

# Global Focus on Knowledge 2010

## **Law and Contemporary Society —Visible Law and Invisible Law—**

Summary: Interactions between Law and Social Order

Proponent: Takashi SHIMIZU

Disputant: Shozo OTA

# What We've Discussed So Far

- ▶ “Visible Law and Invisible Law,” Shozo Ota (Faculty of Law)
  - No.1 (4/7): Visible Law and Invisible Law: Ubiquitous Law and Social Order—Serving Also as an Introduction to Global Focus on Knowledge
- ▶ “Law and Civic Life,” Atsushi Omura (Faculty of Law)
  - No. 2 (4/14): Law and Jurisprudence at Present
  - No. 3 (4/21): Legal Response to Child Abuse
  - No. 4 (4/28): Social Background on Child Abuse Prevention
- ▶ “Law and Science,” Tatsuo Kuroyanagi (Attorney), Tetsuya Obuchi (Faculty of Law), Junichi Hamada (UT President)
  - No. 5 (5/12): Trial and Science (Kuroyanagi)
  - No. 6 (5/19): Invention and Law (Obuchi)
  - No. 7 (5/26): Law and Information (Hamada)
- ▶ “Law and Economics,” Naohiro Yashiro (ICU)
  - No. 8 (6/2): Point Of Contact between Law And Economics
  - No. 9 (6/9): Reform for Urban and Housing Regulations
  - No. 10 (6/16): Law for Labor Market
- ▶ “Law and Culture,” Yoshiko Terao (Faculty of Law)
  - No. 11 (6/23): Japanese Law and Japanese-style Public/Private Structure; (1) On the Theme of Urban Planning
  - No. 12 (6/30): Japanese Law and Japanese-style Public/Private Structure; (2) On the Theme of Gender Issue

## ► Visible Law and Invisible Law (Ota)

- Social control by law

- State law is not capable to perfectly control a closely-related society (sectional society).
- A society, if not tightly related, is possibly controlled by law.

- Rational creation of law by society

- Approach from society→ Creation of law
  - E.g., protection of crime victims
- Rational development of law

## ▶ Law and Civic Life (Omura)

### ■ Law and jurisprudence at present

- ▶ Third stage for the reform of the system of laws (first in the 1890s, second in 1945-50)
- ▶ Law attempts to change responding to changes in society (social issues).

### ■ Legal response to child abuse

- ▶ Number of consultation cases on child abuse keeps on increasing.
- ▶ “Barrier of parental prerogatives”
- ▶ Development of laws to protect children’s rights = To form a legal field of “children’s law” (functional legal structure)

- Social background on child abuse prevention
  - ▶ Multipolarization of legislation = Increase in legislation by House members ←Media
  - ▶ Need for building a support system
  - ▶ Search for Principle = No butting into a household?

	171th Session of Diet (2009)		145th Session of Diet (1999)	
	No. presented	No. passed both Houses	No. presented	No. passed both Houses
Cabinet bill	69	62	124	110
Member's bill	84	18	60	18
(of which) House of Representatives	55	17	38	13
House of Councillors	29	1	22	5

Source: House of Representatives, Trend of House of Representatives, no. 7, 17

- [Comment] Law attempts to change responding to changes in people's behavior. However, behavioral changes are not always linked together with changes in norm consciousness.

## ► Law and Science

- Trial and law (Kuroyanagai)

- Limits of attestation in scientific verification
- A trial is a tentative judgment concerning a legal dispute. = It's not a pursuit of scientific truth.

- Invention and law (Obuchi)

- Legal protection of invention = Why is it protected by law?
- Invention cannot be left unprotected, but should not be overprotected.



- Law and information (Hamada)

- ▶ Influence of the Internet, as one of technological changes, brought on law
- ▶ Libel on the Internet=More speech and anonymity
- ▶ Freedom from public authority and a possibility of exercising that right

- [Comment] Technological changes, such as the Internet, bring about variations of norm consciousness, and furthermore, ones of laws. Such changes of laws break out in the form of judgment on legal disputes.

