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# THE STRUCTURATION OF LAW AND ITS WORKING IN THE JAPANESE LEGAL SYSTEM *

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## 1. – Introduction

In this article, I would like to consider two problems : the significance of the *structuration* of law, and the working of it in the Japanese legal system. There is a double objective in this problem setting : to understand an aspect of the structuration of law, while keeping an eye on the characteristics of the historical development of the Japanese legal system in Asian context. I hope this viewpoint can contribute to the general theoretical understanding of the structuration of law with a richer comparative perspective between the West and the East.

First I would like to explicate the meaning of the term structuration. Since to capture the nature of law in terms of its structuration or structure presupposes an interpretation of these concepts, I should make clear how I understand those concepts before developing my discussion.

The term structuration itself suggests a certain direction for our consideration. To elucidate it in general, we should compare it with

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the term structure in society. Structure usually means a static framework of social practice; it is the bulk of established rules or macroscopic patterns of collective activities in society. Structure is also a constraint on the activities of human beings or groups in society; it functions to integrate various social activities. In contrast, structuration is different in kind : structuration is, basically, a dynamic process of the transformation of structure, that is, the generative and developmental process of structure. Structuration is the process of rule-making or pattern-producing in society. This includes the transformative conditions of the making of structure. Thus, structure is the properties of structuration and both of these have a feed back relation with each other [1]. This understanding of structuration is significant for the discussion in this article, because it will try to penetrate into a deeper mode of the transformation of law than is usually supposed in the mere comparison of legal systems.

From this general perspective, I would like to make some remarks on the structuration of law. Law is a part of the structure of society to the extent that it is constituted of rules or macroscopic patterns of collective actions by human beings or groups. However, law is not a ready-made setting for society, but rather an aspect of the transformative process of normative space in society. Law is generated, established, developed, and revised through incessant constructive process of human beings. In this regard, we can find structuration in the world of law. This viewpoint is significant, because, as far as law has a resulting aspect of its transformative process, the distinctive characteristics of law depend on the characters of its transformative process.

Of course, the contents of law can have independent meanings and linguistic properties of themselves. However, whereas these characteristics of law are, as it were, the logical characteristics, the morphogenetic forms of law are, as it were, the genealogical characteristics worthy of analysis. It is evident that we need to learn both of these characteristics in order to fully understand the nature of law in society. Also, I should add that the alleged distinction

[1] Cf. Anthony GIDDENS, *The Constitution of Society*, Univ. of California Press, 1984, pp. 16ff., pp. 139ff., pp. 185ff. My understanding of the structuration process is not quite the same as Giddens' insightful formulation of it. However, the recognition of the significance of the dynamic process in society is, I believe, the same.

between the practical structuration and the theoretical structuration of law is not necessarily a sharp one. To my understanding, this distinction is not in kind but in context. In legislation, people need a certain theory of the structuration of law to construct various laws in a systematic way as they do so in academic understanding. Here the only relevant difference lies in the type of theory for the structuration of law. Thus we should concentrate on this type.

Having all this said, I think that the term structuration can be used in at least three ways for the understanding of the transformation of law. I shall refer to these as *action-based* structuration, *attribute-based* structuration, and *value-based* structuration.

The action-based structuration of law is concerned with the process of transformation of law according to the spheres of human social activities that law aims to control. For example, the spheres of human social activities include : contracts, torts, family relations, civil procedure, crime, criminal procedure, economic activities of companies, welfare services, environmental protection, administrative acts, legislative acts, judiciaries, civil liberties, and the like. Along these spheres, law can be constructed as a set of various statutes or precedents such as contract law, tort law, family law, civil procedure law, criminal law, criminal procedure law, commercial law, economic law, welfare law, environmental law, administrative law, court law, constitutional law, and the like. This kind of structuration of law is itself a traditional classification of law, though it can mean not only a conventional classification but also a spherical structuration of law. In this regard, the structuration here traces practically legislative processes and establishes the validity-relation of laws in a hierarchical way.

The attribute-based structuration of law is concerned with the properties of norms in law. For example, there are various norms which aim to establish the following functions : constituting evaluative criteria of the application of norms, constituting procedural rules for the execution of legally required acts, manifesting the basic aims of legal protections, constituting normative requirements of certain actions for individuals. We can also add other kinds of functions such as duty-imposing, power-conferring, permission-giving, or exempting. Furthermore, we can add several dichotomous distinctions for the properties of law : native law vs.

transplanted law, custom law vs. artificial law, or regional law vs. global law [2]. From this viewpoint, the structuration of law becomes a set of functional classifications of norms. There are norms that represent expected conditions and effects in the normative space, norms that specify procedural steps that individuals or organizations have to obey, norms that express recognition of problem contexts or desirable goals in society, or norms that regulate particular individual behaviors in ordinary life. Moreover, we can distinguish among duty-imposing, power-conferring, permission-giving, or exempting norms, and other dichotomous distinctions of law. If we understand the various legal provisions by using these distinctions, we can find a functional structuration of law which is cross-cut in the conventional classification of law as stated above.

Although these two kinds of classifications are significant to capture the structuration of law, this is to be taken as the *surface* structuration of law that is different from the *deep* structuration of law. The surface structuration of law is concerned only with the phenomenal classification or connection of law whose characterization relies on the static understanding of law. For example, there are many instances of the surface structuration of law in Japan. These instances are mainly the transportation of various laws or legal provisions in foreign countries to Japanese legal system in the course of history since the modernization of Japan in the 19th century. In the formation process of the modern Japanese legal system in the 19th century, we can find the following transportations from the European legal system : the Constitution of the Japanese Empire of 1889, the Civil Code of 1895, the Commercial Code of 1899, the Criminal Code of 1907, and the like. Also, in the process of revising the Japanese legal system after the defeat of World War II which was greatly influenced by the American legal system, we can also find the following transportations : newly established laws include the Constitution of Japan of 1946, the Habeas Corpus Law of 1948, the State Compensation Law of 1947, the Anti-monopoly Law of 1947, and the like; revised laws include the Code of Criminal

[2] Cf. Masashi CHIBA, *Ajia Hou no Tagenteki Kouzou* [The Plural Structure of Asian Law], Seibundou, 1998, chs. 3. 4.

Procedure, the Code of Civil Procedure, the provisions on the family in the Civil Code, and the like [3].

These instances in the Japanese legal system are important as the examples of the surface structuration, because these transportations were made according to a certain theory of legal system not only practically but also academically. The surface structuration is carried along with a certain systemic view of law, whose expression is to be where to place which provisions, or how to classify which norms. In a sense, this surface structuration makes systematicity and coherence of the legal system with certain normative characteristics. However, the direction of these transformations or the direction of transformational theories for law must be determined by other deeper conditions. Without these conditions, the surface structuration is a mere patch-work. I think there lies a dynamic deep structuration process that determines the transformation of a legal system behind the surface characteristics of law.

