Part I

Law and Socio-Economic Changes in Asia

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How Can Law Interact with Society?: A Note on Recent Law Reform Movements in Asia

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I. Introduction

Since the early 1990s, when the Socialist Regime finally collapsed, "building legal institutions" of these "transition countries" has become fashionable policy agenda among international development aid business. Not only international organizations, like the WB, IMF, and OECD, but also ODA agencies of major donor governments have been supplying "legal technical assistance" to these countries, aiming to assist the transformation of their planned and/or authoritarian economic and political systems smoothly to more market-oriented and democratic ones.

Further, the East Financial Crisis in 1997 revealed fatal defects of the so-called "East Asian <Political Economic> System," which was once applauded as a new development model due to their economic success in the 1980s and early 1990s. As many critiques discuss, the East Asian System has been caused substantially to the traditions of communitarian cultural values, such as regard for personal relations and "harmony" among people. The economic failure has required them to transform their legal systems to more Western modeled legal systems which are often characterized by "transparency" and "accountability."

As a result, huge funds have been input to various projects that intend to introduce more advanced Western legal systems to these transition and/or East Asian developing countries. Now, "Legal Technical Assistance"[1] has become the most profitable and attractive business in world aid communities, which includes not only governments and law businesses but also academics.

I will deliberate the manner in which they can commit themselves to movements to the present disordered and non-disciplined movements of

"Legal Technical Assistance," which apparently are not free from the ghost of the old bankrupted "Law and Development Movement" (OLDM) paradigm on both philosophical and methodological levels.[2] It is true that various efforts have been made to re-examine the OLDM of the 1960–70s, and to build up a new paradigm. However, none can conclude yet that academics have succeeded in creating a more effective alternative to this movement, especially in the field of comparative law and sociology of law.[3]

A main problem seems to be the lack of a clear framework to understand the relation between law and society in these countries. "Law and Society" has been a central subject of sociology of law since it emerged early in the 20th century, and there have been so many works that I cannot refer to them in this paper. However, so far, these works have focused mainly on Western societies, and very rarely were done to expand their concerns to the non-Western world, which has radically different social and cultural traditions. OLDM was a boldly adventurous project to expand their view of law and society to the non-Western world, but it failed.

The cause of its failure is summarized as OLDM scholars' lack of serious intention to understand cultural elements of these societies, which led to simple application of the experience in development of Western society to them, without any meaningful consideration of cultural differences between them.

Now we are in an era of drastic "globalization," which has been causing "the great transformation" of the world political, economic, and social systems both in Western and non-Western countries. This process produces crucial conflicts between values of universal market system and particular culture.[4] It is essential to think about law and society again, and to reconstruct the concept of law in wider perspectives, which include the cultural aspects of law and society.

This paper tries to build a rough sketch of a theoretical framework of law and society in Asian perspectives[5] in the era of globalization, through which I hopefully may contribute to the academic effort to build a theoretical base for the New Law and Development Movement (NLDM). For this purpose, we shall examine the relation between law and society again, from the different point of view of traditional jurisprudence.

II. Three Structural Concepts of Law

To understand Asian legal systems as a whole, I have been proposing a methodological framework based on three groups of law: indigenous,

imported, and development law; and three types of legal principles: community, market, and command principles, each of which has been deduced from the three groups of law.[6] I believe that these typologies are still effective to understand the historical development and current situation of Asian legal systems, and more widely of those of non-Western countries as a whole (see Table 1).

However, the idea of three types of law and principles focuses rather on the aspect of social value of law, so that, I now feel, it is not sufficient to investigate the structural dimension of law, which deals with a more characteristic nature of legal system. It seems indispensable to produce more effective concepts to analyze this structure of law. This is why I will introduce the following three concepts of law: law as norm, law as institution, and law as culture, in order to understand national legal systems.

