AN ESSAY ON HUMAN ENTERPRISE OF LAW IN THE MODERN WORLD

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I Between "Formal" and "Informal"

I happened to hear in the barber the radio saying that there is a great difference, and notice it, of women's "formal" wear between Japanese Kimono and the Western. They may attend any "formal" party (like for celebration for marriage) by wearing definite type of Kimono (Susomoyō) and even walk around street in this style, while they are customarily to wear each different type of the Western "formal" wears in accordance with the conditions whether morning, or afternoon, or night, in order to do so.

Then, I wonder what "formal" and "informal" is. "Barefoot on the Park" may be informal. But, how can we draw a clear borderline between "formal" and "informal"?

There must be, so to speak, an overlapping or penumbral area difficult to make such a distinction. How about the legal world we are involved in? We may perhaps find a similar situation here.

People, having each position and playing each role in the ordinary social world, do behave in their own appropriate way and realize their idea through that behavior, but some of their idea realizing behaviors result and response to the law–institution as a part of social institution. The law is often said and thought of "formal" in terms of means to control and guidance to support private and official conduct under the possible limitations of administrator's and judge's arbitrary intervention. Such a "formal" law is typically seen in the code, parliamentary enactments, but also in the case law, sometimes even in the customary law. Those formal character has been grasped in connection with generality, abstraction, strictness, and lack of flexibility. Though formality of the law conceived from the procedural aspect is relevant to this

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topic, I shall put aside it here as treated before.

The usage of word "formal" law, however, is not certain and obvious. Even formal rationality of the law in M. Weber's sense, as often remarked, shows some difficulty for its understanding as far as legal system and thoughts in Continent, especially Germany and in England (and America) are concerned.[1] Apart from this, another problem will be raised in regard to the point how to critically deal with various limits of the "formal" municipal law, especially viewed from the contemporary situation now we are faced with. Famous legal theoreticians' ideas, like E. Ehrlich's, H. U. Kantorowicz's, M. Weber's, and so on, will offer illuminating classical examples which I shall briefly refer to below. Before specifically treating it, it's better for us, I think, to remember a wider range of the word law, not only limited to the "formal", in order to have a wider perspective, or a bird's-eye view available to grasp some meaning of matters legal surrounding us at present.

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1) According to a relatively dominant interpretation, Weber saw *logically formal rationality* as typically developed in German law and legal thought coming from the Pandekten tradition by contrast with English common law or case law and thought. Though admittedly Weber treated the problem in such a way, he also appears to see formal rationality as a *predictability* or *calculability* not only in German, but in English law and thought under various limitations, for instance by omitting the field of Justice of Peace. For the understanding of the latter, the next passage must be helpful: „Der moderne kapitalistische Betrieb ruht innerlich vor allem auf der *Kalkulation.* Er braucht für seine Existenz eine Justiz und Verwaltung, deren Funktionieren wenigstens im Prinzip ebenso an festen generellen Normen *rational kalkuliert* werden kann, wie man die voraussichtliche Leistung *einer Maschine* kalkuliert. - - - Die modernen Betriebsformen mit ihrem stehenden Kapital und ihrer exakten Kalkulation - - - konnten nur da entstehen, wo *entweder,* wie in England, die praktische Gestaltung des Rechts tatsächlich in den Händen der Advokaten lag, welche im Dienste ihrer Kundschaft: der kapitalistischen Interessenten also, die geeigneten Geschäftsformen ersannen, und aus deren Mitte dann die streng an „Präzedenzfälle", also an *berechenbare* Schemata gebundenen Richter hervorgingen. *Oder* wo der Richter wie im bureaukratischen Staat mit seinen rationalen Gesetzen, mehr oder minder ein Paragraphen // Automat ist, in welchen man oben die Akten nebst den Kosten und Gebühren hineinwirft, auf dass er unten das Urteil nebst den mehr oder minder sichhaltigen Gründen ausspiele: — dessen Funktionieren also jedenfalls im grossen und ganzen *kakulierbar* ist. — "M. Weber, *Gesammelte politische Schriften,* 142f (1920). Moreover, M. Yasaki, The rational law of civil society and the juristic outlook of the world, in : *Theory of Private Law* (Japanese version), a special issue, ed. by Japan Association of Legal Philosophy, 186ff (1951)., and, Legal Formalism Reconsidered, 24 *Osaka Univ. L. Rev.,* Note 14 at 5f (1977). Also, see as a few examples of dominant interpretaions, M. Rehbinder, Max Webers Rechtssoziologie, in: *Max Weber zum Gedächtnis*, herausg. von R König und J. Winckelmann, 1963, 481ff., D. M. Trubek, Max Weber on law and the rise of capitalism, *Wisconsin L. Rev.*, 720ff (1972)., J. Freund, La rationalization du droit selon Max Weber, 23 *Archives de Philosophie du Droit*, 69ff (1978).

