria, he tries to describe what is analytical jurisprudence and what is legal positivism. In doing so, several criteria may be used. At first (test A), a legal positivist is, according to Shuman, one who, I (a), maintains that law and morals are separate, and I (b), maintains that law is a command. To use these criteria, J. Austin would be a legal positivist, but H. Kelsen would not be "since he rejects I (b)." It is much more unreasonable for Shuman that that even St. Augustine might be classified as a legal positivist as far as he once recognized the criterion I (a). Then the second test B is adopted for A. In this case a legal positivist is one who, II (a), maintains that law and morals are separate, and II (b), maintains a certain view as to the nature of morals. At this time Kelsen becomes a legal positivist, for he is rested on noncognitivism as to II (b) which may also be called a relativism to some extent. Instead, however, Austin is not a legal positivist on the basis of II (b).²⁶⁾ After repeating the same kind of test in regard to analytical jurisprudence too, he makes a judgment about Austin as an analytical jurist and Kelsen as a legal positivist. Whenever he uses a word analytical jurisprudence, it means "a method of doing jurisprudence wherein there is concern with the meanings or usages

of the terms indigenous to law and their relations with one another and to the rest of language'. On the contrary, to state what is law is a task of legal positivism. This belief in the distinction, being repeatedly emphasized by him, becomes a basic view point to be seen throughout his book as a whole.²⁷⁾

Then it must be questioned how we can distinguish them. For, even if we might presuppose the distinction appropriate, it does not necessary persuade us about the reason why Austin is not a legal positivist. Whereas the test A identifies Austin to be a legal positivist, why should the test B have been adopted? It seems for the reason, that Kelsen would not be so according to the test A. If so, whatever such a way of his examination through tests may be empirical, it still appears so much artificial that it is compelled to switch tests from A to B, by the overwhelming force of the conclusion which actually is drawn at the beginning in his mind. Apart from a question of the artificiality, there remain further questions. Again, looking to the test B, Austin can not be said as a legal positivist, because he does not fulfil the criterion II (b). But, is it really so? It is well observed that Austin, under the influence of J. Bentham, developed his idea as a utilitarian — the fact that Shuman too clearly has recognized. Seen in this light, Austin also seems to be a man who had a definite (i.e. utilitarian) view as to a nature of morals which naturally is not of a systematic character as well as Kelsen's ethical non-cognitivism. In addition, Austin too made the distinction from such a point of view and developed the theory of nature of law characterized by such a distinction in his own way. If so, it is not yet clear why Austin is not a legal positivist.

It is obvious, however, on the basis of Shuman's criticism to W. Friedman that he has a firm confidence in his argument. While Friedman, in his "Legal Theory", has spoken of "Austin's positivist system", Shuman attacks on it as misleading "since neither Austin's *system* nor Austin's philosophic outlook was positivistic".²⁸⁾ To state a reason of his criticism, he cites an Austin's essay in which Austin urged for his students to receive instruction in both the law as it is and the law as it ought to be. According to this citation both of them or law and morals are to be treated as if they are in a form of coexistence, not of the distinction. He may believe, that is why Austin is not a legal positivist. Can we really accept his argument as it were meant?

Austin in his essay urged to treat the law as positive law regardless on good or wrong. In this context his idea is the same as the well known "Lectures of Jurisprudence" and it impresses us again to confirm an importance of the separation of law and morals. He called such a way of approach "General Jurisprudence". Besides this, however, he spoke of significance of "Science of Legislation" a task of which is

to deal with the law as it ought to be, as well as the law as it is.²⁹⁾ What the essay is going to say, Shuman understands by laying a special emphasis on the latter (Science of Legislation). It seems indeed to lead him the conclusion that Austin's system is not positivistic. All the same it is still sure that Austin, by emphasizing significance of the positive law, aimed at to separate the law from the other social phenomena. When we regard the matter in this light, Shuman's attempt to separate analytical jurisprudence from legal positivism does not deceive us that it still shows a lack of persuasiveness.

