

How Can Law Hold Hope in Cultural Complexity? —Critical Comments on Prof. Annelise Riles' View of Law and Culture Ko Hasegawa †

[1] Today we can find multifarious interrelationships between law and culture. These interrelationships are to be categorized as such four kinds as *law within culture*, *law over culture*, *law between cultures*, *law versus culture*, as I wish to call them respectively. Law within culture is a truism today that law is embedded in culture of a society; law over culture is a recent point that law often determines the development or change of culture in a society; law between culture is significant especially in intercultural setting, domestic or international, that law has to face and adjudicate cultural conflicts in society; and, law versus culture is also important that law often suppresses culture, especially to tame cultural disobedience. In these problem contexts between law and culture, law is understood, respectively, as dependent on culture, as determinant of culture, as impartial between culture, or as oppressive to culture. And, in this regard, we can easily understand the complexity and subtlety of the relationship between law and culture in societal order.

The recognition of the complex and subtle relationship between law and culture is of course important, especially not to be trapped in a narrow doctrinal understanding of law. Law is not the problem of simple reasoning from relevant legal materials to the applicability to a particular case in seeking a better solution of conflicts. Rather law is a normative practice among various human practices for shaping societal order and it has various relationships with those practices, including culture in a society. In this regard, viewing law in the light of culture as indicated above is significant in the following way. Law within culture is an aspect of the problem of the culturality of law; law over culture is an aspect of cultural conflict in that law shows itself a culture while culture shows another; law between culture is also an aspect of cultural conflict yet in that law makes a meta-culture for several conflicting cultures; and law versus culture is also an aspect of cultural conflict in that existing law which itself represents a culture has to face other different cultural challenges. Here the relationship between law and culture become much closer than ordinarily assumed to possibly result in some sort of infusion of both.

The view these points suggest is a version of the "culturalist viewpoint of law" which Professor Annelise Riles coined.¹ It is significant today for us to explore the

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substance of this viewpoint further. Traditional approach to law and culture tend to be hypostatic. When one sets the concept of law and of culture separately, he tends to set them as independent units in societal order and tends to try to understand their difference and mutual influence under that conceptual independence. Needless to say, we would need certain conceptual device for identifying possibly different objects of our understanding; but it is another thing for us to hypostatize them as *really* separated. While law can be grasped as relatively fixed with coherence in terms of legislation, court rulings, and other related cluster of legal documents and voices, cultural order may stay rather vague as the background conditions for the working of law. This is understandable to some extent, especially because culture cannot be captured well in conceptual rigidity. This looseness might even be necessary for understanding culture, because its working is notoriously elusive.

However, I do not think we can retain this sort of naïve division in our thinking, in facing with the ongoing complication, or even hybridization, between law and culture today.² And what those problems indicate is further that we need to think, even as a culturalist of law, about the very possibility and conditions of the relationship between law and culture. Then the real question to be squeezed out is what is law as a significant parameter of culture and, at the same time, how culture co-works with law in such a subtle relationship.

[2] Professor Riles is one of the significant legal theorists today who understand well the complex and subtle relationship between law and culture in this globalizing world. And recently she impressively showed a persuasive move in the culturalist understanding of law.³ In facing with the complex and subtle relationship between law and culture today, Professor Riles points out, as a stimulating opposite to the Geertzian localist-narrativist approach to law and culture,⁴ that law is to be rehabilitated as some

¹ Annelise Riles, "A New Agenda for the Cultural Study of Law: Taking on the Technicalities" (in: *Buffalo Law Review*, Vol. 53, 2005-06, pp. 973-1033), p. 973.

² Cf. Ulf Hannerz, *Transnational Connections* (Routledge, 1996), Part I.