## ► Law and Economics (Yashiro)

- Point of contact between law and economics: Why is a market role important?
  - Pareto improvement by leveraging a marketplace (All can become happy.)
  - Except for the presence of externalities
- Application to urban and housing issues
  - Shortsighted (or emotional?) protection of “the weak” = Measures being not necessarily appropriate
    - Land Lease and House Lease Law = Prevention of making a tenant leave = Actually distorting resource allocation through the market (to hinder the supply of high-quality houses for rent)
    - Building Standards Law = Floor-area ratio control



## ■ Application to employment issues

- ▶ Dismissal regulation = Concrete standards for dismissal are still unstable. Reparation in cash has not been approved yet. (cognition to “buy the right of dismissal with money”)
  - ▶ Agency-dispatched temp = Diverse ways of working indicate various needs of agency-dispatched temp.
- 
- [Comment] It is not that the weak need not be protected, but that any issue needs to be dealt with appropriately. Making a market function appropriately is desirable to all people. Any measure that is too much swayed by consciousness of “saving a person at hand” is possible to bring on a bad effect over the long term.

## ► Law and Culture (Terao)

- Japanese law and Japanese-style public- and -private structure:  
(1) On the theme of city plan
  - Japanese “*ohyake*” and “*watakushi*” are different from American “public” and “private.” (the telescopic structure of *ohyake-watakushi*)
  - Loose restraints on city planning, and the insufficiency of the system concerning the return of developmental benefits out of public works = Absence of the concept of the public?
- Japanese law and Japanese-style public- and - private structure:  
(2) On the theme of gender issue
  - With a new phrase coming into being, a reality becomes “recognized,” and which grows into a legal concept.
- [Comment] There is a possibility that a gap in norm consciousness between *ohyake* and *watakushi* brings forth different results. Also law gets created through the formation of the language that describes society.

# Conclusion: Interaction between Law and Social Order

## ► Interaction between Law and Society

- Control of society by law
- Rational creation of law by society

### ■ Control of society by law does not necessarily work out at all times.

- E.g., the system concerning the return of developmental benefits out of public works
- Social control by law = To exert influence upon a rational individual to act in accordance with a policy object

- Creation of law by society
  - ▶ Creation of law in conformity with social changes
  - ▶ However, it is not that all kinds of law are possible as long as they can respond to social changes. = “Rational” creation of law is needed.
- Rational creation of law?
  - ▶ To create a law that is capable to “control society by law” effectively (Capable to achieve the aim in light of a specific law’s object )

## ► Effective control by law

- (1) To be compatible with norm consciousness held in common in society
  - Two paths of “conscience” and “reputation”
  - Norm consciousness: Recognition as to “should not do it this way” and “should do it this way”
    - A norm held in common nonetheless does not necessarily exist in all fields.
  - E.g., “parental prerogatives,” and the system concerning the return of developmental benefits out of public works
- (2) To provide people with such an incentive to act appropriately for their objective at hand
  - E.g., Land Lease and House Lease Law