Necessity of the Distinction

Second, it must be questioned of necessity of the distinction. According to Shuman, the distinction is very urgent on the ground that to identify both of them has led to the result attached by unnecessary or unexpected misunderstanding and criticism. What then is a case caused by such an unexpected identification? It is shown by "the belief that analytical jurisprudence caused legal positivism which caused or facilitated totalitarianism, and since totalitarianism is bad legal positivism must be bad and likewise its cause, analytical jurisprudence".³⁰⁾ This may be an extreme case and belief, but, I think, there is a proper reason when he emphasizes the necessity. Because he concerns with a political consequence of both legal thinkings which come to be accused for the conspiracy when they were identified. By the way, here appears a dimension where analytical jurisprudence and legal positivism really get a contact with actuality of so-called mass society, that is, day by day of citizen and lawyer's responsibility there. What then has Shuman found such a consequence under this dimension? To summarize a way of his argument, it is as follows:

What analytical jurisprudence deems relevant is the famous belief in sovereign power being under no legal restraint. Regarding it in the context of Nazi social system, we can not deny a possibility that it influenced the Nazi-Leader-State idea. It does not imply, however, that there was decisive influence. For there was another type of an idea dominant at that time that a community binded by blood and earth as a whole is developed under the leadership of Nazi leader (elite).³¹⁾ Such is also the case with legal positivism. For example, let us imagine a people accepting legal positivism as a true theory of nature of law who are morally lazy or weak, or even morally pluralistic.³²⁾ In addition, legal positivism too, in dealing with the law regardless of morality or moral judgment, exactly fits the people's attitude. On the basis of the popular and lawyer's indifference to the moral matter, totalitarian politics may power-

fully control legal process or judicial process. Such a chance may exist in a considerable degree. Seen in this light we can assume that legal positivism and totalitarianism are in a relation of cause and effect with one another. But it is again not decisively so. What Shuman emphasizes on here is rather an attitude of the halfness (*Halbheit*)³³⁾ found in the judicial functionaries during the Nazi period. For instance, this is one of the reasons why german judges served under the Nazi regime. It does not imply that they did so because of their positivistic mind. Even though analytical jurisprudence and legal positivism have gotten a contact with Hitler's rising to and maintaining of power, both of them do not offer a sufficient and final reason for the success of Hitler and his totalitarianism at that time.

As to german judge at that time, however, it should be remembered that there were two types of judges different both in belief and action. As I dealt with this problem in my another paper, here, I shall cite only a phrase written by Radbruch in his last years: "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."³⁴⁾

This is an outline of Shuman's attempt to disprove the false charge brought against both of them. He has succeeded it, for he does not find any necessary and sufficient reason enough to prove a cause and effect relation between both and totalitarianism. If analytical jurisprudence and legal positivism had no *decisively* worse influence as Shuman has pointed out, however, why then is it necessary to distinguish both in order

to clarify which of them is to be charged with cooperation with the totalitarianism? It seems not so much necessary to distinguish both of them.

Besides, it is worth noticing that a word legal positivism is used by Shuman thoroughly in a delimited sense. He regards Kelsen as a representative of this legal thinking as cited above, and yet he speaks of Kelsen as if he is a sole representative. It is true that he is a typical legal positivist. His legal positivism, being refined, is a *critical* legal positivism, but legal positivism as a whole is not necessary exhausted to the critical legal positivism.³⁵⁾ So-called conceptual jurisprudence developed in the latter half of 19th century Germany was also a kind of legal positivism which remain to live even under the Nazi regime by modifying a little bit its characteristic. Accordingly, if we try to examine a relation between legal positivism and totalitarianism, it becomes indeed necessary to allow for such a kind of legal positivism, that is, that of conceptual jurisprudence, while Shuman himself gives no allowance for it. Why he does not so may come from the way of thinking commonly found in American and English who are accustomed to directly discuss and analyze problem before them in a way of case by case instead of giving an attention to its background or origin from historical point of view.³⁶⁾ Notwithstanding, I think, it is still necessary to consider at least factors like those of background so and so of legal positivism.