³ Annelise Riles, *op. cit.*; *do.*, "The Empty Space" (at SSRN); *do.*, "Cultural Conflicts" (in: *Law and Contemporary Problems*, Vol. 71, 2008, pp. 271-306); *do.*, "Hou ni Kibou wa Aruka? [Is There Any Hope in Law?]" (in: Yuji Genda and Shigeki Uno, eds., *Kibougaku 4: Kibou no Hajimari* [Theory of Hope 4: The Beginning of Hope], University of Tokyo Press, 2009, Ch. 2). This view was also eloquently showed in Professor Riles' presentation entitled as "After Culture —Toward a Theory through Techniques" at the Global COE Workshop in the School of Law at University of Hokkaido in July, 2009.

⁴ Clifford Geertz contrasts his hermeneutic viewpoint with the systemic viewpoint of law, in his famous article "Local Knowledge" (Clifford Geertz, *Local Knowledge*, Basic Books, 1983, Ch. 8). He rejects the static and logical construction of law in order to emphasize the dynamic and living aspects of law in a particular local context. From his viewpoint, law subsists in particular narratives seen in particular normative performances of the people in question. And this means contrariwise that the static and logical understanding of law does not reflect the reality of law as a matter of fact. This is recognizable when we sense that the reality of law does not lie solely in the systemic understanding of it. I basically share with Geertz the idea of the relativization of

practically accommodating tool which may get beyond culturally serious conflicts in terms of its own agency, especially through its *technicalities*. And she also suggests interestingly that law is a normative tool for maintaining *social hope* in the midst of politically and morally serious conflicts in today's societies.⁵

Professor Riles emphasizes the independence or autonomy of law through its technicality, rejecting the naïve culturalist understanding of law. Naïve culturalists in law tend to criticize the formalist elements in law, or legal technicalities, as vacuous simplicity which holds no substantive significance for shaping societal order. Yet Professor Riles points out, relying especially on today's practice in conflict of laws, that legal technicalities can yield themselves useful skills and fictions to accommodate cultural conflicts involved in those conflict cases; which make impact of the rearrangement of culture itself in society. In so emphasizing, she maintains rightly that law is itself another important factor constituting culture, with also indicating further that practical and professional legal practice itself can be a significant moment of culture in a society.

There are a couple of good reasons for this perspective. One is the view that culture is socially constructed through various interpretations and activities in a society; which rejects a simple static or positivist understanding of the structure and function of culture and makes possible the outlook that law is itself a culture which transforms culture. The other is the view that law is in some systemically autopoietic process which establishes a self-reflexivity, thus that even the effectivity of such artificial device as legal fictions is very significant in this process of legal formation. Especially in cultural conflicts, law is not the simple third viewpoint where certain conflicting cultures are judged neutrally; rather law permeates self-reflectively into

the systemic viewpoint of law that tends to dominate lawyers' doctrinal mind. It is significant for us to learn that the reality of law is rich and multi-layered in our normative practice in society; that our normative practice is constitutive of various kinds of narratives concerning ethics, law, and even politics, or that various kinds of principles, standards or rules, whether they be ethical, moral, or political, work for a particular law such as civil law. To secure the viewpoint which is perspectival to catch the multifarious reality of law is much important, as Geertz stimulatingly emphasizes. However, acknowledging all this, I think that Geertz's discussion misleads us in understanding the reality of law. One point is concerned with his distinction between norm and fact. When he talks about the local practice of law in a particular society with his hermeneutic viewpoint, he emphasizes the importance of fact against the system of norms. For him, the local practice of law, which is usually considered as belonging to the domain of the factual from the systemic viewpoint, is actually an expression of the domain of the normative. Thus, his main point should be, as I take it, the importance of *micro-norms* performed in local narratives against *macro-norms* constructed systemically in the form of legal system, though both belonging to the same domain of the normative. His emphasis of micro-norms should be placed as the problem in the domain of the normative, and not in the domain of the factual. But, even if this alternative contrast for him is understandable as a mode of argument, his viewpoint is still misleading: I sense that his viewpoint overlooks the important aspect of the complex relationship between micro- and macro-norms, especially of the relative independence of the latter from the former.