A. Law as Norm

Law is generally defined as "rule or a system of rules recognized by a country or community as regulating the actions of its members, and enforced by the imposition of penalties" (*Oxford Concise Dictionary*).[7]

First, it is a code of behavior, what I call "law as norm." Norm is sometimes an attribute of the value system when we say "moral norm," but here I define it in a more formal and value neutral direction.[8] Law as norm is an essential component of any legal system. It takes both written and unwritten form, but is expressed in linguistic form. In modern society, it is required to be expressed in clear and articulate language. This relates to another nature of modern law, "enforceability."

Second, law should be enforced mainly by the state authority as "order." This is why it takes an imperative form. As we see in the definition of law, the enforceability or nature of command or order is a fundamental of law as norm, although there are certain differences of application among the nature of law.[9] The power to enforce it is monopolized by the state in the modern legal system. The reason why clarity and articulateness of law as norm is required in modern (capitalist) society, is to prevent state authorities (especially enforcement authority) from abusing their power and making arbitrary interpretation of law.

B. Law as Institution

"Law as norm" itself is a neutral and instrumental concept, and it never goes beyond an abstract message to the related authorities and citizens. It

Table 1

Three Types of Legal Principles

Principles	*Community Principle*	*Market Principle*	*Command Principle*
Type of Law derived from	Indigenous law originated in the "proto states"	Imported (modern Western) law in the "colonial states"	Development (socialist) law in the post-independence "developmental states"
Model social action	One for all, all for one	Voluntary exchange of goods	Compulsion by a superior
Core sphere or dimension	Communal society (community)	Economic society (economy)	Political society (state)
State model	(Commune state) Proto-states	Modern capitalist state Colonial states	(Former) socialist state developmental states
General pattern of norms	Not clear, depending on community feeling	Supplying clear interpretation rules	Giving discretionary power to the authority
Typical branch of law	Family law	Civil and commercial law	Public (political) law
Nature of disputes settlement	Amicable settlement (mediation or reconciliation)	Adjudication by a third party (like courts)	Reconsideration by authority
Basic value for the settlement	Identification (solidarity)	Legality (justice)	Reasonableness (fairness)
Typical settlement Agent	Community mediation or conciliation center	Judicial Courts	Administrative tribunal
Basic Value	Fraternity	Liberty	Equality

SIMILAR TRICHOTOMY

Name	*Community Principle*	*Market Principle*	*Command Principle*
Unger, R. (1986)	Customary-interaction law	Legal order and legal system	Bureaucratic law
Nonnet and Selznick (1977)	Responsive law	Autonomy law	Strict law
Kamenka and Tay (1980)	Gemeinschaft type of law	Gesellshaft type of law	Bureaucratic-administrative type of law
Ghai, Yash (1986)	Custom	Market	State and its law
Miller (1976)	Primitive	Market	Hierarchy
Pollani, P. (1977)	Reciprocity	Exchange	Market
Paul Tillich (1954)	Love	Justice	Power

Sources: Unger, R.M., *Law in Modern Society: Toward a Criticism of Social Theory*,

New York: The State Press, 1976.; Nonnet P. and P. Selznnik, *Law and Society in Transition, Towards Responsive Law*, New York: Happer Colphan Books, 1978; Kamenka, Augen and A.E. Tay, "Social Traditions, Legal Traditions" in Kamenka &Tay (eds.), *Law and Social Control*, Edward Arnold, London, 1980; Ghai, Yash, "Land Reform and Paradigm of Development: Reflections in Melanesian Constitutions," in P. Sack (ed.), *Legal Pluralism* Proceedings of Canberra Law Workshop VII, Research School of Social Science, ANU, 1986; Miller, D., *Social Justice*, Oxford: Clarendon Press, 1976; Polanyi, K., *The Livelihood of Man*, ed. by H.W. Pearson, New York: Academic Press, 1977; Tillich Paul, *Love, Power and Justice*, Oxford University Press, 1954.

does not secure its effectiveness or enforceability unless suitable institutions, like a judiciary, take action in the enforcement process. Therefore, it is essential for us to come into the next definition of law at a more institutional level, on which law functions as an enforceable norm or rule in the actual context of society.