Utility of the Distinction

I have questioned above to distinguish both. But I am not intended naturally to identify them. It is incontrovertible today, particularly after the 2nd World War, that both are conditioned and given different characteristics by difference of each countries in regard to their own cultural traditions wherein both have grown up and by difference of the experiences which come from when both have been faced with terror of totalitarianism.³⁷⁾ Accordingly, what I have questioned is not about the distinction itself, but a way of distinction. Let us again consider a meaning of that essay given by Austin. Shuman assumed there that Austin emphasized the necessity for students to study *the law as it ought to be* as well as the law as it is. This is all I have cited above. Isn't it, however, very *natural* attitude for each scholars, not only for Austin, unless they might show an extremely sceptical attitude to morals, that is, moral nihilism? Such is also the case with scholars like Mr. Justice Holmes Jr. or J. C. Gray, whereas they have been often condemned as typical representatives of legal positivists who merely look to the law as it is.³⁸⁾ What is worth giving attention

here is their way of approach when they deal with, discuss and decide legal problems. At this time, they seem very businesslike in dealing with the problems so that they mainly take an attitude to distinguish the (positive) law from the other social phenomena. From a utilitarian standpoint it may well be said that they make such a distinction in order to avoid unreasonable treatment about legal problems resulting when identifying the law as it is and the law as it ought to be. Therefore, to distinguish at this time does not mean that they are indifferent to the non-legal phenomena, especially morals, but that most of them allow largely for a relevance of morals to the law as it is whenever being faced with an aspect of ordinary life or legislative process, as I pointed out in my another book.³⁹⁾ This is the same to Kelsen. Though he is famous in the assertion to maintain purity or neutrality of the law and jurisprudence, it is also worth noticing that his pure theory of law implicitly rests on a belief in individual freedom as recognized by Shklar too.⁴⁰⁾ If so, does not legal positivism come to share a belief in morality or value orientation with analytical jurisprudence, and yet in regard to some crucial matters?

On viewing broadly such a way of discussion, we find two possible ways to examine utility of the distinction of analytical jurisprudence and legal positivism. One is the way Shuman has shown. In comparing progressively both of them, it confines a word legal positivism to a narrower sense for it can find no common link between them. On the other hand there is another possible way, that is, a traditional which is ready to name both together legal positivism in a broader sense only if common link will be found between them. Here, I think first, it is natural to characterize both as legal positivism according to the traditional way. This being so, within a *broader* framework of legal positivism, I think second, it is still necessary to find whence comes difference between its *parts* (to put it tentatively, English styled part and German styled part) and what kind of meaning or function causes the difference. In this respect I am not always for the traditional way, rather I am intended to appreciate the way of stimulating discussion done by Shuman.

To understand both kinds of legal thinking under the common name: legal positivism as well to make a distinction between its parts within a framework of common ground may surely appear too much artificial and halfway. But there are two reasons enough pursuing. One is that I would like to avoid the *either-or* technique in dealing with problems. For, while the technique has a merit to cut a mixture in two halves, but it shows a defect tended to ignore the common ground in its haste of distinction. This is also exactly the same as natural law and legal positivism only if we recall our

mind that we tend to think of them in *either-or* form. The other is to avoid unnecessary controversy by setting up a common ground and following carefully a *translation* formula.

In regard to a translation formula, I shall cite here only an idea of late professor F. Cohen as an illustration:

“(1) Never assume that a philosophical doctrine is a true-or-false proposition. Its significance may lie in its function in organizing inquiry.

(2) Beware of assuming that any particular perspective is pre-eminent or that any philosophy is unavoidable or that any truth can be expressed in only one language.

(3) Never assume that two philosophers who use the same symbol mean the same thing, or that those who make apparently contradictory assertions really disagree. They may be talking different languages.

