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LAW AND SHAKAI-TSUNEN*
AS A LEGAL FORM
OF CONSENSUS IDEA

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I Prefatory Remarks

One of the old and new problems raised by law, State, and society in transition, is that of "shakai-tsūnen"¹⁾, in other words, "community standard", "present-day standard", "community sentiment", "conventional morality" and so on.²⁾ My aim of this paper is to make a brief survey on the usage of the shakai-tsūnen mainly in the judicial process, especially by paying attention to this in Japan, for the purpose of grasping incidental or necessary connection both, philosophy of law, that is, jurisprudence and sociology of law.

Shakai-tsūnen, or the standard of this sort, I think, still have a *considerable* weight in the judicial process, that is, a judicial interpretation and application of the law on the following reasons; First, the formal state law,

* This is a paper originally written for and read at X CONGRESO MUNDIAL ORDINARIO DE FILOSOFIA DEL DERECHO Y FILOSOFIA SOCIAL which was held at Mexico City in 1981. And, it is this paper that, later, I made a considerable change on that original manuscript — "Role and limits of "Shakai-tsūnen" in law and Society in Japan".

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1) I have written papers on this topic. Here, I shall cite them in a following order; a) M. Yasaki, Philosophy of law and sociology of law, Iwanamishoten, 1973. b) Yasaki, Shakai-tsūnen and the law, Hōritsujihō, No. 632, May, 1980.

2) As to an example of American cases, see Roth v. United States, Alberts v. State of California, 354 U.S. 476, 1957. Cf. also R. Dworkin, Lord Devlin and the enforcement of morals, 75 The Yale L. J., P. 986, 1966.

whether statutory law or judicial precedent, especially in regard to some words provided by them, has a fringe, or penumbra, though maintaining core of certainty.³⁾ *Shakai-tsūnen*, or the standard of this sort is vague by itself, and of flexible nature. Due to the nature, however, it is apt to be used in fringe case or penumbral case. Then, we may be confronted with a question of how to draw a borderline for such standard between proper use and abuse for the reason below.

Secondly, as it is vague by itself and yet appealing, this standard is tended to be used as a generally and impartially valid, maintained and observed standard in a given community, while *in fact* it may be a standard subjectively or even arbitrarily imaged, proposed and held by only a few members of that community. Then, there must be raised a question whether *shakai-tsūnen* is a standard as it is or a standard as it ought to be (which means subjectively or partially wished, desired, and so on). With these points in mind, I shall examine a few topics.

II *Shakai-tsūnen* in the Judicial Process

The term *shakai-tsūnen* has rather a long history of its usage in various fields of law in Japan.⁴⁾ Quite a few judicial decisions often have found their material justification in such standards, for instance, *shakai-kannen*, *gojin no hōritsu-kannen*, *hōritsu no seishin*, etc., in torts cases, criminal cases, or constitutional cases, and so on. And yet we may find delicate difference in such standards used in a variety of cases and fields of law. In a considerably older case of marriage, the Supreme Court (Taishin-in at that time, 1915, 4th year of Taisho), by repeating citation of *shakai-tsūnen*, permitted a reason in a claim of a "Naien" wife on her damage caused by one-sided dissolution of marriage, though the court finally rejected it by means of curious judicial logic.⁵⁾ On the other hand, the

3) The technical terms used in the text are, mainly, due to modern thinkers, such as like G. Williams, H. L. A. Hart.

4) 1) a) pp. 196f. 220f. 2) b) p. 15.

5) Judgement of Jan. 26, 1915, Taishin-in. A collection of civil Taishin-in cases, vol. 21, P. 53. The term "Naien" may be strange for readers. According to T. Kuki, it "is the relation between man and woman which is not legally admitted to be the lawful marriage on account of the failure of the registration which is laid down by the Family Registry Act. Generally speaking the spouses go through the process of the celebration of the marriage first, then the cohabitation. And most

Supreme Court, 1957, decided against the defendants' claim of nonguilty for their translation and publication of "Lady Chatterlay's Lover" by utilizing shakai-tsūnen as a material standard for punishment to be infringed.⁶⁾

Putting aside the other interesting cases, we are tentatively to classify at least three types of the usage of shakai-tsūnen in the judicial process.

1. Supplementary role

Shakai-tsūnen is given a role to make a supplement for an interpretation of a written legal provision which does not have a proper concepts for the relevant case, or does not cover the case, and so on, that is, for judicial treatment of the socalled open texture case or hard case.

2. Modifying role

Shakai-tsūnen, furthermore, is sometimes given a role materially to modify a written legal provision, leading to the socalled "judicial legislation".

3. Facts-ascertaining role

To speak principally, shakai-tsūnen has been used at the level of interpretation of law. But, it is hard to say that there was no case to use shakai-tsūnen as a role for facts-ascertainment.