II Variety of Informal Control Systems

The type of law of formal character is certainly the type for laymen ready to imagine, but it is also sure that a wider range of the word law is not exhausted to designate that type. We may immediately point out a series of each different types of informal control systems perhaps very relevant to that wider range of the word law:

1. informal control system which plays a decisive role of control in social relationships deeply interwoven with traditional way of life (perhaps rural community is an example as explained by E. Ehrlich).
2. informal way of dispute-settlement prior or post to the official formal administration of justice within municipal legal system.
3. informal control system working at various levels of modern social relationships: within each group of mass media, medical profession, legal profession, even scientists.
4. informal judgement which is typically made in the so called hard case by reference to material standard of judgement when any relevant legal provision seems hard to be found in the official formal administration of justice. To use late prof. H. U. Kantorowicz's phrase, it may be closed to free law to be replaced in the lack of formal law.
5. To sum up, the matter of facts called "informal" so far will be found everywhere, either within, or outside the judicial decision-making process, that is, interpretation and application of formal municipal law.
6. Main problem, as far as Japan is concerned, is how to classify each different aspects of informal control system and to what extent they are peculiar to the informal in Japan and otherwise "informal" in a sense of universally valid in the world.[2)]

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2) The point 1. mainly means „lebendes Recht" or „lebendiges Recht" a significance of which is impressively pointed out by E. Ehrlich. It is worth noticing that he makes an emphasis on the living law not only in the rural community, but even within the monopolistic organization in the capitalistic society at the beginning of 20th century Germany. Ehrlich, Soziale Frage und die Rechtsordnung, 9 Jg. *Die Neue Zeit*, 543 (1891). cf. M. Nishimura, An enquiry in the formation of legal sociology in Germany, 28 *Studies in Legal History*, ed. by Japan Association of Legal History, 37f., 45 (1978).

The point 4, attracts our attention, as it is a familiar topic of nature of judicial process, and it is also related to the topic mentioned above. As an illustration, I shall cite the passage written by H. U. Kantorowicz.

III Kantorowicz and Free Law

"Law is either *formal law, i.e.*, law having undergone and completed a definite process of formation or integration, or "*free law*," *i.e.*, law which has not completed these processes. In both cases it is either *explicit law (gesetztes Recht), i.e.*, a rule which has been explicitly declared to be law, or *implicit law, i.e.*, a rule which is recognizable as law by significant actions (*concludente Handlungen*). Free law is infinitely greater practical importance than formal law, a lawsuit being generally superfluous if the case in question is really determined by genuine formal law".[3]

It seems to me that Kantorowicz tries to draw a panoramatic picture of formal law relatively separate from and yet relatively supplemented with free law. A Formal law is 1. *formal explicit* law: (a) statutes, (b) orders in council, rules of court, by-laws, ordinances, regulations, etc., (c) case law, or judge-made law, and 2. *formal implicit* law, namely customary in its usual sense. There is no great difference between this "formal" law and that mentioned above. Then, what is free law resembling to some of "informal" control system?

B "Free law may be divided into: 1. *nascent law,* namely law, that would be formal law, if it had undergone and completed the process of formation, instead of only having entered into it; 2. *desired law,* namely law which those who apply it desire to become formal law".[4] Kantorowicz, furthermore, points out both forms again being either (a) explicit law, or

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The point 2. mainly means informal way of dispute-settlement in cases such as like the recent nuisance problems, environmental problems, etc. As to the general problem of "informal control systems", I could come to deal with each of them altogether for the occasion of "*Forum on Legal Culture*" held at Kyoto in Dec. 18, 1979, and I am very grateful to Professors Z. Kitagawa, R. D. Schwartz, M. Rehbinder.

3) H. U. Kantorowicz & E. W. Patterson, Legal science-A summary of its methodology, 28 *Columb. L. Rev.* 679, 692 (1928).

4) 3) 693.