(4) In order to determine whether two philosophical doctrines are compatible, incompatible, or identical, look for a formula of translation by which propositions within one philosophical system may be correlated with equivalent propositions in the other.”⁴¹⁾

It must be added here, at the same time, to clarify what is a difference between them and to make it an object of examination or criticism. When we regard the matter in this light, can we find another aspect concerning analytical jurisprudence and legal positivism? As an illustration, I shall turn to Kelsen's article: “Pure Theory of Law and Analytical Jurisprudence” in which he analyzed a meaning of his theory in contrast to that of Austin.

Analytical jurisprudence was intended to analyze the positive law as its main subject. In this respect, Kelsen has no objection to this thesis, because he has also the same subject in his pure theory of law. Analytical jurisprudence, however, appears for him as such having made several mistakes. One of them is to see the law as rule, and yet to see rule as command of sovereign. On the contrary, Kelsen points out that the law is norm being in validity and it must be treated in an ought proposition. The other is the theory of sovereignty under no legal restraint. According to Kelsen, it began with Austin's account for the law as command. But, is it possible to imagine a sovereign who is under no legal restraint even by means of the positive law? It is impossible. To put it shortly, Kelsen criticizes, such a defect comes from the lack to state concept in Austinian system.⁴²⁾ Therefore, to put aside it is to afford a key for an advancement.

Conclusion

Now we come to know, on the basis of Kelsen's comparative analysis, two very characteristic views appearing in another aspect said above. One is a view to look upon the law as coming from sovereign will-decision (but, to put it broadly, *man* as an autonomous subject *made decision*). The other is a view still looking upon the law as norm or rule to distinguish it clearly from man made decision which is used to be taken de facto in a sense. While Austin went along the former way, Kelsen is going along the latter way. To sum up, it becomes apparent that there are a voluntaristic views of law, that is, a view of law as based on man made decision on the one hand, and normativistic view of law, that is, rule theory of law on the other. — Remember a difference between judge *made* law and judge *declared* law! — Shuman does not systematically refer to either man made decisionism or normativism. It may be not necessary, as long as we deal with legal thinking within a framework of A (for instance, Austinian) school of law and B school of law so and so. But to consider significance and role of contemporary legal thinking, especially legal positivism and analytical jurisprudence in connection with judicial process or social system today, it seems urgent to examine where such a contrast between decisionistic and normativist view comes from, let alone the difference of analytical jurisprudence and legal positivism for themselves. To take a familiar example, a view of law as based on man made decision is not unrelated with a realistic or fact study of law like sociology of law and sociological jurisprudence on the one hand. It is interesting to see here that Kelsen, by having American realist in his mind, takes account of relevance of sociology of law or sociological jurisprudence and urges for scholars to study it as well as normative jurisprudence, despite of the fact that at a glance he looks a legal positivist in a proper sense.⁴³⁾ On the other hand, that normativist view of law is basically connected with that legalism. In this sense, does not normativism become again a common link between natural law and legal positivism by offering rule following attitude (morality)? From this it will be seen that these two views are still useful to reexamine the subject: legal positivism and analytical jurisprudence, after due consideration of both, macro- and micro-approach, that is, to see both, *a wood* and *a tree*, as I mentioned at the beginning.⁴⁴⁾