⁵ Annelise Riles, "Hope in the Law" (in: *Cornell Law Forum*, Fall, 2009, pp. 2-7), esp. p. 5ff.

cultural conflicts through its own characteristic arguments and judgments for some political, moral, or cultural impacts. Further, in this regard, the notorious formality of law can itself be a cultural drive to shape the newer cultural setting in a society, as an invaluable feature of current law. And practical and professional legal practice, especially in the field of conflict of laws, expresses this tendency as a self-reflectively technical and cultural medium through which culture is transformed and made better.

There is no denying that law is a dynamic part of culture which shapes itself the constitution of culture. As mentioned earlier, considering various relationships between law and culture, law can itself be a medium of culture, as in the case of law over culture, in such a complex and subtle relationship to culture. Still, we should beware, as remarked on the culturality of law or in the case of law within culture, that this sort of law's internal drive is itself culturally bound: the technical legal device itself can arouse some cultural conflict with its own cultural background. We can say that this point is related to the politics of legal formalism. Legal formalism is not such a neutrally autonomous view of law. Rather it is supported either by some expressivist view of law or by the instrumentalist view of law, both of which are not politically innocuous.⁶ Putting aside the former view which is irrelevant for the moment, the latter idea of legal instrumentalism includes such normative ingredients as the following.⁷

Abstract Ingredients	–Form	: Constructing Desirable Norms
	–Substance	: Prizing Purposes
	–Boundary/Relation	: Human Artifice/Coherence
Intermediate Ingredients	–Form	: Constructing Purposive Norms
	–Substance	: Promoting Policies
	–Boundary/Relation	: Norm Connection/Infusion of Law and Politics
Concrete Ingredients	–Form	: Arguing with Various Policies
	–Substance	: Achieving Purposes
	–Boundary/Relation	: Norm Construction/Revising Societal Standards

Here the important ingredients are prizing purposes, promoting policies, and achieving purposes; which are themselves the expressions of certain political morality and hold certain valuational directions. For legal instrumentalism, its purposiveness is the very basic factor.⁸ But, purpose and policy themselves must be justified in morally substantive way, and the emphasis on the technical autonomy of law must follow this justification. In particular, the emphasis on the importance of legal technicalities

⁶ On legal formalism, Cf. Gary Minda, *Postmodern Legal Thought* (NYU Press, 1995), p. 20ff.

⁷ Ko Hasegawa, "Normative Ingredients of the Idea of Law in the Light of Cultural Differences" (Completed draft to be published shortly from NUS Press).

⁸ Cf. Robert Summers, "Pragmatic Instrumentalism in Twentieth Century American Legal Thought: A Synthesis and Critique of Our Dominant Theory About Law and Its Use", *Cornell Law Review*, Vol. 66, pp. 861-948, 1981)

presupposes the importance of legal formality; which is yet a function of the stable framing of law relying on some substantive view of morality. If this kind of legal formality works well in the context of cultural conflicts, it has to be only because the substantive frame for law is stably cleared as a product of adequate normative judgments among conflicting cultures in sustaining the focus on legal formality and technicality.⁹ Thus, there should be substantive moral judgment behind Professor Riles' view of the distinctive place of law in culture.¹⁰ If we imagine this point as an extension of the choice-of-law problem, as Professor Riles does so, thereby thinking that the principles for choice-of-law themselves, if any, are somehow technically neutral at some meta-level for the accommodation of conflicting cultures, even if self-reflective, then we would lose sight of the cultural confrontations among the cultures in question involving the very law itself.¹¹

For example, let us take the case of the Nibutani Dam in Hokkaido, Japan, decided in 1997; which was concerned with the conflict between Japanese national government and the Ainu people.¹² A dam construction for water control in Nibutani area in Hokkaido made sink the sacred ritual places for the Ainu, the indigenous people in Japan living in that area. And the Sapporo District Court made a very famous decision on this case, declaring that the rights and vital interests of the Ainu for their traditional rituals had to be protected against the governmental interests for water control.

⁹ If one thinks that legal technicalities can work with backed by the very establishment of the law in question, it itself already involves some substantive judgment that the law in question is set for a certain justified or desirable direction of societal order.