(b) implicit law, consequently four forms of free law to be divided. Within four, that is, nascent explicit law (B1a), desired explicit law (B2a), nascent implicit law (B1b), desired implicit law (B2b), B1a appears rather closed to formal law than others, because it includes the rules as may be concluded from the preparatory stages (motivations, debates, etc.) of the statute, and so on. Others include various stages of the rules from the rule like Art. 1 of the Swiss Civil Code through new customs, mere standards referred to in connection with boni mores, nature of things, equity, exigencies of life to judicial practice.[5)]

Let us reconsider what is merit or demerit of this doctrine. Kantorowicz with self-confident counts its merits as follows:

"All these six forms of law are required by the necessity of possessing a rule of law for the decision of any imaginable case which, on account of the incompleteness of the existing formal law, would be impossible, if the rules of free law could not be applied. They are further required to solve the problem arising from the fact that, on the one hand, it cannot be honestly denied that very often, and especially in the Anglo-Saxon countries, judges create new formal law, and that, on the other hand, one could not accept the view that the decided case was governed, before the decision of the judge, by no law at all, or by a contrary formal law. This problem is solved, if we recognize that such cases were governed by free law."[6)]

It is clear that he takes a careful attitude to the judicial law-making and pays a special attention on the side of preexisting (free) "law" idea prior even to the decision of hard cases, which appears for us to make an interesting contrast to his former challenging idea of so-called "contra legem". This attitude may be more interesting for us in giving a similar impression with the so-called "principles" idea do when appealed to principles, or standards to justify right or entitlement in the treatment of hard cases.[7)] But, generally Kantorowicz only refers to free law or rules

5) 3) 694–7.

6) 3) 693f.

7) Idea paying a special emphasis on principles or standards as distinct from policies has been particularly adopted and promoted by R. M. Dworkin in his long series of articles which are crystalized to "*Taking Rights seriously*" (1977). Though I don't touch this point here, I only mentioned to some formative factors of that idea. See Yasaki, Notes on history of the Western legal thought, 273 *Hogaku Seminar*, 82–3 (1977), and 275, note 18 at p.81 (1978), and 292, note 16 at 114 (1979).

instead of principles.

His catalogue of "free law" may well serve as a useful tool to reconstruct each different, slippery, and elusive types of informal control systems into reliable and visible framework as perhaps seen, for instance, in the case of informal autonomous control system of medical profession which in turn will find an end-result in the confirmation or rejection through judicial practice. But, it concerns merely some of the matter informal.

IV Weber and Free Law

The sujet matter of Kantorowicz must have been the same concern of his collegue and senior friend, M. Weber. If so, why Weber has been said and thought as if he was against such a free law movement in favor of municipal formal law? According to his writings Weber seems to leave evidences dubious to decide either. On the one hand, he certainly sets forth:

„Die »freirechtliche« Doktrin unternimmt den Nachweis, daß dies Versagen das prinzipielle Schicksal aller Gesetze gegenüber der Irrationalität der Tatsachen, daß also in zahlreichen Fällen die Anwendung der bloßen Interpretation nur Schein sei und die Entscheidung nach konkreten Wertabwägungen, nicht nach formalen Normen, erfolge und erfolgen müsse. Der bekannte, in seiner praktischen Tragweite freilich oft überschätzte Art. I des Schweizerischen Zivilgesetzbuches, wonach der Richter mangels eindeutiger Auskunft des Gesetzes nach der Regel entscheiden solle, welche er selbst als Gesetzgeber aufstellen würde, entspricht zwar formal bekannten KANTischen Formulierungen. Der Sache nach würde aber eine Judikatur, welche den gedachten Idealen entspräche, angesichts der Uvermeidlichkeit von Wertkompromissen, von einer Bezugnahme auf solche abstrakten Normen sehr oft ganz absehen und mindestens im Konfliktsfall ganz konkrete Wertungen, also nicht nur unformale, sondern auch irrationale Rechtsfindung, zulassen müssen."[8]

Here he worries court's decision being fallen into the hand of solely concrete value-judgement, therefore even irrational, still less informal law-

8) M. Weber, *Rechtssoziologie*–Aus dem Manuskript herausg. und eingel. von J. Winckelmann, 281 (1960).

finding and he indirectly seems to criticize such a tendency immanent in law, judicial practice and theory in Germany at that time. In addition, he writes furthermore.:

„Daß man heute diesem subjektiven Glauben gerade der anerkannt erheblichsten Juristen den objektiv anders liegenden Tatbestand entgegenhält und aus diesem nun die Norm für das subjektive Verhalten machen möchte, ist – mag man sich zu dem Verlangen stellen wie immer – jedenfalls Produkt intellektualistischer Desillusionierung. Die alte Stellung des englischen Richters dürfte mit Fortschreiten der Bürokratisierung und der Rechtssatzung auf die Dauer stark erschüttert werden. Ob man aber einen bürokratischen Richter in Ländern mit kodifiziertem Recht dadurch allein zu einem Rechtspropheten machen wird, daß man ihm die Krone des »Schöpfers« aufdrückt, ist nicht sicher. Jedenfalls aber wird die juristische Präzision der Arbeit, wie sie sich in den Urteilsgründen ausspricht, ziemlich stark herabgesetzt werden, wenn soziologische und ökonomische oder ethische Räsonnements an die Stelle juristischer Begriffe treten. – Die Bewegung ist, alles in allem, einer der charakteristischen Rückschläge gegen die Herrschaft des »Fachmenschentums« und den Rationalismus, der freilich letztlich ihr eigener Vater ist."[9]

But, Weber really took negative attitude to the free law movement? In the following passage he appears to write in a descritive way:

„Jedenfalls also zeigt die Entwicklung der formellen Qualitäten des Rechts eigentümlich gegensätzliche Züge. Streng formalistisch und am Sinnfälligen haftend, soweit die geschäftliche Verkehrssicherheit es verlangt, ist es im Interesse der geschäftlichen Verkehrsloyalität unformal, soweit die logische Sinninterpretation des Parteiwillens oder die in der Richtung eines »ethischen Minimums« gedeutete »gute Verkehrssitte« es bedingen."

Furthermore, he takes into consideration relevant various factors:

„Es wird darüber hinaus in antiformale Bahnen gedrängt durch alle diejenigen Gewalten, welche an die Rechtspraxis den Anspruch stellen, etwas anderes als ein Mittel befriedeten Interessenkampfes zu sein. Also durch materiale Gerechtigkeitsforderungen sozialer Klasseninteressen und Ideologien, durch die auch heute wirksame Natur bestimmter politischer,

9) 8) 289.

speziell autokratischer und demokratischer, Herrschaftsformen sowie derjenigen Anschauungen über den Zweck des Rechtes, welche ihnen adäquat sind, und durch die Forderung der »Laien« nach einer ihnen verständlichen Justiz. Endlich unter Umständen auch, wie wir sahen, durch ideologisch begründete Machtansprüche des Juristenstandes selbst."

Weber's seemingly concluding remark is as follows:

„Wie immer aber sich unter diesen Einflüssen das Recht und die Rechtspraxis gestalten mögen, unter allen Umständen ist als Konsequenz der technischen und ökonomischen Entwicklung, allem Laienrichtertum zum Trotz, die unvermeidlich zunehmende Unkenntnis des an technischem Gehalt stetig anschwellenden Rechts auf seiten der Laien, also die Fachmäßigkeit des Rechts, und die zunehmende Wertung des jeweils geltenden Rechts als eines rationalen, daher jederzeit zweckrational umzuschaffenden, jeder inhaltlichen Heiligkeit entbehrenden, technischen Apparats sein unvermeidliches Schicksal. Dieses Schicksal kann durch die aus allgemeinen Gründen vielfach zunehmende Fügsamkeit in das einmal bestehende Recht zwar verschleiert, nicht aber wirklich von ihm abgewendet werden. Alle die kurz erwähnten modernen, wissenschaftlich oft höchst wertvollen Darlegungen rechtssoziologischer und rechtsphilosophischer Art werden nur dazu beitragen, diesen Eindruck zu verstärken, mögen sie ihrerseits Theorien über die Natur des Rechts und die Stellung des Richters vertreten, welchen Inhalts immer."[10)]

Informal control systems especially in connection with judicial process are partly and briefly explained above. But, what makes informal control systems necessary originally lies in the ordinary social world which perhaps will require a bit more explanation in detail below.

V A Spiral Development of What Appears Horizontally Feedback Relation

In our daily lives we usually see incredibly tremendous matters, such as like houses, buildings, streets, railway, buses, cars and people. They build houses, ride on buses, walk along street, enter into buildings, so and so.

10) 8) 289f.