- 1) "Ki o mite mori o minai yōni".
- 2) K. Popper, *The poverty of historicism*, 1957.
- 3) Judith Shklar, *Legalism*, Harvard University Press, 1964.
- 4) Samuel I. Shuman, *Legal positivism, its scope and limitations*, Wayne State University Press, 1963.
- 5) F. Neumann, *The change in the function of law in modern society*, in: *The democratic and the authoritarian state*, 1957, p. 22 ff.
- 6) Shklar, *op. cit.* p. 1 f.
- 7) *Ibid*, p. 10.
- 8) *Ibid*, p. 30.
- 9) *Ibid*, p. 56.
- 10) As to the subject, see my book and article. The book is "Legal positivism" written in Japanese, pub. by Nihonhyoronsha, 1963, esp. p. 184. The article is "Legal positivism reconsidered" which is written in English and concerned with the last part of "Legal positivism" above, *Osaka University Law Review*, No. 11, 1963, esp. p. 4.
- 11) Shklar, *op. cit.* pp. 92. 98.
- 12) *Ibid*, p. 106.
- 13) G. Radbruch, *Rechtsphilosophie*, 4 Aufl., eingel., von E. Wolf, 1950, S. 102 ff. As for the problem of meaning-change of Radbruch's view on relativism, see Yasaki, *Legal positivism*, p. 11 ff.
- 14) Shklar, *op. cit.* pp. 5. 22.
- 15) *Ibid*, pp. 84. 112.
- 16) *Ibid*, pp. 21 228. Moreover, see M. Weber, *Gesammelte Aufsätze zur Religionssoziologie*, Bd. 1, 1920, S. 1 ff.
- 17) Derselbe, a. a. O., SS. 12. 234 f. 238.
- 18) A. a. O., S. 49 ff.
- 19) Hisao Otsuka, *Social scientific approach to intellectual history*, in: *Series of intellectual history in modern period*, vol., 1, 1958, p. 35.
- 20) As to problem, see a brilliant analysis of M. Maruyama in his "Studies of history of political thought in Japan" (publ. by Tokyodaigakushuppankai, 1952).
- 21) Shklar, *op. cit.* pp. 38. 100.
- 22) *Ibid*, pp. 156. 165.
- 23) Radbruch, *Zur Diskussion über das Verbrechen gegen die Menschlichkeit*, in *Süddeutsche Juristenzeitung*, 1947, S. 131 ff.

- 24) S. I. Benn and R. S. Peters, *Social principles and the democratic state*, 1959.
- 25) E. Ehrlich, *Grundlegung der Soziologie des Rechts*, 1913, and M. Weber, *Rechtssoziologie*, eingel. von J. Winckelmann, 1960.
- 26) Shuman, *op. cit.* p. 14 f. As for Suman's book, see a review done by R. A. Falk, in: *Journal of Legal Education*, vol 16, No. 2, 1963.
- 27) Shuman, *op. cit.* pp. 7. 9. 12. 64 f. 121. 193. 200 f.
- 28) W. Friedman, *Legal theory*, 3rd ed., 1953, p. 151. Shuman, *op. cit.* p. 11.
- 29) J. Austin, *Lectures on Jurisprudence or the philosophy of positive law*, ed., by Campbell, vol. 2, 5th ed., 1885, pp. 1072. 1077 f.
- 30) Shuman, *op. cit.* p. 179.
- 31) *Ibid*, p. 180 ff.
- 32) *Ibid*, p. 189.
- 33) *Ibid*, p. 213.
- 34) Radbruch, *Des Reichsministeriums Ruhm und Ende*, *Süddeutsche Juristenzeitung*, 1948, S. 63 r. Translation is mine.
- 35) H. Kelsen, *General theory of law and state*, 1949, p. 438.
- 36) R. A. Falk and S. I. Shuman, *The Bellagio Conference on legal positivism*, *Journal of Legal Education*, vol 14, No. 2, 1961, p. 216 ff.
- 37) H. L. A. Hart, *Positivism and the separation of law and morals*, *Harvard Law Review*, vol. 71, 1958, p. 617.
- 38) O. W. Holmes Jr., *The path of the law*, *Harv. L. Review*, vol. X, No. 8, 1897, p. 459. J. C. Gray, *The nature and sources of the law*, 2nd ed., 1948, p. 309.
- 39) Yasaki, *Legal positivism*, p. 207 f.
- 40) Shklar, *op. cit.* p. 41.
- 41) F. Cohen, *Legal conscience*, 1960, p. 110.
- 42) Kelsen, *The pure theory of law and analytical jurisprudence*, in: *What is justice?* 1957, pp. 269. 272. 280 ff.
- 43) *Ibid*, p. 267 ff.
- 44) As to detailed analysis of the problem, see Yasaki, *Legal positivism*, p. 181 ff. *Ibid*, *Legal positivism reconsidered*, p. 18 ff.