What is this deep structuration of law? I think it the *value-based* structuration of law. To understand this kind of structuration, we should make a fresh start.

## 2. – The Value-based Structuration of Law [4]

### A. – The Layers of Normative Control and the Spheres of Normative Objects

Generally speaking, law and society have an interactive relationship for the formation and maintenance of social order. Here, to grasp the structure of this interrelationship, it is fruitful to distinguish the layers of normative control from the spheres of controlled objects.

First, regarding the layers of normative control, we can distinguish three dimensions : legal principles, statutes, and legal per-

[3] Cf. Tsuyoshi Kinoshita, « The Reception in Japan of the American Law and its Transformation in the Fifty Years since the End of World War II : Introduction », in *Law in Japan*, Vol. 26, 2000, p. 4ff.

[4] This and the next section are partly adapted, with revisions, from my article in Japanese entitled as « Ajia Shakai ni Okeru Fuhen Hou no Keisei [The Formation of Universal Law in Asian Societies] », in *Hokkaido Law Review*, Vol. 50, No. 3, 1999, pp. 278-261.

formance[5]. Legal principles are abstract fundamental values of political morality such as liberty or equality which can be accepted beyond the wall of particular culture, even if symbolically. They are mostly confirmed in constitutional law in a society and thus become fundamental principles for the establishment of the statutory system. Statutes refer to the system of general or special positive laws established within a constitutional order. They are valid under the constitution, and concretize the constitutional principles in various problem contexts in such forms as civil law, criminal law or anti-trust law, and the like. Legal performance means the cluster of concrete problem-solving activities through the application and interpretation of law or statutes, which are performed by administrators, judiciaries, or ordinary citizens under law or statutes. Here, the application and interpretation of law is carried out in a variety of forms in society, and, as a whole, various possibilities of the application or interpretation of law is pursued incessantly.

These three layers have a certain difference in the abstractness of normative control. That is, while legal principles can be most abstract and universal, statutes are general and yet concrete in content because they are determined within particular social circumstances, and legal performance, being carried out along particular cases, subsists in relation to specific problem situations. Also, these three layers are found typically in artificial norms, and yet not found in customary norms. In customary norms or customary law, only the accumulation of legal performance makes a loosely systematic order, while legal principles and statutes do not appear in a crystallized form. However, if certain abstract principles are to be sought or valid precedents are found in custom by some theoretical investigations, a similar layer of quasi-legal principle or quasi-statutes will be found in it.

Second, we can distinguish several spheres of human activities in society. Although the entire society is constitutive of a variety of spheres for human activities, I distinguish here at least three of them : the political sphere in which political activities such as the formation and change of power relationship among people are

[5] On this distinction, regarding between principles and statutes, cf. Ronald DWORKIN, *Taking Rights Seriously* (Harvard U.P., 1977) chs. 1. 3.; regarding between statutes and performance, cf. Lawrence FRIEDMAN, *The Legal System* (Russell Sage Foundation, 1975) chs. II. III.

prevalent; the economic sphere in which economic activities such as the production and consumption of goods or labor relations are prevalent; and the cultural sphere in which cultural activities concerning family, education, or social security are the main focus. The entire variety of human activities in society can be sorted into these three spheres [6].

This distinction of spheres is based not only on the nature of goods dealt with in each sphere, but also on each one's distinguishing characteristics in terms of the nature of order. That is, the political sphere is distinguished on the basis of the power relation; the economic sphere on the basis of material wealth; and the cultural sphere on the basis of life forms of people in society. In other words, the political sphere is distinctive on account of normative control for power activities, in which the protection of human rights or the establishment of a democratic regime is demanded. The economic sphere is distinctive on account of control for the allocation of material wealth, in which the guidance of individual or collective activities in the market and the balance of material results of those activities are desired. The cultural sphere is distinctive on account of control for social bonds, in which equal enjoyment of basic resources such as education or welfare services is required.

This distinction of spheres corresponds to the basic units of modern society : government, company and household. Some societies might not have such clear units, and yet even in that case, a governmental part, economic part, and cultural part in society can be distinguished among a variety of human activities.

### B. – The Formation of « Hybrid Law »

If we can assume the distinctions of layered and spherical aspects of legal practice, we can grasp the interaction between law and society by reference to the following matrix made up of a combination of the three layers and the three spheres. Using this matrix, we can grasp the structure of the interactive relation between law and society as the nine-cell dimensional integration by law of society,

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[6] On the distinction of spheres, cf. Jennifer HOCHSCHILD, *What's Fair?* (Harvard U.P., 1981), esp. ch. 3.

especially in the combination of whether more idealistic or more realistic (Figure 1) [7].

FIGURE 1

Matrix representing the intersections of the layers of normative control (legal principles, statutes, and legal performance) and spheres of human activity

| | Legal Principles | Statutes | Legal Performance |
|---|---|---|---|
| Political Sphere | *I* | *I* | *I/R* |
| Economic Sphere | *I* | *I/R* | *R* |
| Cultural Sphere | *I/R* | *R* | *R* |

(*I* = the ideal, *R* = the real, *I/R* = an amalgam of the ideal and the real)

This matrix indicates that the integrative function by law of society varies multi-dimensionally with the working of complex values. A spectrum will exist here between the case that law integrates society in a monistic way (which means that the matrix in this case is completely coherent among nine cells) and the case that law leaves conventional changes in society untouched (which means that each cell of the matrix in this case shows a different character of order from the other cell along each problem-context). However, as will be shown in the course of my discussion, I think there can be a certain equilibrium among the nine cells.

Also, in this vein, we can grasp a certain value pattern of law, in whose nine cells foreign values and existing values have some tension and conflicting relationship. Here we have two basic patterns, represented in the following figures (Figures 1a and 1b). The former figure indicates the case in which foreign values are accepted ideally and the existing values are realistically persistent against the permeation of foreign values. The latter figure indicates the opposite case, in which the existing values are basically sustained and foreign values intrudes some part of the existing system.

[7] The idea of matrix is used not to indicate the formal structure of legal system but rather to indicate the dimensions of the structuration process of law. Also, « the ideal » means societal (often new) values which should be introduced into the existing society, whereas « the real » means societal (often conventional) values which should be maintained for the existing society.