The concept of "institution" has drawn increased attention by lawyers and economists who are interested in Development Studies when they emphasize the importance of institutional building or capacity building.[10] Here, we can look at "law as institution" at two different levels: enactment and enforcement.[11]

One is "law as institution at the enactment level," which relates to the legislative process of law. In modern states, written laws or statutes are the most typical "law as norm," which are enacted through formal procedure by legislature. The law at this level functions to mold the peoples' will or social norm into the law as norm, through various arguments and debates in and out of legislature. Law as norm is defined more clearly in this process. The concept of law as institution at this level can be extended to the rule (subsidiary laws) making institutions. In the area of administrative or economic law, rule-making institutions often overlap with the enforcement institutions, as we see in quasi-judicial authorities like the Fair Trade Commission.

The other is "law as institution at the enforcement level." This concept of law is more important for legal science or jurisprudence, because at this level, the inherent nature of law, a command to the people, is realized through the specialized process of application of law. Law as norm is enunciated as what it really means, through the decision of the authoritative institution (mainly judiciary) in more specific circumstances, and it produces binding force not only between the parties but also among all members of a society. In other words, "law as institution" creates law itself at the concrete level within the "formal" legal system. How the law as norm is interpreted and constructed is the most important sphere of the formal legal system. This

process is conducted by judges, prosecutors, and lawyers, who are educated as legal experts. This is why law as institution at this level is the core of the formal legal system, which is constructed on the legalistic method based on special techniques of interpretation.[12]

C. Law as Culture

"Law as norm" and "law as institution" are closely interwoven and form the substance of the "formal legal system."[13] It would be difficult to distinguish one from the other clearly, in some cases. What we can say is that the former is concerned more with the normative or dogmatic aspect of law, while the latter includes the social and institutional phase of law. Both laws jointly form the "formal legal system."

However, both concepts of law are not adequate to understand the legal system as a whole, especially in non-Western countries, because the formal legal system is constructed substantially on the concepts of imported Western law. It was originally transplanted or imposed by Western countries under colonial rule, or in the process of modernization or Westernization. Therefore, the formal legal system has no cultural or traditional roots in these countries, although it is enforced by the state power.

The "informal legal system," on the contrary, originated in pre-colonial or pre-modern (traditional) proto-states, has existed in the peoples' life firmly, although it has lost the support of state power. More importantly, it often conflicts with the formal legal system. The informal legal system is based on the cultural tradition of a nation. So, I call it "law as culture."

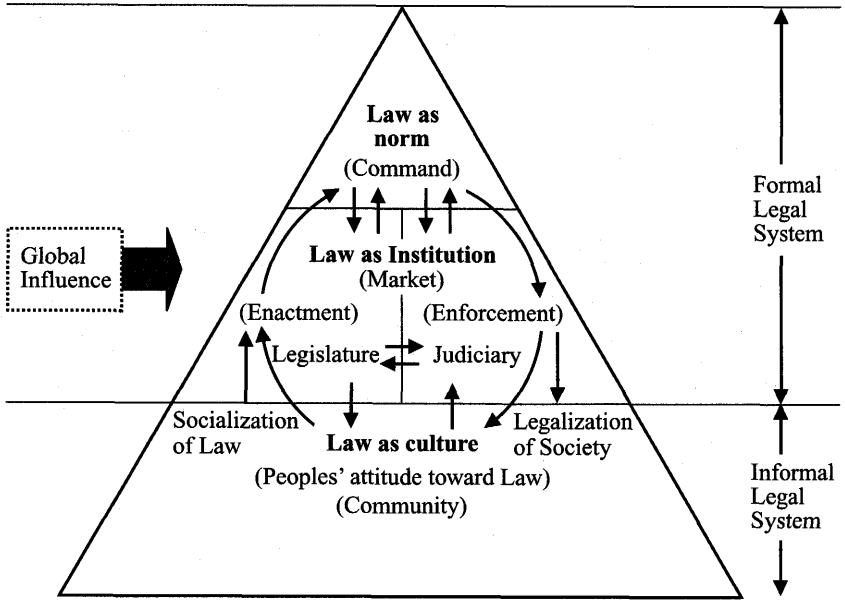
This is why we need to set up the concept of law as culture, and to inquire into it, when we examine the comprehensive legal system of these countries. Law as culture is generally defined as the peoples' attitude toward law.[14]

III. Pyramidal Structure of the National Legal System

Now, we can draw a picture of the pyramidal structure of a national legal system, using the concepts of law as culture, law as institution, and law as norm, from bottom to top, as shown in Figure 1.