Except "nature", there are and exist, we see, only men and women and matters they *artificially* created. Then, how about political state, law, and social institutions? Only we can find buildings built by people, Parliament, Supreme Court, and so on, where they come together to do something, in addition parliamentary documents, statutes, reports. Here and there we only glance a few parts of the so-called state or law. Nevertheless, we are accustomed to say and hear that powerful state stands in our way and the law (formal) exists and functions with exact conformity. Is this merely a *fictitious* picture or products of imagination? Partly, yes, but partly, no. Something must be said on our internal streams of images in order to explain this situation. What are internal streams of images? To have a proper understanding, perhaps we need to take into consideration a rather longer intellectual history on this subject. But, here I merely refer to a few scholars' suggestions.

1. Internal streams of images

„Der Boden des Rechts ist überhaupt das Geistige und seine nähre Stelle und Ausgangspunkt der *Wille* welcher *frei* ist."[11] G. W. F. Hegel in writing in this way may perhaps offer an illustration for that subject. He puts forth: „Die objektive Wirklichkeit des Rechts ist teils für das Bewusstsein zu sein, überhaupt *gewusst* zu werden . . . . ".[12] It is interesting for us to find Hegel emphasizing such a mental (geistig) aspects while maintaining his idea of law with positivity, or of positive character. Here, he appears to suggest main features of law or right being interrelated with both aspects of internal and external, or mental and physical, institutional. We may again count of names of great scholars, theoreticians like K. Marx, G. Simmel, W. Dilthey, E. Lask, who in their own parts contributed to that subject.

2. The transitive and the substantive

At the beginning of this century, however, W. James or M. Weber, and a little bit later, Ed. Husserl explained their ideas which still now have a remarkable meaning.

11) G. W. F. Hegel, *Grundlinien der Philosophie des Rechts,* § 4 (1821).
12) 11) § 210.

Weber says:

„Menschliches (≫äußeres≪ oder ≫inneres≪) Verhalten zeigt sowohl Zusammenhänge wie Regelmäßigkeiten des Verlaufs wie alles Geschehen. Was aber, wenigstens im vollen Sinne, nur menschlichem Verhalten eignet, sind Zusammenhänge und Regelmäßigkeiten, deren Ablauf v e r s t ä n d l i c h deutbar ist."[13]

He also writes in „Wirtschaft und Gesellschaft":

„Wir sind ja bei „sozialen Gebilden" (im Gegensatz zu „Organismen") in der Lage: ü b e r die bloße Feststellung von funktionellen Zusammenhängen und Regeln („Gesetzen") h i n a u s etwas aller „Naturwissenschaft" (im Sinn der Aufstellung von Kausalregeln für Geschehnisse und Gebilde und der "Erklärung" der Einzelgeschehnisse daraus) ewig Unzugängliches zu leisten: eben das „Verstehen" des Verhaltens der beteiligten Einzelnen".[14]

Moreover, we shall only remember key terms, "the substantive parts" by comparison with "the transitive parts of the stream of thought" (James).[15] and "Noema" by comparison with "Noesis" (Husserl).[16][17]

3. Mass communication

From another perspective we can ask as follows: Is real world where we live in truly real? It may be a kind of cinical question, but we must keep it in mind, because we are inclined to be negative to that question by remembering the mass media operating situation in our contemporary

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13) M. Weber, Ueber einige Kategorien der verstehenden Soziologie (1913), in: *Gesammelte Aufsätze zur Wissenschaftslehre,* zweite durchgesehne und ergänzte Auflage, besorgt von J. Winckelmann, 427f (1951).

14) M. Weber, *Wirtschaft und Gesellschaft,* 1. Halbband, 4 Aufl., besorgt von J. Winckelmann, 7 (1956).

15) W. James, *The Principles of Psychology*, Dover Books, vol. 1, 243 (1950).

16) Edmund Husserl, *Ideen zu einer reinen Phänomenologie und Phänomenologischen Philosophie*, 179ff (1913)., *Husserliana*, Bd.III/1, 200ff (1976). As to the relation of Husserl to James, see, for example, *Die Krisis der europäischen Wissenschaften und die transzendentale Phänomenologie, Husserliana*, Bd. VI, 267 (1976). A. Schutz, *On Phenomenology and Social Relations*, ed. by H. R. Wagner, 56ff (1970).