FIGURE 1a

**Matrix representing the value pattern of law in which foreign values are accepted against existing values**

| | Legal Principles | Statutes | Legal Performance |
|---|---|---|---|
| Political Sphere | *F* | *F* | *F/E* |
| Economic Sphere | *F* | *F/E* | *E* |
| Cultural Sphere | *F/E* | *E* | *E* |

(*F* = foreign values, *E* = existing values, *F/E* = an amalgam of foreign and existing values)

FIGURE 1b

**Matrix representing the value pattern of law in which existing values are persistent against foreign values**

| | Legal Principles | Statutes | Legal Performance |
|---|---|---|---|
| Political Sphere | *E* | *E* | *E/F* |
| Economic Sphere | *E* | *E/F* | *F* |
| Cultural Sphere | *E/F* | *F* | *F* |

(*E* = existing values, *F* = foreign values, *E/F* = an amalgam of existing and foreign values)

These two matrices can be used for the identification of the value pattern of law not only in Asian societies but also in various societies, including Anglo-Saxon or European ones, to the extent that these societies have experienced certain processes of value-based structuration of law. Apparently, in the transportation of law from Western societies to Asian societies, the former pattern is found. Maybe, in the reception of Roman law in European societies since the Middle Age, the former pattern is found; maybe, in the formation of modern legal system in Europe, the latter pattern is found; and maybe, in the American case, also the latter pattern is found.

In addition, we might be able to consider the intermediate case between those two patterns above. In this intermediate case, some sort of amalgam appears all over the distinguished layers and spheres : foreign values revised by existing values, existing values revised by foreign values, and the entangled amalgam of two

values. The pattern of this intermediate case will be also represented in a matrix. However, it will suffice here to identify the basic contrast of those two patterns.

According to the understanding so far, we need not grasp the reception process or conflicts and tension between Western and Asian values as a strict alternative. We need not think either the purified monistic rule by Western values emerges in Asian societies or the particularized conventional order in Asian societies is persistent against Western values. Rather, using the matrix above, we can think along a middle way. That is, multi-dimensional normative control exists among segments of society. This recognition leads to the idea of « *hybrid law* ». This idea expresses the multi-dimensional space of law especially in complex society, of which Asian societies are one example as well as other societies including Western societies. This idea is different not only from a positivistic understanding of legal system as monistic and hierarchical but also from an anarchistic understanding of legal system as fractional and dispersed [8]. « Hybrid law » is loosely consistent and multi-dimensionally plural complex of laws, whose internal constituents are neither rigidly coherent nor completely unrelated.

Based on this view of « hybrid law », we can make a tentative hypothesis about the complex structure of the reception of Western values into Asian societies and their societal values, including Japan, like the following (Figure 2) [9].

This hypothesis means that Asian societies can seek the best mix of law in such a way that the following three conditions can be met without serious contradictions : the establishment of liberal democratic government, the balanced rationalization of economic system, and the respect of particular traditions of culture. These conditions are also to be represented in the « hybrid law » in Asian societies. In this regard, the *value-based* structuration of law emerges in Asian societies [10].

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[8] For the positivistic understanding, e.g. Hans KELSEN, *Reine Rechtslehre* (2. Auflage) (Franz Deuticke, 1960). For the anarchistic understanding, e.g. Stanley FISH, *There's No Such Thing as Free Speech, and It's a Good Thing, Too* (Oxford. U.P., 1994).

[9] Hereafter, although Asian societies or values are often talked about, they can also be taken as Japanese society and values to the extent that there are common factors between Japan and other Asian societies.

[10] Based on Figure 1a and 1b, we can identify the two possibilities of the transformation of law in Asian societies. Although I am focusing on the Figure 1a possibility hereafter, we might need more attention to the Figure 1b possibility.

FIGURE 2

**Matrix representing the pattern of « hybrid law » in Asian societies**

| | Legal Principles | Statutes | Legal Performance |
|---|---|---|---|
| Political Sphere | $W$ *(liberty, equality, etc.)* | $W$ *(constitution)* | $W/A$ |
| Economic Sphere | $W$ *(market principles)* | $W/A$ *(contract law, antitrust law)* | $A$ |
| Cultural Sphere | $W/A$ *(principles of family, etc.)* | $A$ *(family law, social welfare law)* | $A$ |

($W$ = the Western, $A$ = the Asian, $W/A$ = an amalgam of the Western and the Asian)

However, all of this does not imply that adequate « hybrid law » has already been established in Asian societies. Rather, the opposite is the case. Asian societies, and Japan as well, have been experiencing the dynamics of value change. The best mix of Western and Asian values and the formation of « hybrid law » are still being pursued in every dimension of Asian societies, where various conflicts or tensions among values can be found. Sometimes the process fluctuates, and sometimes it tends to converge [11]. Still, this dynamic process will be able to organize the complexity of laws and values in each of the Asian societies over time. And, I should add, if the complexity of law and values in a society should not be completely fragmented, it has to hold around a certain axis. We need a certain leading value which can integrate the entire system of law com-

[11] It is sometimes said that Japanese society is characterized as an amalgam of the premodern, modern and postmodern, which shows the complexity of Japanese culture today. For example, there was the problem of constitutionality of Prime Minister's official visit to the Yasukuni Shrine on August 15, 2001. In this recent case, the constitutional issue was naturally the separation of the state and religion. However, astonishingly enough, according to a poll by Kyoudou Press on September 18-19, the percentage of people who were against the visit itself was only 23.2 % and, within this group, the reason based on the separation of the state and religion was just 24.5 %. Thus, among all the people who answered the poll, only one sixteenth judged that the official visit violated the Constitution. The percentage of people who were for the official visit on the very day of August 15 totaled 23.6 %, and 50.5 % of the people were for the official visit on August 13, the actual day of the visit. Thus, 74.1 % of the people were somehow for the official visit and never thought that the official visit violated the Constitution.

prehensively. This is the nature of the *value-based* structuration of law in general. I think the axis value is justice and its adequately interpreted conception, which is a kind of substantive fairness as I have mentioned at the beginning. In any case, the matrix shown above is the very first step to help us to understand the entire process of *value-based* structuration of law in Asian societies, including Japan.

## 3. – The Value-based Structuration of Japanese Legal System

### A. – Social Plurality and Value Conflicts in Asia

In Asian societies, we can easily find a deep variety of cultural differences. First, there are basically three Asias : West Asia, East Asia, and South Asia. West Asia is basically composed of Muslim societies, East Asia basically Confucian, and South Asia basically Buddhist or Hinduist. We have to be aware of the different cultural bases of these three Asian societies.

But, we should also heed to another framework which can capture different Asias by utilizing the spherical differentiations indicated above. In the political sphere, traditional authoritarian regimes exist, such as monarchy, oligarchy, or military dictatorship, whose center or upper level of society was greatly influenced by the West in the history of Western colonization or cultural invasion [12]. In the economic sphere, while Western capitalism has invaded and changed Asian economies, Japan and the newly industrialized economies (NIEs) were able to develop their own capitalism in an interaction with a particular circumstance of each country. However, we should note that the gap between the development of urban capitalism and the traditional life forms in rural areas is often enormous, and has produced social problems such as poverty or discrimination in many places in Asia [13]. In the cultural sphere, we can observe the amalgam of diverse religions such as Buddhism,

[12] We should recall that, although Japan is the only country in East Asia that was not colonized by European countries, Japan, as a nation state, has been trying itself to catch up European countries or the United States through the 20th century.