¹⁰ In "The Empty Place" Professor Riles discusses about the court decision in Fiji, as a vivid example of legal technicalities for cultural accommodation, which employs the existing concept of "empty place" to redirect itself for the maintenance of traditional culture on land use (p. 11ff.). I think this is also the case for my standpoint, because it is considered some idea of freedom that led this decision to utilize the concept of "empty space" for the interests of the Fiji people.

¹¹ It might be pointed out that the case I dealt is different in nature from the cases of conflict-of-laws Professor Riles relies on. But I think the basic problem situation is the same between them. In conflict-of-laws, several methods are said to be available for court. The Restatement (Second) of Conflicts of Law is said to endorse the so-called "most significant relationship" test, which appreciates (1) the needs of the international system; (2) relevant policies of the nation in which the suit was brought; (3) the relevant policies of all interested states; (4) justified expectations of the parties; (5) certainty, predictability, and uniformity; (6) and ease of administration. But there are also other approaches. The "center of gravity" approach chooses the law most closely tied to the case in question. The "interest" approach chooses the law that, looking the history of the applicable laws, is applicable without impairing the participants' interests. Also possible is the "comparative impairment" approach that the choice-of-law in question holds the least impairment. Further, there can be the "advancement of the forum's interest" that maintains the predictability of result and the existing order. It looks to me that all these approaches try to establish some basic principle of choice-of-law by attaining some *equity*; which shows the importance of substantive valuations in making legal technicalities.

¹² Cf. Georgina Stevens, "Selected Human Rights Documents: Resolution Calling for Recognition of the Ainu People as an Indigenous People" (in: *Asia-Pacific Journal on Human Rights and the Law*, Vol. 1, 2008, pp. 49-50).

Important theoretical bases for this decision include the Constitution of Japan (Article 13, where “the right to life, liberty and the pursuit of happiness” is guaranteed for Japanese people) and related international treaties on human rights that the Japanese government had ratified, as well as positive arguments by anthropologists, legal scholars and political scientists for respecting the sacredness of Ainu’s traditional rituals. Of particular importance in this decision is to ensure that the Ainu have the right to enjoy their own culture, based on Article 13 above.

The logic of the decision is characteristic in that, rather than supporting universal human rights as with those excluded from any nation’s legal systems, it explains the necessity of respecting the rights of the Ainu as a racial minority by insisting that these be inherent rights guaranteed in Japanese legal system. The court explained the importance of respecting the Ainu’s right to enjoy its own culture as one of the personal rights guaranteed under the Japanese Constitution. It also stressed that the right to enjoy culture was given in the context that all the Japanese people shall be guaranteed their personal rights; and yet, given the discriminative history endured by the Ainu through assimilation policies forced on them, greater attention should be paid to the Ainu to ensure that this right is firmly guaranteed.

Further notes will be necessary here. The right of cultural enjoyment is not a collective right exclusive to the indigenous people, but a personal right available to both the Japanese and the Ainu under the Constitution. Japan’s current legal structure guarantees only personal rights under the Constitution, and the definition of personal freedom in a collective unit is still unclear in the general theories of collective rights. Given this, the Sapporo District Court decision, which affirmed the right of cultural enjoyment as one of the general personal rights, may be considered a highly practical approach.

In fact, the right to cultural enjoyment is important to anyone in general, because it works as a premise on which people make personal decisions and choices, and thus due respect and consideration should be paid to anyone in exercising this right. Thus, not only the racial minority but also the social majority is entitled to the right; there is a possibility that, through this reasoning, the oppressive effects of the activities by the social majority on the minority may be justified under the pretext of guaranteeing the former’s cultural right. However, the court maintained that the minority is actually subject to undue discrimination as a result of differences from the social majority in exercising the right to enjoy their own culture. This is because, while the latter can enjoy cultural rights and receive support in protecting and promoting their cultural environment almost as a matter of course, the former may have to demand nonintervention into their cultural environment or ask for compensation and support in their efforts to conserve cultural environments. They may also have to be guaranteed the right to preserve and use their own language without yielding to that of the social majority. By acquiring this right, indigenous people become able to demand that their

distinct culture be preserved through proper respect and consideration in local economic development projects meant to serve the needs of mainstream society.¹³