There is "law as culture" at the bottom of the pyramidal structure of a national legal system, and it forms its informal part. In Western countries, law as culture has a common historical background and forms the basis of laws as norm and institution. The latter evolved from the former endogenously, and there is firm cultural continuity among them.

Figure 1
Pyramidal Structure of the National Legal System



In non-Western countries, however, there is no cultural homogeneity and continuity between these two laws. The basic concepts of laws as norm and institution were transplanted from Western countries under colonial rule and in the process of modernization, while law as culture is based deeply on traditional and indigenous values. This cultural discontinuity between formal law (law as norm and institution) and informal law (law as culture) has caused serious problems in legal systems in these countries.

"Law as institution" is divided into two levels: enactment and enforcement. Law as institution at the enactment level pumps up the peoples' will based on law as culture, and molds it into law as norm. Law as institution at this level has a certain continuity with law as culture, even in non-Western countries, because of the legislative process in which this law reflects naturally the "peoples' will" through the elected members of legislature. We can characterize this process as "socialization of law," because the social convention or aspiration is materialized into legal form in this process.

However, it should not be disregarded that, in non-Western countries, the channel between them is much narrower compared with that of Western

countries, because of the stark cultural discontinuity between the transplanted formal legal system and the cultural reality of these countries. More importantly, the drastic wave of globalization especially since the later 1980s, has reduced the possibility of strengthening and broadening this channel, and has tended to widen the gap between them. Globalization is apt to expose the national legal system to the impact of external law, and to impose universal and global standards on it without connection to law as culture.[15]

"Law as norm," which is mainly the product of legislature, is at the apex of the pyramidal structure of national legal systems. This law is of a universal nature by itself, because it takes the form of abstract and general normative precepts. For this reason, this law is more disconnected with law as culture. As we examined, law as norm does not prove any effectiveness as law, although it takes a form of order.

Law as norm comes down to "law as institution at the enforcement level," and realizes itself, although it is required to meet social reality. Law at this level takes a form of more concrete rules through the interpretation or application of law as norm by legal institutions, like a judiciary. Law as norm is expected to legalize society in the process of enforcement, because it imposes itself as a command on society. So we can characterize this process as "legalization of society."

It should be noted that the old paradigm of the Law and Development Movement (OLDM) during the 1960s and 1970s, was liable to focus substantially on the aspect of "law as norm" and disregard the importance of the institutional aspect of law (law as institution).[16] The finding of the importance of this aspect is the achievement of the New Law and Development Movement (NLDM), which started from the early 1990s.[17] The problem with NLDM is that it might fail to show how law as institution relates to law as culture. In other words, it defines the institution in the way of a universal standard based on the formal legal system which reflects market system, and does not concern itself adequately with the informal system based on its cultural tradition.[18]

It is most important to understand how laws as norm and institution (formal legal system) interact with law as culture (informal legal system or legal culture), because the effectiveness of a national legal system depends on how these laws are integrated into a unified legal system.

IV. Three Dimensions of Society

To build up a comprehensive framework to understand the law and society, it

is also essential to define "society." It is nearly impossible to define it from a single point of view, because it is a rather holistic and multidimensional concept. This is why I would propose three different dimensions of society: political, economic, and communal, as deduced from the three principles of command, market, and community, as I show in Table 1.