[13] We can find this phenomenon especially in South East Asia. See Hisashi NAKAMURA, *Hitobito no Ajia* [People's Asia] (Iwanami Shoten, 1994).

Confucianism, Muslim, or Christianity, or the amalgam of diverse races and their languages, and also diverse family forms [14]. This amalgam is deepened according to particular circumstances of political and economic spheres in each country.

Needless to say, there are many kinds of political, economic and cultural differences among Western societies, that is, say, among Western and Eastern Europe or North America. Generally speaking, every society is highly complex, even if its societal ideals themselves are simple and abstract. There are no basic differences among any societies in this regard. Nevertheless, we can say that political and economic differences in the West are not so enormous as among Asian countries, and that the extent of differences in Asia is more complicated than in the West. However, this comparison of social complexity is not our purpose here. Here it will be enough just to confirm the following basic observation. In Asian societies, including Japan, due to particular social circumstances, tensions in political, economic and cultural spheres exist. Traditional Asian societies are now facing enormous influence from Western societies, especially from the United States. For example, there are authoritarian regimes facing the pressure of democratization, the agricultural form of production form facing the extension of capitalist market economy, and collectivistic conventions facing the process of individualization. With this observation in mind, let us concentrate on the task of « hybrid law » for these societal tensions.

Based on the recognition of these tensions, the task of law in Asian societies, including Japan, is to be sought in the proper arrangement of these mutually conflicting values. We need to think that the task of law in Asia should be different along the three different spheres in society : the political sphere, the economic sphere, and the cultural sphere.

In the political sphere, an authoritarian regime has many deficiencies. Despotic government tends to oppress the critical movements in society, to monopolize various interests and profits, and to corrupt or make bad alliance, all of which are never in the interests of the people. Here the Western value of constitutionalism is significant : the division of power, the protection of human rights, the sovereignty of the people, and the establishment of the rule of

[14] See NAKAMURA, *ibid.*, esp. ch. IV.

law. These values work to restrain the traditional authoritarian regimes of power in Asian societies.

In the economic sphere, due to the big pressure of capitalism, Asian societies have to cope with the power of the global market mechanism, whether they like it or not. Here the problem is to provide adequate rules for the functioning of market mechanisms compatible with the working of traditional economic conventions. While each of the Asian societies has to establish transparent and rational rules for economic activities, it also has to protect conventional economic practice for its particular spirit and ethics. In spite of the recent depression of Asian economies, especially in Japan, the invariant problem is still how Asian societies can accommodate their own logic of economic practice to the expansion of the standards of market economy.

In the cultural sphere, a significant problem is how the desirable uniqueness of Asian cultures should be protected. Diverse religions and traditional life styles are still the cores of Asian identities. Even if they change naturally over time, they cannot be naively corrected or revised by Western values. For example, family ties and the spirit of care-taking are still relatively stronger than those in the West. Of course, say, male dominance or conformist pressure within group is often a problem in Asian societies, but these are to be also regarded as problems with Asian values. Thus, while the pressure of the Western values can be strong and often desirable in the political or the economic sphere, this pressure is to be limited to a certain extent in the cultural sphere.

It will not be easy for law to carry this complicated task for different spheres in some systematic way. This apparently cannot be realized by some monolithic way, nor should be left for fragmentation. There is a need for a flexible formation of legal order, especially, I think, with the distinction of layers and spheres in legal practice stated above. We need « hybrid law » here to cope with this complicated task. Thus, let us turn our attention to the possibility of « hybrid law » from the Japanese experience after World War II.

### B. – A Possibility of « Hybrid Law » in Japan

In Japan, hybrid in the political sphere can be found in the symbolic Emperor system. The traditional rule of the Emperor was

changed not only formally but also substantively after the 1946 Constitution which declared the sovereignty of the people. The Emperor became only a legal symbol of the integration of Japanese people and to have only very limited formal power determined by the Constitution [15]. Examples of such powers are the promulgation of laws, the summoning of the Diet, or the receiving of foreign VIPs and the like, all of which is to be done with the advice and approval of the cabinet [16]. Although the process of constitution making just after the World War II was the result of a political struggle between the United States and Japan, and the persistence of the Emperor ruling in social consciousness of people is still problematic even today [17], the principled inversion and limitation of the traditional imperial regime by radical democratization after the World War II demonstrates the possibility of hybrid in the political sphere. To give other examples of the reception of the Western constitutional values, the traditional understanding of the rights of subjects, that rights of subjects as dependents of the Emperor cannot be the demands of people but are only the lot given from above [18], was inversed into the idea of basic human rights of individuals, and public welfare became regarded as an exceptional limiting condition for rights [19]. Few people doubt that this inversion has developed effectively since its inception through the 1946 Constitution.

An example of hybrid in the economic sphere in Japan is the regulation for the construction of large shopping stores. The so-called Large Shopping Store Regulation Law of 1973 first required the *ex ante* notification, examination and other arrangements among the governmental committee, local economic associations, and other parties in order to protect the interests of small stores in the area concerned. The point of this law was to limit the economic

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[15] The Constitution of Japan, Art. 1, 4.

[16] The Constitution of Japan, Art. 3, 7.

[17] Although it is not itself problematic that the Emperor and his family is always the focus of social attachment, the fact that Japanese people often confuse that attachment with the political authority in this country is problematic. Also, we should note that, while almost all legal academics identify our regime as a liberal democracy, the Japanese government identifies it as a constitutional monarchy with the emphasis on the integrative role of the Emperor.

[18] The Constitution of the Japanese Empire of 1889 protected the rights of subjects with the notorious « legal reservation ». This meant that the protection of subject's rights was determined within the provision of statutes which the Emperor promulgated.

[19] This is a dominant theoretical doctrine for the meaning of Article 13 in the Constitution of Japan. However, in court decisions, a more paternalistic view of public welfare is often invoked.

powers of large shopping stores in favor of the competitive interests of small stores. However, as the *ex ante* arrangements tended to be more competition restrictive, the first law was revised in 2000 to have weaker regulations, such as those regarding traffic conditions or other environmental circumstances and simplified *ex ante* arrangements [20]. This is an example of the adoption of standardized rules by the market economy. Nevertheless, by the same revised Large Store Regulation Law along with other anti-monopoly regulations especially regarding the fair competition conditions, the interests of small stores are still being protected, even if circumscriptively (for example, the regulation of the gross area of large store, the necessity of concern for local opinions and city planning, or the prohibition of undue bargaining) [21]. These complex regulations necessitate the pursuit of a balance between the market economy and conventional economic practice in a particular problem context.