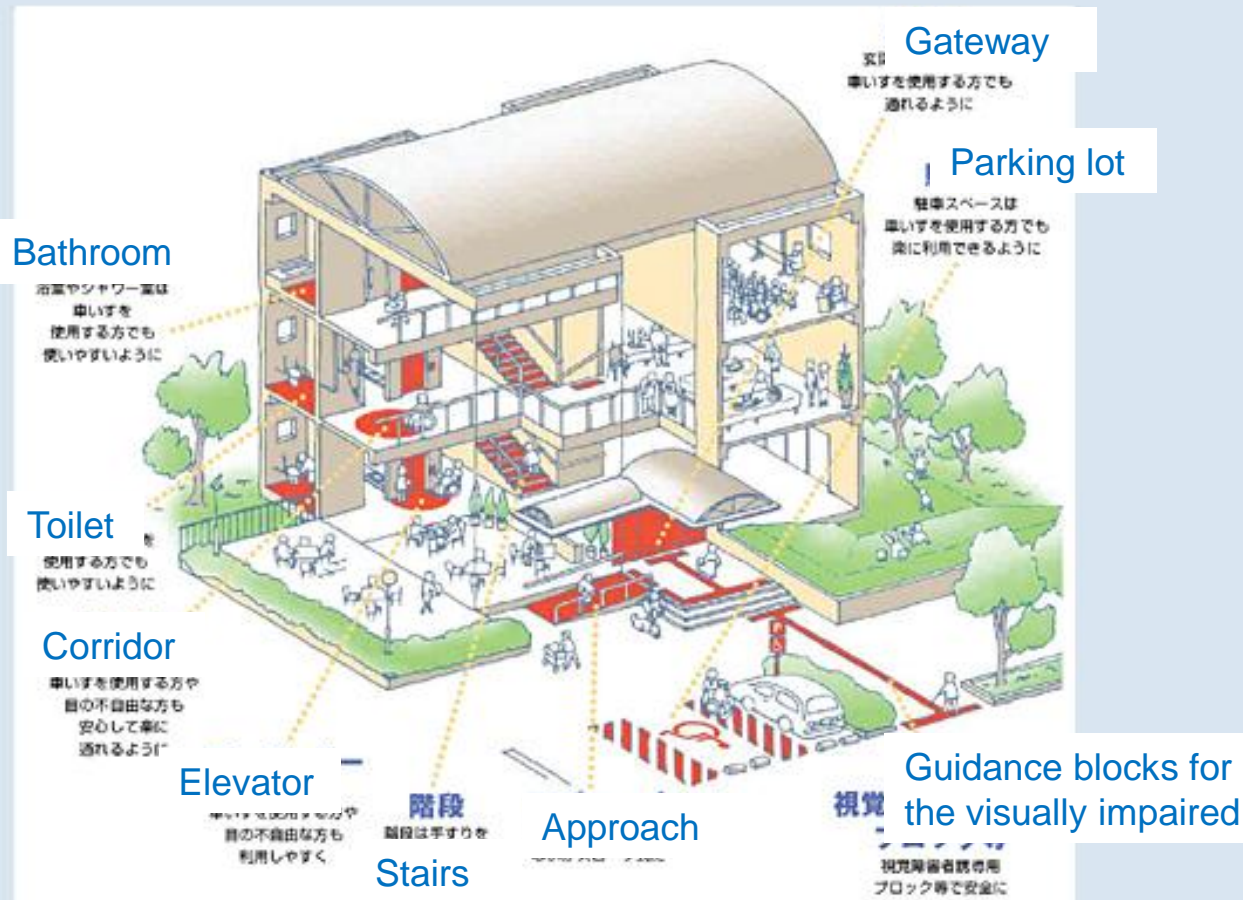


- A law slipped out of norm consciousness held in common is not observed unless there's some other incentive.
  - ▶ E.g., violation of the speed regulations (particularly at midnight and deserted places ), and Anti-Monopoly Act till quite recently (to be discussed subsequently)
- Even in a situation controlled by an incentive, there occurs a conflict between commonly-held norm consciousness and an incentive.
  - ▶ E.g., Oil cartel incident



## ► Changes of norm consciousness and law

- Norm consciousness and law interact with each other.
  - Change in commonly-held norm consciousness brings about that of law.
    - E.g., tightening of Anti-Monopoly Act
  - Change in law urges that of norm consciousness
    - E.g., the former “Heart Building” Law. (the Law on Buildings Accessible and Usable by the Elderly and Physically Handicapped), the new barrier-free law



Data: Ministry of Land, Infrastructure and Transport

- ▶ Anti-Monopoly Act (Act on Prohibition of Private Monopolization and Maintenance of Fair Trade)
  - Established in 1947, the original Act contained such strict stipulations as a total ban on cartels except for ones with insignificant impact (ex-Article 4), and corrective action in case there was a disparity in business capability from a competitor (ex-Article 7). Through the amendment in 1953, however, the provisions like the above were deleted, and further, the new rules for exemption from application, etc. were added, all of which promoted the “emasculatation” of this Act. And some cartels were approved under a special law; thus this period was referred to as an “ice age of Anti-Monopoly Act.”

- At the (and subsequent) time of establishing Anti-Monopoly Act, the “doctrine of good cartels” (Yoshiro Inayama), laying emphasis on gaining fair returns, was insisted, and in reality, the adjustment of production was carried out in the steel industry and oil industry until the mid 1960s. In this sense, an awareness that a cartel was “something bad” does not seem to have existed in Japan for the 1950s and 60s. In as much as there was the “emasculatation” of Anti-Monopoly Act taking place in parallel, it can be pointed out that norm consciousness was too weak to support Anti-Monopoly Act, thus resulting in the “emasculatation.”



- By putting great emphasis on “consumer protection” in the 1960s, Fair Trade Commission of Japan gained support from consumer groups. Coping with cartels during the oil crisis in 1973 and 74, the Commission brought criminal charges against oil companies (the oil cartel scandal). But the adjustment of production conducted under coordination with Ministry of International Trade and Industry was found guilty of nothing in the end. As for the adjustment of price conducted under coordination with the same ministry, although the case was eventually ruled guilty, it is pointed out that there is a possibility of a reversal under certain circumstances.