We can say that this is such a self-reflective decision of the court in which it conscientiously tried to accommodate cultural conflicts between Japanese national government and the Ainu. This decision is to be appreciated as one of the best examples not only for such self-reflective cultural accommodation but also for a morally admirable solution to the problem within the limitation of legal resources in Japanese legal system.¹⁴ But, in saying so, we should be careful here that this decision cannot be said as an expression of new technicality of law in culturally complex setting. Indeed, the main legal point in the decision was the interpretation of the clause in Land Expropriation Law in Japan that requires government to “contribute to the adequate and reasonable use of the land” (Article 20, § 3); the court made the established interest-balancing test between governmental and the Ainu’s interests to measure the fulfillment of this standard. But this technicality itself is not the real point of the decision. This is because, on the one hand, the decision is made within the existing legal framework through immanently critical viewpoint (not by simply working out some technical device¹⁵), and because, on the other hand, this decision is surely based on substantive equality considerations similar to the one developed by Will Kymlicka as external protections for minority people¹⁶. The leading thread of this decision, even if it discusses some technicality of interest-balancing, lies in the equitable recovery of the discrimination against the Ainu people. This thinking is led by the ideal of equality for the enjoyment of culture by anyone in a society.¹⁷

¹³ Specifically, in the Ainu’s case, it is recognized under the right of cultural enjoyment that they can maintain their own life forms, enjoy benefits from using natural resources and live on their own in distinct cultural contexts that differ from those of mainstream society. Indeed, because the primary importance of ensuring this right is to preserve indigenous culture, it may constitute only part of the Ainu’s entire rights; in this regard the role this right plays in realizing their overall rights is limited. Yet the significance and possibilities of this right (which has been incorporated in the Japanese legal system to certain extent) are important for the basic stance of the Sapporo District Court.

¹⁴ This decision holds such a contrasting mode to the case Professor Riles critically examined in her article “Cultural Conflicts”: *United States vs. Jarvison*. Riles, “Cultural Conflicts”, p. 280ff.

¹⁵ Besides the problem of simple interest-balancing, we could not think also that, when the court discussed about the sacredness of the Ainu rituals for praying ancestors in the special site at some riverbank of the Saru river, it made some *legal fiction*, as Professor Riles might expect as a realization of some significant legal technicality, for endorsing the importance of the rituals against the interests of Japanese governments.

¹⁶ Cf. Will Kymlicka, *Multicultural Citizenship* (Oxford U. P., 1995), esp. Ch. 2.

¹⁷ The reference in the decision to some international human rights treaties which Japanese government had ratified is of course important. Yet this should not be understood in the formalist way that the existence of these treaties itself gave certain justification for the court decision. Because we should not forget the legal gap between international and domestic law. If this gap is to be filled, then one needs some other arguments to show the necessity of the connection between two legal systems. And, to complete these arguments, one needs a substantive one to show why a particular treaty provision on indigenous rights is legally

If the court decision would have held some formalist stance, then it would have repeated a familiar sort of opinion that from the viewpoint of Japanese constitution where only individual rights are guaranteed, there would have been no special constitutional protection as to the rights of the Ainu people; and that the special considerations for the Ainu people would have been in the domain of administrative discretion along the existing system of administrative law which itself was supposed to be constitutional. And this kind of view would have led to the conclusion that there would have been no legal inadequacy for the administration to decide the dam construction for water control for the realization of public welfare of the people in that area. However, the actual decision of the court was never like that and rather became a transformative medium for the cultural coexistence in Japan, just because it tried to avoid the very formal understanding of Japanese law and redirect that formality through its sensibility for equality. Then, if one should like to support that sort of formalist reasoning, his position could become insensible to the claims of culture from the Ainu people, possibly betraying his own understanding of the dynamic formality in law. But, if one would like to support more egalitarian understanding of relevant laws which the Sapporo District Court ruling actually showed, then he would have to incorporate the value of equality into his own understanding of the formality of law. This would mean that the utilization of legal technicality anyhow needs certain substantive conception of relevant values in its own position to orient itself toward an adequate valuational direction.¹⁸