17) In the context mentioned in the text, I shall add two scholars' achievements who published each own first book at the same time, March, 1932, and at the same place, in Vienna, which became pioneerworks for phenomenologican sociology—A. Schütz, *Der sinnhafte Aufbau der sozialen Welt* (1932), and T. Otaka, *Grundlegung der Lehre vom sozialen Verband* (1932). I am also grateful to Professor J. Tokunaga for suggesting me their intimate relation.

society. All day, if we want, we can listen radio or watch television. Most of our knowledge concerning natural and cultural world we are commited to directly or indirectly come from this mass communication produced by mass media. So happenings at south pole area, or accidents in the Western Europe now are not very far from us, but immediately known by us through mass communication as if, we feel, we are actually watching them. Those, however sent in an appropriate way, are kind of "images" produced by that media which may leave rather wider space for *manipulation*. In this respect, it is not surpring for us to say that we live in an *imaginal* world. But, now we are better to return to the original course of consideration.

4. Circulation?

Each individuals in society think and act under strong impact of social institution including legal, for instance to perform their contractual or promissory obligation. Each individuals under the law-institution realize their each own different ideas, in other words, subjectively intended meaning within a contextual stream of the objective meaning through their action into the law-institution, which, reified, as a uniquely meaningful institution, in turn react to them to control or to give guidance, and - - - . This is not only the case with private individuals, but with officials, judges, and so on, though different in their each own positions and roles.

It is sure that this glimpse of our daily surroundings, that is, idea → action → institution → idea → action - - - shows a feedback relation developing between them. Viewed from a different perspective, it may be better to call it a "spiral" development of what appears a feedback relation. I shall conclude this short paper by paying attention to why spiral.

5. Others

In our daily lives we are in very complex networks of social relationships and institutions. Our actions whether social or legal, themselves depend on our mutual understanding and reliance of expectability (predictability) of humann activity. What is mutual? It presupposes one-another relation. What

is *another*?[18] In a sense, each individuals are similar as far as they are human beings. Each of them, it is also sure, is a being of uniqueness. If they are characterized by both similarity and uniqueness, then it may be a bit easier for us to understand our daily life. By the way, our daily life continuiously raisse all kind of conflicts and requires peaceful resolution or regulation of conflicts or disputes, to which, in turn, various types of informal and formal control systems respond and serve.[19]

6. From objectivation to personification

Our social as well as legal actions are interwoven with the so-called social facts as shown by keeping a promise, making a contract. Analytically speaking, it may be possible tentatively to classify each steps by which private individuals (officials, judges, - - - though different in each positions and roles) realizes and embodies each own ideas, in other words, subjectively intended meanings within an internal stream of objective meanings through their actions, by using symbols, that is, words and phrases, into the law–institution. Each steps may well be expressed by objectivation, objectification, alienation, and reification in accordance with P. Berger and S. Pullberg. I would add "personification" of products, that is, institutions.

"*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. - - - - - Thus, for instance, man produces material tools in the process of objectivation which he then objectifies by means of language, giving them 'a name' that is 'known' to him from then on and that he can communicate to others. - - - - -

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

18) 17) Schütz's work may be still now helpful.
19) N. Luhmann, *Rechtssoziologie*, Bd. 1, 31ff (1972).

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 thing-hood becomes the standard of objective reality."[20]

By personification I mean the process by which the product by itself stands in our way as it were endowed with its will, power, etc., like each individuals.

7. Ideas → actions → institutions →

Similarly, we may perhaps get a considerably total image of dynamic relation between us and our surroundings, especially the law–institution by using these delicate means for expression, language, that is, ideas → actions social as well as legal which are characterized by actual and mental factors → the law–institution a bit renewed, modified, developed → ideas → actions - - -. Viewed from horizontal perspective, the whole process means only a circulation of feedback relation. But, each faces newly add something to the original resulting gradually to modify and change the process as a whole. It is for this reason that I call it a spiral development of what appears horizontally feedback relation.[21]

8. Rules and practice

To look at a little bit closely social as well as legal rules, standards, principles partly raised by needs of conflict resolution, partly by needs of possible guidance, they have an interesting structure of their existence within an internal stream of objective meanings. As mentioned above, they are only assumed or presumed to exist by reference to Parliament, Supreme Court working, or parliamentary documents, statutes, reports, and monuments, etc. They are rather ascertained through social as well as judicial practice concerning them.[22] Practice? Yes. For instance, social rules are

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20) P. Berger & S. Pullberg, Reification and the sociological critique of consciousness, 35 *new left review*, 56, 60f (1966).