Finally, as examples in the cultural sphere, there are social problems recently in Japan such as the selective family name system [22], children's rights, or the welfare service for elderly people. In these cases, the common issue is in whether the existing regulations are to be weakened (in the case of the family name) or strengthened (in the case of children's rights or welfare service) in order to change deficient legal protections. In Japan, since existing regulations for these cases are far from the ideal principles of liberty and equality and legal performance are impoverished to that extent, it is sometimes said that the important thing is to change statutes or legal performance to attain liberty and equality. However, we should be aware that the other side of the problems lies in law's proper representations of cultural conditions by respecting traditions in society. For example, welfare services should not be as individualized as in the United States, because Japanese people often feel the importance of familial affections [23]. In any case, these cultural problems are a hotly contented topic with

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[20] Large Shopping Store Regulation Law, Art. 4, 7.

[21] Cf. Anti-monopoly Law, Art. 2, 3.

[22] This means the family law system in which husband and wife can each use his or her own family name in marriage. Under the existing Civil Code (Art. 750), they are required to use one name, whether the husband's family name or the wife's one.

[23] Of course, after the age of nuclear family, this kind of relationship tends to extinguish in Japan. Cf. Masahiro YAMADA, *Kazoku no Risutorakuchuaringu* [The Restructuring of Family] (Shin'yosha, 1999).

people discussing how we should strike a balance between existing traditional values and Western values. In these cases, Western values such as individualism might need to be modified to be congruent with traditional values in practice than in the cases of the political or economic spheres.

All of these examples can show the recent situation of « hybrid law » in Japan. There are heterogenous value factors in the Japanese legal system, which will be captured adequately only by the idea of « hybrid law ». However, we should be aware here that « hybrid law » in Japan is, as elsewhere in Asia, in the continuing process of value-based structuration. This means that in every aspect of law many foreign values are incessantly introduced in the form of legal movements or of legal scholarship and incorporated into Japanese legal practice, whereas existing values are still working in the important parts of Japanese society. And how we perceive and appreciate this situation is itself a part of the entire process of transformation of law [24]. Thus, as I will be maintaining later, we need a certain valuational axis to integrate this process in the Japanese legal system.

## 4. – Furhter Remarks on Some Salient Features of « Hybrid Law »

### A. – The Internal Tensions

In « hybrid law », certain internal tensions exist among a variety of heterogeneous values. There are three kinds of internal tensions : the first is among legal principles, statutes and legal performance within the same sphere (which we can call *horizontal tensions*); the second is among the political, economic and cultural spheres within the same layer (which we can call *vertical tensions*), and the third is among different layers in different spheres (which we can call *diagonal tensions*).

The pattern of « hybrid law » in Asian societies (Figure 2) also shows the internal tensions in the following way.

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[24] Generally speaking, any kinds of activities in legal practice are themselves constitutive of the transformation of that practice through constructive interpretations from within. Cf. Ronald Dworkin, *Law's Empire* (Harvard U.P., 1986) ch. 2, 3.

Regarding horizontal tensions, we can say this. In the political sphere, to the extent that people accept Western constitutional principles, statutes and legal performance are to be accorded along the guidance of legal principles, while the particular institutions or activities at the performance level can be realized in a different and distinctive way. In the economic sphere, the tension among principles, statutes and performance is more evident than in the political sphere, because strong tradition exists, say, of Japanese management practice such as the « Kanban system » of production and exchange which is significantly different from standardized market rules [25]. This means that legal principles in economic life should compromise with the legal performance in the economy via the mediation of statutes. Also, in the cultural sphere, a tension exists between legal principles and statutes-cum-performance. Here it is difficult for principles to straightforwardly realize themselves through statutes and performance concerning, for example, family life matters. For example, regarding family name selection in marriage, children's status, or care for the elderly in Japan, there is certain reluctance toward Western principles of individuality.

As to vertical tensions, we can understand it in this way. In the layer of legal principles, the political principles and the economic principles can be congruent because constitutionalism and capitalism can go hand in hand. However, cultural principles can be different, especially when they are basically collectivistic in, say, family life or group life (though we can find in this layer certain individualistic trends recently). In the layer of statutes, internal tension is more evident, since there can be gaps or revisions between the demands of the constitution and particular provisions of other laws [26]. Of course, here we can think statutes are expected to realize constitutional ideals in concrete ways. However, even if so, there will arise the problem of statutory consistency among different laws. Finally, in the layer of legal performance, the pressure of internal tension heads into political performance. Here political performance can be distorted by the social pressure even against

[25] The « Kanban system » was developed by Toyota Automobile Company. It is a system for efficient production management that produces and delivers the necessary items for whenever and wherever at the necessary time. Since the mid-90s, it has been slightly changed to a certain online form of management.

[26] A notorious example in Japan is the gap between Art. 9 of the Constitution of Japan and the Self-defense Force Law of 1954. Or, although not so notorious, there can be many interpretive gaps between the Constitution and other statutes, especially in administrative law.

the ideal political principles, like in the case of, for example, the Prime Minister's official visit to the Yasukuni Shrine in Japan.

Diagonal tensions are more complicated and difficult to handle. Among them, for example, the tension among political principles, economic statutes and cultural performance is the most severe, while there is lesser tension among political performance, economic statutes and cultural principles (Figures 3 and 4 below). In the former case, the tension is the most severe because there are not only spherical gaps but also layer-concerned gaps. This double gap puts a heavier burden on the integration of « hybrid law ». In fact, especially for the familial order, Western individualism, economic rationality, and Asian traditional (collectivistic) family forms will have much tension. For example, under the problem of selective family name in Japan, there is an amalgam of problems of gender equality, independence of labor force, and the maintenance of family ties. In this case, the three values can conflict with each other : the affirmative pursuit of gender equality can conflict with the protection of individual rights of workers and with the existence of sound authority in family, and the protection of worker's rights can conflict with the collective decision in the family.

FIGURE 3

**Reference matrix illustrating the diagonal tension between political principles, economic statutes, and cultural performance – the most severe**

| | Legal Principles | Statutes | Legal Performance |
|---|---|---|---|
| Political Sphere | ***W* (liberty, equality, etc.)** | *W* *(constitution)* | *W/A* |
| Economic Sphere | *W* *(market principles)* | ***W/A* (contract law, antitrust law)** | *A* |
| Cultural Sphere | *W/A* *(principles of family, etc.)* | *A* *(family law, social welfare law)* | ***A*** |

(*W* = the Western, *A* = the Asian, *W/A* = an amalgam of the Western and the Asian)

FIGURE 4

Reference matrix representing the diagonal tension between political performance, economic statutes, and cultural principles – lesser tension

| | Legal Principles | Statutes | Legal Performance |
|---|---|---|---|
| Political Sphere | *W* *(liberty, equality, etc.)* | *W* *(constitution)* | ***W/A*** |
| Economic Sphere | *W* *(market principles)* | ***W/A*** ***(contract law, antitrust law)*** | *A* |
| Cultural Sphere | ***W/A*** ***(principles of family, etc.)*** | *A* *(family law, social welfare law)* | *A* |

(*W* = the Western, *A* = the Asian, *W/A* = an amalgam of the Western and the Asian)

Now, understanding these internal tensions of « hybrid law », what dynamics can we find for the integration of these tensions, if we have to manage them anyhow?