The classification above probably indicates such standards being used in a very complicated way and often arbitrarily. Judicial decisions cite such standards, as if those were objective and evidental truth in a daily life, by

spouses make the registration after their cohabitation. Customary conception, however, is that man and woman become the formal couple by celebrating their marriage. Here lies the gap between our custom or general consciousness and the provision in the Act. The parties to Naien are disadvantaged in the code in comparison to the parties to the lawful marriage." T. Kuki, Naien: One problem in Japanese marriage law, 12 Osaka Univ. L. Rev., pp. 9f., 1964. The case cited in the text is of course related to this problem in Japan, though the situation around legal protection of Naien-wife has been getting better.

6) This case is concerned with an interpretation of Art. 175 of Criminal Code of Japan. It says: "A person who distributes or sells a pornographic writing, picture, or other object or who publicly displays the same, shall be punished with imprisonment at forced labor for not more than two years or a fine of not more than five hundred yen or a minor fine. The same applies to a person who possesses the same for the purpose of sale." T. L. Blakemore, The criminal law of Japan, 1950. This provision leaves judges a wider range of material judgement on what pornographic, obscene is. It is for this reason that shakai-tsūnen is used in this case, too, as a material standard for judgement. In the cases of this sort, shakai-tsūnen has been referred to as a stable generally valid standard. But, it is worth-noticing that shakai-tsūnen in a recent decision is used rather tolerantly to the matter, which was treated as pornographic before, for the reason of change in a popular consciousness to it. Cf. Realm of Passion case, Judgement of Oct. 19, 1979 Tokyo District Court. Hanrei-Times, No. 398, pp. 60ff.

saying "according to shakai-tsūnen", or "in terms of shakai-kannen" prevailing in the community. It leads sometimes not only to the "interstitial" but apparent judicial legislation. But what irritates us is their vague, or ambiguous usage in the judicial process. Should we then propose to give up such standards? No. As far as the formal state law, or the black-letter law is accompanied by open texture, we can't help to take into account that judge or official may utilize some other standards of similar nature, even though we might give up it. At the moment, it seems better for us to collect, clarify, and arrange to order a great deal of the decided cases on the ground of shakai-tsūnen, for avoiding possible judicial interference in private individuals' freedom and right through this convenient means. But, leaving its examination to a next opportunity, let me now turn to daily life.

III Shakai-tsūnen in a Daily Life

Shakai-tsūnen is not only spoken of in the narrower field of law, but in a daily life. This is very natural, since shakai-tsūnen originally means standard or idea which is supposed to be dominant or prevalent in a given community, thus "community standard".

Human beings in daily life are principally working together despite of the very fact of, so to speak, an apparently opposite relationship of ego to alter-ego. Each one is working mainly in terms of inter-subjective, though often conflicting, stream of thinking or consciousness which in turn, becomes a part of the social context.⁷⁾

Viewed in the short term, certain type of shakai-tsūnen as a loose form of shared values appears predominant in a given society. Viewed in the long term, however, it is getting clearer that each different value-ideas of society are so keenly competing with another for a win that one occupies a post and role of shakai-tsūnen only for a while. It is certain that shakai-tsūnen works and yet also certain that it works only in a limited sense said above. Shakai-tsūnen in this sense is considerably similar to the socalled "social

7) Intersubjective stream of thinking or consciousness is a sweeping expression. But, here I take into account a long series of consideration on this topic through thinkers, W. Dilthey, W. James, Ed. Husserl, M. Weber, A. Schütz, and others. Cf. 1) b) pp. 10ff. P.L. Berger & S. Pullberg, Reification and the sociological critique of consciousness, 35 new left review, PP. 60f, 1966, and K. Klare, Law-making as a praxis, 40 Telos, 123, Summer, 1979, also offer relevant materials for this topic.

consensus". As well as doctrines of social consensus differ with each other, shakai-tsūnen, that is, conventional morality, community sentiment has been also looked from different point of view.

For instance, J. Shklar once wrote as follows: The "notion, that there is a stable community sentiment and that the judge may and should rely upon it rather than upon his own conscience and intelligence, is politically most dubious. It leads right to that pseudo-democracy of agreement among Clapham bus riders which Justice Devlin proclaimed and which from the liberal point of view is thoroughly dangerous.⁸⁾" Recently, J. H. Ely puts it: "The notion that the genuine values of the people can most reliably be discerned by a nondemocratic elite is sometimes referred to in the literature as "the Führer principle," and indeed it was Adolf Hitler who said "My pride is that I know no statesman in the world who with greater right than I can say that he is the representative of his people." We know, however, that this is not an attitude limited to right-wing elites.⁹⁾"

On the other hand, the notion as criticized by Ely has been expressed by H. H. Wellington, though under various reservations: "The Court's task is to ascertain the weight of the principle in conventional morality and to convert the moral principle into a legal one by connecting it with the body of constitutional law".¹⁰⁾

The law finds its roots in such a daily life and functions both as a guide for citizen's conduct on the one hand and as a means of official for dispute settlement at the nonordinary level, etc. on the other. It is for this background that judge faced with fringe case, penumbral case sometimes tends to make a judgement by relying on that shakai-tsūnen. As we saw above, however, the standard is not evident itself, but flexible, changeable, and under usual variation. Strictly speaking, we are confronted with a problem of a distance of the term shakai-tsūnen from a reality signified by it, or of a signifier from a signified.