21) As it shown later, a part of this development is formalization, legalization.

22) An interesting approach to this point in terms of critical legal thought is made by K. Klare, Law-making as praxis, 40 *Telos*, 123 (1979).

accepted and acknowledged by some members of that social group wherein rules function. Those are not mere regularities but meaningful standards at least for some to observe. This is a favorite topic raised and especially emphasized by H. L. A. Hart in regard to internal aspect of social rules by contrast to external aspect of social facts.[23] This approach reminds us of somewhat phenomenological or meaning understanding approach as referred above.

Social as well as legal rules, according to such trends of approach, are given shapes in a depth of pure consciousness so that those are accepted as ideal or mental forms of existence within an internal stream of consciousness. But, we need again return to the reality of social facts or social action actually experienced by us in order to empiristically ascertain that ideal or mental images. Then, are we not faced with somewhat similar way of enquiries to reconsider one upon another, for instance, social rules not only from internal aspect, but in connection with external, not only from mental or ideal aspect, but in connection with actual practice?

VI Problem of Formalization, Legalization

Viewed from this perspective, informal and formal control systems may be fundamentally a continuous one as well as daily process of human relations and non-daily or extraordinary process coming from social conflicts. Certainly we must keep it in mind that still there remains relatively a great difference between modern formal legal system and nonlegal control systems at present. This is a remarkable fact even though we don't take a legal positivistic point of view or something like. What is worth noticing, however, is not only difference or distinction, but *formalization* of the informal in our daily life and *legalization*[24] or *formalization* of the nonlegal or informal in the process of conflict resolution or the process providing for possible guidance, which may to some extent correspond that pocess from objectivation to personification. A spiral development of some factors, that is, ideas → actions → institutions →, though very simple scheme, may serve

23) H. L. A. Hart, *The Concept of Law*, 54ff (1961). See also P. M. S. Hacker, Hart's philosophy of law, in: *law, Morality, and Society*, ed. by Hacker & J. Raz, 9ff (1977).

24) See Yasaki and T. Yagi, *Introduction to Legal Philosphy* (Japanese version), 59 (1978).

for our understanding of that process.

Many times such a developmet meets a strong rejection, it may be after all brought back to a starting point, or furthermore. But, step by step, those facters spirally develops in the way of legislation, judicial decision, or administrative decision. To add a few words, way of such a development may take slightly or greatly different courses in accordance with types of law in a society—types, which are classified into customary or interactional law, regulatory or bureaucratic law, legal order or legal system according to R. M. Unger,[25] and into responsive law, repressive law, autonomous law according to P. Nonet and P. Selznick[26]

Even legal system, autonomous law which are mostly equivalent to the formal municipal law in this paper, leaves a wider range of spaces for informal factors working. II-4, informal judgement which is typically made in the so-called hard case is an illuminating example. To use an expression as remarked above, a judge, facing with hard case, may make a judicial opinion according to subjectively intended meaning of the matter with in an internal stream of objective meaning which may also be called value system, or conventional morality, or sometimes principles. As to such a type of law, however, it is worth noticing that judge's decision even in such a hard case is not always arbitrary, and that even though arbitrary in the original case, it comes to be *formalized* or *legalized* due to the judicial precedent-making function of judicial court.

If it is the case with legal system, autonomous law, then much more with other types, interactional or responsive law, and bureaucratic or repressive law. At first glance, the former appears more elastic to accept and adapt to various informal control systems coming from social needs rather than the latter. Here too, we must be careful about delicate combination of each different levels of informal control system (for instance, II-1, 2, 3, 4,) with at least three differing types of law which will make an attractive task in jurisprudence. To the tasks in jurisprudence our approach may perhaps make some contribution. I shall finish my simple essay by listing possible contributions as follows:

1. Understanding of complex consciousness existing under individuals

25) R. M. Unger, *Law in Modern Society*, 1976.

26) P. Nonet & P. Selznick, *Law and Society in Transition: Toward Responsive Law*, 1978.

on law, state, society, etc.

2. Clarification of socio-cultural context for interpretation and application of law.
3. Providing for justification or critique of contemporary community standard, a public morality, etc. as used in judicial decision.
4. Providing for some perspectives in dealing with purposes, values, ideologies in regard to law.