First of all, the figures and explanations presented above are just the first step for the recognition of the internal tensions. We need to reason from this recognition to the normative and evaluative stance of law on what values the weight of protection is to be placed within the matrix of hybrid. In a word, we have to search the valuational axis for the integration of those internal tensions. For example, when we introduce gender equality for selective family name in Japan, we also should introduce new interpretations of labor or tax law with similar name use through court decisions, or we also should develop some institutional tolerance both for the people who support the selective name use and for the people who dislike it. In this kind of revisional interpretations, we have to seek a way to moderate the internal tensions through proper weighing based on an adequate valuational axis.

To maintain this way of thinking, there needs to be a presupposition that we can grasp law and society as separate entities which can interact. To make sense of the fact that a certain valuational axis can integrate apparently conflicting legal practice, we need to

place this axis at the higher level of the problems handled. The view of the interaction of law and society which tends to emphasize the push of norms toward society might be caught by a static view of normative force of law. Real law can be always dynamic in the accumulation of human social activities. However, we have to note that law and societal values are still different units. The things which have tensions or conflicts are basically societal values, and law selects the weightier values from a public standpoint with the anticipation of enforceability [27]. Here law has to introduce a certain higher-order value to make an ordering of conflicting societal values. Thus the question becomes what this higher-order value for the axis of law can be. I think this value is justice, and its basic content has been set at the constitution-making level of society. Although there should be certain conflicts with traditional societal values in this constitution-making, the more progressive constitutional values can conquer the traditional barriers for a new, more democratic regime and guide the developmental integration of diverse fields of law, like the Japanese case. Probably, from my view, we have to bet on and introduce certain ideas of justice for this constitution-making, where I assume a certain conception of substantive fairness can work for it [28].

There is an additional problem to be addressed : what kind of consistency in nine cells in the matrix is possible, or how the tensions and conflicts among heterogeneous cells can be integrated, after the introduction of the valuational axis of justice ? This is also the basic theoretical question for the establishment of « hybrid law ».

Indeed, there might be a view that heterogeneity of values in law is itself a reality of a complex legal system. Actually it is not easy to interpretively integrate such a value conflict as mentioned just before. However, I think that law has certain moral power to integrate its heterogeneous factors over time to realize its integrity with the axis of basic conception of justice, and that Asian or

[27] My view is that abstract public morality attains a form of law when it is expected to be valid with a certain form of sanction. Because, whereas abstract morality is concerned only with the world of « the ideal », law has to deal with the world of « the real », backed by « the ideal » and by means of various forms of sanctions.

[28] On this view of mine, see Ko HASEGAWA, *Kousei no Houtetsugaku* [The Philosophy of Fairness] (Shinzansha, 2001), Part 2.

Japanese « hybrid law » is no exception to this process [29]. Still, it is not yet clear by what regulative force a certain conception of justice can arrange conflicting values in society. This question is mainly concerned with the formal constraints of the integrative process, and not with the substantive constraints of it. For there can be various substantive contents for law.

Regarding this question, I suggest that we hold the process of *interpretive conciliation*, as I call it [30]. This process means that the abstract principles are concretely realized at the level of statutes or performance through ubiquitous interpretative activities of people. The tensions analyzed above are to be resolved gradually by this process of interpretive conciliation, which can be restated as a process of constructive equilibrium in « hybrid law ». The interpretive conciliation can include three constructive strategies when it deals with values evidently incompatible with the axis value of justice : *exceptionalization*, *sphericalization*, and *inclusion*, as I call each of them. Exceptionalization means that a value is arranged for the other conflicting value in such an auxiliary way that the latter value can be interpretively validated only when the *ceteris paribus* condition for the former value cannot be established. For example, we can interpret that liberty is to be important only when basic equality is guaranteed. Sphericalization means that conflicting values are interpretively allocated different working spaces in which the validity of each value is to be maintained independently. For example, we can interpret that efficiency should be valid only where production or consumption of goods is concerned while the principle of reciprocity should govern the context of welfare service. And, inclusion means that two conflicting values are interpretively arranged as concrete cases under the higher third value. For example, when freedom of expression and the protection of privacy conflict, we can interpret that both are to be sub-values of equal respect and concern for everyone. The adequacy of these strategies themselves is determined by critical examinations of the alleged interpretations.

When it is inevitable for us to commit some ideal value of justice to explore the interpretive conciliation, there should be dis-

[29] Cf. DWORKIN, *op. cit.*, ch. 2.
[30] Interpretation can connect and integrate many kinds of statements in various ways, that is, the conciliation.

tinguished two cases, generally speaking. That is, while we can rely on principle-oriented values which tend to support legal principles and statutes, we can also rely on performance-oriented values which tend to support legal performance or statutes. The latter values are likely to be more local than the former, and each of them has different and conflicting effects on legal principles. The former values can reinforce the significance of legal principles, while the latter values will restrain the scope of legal principles. Although the former position can be better, the latter position is also understandable [31]. Indeed, the commitment to the former position might have such normativistic prejudice that it ignores the complicated and dynamic reality of law that the entire law changes over time through conflicts of diverse values. Which position should be adopted is very fundamental evaluative problem. To examine it, we need recourse to the content of the axis value of justice. In any case, the interpretive conciliation should proceed in making the entire legal system more consistent with legal principles, even if gradually.

From the standpoint of principle-oriented values, under the matrix shown above, legal principles for Asian or Japanese « hybrid law » are to be Western political values such as liberty and equality, or economic values of fair market. This set of liberty, equality or fair market can be translated into some conception of justice. This will lead to the point, as I mentioned at the very beginning of this article, that we should adopt a conception of substantive fairness in order to integrate « hybrid law » in Asia or Japan and to be ready to extend it to the cultural sphere, too. In this sphere, the principle-oriented value of substantive fairness has to try to interpretively rebut traditional collectivistic values such as the Emperor's governance or public welfare which tend to work conservatively against the interests of the people. Also, such substantive fairness should interpretively work against the discriminatory reality such as male dominance or domestic violence [32]. Through the accumulation of these interpretive criticisms toward the direction of substantive fairness in the entire legal practice, both the contents of statutes and legal performance change toward this direction.