8) J. Shklar, Legalism, P. 102, 1964.

9) J. H. Ely, Democracy and distrust, P. 68, 1980.

10) H. H. Wellington, Common law rules and constitutional double standards, 83 Yale L. J., P. 284, 1973.

IV Term and Reality of *Shakai-tsūnen*

Judges, Officials, and individuals, too, mostly believes, heartily or lipdeeply, in the term as fitting the reality. But, to look at in detail, the term does not always signify a reality. A relation of the term to reality, of a signifier to a signified may be expressed in the following approaches:¹¹⁾

1. An approach to understand and define *shakai-tsūnen* in terms of the empirical facts clarified by means of sociology and psychology. It may be called a naturalistic approach to translate value-related concept into facts-related concept, or normative concept into less-normative natural concept.
2. Pseudo-naturalistic approach. Though adopting the first approach on a surface, it in reality differs from this, since it manipulates, consciously or unconsciously, to show relevant matters as treated according to the less-normative (objective) *shakai-tsūnen*, while it actually treat *shakai-tsūnen* from its normative (subjective) point of view.
3. Non-naturalistic approach. Permitting normative factors in *shakai-tsūnen* which, more or less, can not be reduced to empirical or natural facts, it still aims at objectively to grasp *shakai-tsūnen* through reflexion, intuition.
4. An approach to give up a way for an objective cognizance of *shakai-tsūnen* for the reason of normative or emotive factors involved in it. But, there remain perhaps two possibilities.

One is to make a distinction, if possible, between aspects in *shakai-tsūnen* which can not be cognitive due to that emotive factors dominant and those which come to be cognitive in effect of artificial discerning from that emotive — Noncognitivistic approach —, another is to see in *shakai-tsūnen* a kind of “fiction”.¹²⁾

To apply these approaches to the examples in the judicial process and a daily life mentioned above, we may perhaps find an interesting set of

11) M. Ossowska, *Social determinants of moral ideas*, PP. 12ff., 1970, is one of interesting examples for us to make such a tentative classification.

12) Cf. 1) a) P. 262.

combination. The first approach may be a main concern of Sociological jurists. By contrast, sceptical thinkers may adopt the latter of the fourth approach. If we look at daily life, from which shakai-tsūnen is supposed to arise, in a distance, critically, in a cold attitude, this standard may appear as one of typical examples symbolizing snobbery, ugliness and furthermore, falseness in the late capitalist society.¹³⁾

In this context, the latter of the fourth, that is, an approach seeing in shakai-tsūnen a kind of fiction may appeal us very strongly.

V Shakai-tsūnen in Law and Society

Even though we may admit this approach as persuasive, it must also be recalled in mind that shakai-tsūnen still has been mentioned and used in such a social context. In looking back the starting point of this essay from a perspective of the social context, it reminds us furthermore at least two aspects of the problems we are faced with.

The first is an aspect of actors in society and the state, for example, officials, judges, prosecutors, councils in law, and citizens or private individuals. Shakai-tsūnen is supposed to be predominant between them, as far as viewed in a short term. At the same time, as far as each of them are given a each different position, role, and personality, it is natural that they mention to and adopt shakai-tsūnen from their each own different, therefore, unique point of view, as said above. This tendency may be much more apparent and impressive in the case of "social consensus" in crisis, as seen

13) We may also find an interesting process in this social consciousness in relation to social action and social settings (including legal institution). For instance, Berger and Pullberg, 7), PP. 60f, paid their attention to four key terms, which in turn may serve for our understanding of the problems, that is, objectivation, objectification, alienation and reification: *"By objectivation we mean that process whereby human subjectivity embodies itself in products that are available to oneself and one's fellow men as elements of a common world.* This process, we must emphasize from the beginning, is anthropologically necessary..... *By objectification we mean the moment in the process of objectivation in which man establishes distance from his producing and its product, such that he can take cognizance of it and make of it an object of his consciousness.....* *By alienation we mean the process by which the unity of the producing and the product is broken.* The product now appears to the producer as an alien facticity and power standing in itself and over against him, no longer recognizable as a product..... *By reification we mean the moment in the process of alienation in which the characteristic of thinghood becomes the standard of objective reality.* That is, nothing can be conceived of as real that does not have the character of a thing. This can also be put in different words: *reification is objectification in an alienated mode.....*"

during the period about ten years after 1965.¹⁴⁾ Democracy, the rule of law idea on the one hand, belief in freedom and equality on the other, which formerly were seen as reliable by considerable members of society, appear gradually to having been shaken in contrast with reality. Each actors, whether immediately or not, are responding to those situation reflection of which requires us to reexamine each of their value orientation in similarity and distance between them.