And, to add, we should not forget about the normative character of this substantive value of equality. Equality is such a fundamental and sensible value for the equitable status of various agents, groups, as well as cultures, and this is the very reason why the Sapporo District Court decision can not only be attractive for the Ainu people but also be persuasive for the majority in Japan. And this is also why the decision can itself be a dynamic part of the shaping of newer culture in Japan with claiming its own *legal* validity and adequacy.

relevant to the domestic decision at hand, other than formally showing that the availability of the treaty in question is simply utilized for the understanding of the domestic provisions in question.

¹⁸ If one should like to maintain this new formalist viewpoint by emphasizing legal technicality, he would have to avoid the criticism of the notorious “politics of form” which CLS once threw on modern legalism. Here, as all of us know well, CLS attacked the alleged neutrality or impartiality of modern law by emphasizing that law is political. This remark itself is important, though CLS could not make clear its own politicality in law. One may be also trapped in this theoretical blindness, when he would like to simply emphasize the new formality of law. “Politics of form” can disguise its substantive endorsement in law; and, when one can ingeniously endorse this position by turning this idea into the cultural context for renovating the cultural setting in society, he may forget that he already deploys some substantive value with the understanding of the very formality of law, even if as a cultural medium. And we have to make clear about this substantive value for this kind of move and its sensibility to cultural problems.

Then, is some substantive judgment really forgotten in Professor Riles' view of law and culture? As a matter of fact it looks to hold a certain view of this sort of value; which I sense is much related to Professor Riles' idea of *social hope*. We should be careful that when Professor Riles discusses hope as some internal drive for human activities such as legal reasoning, hope is important not as some possible realization of our concrete objectives but rather the continuation of human efforts for doing something better. In the midst of cultural conflicts where various possibilities for the transformation of culture are debated among people, certain hope with its risk for fear emerges for a better future of society. Indeed, hope may include suffering, effort, failure, or misery; and yet it is important drive for the pursuit of the better.¹⁹ This is itself a deep philosophical thesis about human subsistence; I sense we surely hold certain hope in such a radical sense in human communication. And, we should also note that Professor Riles wishes to regard hope as one of the possible extensions of social primary good in the Rawlsian sense.²⁰ When hope is a primary good for societal institutions where some idea of justice regulates to distribute those goods equitably to people, hope may become close to the endurance of self-respect which Rawls wished to maintain through the just workings of societal institutions.²¹ Yet, this concept of social hope seems not supposed to include some substantive idea of morality, as Rawls did so with the value of equality. Rather this social hope looks an idea of the aspirational morality in Fuller's sense.²²

Although it is much understandable that hope is very important motivational factor for human beings, there are some unclarities in this idea in the context of law and culture. —First are the following. Are all the legal technicalities hopeful; is there no distinction between good and bad technicality in law? If there is the significant distinction between them, how can we think about the conditions against hopeless technicality? If these questions be irrelevant to understand the significance of hope in law, then how the Ainu in Nibutani could have hope for their existential recoveries? And can the formalist criticism against the 1997 Sapporo District Court decision hold still as some hope for the Ainu people? These questions lead to the second unclarity how hope can be a protective wall against continuing harms against cultural minorities: if even constant discrimination could be hopeful, then how could we be against inadequate or unjust institutions? In this situation, hope could exist with the distrust of others; and yet would not hope, in whatever form, need societal trust for its realization? Then, by what is this trust really possible; not by some substantive ideal? And third and finally, as society needs trust among people to maintain its order, we need at least certain cooperation among people. For this we need certain civility

¹⁹ Hirokazu Miyazaki, *The Method of Hope* (Stanford U. P., 2006), Ch. 1.