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[31] A certain nationalistic or localistic attitude is sometimes desirable to defend the conventional legal practice in society, especially in Asian societies.

[32] HASEGAWA, *op. cit.*, p. 132ff., p. 201ff.

However, from a purely observational point of view, there are several possibilities as to what values can emerge as dominant among conflicting values in Asian societies. In this regard, there are certain characteristics of the tension among conflicting values in Asian societies : first, the tension between *individualization* and *collectivization* values, and, second, the tension between *perpendicularity* and *recumbency* values. The former tension is between individualistic values such as liberty or autonomy and collectivistic values such as social interest or solidarity; the latter tension is between authoritarian values such as loyalty or conformity and anti-authoritarian values such as privatization or self-determination. In Western societies, individualization parallels recumbency, and collectivization perpendicularity. However, in Asian societies, such as Japan, individualization often works perpendicularly (for example, the ideality of freedom), or collectivization often works recumbently (for example, the so-called bad equalization or standardization). This contrast is caused because the background societal conditions of Western values are different from those of Asian values. For example, it is said in Japan that there exists a collective group structure at the background of values, and that the significance of individuals is always circumscribed by various group pressures [33]. Thus we need subtle interpretations to significantly realize Western values in the context of Asian societies, hoping that the value which can have universal force becomes weightier over time.

### B. – The Historical Reiteration of Hybrid

I would like to add one more important feature : *the historical reiteration of hybrid*, as I call it. This means that the hybrid matrix of law-making is reiterated over the course of time, and this matrix itself becomes multiplied. This case is prominent in Japan. Japan has experienced several significant changes of value system. Especially after modernization in the $19^{th}$ century, there appeared two important and distinctive strata in the Japanese legal system. After 1889, one stratum of hybrid was formed from German influences, while the other stratum of hybrid, coming after 1945, was formed from American influences. In this sense, « hybrid law » in Japan is,

[33] E.g. Chie Nakane, *Tate Shakai no Rikigaku* [The Dynamics of Vertical Society] (Koudansha, 1978).

so to speak, « doubly westernized » since its first conception in the 19$^{th}$ century. Incidentally, if we count other foreign influences on Japanese legal system since the 6$^{th}$ century, it will have more strata of hybrid [34]. This is an example of the historical reiteration of hybrid. Needless to say, other Asian countries which have had similar experiences will be also in the same situation as Japan.

In the historical reiteration of hybrid, we have to consider the hybrid matrix as doubled, or tripled, and the like. Thus the interesting question will be what change happens in the multiplied matrices of legal practice. I guess there are basically three possibilities in the relationship between multiplied matrices : *extension*, *contradiction*, and *distortion*. Extension is a straightforward relationship between matrices in which the existing principles, statutes or performance are maintained and developed consistently. Contradiction is a contrariwise relationship between matrices in which the existing principles, statutes or performance are inversed and rejected. And distortion is a complicated relationship between matrices in which the existing principles, statutes or performance are transformed and revised, whether in a good direction or a bad direction. If the historical reiteration of hybrid becomes more multiplied, there appear multiple combinations of these basic possibilities. For example, in modern Japan, we might be able to find that there is a combination of distortion/contradiction/extension. That is, distortion appeared in the Meiji revolution when it slightly changed the Tokugawa Shogunate, and yet contradiction appeared after 1945 when Japan established a basically liberal democratic system. Also, the legal change since 1990s might show some extension whence it has furthered the fair market system or has been trying to establish the selective family name.

However, these possibilities are evidently only formal ones. We need a more subtle understanding of the patterns of the historical reiteration of hybrid, which will be a task for future research.

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[34] We can say at least that after the 6$^{th}$ century Confucian thought and culture became prevalent upon the basic layer of native life forms, and that after the 12$^{th}$ century the Samurai culture added to the strata until the modern change in the Meiji period.

### C. – The Adequacy and Universality of « Hybrid Law »

As we have seen so far, the conception of « hybrid law » is established for the complex reality of legal practice. This reality is so complicated that we sometimes cannot find the clear connections among norms and values. The distinctions I have suggested, that is, legal principles/statutes/legal performance and the political sphere/the economic sphere/the cultural sphere, are one of the possible distinctions, to which correspond the following distinctions of law. One distinction is the principle-giving part of law, the rule-giving part of law, and the performance part of law. The other distinction is traditional fields of laws such as public law, private and labor law, and family law and other social law. The combination of these distinctions related to the matrix I have shown will make the basic stance of each particular law more sensitive to the characteristics of the particular field of regulations (Figure 5). And this combination itself is a derivative of the value-based structuration of law [35].

FIGURE 5

**Matrix representing the pattern of the regulations within « hybrid law » in Asian societies**

| | Principle-Giving | Rule-Giving | Performance |
|---|---|---|---|
| Public Law | *W* *(liberty, equality, etc.)* | *W* *(constitution etc.)* | *W/A* |
| Private or Labor Law | *W* *(market principles)* | *W/A* *(contract, antitrust)* | *A* |
| Family or Social Law | *W/A* *(principles of family, etc.)* | *A* *(family relation, welfare service)* | *A* |

(*W* = the Western, *A* = the Asian, *W/A* = an amalgam of the Western and the Asian)

[35] This means, from within the standpoint of statutes, that there are norms which are different in degree in one and the same law, and that this difference is originated in the value-based structuration process of law-making.

Sometimes, to understand the complexity of legal practice in Asian societies, a dichotomous view is developed. For example, Professor Masashi Chiba at Tokai University in Japan maintains that there are three dichotomies of law in Asian societies [36]. According to him, these three dichotomies are : official law vs. unofficial law, legal rules vs. legal conventions, and transplanted law vs. native law. And he also says that in the background of these dichotomies exists the principle of legal identity which connects those dichotomies above in each society. Further, he distinguishes national law, domestic laws, and world law. Thus, his understanding of the complexity of law in Asian societies is that, based on the tripartite global legal system, the three dichotomies are structural constituents under the principle of legal identity in each Asian society. For example, in Japan, while official legal principles and statutes are Western, unofficial norms are native ones. And these two kinds of norms are combined by a certain tie of Japanese legal identity. In this understanding, as I see it, Professor Chiba's focus is on the static classification of law in relation to the encounter of Western and Asian values. This view implies the relative independence of Asian legal culture and, to that extent, the recognition of cultural relativism. It is evident that the three dichotomies of unofficial law, legal conventions, and native law seem to be focused on the significance of traditional law in Asian societies.

In contrast to this classificatory view, the conception of « hybrid law » focuses on the value-based differentiation of the normative working of law in Asian societies, and on the force of the abstract principle of justice for the integration of complex norms. In so doing, this conception has a potential toward the universalism in law. Here, the difference between these two views lies in the recognition of cultural universality or relativity. According to the three dichotomies view, Western laws are transplanted into Asian societies along the principle of legal identity, and have classificatory tensions with Asian laws in other dichotomies. However, according to the conception of « hybrid law », Western norms are mutually fusing with Asian norms under the interpretive guidance of the conception of justice.