- Formation of and change in commonly-shared norm consciousness
  - ▶ People's norm consciousness changes in accordance with changes in circumstances surrounding them and ones in their behavior.
  - ▶ However changes in circumstances and behavior are not always linked together with changes in norm consciousness.
    - Case where norm consciousness of just a portion of people has changed
      - ▶ E.g., “Convention on the Rights of the Child,” and the increase in child abuse and consciousness of “parental prerogatives”
    - There may be a situation where either of the two changes rapidly to arise a time lag.
      - ▶ E.g.: Case an environmental change went ahead; Japan Sumo Association? : Cases norm consciousness changed rapidly; the protection of victims, perception about bid-rigging



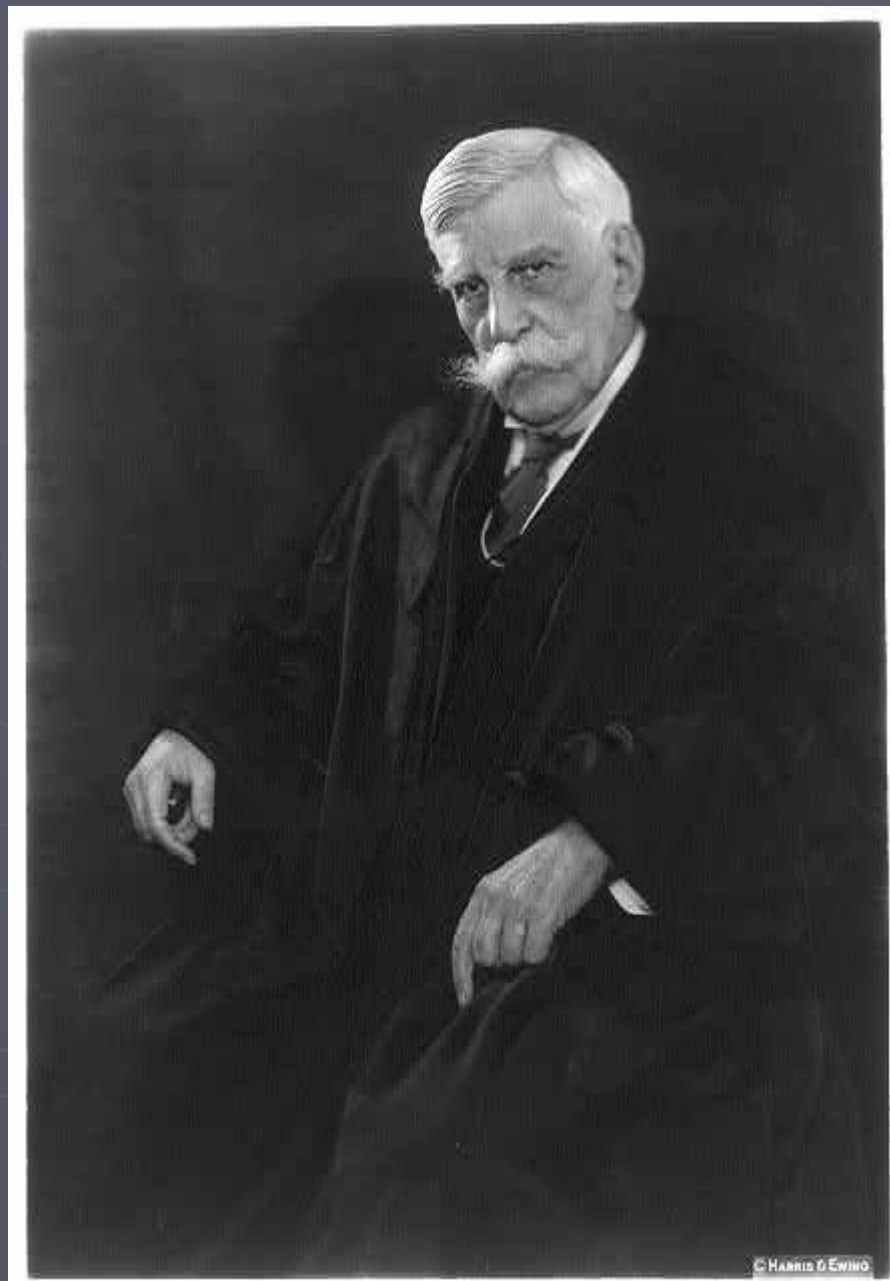
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## ► Process of the creation of law

- By legislation
- By trial

► Environmental change → Change in norm consciousness  
→ Path of the creation of law is an environmental change. →  
Creation of law → Path of a change in norm consciousness  
is conceivable. In any case, people's behavior changes  
through ones in norm consciousness and incentives granted  
by law.



Oliver Wendell Holmes, Jr. <http://hdl.loc.gov/loc.pnp/cph.3a47967>

The life of the law has not been logic: it has been experience....The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

Oliver Wendell Holmes, Jr., *The Common Law* (1881)