²⁰ John Rawls, *A Theory of Justice* (Revised Edition) (Harvard U. P., 1998), § 11, 15.

²¹ Rawls, *op. cit.*

²² Lon L. Fuller, *The Morality of Law* (Yale U. P.), Chs. 1, 2.

embracing mutual respect, recognition, and willingness for others. Then, does hope also include these virtues? If including, then can we say that there is no substance like equality in them; if not including, how can hope be connected cooperatively to yield trust among various people in a society? —In all this, my point is concerned with certain substantive value to orient hope for a better future. If hope should lack this orientation, hope could be at most only a wish for a particular individual and be societally in vain.²³

[3] Let me make some concluding remarks. Law in culture itself shapes culture with possibly conflicting with existing cultures thereby introducing newer cultural factors. I think this global embeddedness of law within culture is what we should beware and the point for the very place of law in culture; in the discussion so far, I have emphasized the culturality and also the valuational orientation of law. Thus, the point for my understanding of the place of law in culture should be how to integrate those points I have made. And I wish to maintain here that *a model of law* is necessary for this theoretical integration.²⁴

The question here is concerned with not the substance but rather the role of this model to form some boundary and shape of law in such a complex and subtle relationship between law and culture.²⁵ Some norms which may be captured as law, with its own cultural force, can come in the world of culture making; where various norms are mixing to form, maintain, and transform culture itself. Then those norms shape themselves into newer moments in the movements of entire norms in culture for providing newer law through a model of law. We put various norms through a model of law into the world of the movements of cultural norms; when those norms can accommodate the existing cultural norms and succeed in transforming them, we also capture this movement positively in our model of law as an aspect of law. Here law is also a cultural factor and yet it is so not because it retains its own technicalities but rather because it renovates its own character with the adaptation to the cultural setting in question through the background values of itself.²⁶ This is to be called as *the metamorphosis of law*, in which law and its background values are always tested, so to speak, if it may adequately accommodate cultural conflicts not from without but rather

²³ I should add that the good of social hope may be supposed as some common good in a society, in accordance with a communitarian understanding. But, if social hope was to be grasped in this way, the value of it had to be societally substantive.

²⁴ Cf. Mark Greenberg, "How Facts Make Law" (in: Scott Hershovitz, ed., *Exploring Law's Empire*, Oxford U. P., 2006, Ch. 10), esp. p. 245ff.

²⁵ This point is also related to the conception or idea of law, about whose complexity I discussed in my "Normative Ingredients of the Idea of Law in Cultural Differences".

²⁶ The Sapporo District Court decision made itself a part of accommodated cultural co-existence between the Japanese law and the Ainu culture by trying to immanently criticize the existing view of the Japanese law to make a substantive case for the Ainu people whose distinctive interests have been ignored in that existing view.

from within through an adequate substantive ideal for law. And in so doing, law's shape is always configured through the model of law in question with newer norms to cope with newer cultural conflicts. In this sense, there would be no fixed shape of law; rather the shape of law, if any, lies in the very construction and revision of the model of law in question itself.

Needles to say, what sort of significance this model of law may have is the much contested question. As I tend to hold this model in a Dworkinian way, one might criticize that my outlook is unnecessarily more comprehensive than, say, the model of legal instrumentalism which allows us to purposely work out necessary legal devices context by context ((Professor Riles seems to embrace this model). I acknowledge this kind of criticism is significant. But it would be also possible to counter it by raising the points similar to the ones that Dworkin himself made against legal pragmatism in his *Law's Empire*: if only future considerations in terms of policy is important for law or not; if genuine rights problem is to be reduced to some fictitious handling by interest-balancing or not; if or patchwork decisions are to be allowed or not.²⁷ I am not sure at this moment if legal instrumentalism can really escape from this counter-criticism. But the important thing now in our problem context is that Professor Riles' emphasis on legal technicalities is, as it stands, not really successful in the complex and subtle relationship between law and culture.

²⁷ Ronald Dworkin, *Law's Empire* (Harvard U. P., 1986), Ch. 5.