[36] Chiba, *ibid.*

Now, a more important problem for « hybrid law » is the nature of consistency among diverse fields of regulations, and the meaning of universality of the entire subsistence of « hybrid law ». How is the hybrid in law to be logically consistent? Is it easy to attain logical consistency in the hybrid? Also, how is it possible for the hybrid between such heterogeneous values to be universal? Is it not different from the case that simple value can be universal if it is accepted worldwide? These are very fundamental meta-theoretical issues, which need profound consideration. However, for now I will only touch some basic points.

First, the consistency in « hybrid law » is relatively loose. For it emerges as a result of the interpretive conciliation among the following complex : the interpretations of abstract legal principles and their extensions to statues, the interpretations of statutes and their diversification along the spheres, and the interpretations of the performance of the particular cases [37]. For the conciliation of this complex to be possible, we need a certain principle-oriented value as the axis of various interpretive activities, as I have stated earlier. And, around this axis value, there will emerge a certain normative network in « hybrid law ». This normative network is such that standards in constitutional law also appear in standards of civil law, or support standards of anti-monopoly law and this connection is ultimately integrated by the abstract value of justice. In this network, there are vertical and horizontal connections of norms. Vertically, a certain contextual order of laws can be established along the validity relations. For example, constitutional law gives validity to civil law or anti-monopoly law. However, horizontally, a certain inclusive order of laws can be established along the substantive relations. That is, according to the integrative conception of justice in hand, laws can be categorized in such a way as this conception prescribes. For example, if that conception of justice regards the equality of status as the fundamental requirement, equal status standards in a variety of laws can be gathered as a set of equal status law. This set of law corresponds to principle-giving law [38]. The normative network is the entire connections of these

[37] If the various norms in « hybrid law » are to be organized by a conception of the axis value of justice, the core of the making of « hybrid law » lies in a variety of interpretive activities. Thus « hybrid law » is always in the flux of interpretations. On the significance of interpretation, see Hans-Georg GADAMER, *Truth and Method* (2nd. ed.) Sheed & Ward, 1989.

[38] See Figure 5 at p. 344.

relations. This kind of subsistence of law is obviously different from the one which legal positivism imagines in terms of logical completeness. « Hybrid law » shows the loose consistency in which diverse principles, statutes and performance in various spheres are involved, backed by the axis value of justice in society. In this regard, the nature of adequacy of « hybrid law » will be that the entire law is not inconsistent with justice and its expressions in the dimension of legal principles.

Then, how can « hybrid law » be universal ? « Hybrid law » is itself an amalgam of diverse norms. Thus, we should think first that the universality here can lie not in the level of content but in the integrative process and pattern of law in the face of conflicting norms. If so, the role of the axis value of justice for the interpretive conciliation becomes important, because it guides the very construction of « hybrid law ». Also, this axis value must be, in principle, supposed as impartial to particular values or cultures, because it has to accommodate diverse, even foreign values in « hybrid law » in a higher-order. In this perspective, formally speaking, a conception of the axis value of justice can be proposed as a value interpretation $V$ to which other values are interpreted as accommodated. This $V$ will save some value in existing society and extend the implications of it, transfer new values into society, or connect several kinds of values in the encounter of different cultures [39]. However, at this stage, we cannot ignore the working of the content of the axis value of justice. For, in the perspective developed so far, it is a conception of justice that arranges the proper configuration of diverse values which encounter and conflict with each other. The possible content of justice should be the key for the universality of « hybrid law ». However, here we need to examine the possible contents of justice by way of interpretive contest. And my idea of substantive fairness is just one candidate. Only through this interpretive contest, we can find a possibly universal content of justice. We need to present the alleged best

[39] An interpretation of the axis value of justice constructs a conception of justice for « hybrid law ». In this case, it organizes the contents of « hybrid law » along the evaluative strategies of endorsement or rejection of some values to be involved in the matrix. I think we need here to consider two factors : quality and quantity. Regarding quality, an interpretation of justice has to throw light on the relevantly similar parts of the existing values, while, regarding quantity, it has to integrate the possibly maximal contents of the existing values. That is, an interpretation $V$ needs to reconstruct the various existing values as a bulk of interpretations $V'$, $V''$..., $Vn$.

conception of justice, examine it, and revise it to reach certain shared understandings. This process itself is also the incessant making of « hybrid law » toward the more universal order. It is an invariable fact that people try to pursue the best-mix of diverse normative factors in law, whether in the West or in the East. Only on this assumption, we can think our « hybrid law » in Asian societies can be universal when it realizes the best balance of Western and Asian values.

However, the exact conditions or processes of this making of « hybrid law » are anticipated to be much more complicated, and it will be better to treat them at another time.

## 5. – Epilogue – Can the Rule of Law be Established in Japanese Society?

If the basic character of the structuration of law in Japan is as has been explained so far, how can we respond to the possible question of whether the Western ideal of the rule of law or constitutionalism can be established in Japanese society? My brief answer is, as you can naturally imagine, that the ideal can permeate into Japanese society in a composite way to make an organic whole toward a new possibility of universal law-making. Of course, this does not necessarily mean that the rule of law has been already established in the Japanese legal system through the experience since its modernization in the $19^{th}$ century. Rather, we should take Japanese legal system as still exploring the proper form of rule of law in its own social and historical context [40].

Generally speaking, Asian societies can introduce the Western ideals of the rule of law or constitutionalism in a composite way according to the unique character of their societies, and they can accommodate and even remake such ideals in a richer way. As is often said, the encounter of different cultures is not only the cause of conflicts but also a chance to emerge with richer communication and understanding. I would like to emphasize the importance of the latter aspect here. If we naively think that Western constitu-

[40] For example, in the judicial reform in Japan today, people concerned tend to claim the establishment of the rule of law in Japanese society. However, it is not so clear what this claim can implicate. Instead of claiming some ideology for stronger legalism, we have to reflect carefully on the complex problem-situation of Japanese legal system.

tionalism is the only possible constitutionalism on this globe and other non-Western societies have to be reshaped along it, we will lose sight of the rich implications of constitutionalism. Or, the same thing happens if we naively think non-Western societies should reject Western thinking as entirely foreign to their societies. Although the essence of constitutionalism is in the division of powers and the protection of human rights as has been developed in the West, the more concrete and specific contents of the scheme has to be created along the particular contexts of diverse societies. Asian societies, and Japan as well, can learn from the Western experiences, and they can also be another candidate to create a new possibility of constitutionalism. People in the age of multiculturality have to have multidimensional eyes to see and understand the complex reality of human lives to be expressed in law.