The second is the law in a changing profile. Corresponding to the situation above, the law in turn has been forced to respond. In 1976, R.M. Unger puts it in the following way: "Whether one accepts the hypothesis of the circle or that of the spiral, it is important to remember that the three kinds of law present themselves historically as overlapping and interpenetrating realms, rather than as neatly separated worlds. The legal profession and legal education in postliberal society show the juxtaposition of concerns with all these forms of law and legal thought. This universe has an outer sphere of blackletter law: the area wherein the rule of law ideal and the specialized methods of legal analysis flourish. Then there is an inner sphere of bureaucratic law and bureaucratic rhetoric. At this level, law is approached instrumentally; one talks of costs and benefits, and one searches for a science of policy that can help the administrative and the professional elite exercise its power in the name of impersonal technique and social welfare. But, beyond legalistic formality and bureaucratic instrumentalism, lie the inchoate senses of equity and solidarity."¹⁵⁾

In 1979 Shigeaki Tanaka impressively offers three patterns of law as models for analyzing contemporary law in Japan by comparison to the Western, 1) universalistic pattern of law as a product of liberal legalism, 2) regulatory pattern of law as serving for realization of policy purpose, 3) autonomous pattern of law as expressing popular demands (and official

14) "The current crisis of authority, with its accompanying dispraise of law, has its immediate source in the social turbulence of the 1960s. That decade poignantly displayed the two faces of justice. On the one hand, some courts and some sectors of the legal profession made themselves spokesmen for the disprivileged; they interpreted their mission as the enlargement of rights and the fulfillment of the latent promise of the Constitution—full citizenship for all—and the movement for social advocacy and public-interest law gained wide support. On the other hand, during the same decade the law wore jack boots and acted repressively to stamp out the fires of discontent." Nonet & Selznick, 17), p. 5.

15) R. M. Unger, *Law in modern society*, P. 241, 1976.

response) on the new legal issues caused by changing social conditions.¹⁶⁾

In 1978 P. Nonet and P. Selznick wrote: "In this essey we give special attention to a range of law-related variables. . . . Each of these variables differs significantly as the context is changed. . . . The theory we propose is an attempt to clarify these systematic connections and to identify the characteristic configurations in which they occur. We distinguish three modalities or basic "states" of law-in-society: (1) law as the servant of repressive power, (2) law as differentiated institution capable of taming repression and protecting its own integrity, and (3) law as a facilitator of response to social needs and aspirations. For example, although coercion is present in all three types, its significance varies: It is dominant in repressive law, moderated in autonomous law, and submerged in responsive law. Again, the role of purpose must be considered in each system: There is a repressive instrumentalism in which law is bent to the will of governing power; there is a withdrawal from purpose in the striving for autonomous law; and there is a renewal of instrumentalism, but for more objective public ends, in the context of responsive law¹⁷⁾".

These models immediately raise a question of their relation to shakai-tsūnen. In recalling that ambiguous and flexible use of shakai-tsūnen in both, daily life and the judicial process, we may perhaps easily get an impression, that its use is moderated, to borrow from Nonet's and Selznick's technical term, in "autonomous law" mainly because of its legal formality, while dominant in repressive law as a convenient means for repression as mentioned by Ely on Hitler's case, and in responsive law as expressing hot demands gradually and spontaneously made, for instance, by certain disadvantaged members of society in crisis. But, propriety of this first impression must be carefully examined again in detail. Furthermore, it is also case with those law models. It may be necessary for us to take into consideration which is more convenient and proper to offer law models in such a way, or to show an internal differentiation of the modern State law

16) Shigeaki Tanaka, *Saiban o meguru hō to seiji* (Law and politics as underlying adjudication), Yuhikaku, 1979.

17) P. Nonent and P. Selznick, *Law and society in transition*, P. 15, 1978.

into each different function or role¹⁸⁾.

But, we must be content, at this occasion, with such a simple remark on relevancy of new aspects, or conditions in society, law and the State to the study of *shakai-tsūnen*.

18) What is anxious about this type of classification is that it might convince us of "thereness" of, so to speak, nascent law, such as like responsive law or repressive law, while it has indeed a merit for us to acknowledge the changing reality in certain names of law.