A. The Political Dimension of Society

One is "the political dimension of society," which is the social field of the power relation between the state and people. By power relation, here, I mean the relation between state dominance and subordination of people. Although this relation appears in any field of society, such as in parents and children, factory owners/management and workers, etc., the most typical one is the state and people (subject) relation. In modern society, the state has conclusive (sovereign) power to dominate people (citizens), although the latter stands against it claiming "unalienable human rights." People are forced to obey state order taking the form of law. This vertical relation I characterize by the term "command principle."

As mentioned above, law as norm has affinity to the command principle by nature, although all legislation does not always aim directly to force people to do or not do. Neither private law, like contract law, nor social security legislation, for example, compels people to do or not do certain behavior.

Public or political law expresses, typically, the command nature of political society. Let me take the example of the Constitution, the basic legal and political document of state political society. Generally, it provides two major subjects. One is government structure or governance, through which the power relations among government branches are legalized and regulated. The other is fundamental human right (Bill of Rights). These provisions impose a certain limitation on the power of the state, so that people can enjoy the basic and minimum (human) rights, as the state cannot deprive them.

In this dimension of society, the most important value is how the people can control the state or government mainly for their political welfare, which might be symbolized by democracy in modern states. All political institutions are justified to achieve the democratic society, although there are diversified arguments on what democracy means actually.

Political society is still based on a (nation) state, but it should be noted that its effective arena has been expanding beyond the state border, as we see in strengthening international political institutions, such as the UN and other

international organizations.[19] Globalization accelerates this process rapidly, as we can observe in the recent international human rights movement. This also tends to cause inter-ethnic conflicts within or among the national borders, especially of developing nations, which borders were set arbitrarily by Western colonial powers without consideration for national or ethnic identity.[20]

B. The Economic Dimension of Society

Second is "the economic dimension of society." There are various views on how to define "economy." I confine it to society based on the exchange of goods and values, because all economic activities relate to this activity by nature. The exchange I mean here is voluntary transaction between two or more parties without coercion, and presumably by equivalent value on an optimized basis of supply and demand. Through the exchange of goods and values, we satisfy our material needs and manage our material life. All these principles are incorporated into contract law in modern society.

The most important principles of exchange (contract law) are generally summarized as follows. First, the party must have individual capacity of decision-making ("autonomous self"). Second, the contract is agreed upon by the free will of the parties. Third, if a party commits a breach of contract, the party has a duty to restitute other parties for their damage. These are characterized by free and equal relations between parties, which I define as the "market principle," because this is typically observed in the exchange process at the marketplace.

It is true that, in modern society, a "contractual relation" is not limited to economic activities but is expanded to all dimensions of society. Even in the political dimension, the classic political theory presumes that the state or political community should be created through "social contract," by which peoples agree to create the state or government. Further, it is pointed out that the idea of democracy based on free election shows strong affinity to market capitalism based on free competition.[21] Needless to say, the nature of judiciary, especially the adversary litigation process, can be explained in the same analogy.

For the communal dimension of society, which we will discuss next, size of family: a matrix of society becomes smaller, from the large, joint family to the modern nuclear one consisting of parents who agree to form a family and immature children.[22] The relation between spouses is similar to that of contract. This evidence that the communal society is so individualized that people are involved directly in market society.

Economic society has been expanding rapidly far beyond the state border in the process of globalization accelerated in the 1980s. The WTO and other international economic regimes strengthen the process of global expansion of market economy, and the state seems to be losing its sovereignty substantially in this field.[23] It also tends to dissolve the resilience of communal society, which causes an identity crisis of community and family.

C. The Communal Dimension of Society

The third dimension is "the communal dimension." This is the matrix of society in which people are born, live together, and die. In this sense, it is the incubator for the other two dimensions of society. In fact, in the beginning of human history, the political and economic dimensions were embedded in all of community life. It seems that three separate dimensions of society were differentiated clearly in modern Western societies when the political and economic societies were separated from community life and established their own dimensions. The community was left behind the rapid development of the other two dimensions of society in the process of modernization, and both of them have started dissolving the community.[24] It is well known that a mainstream of modern political and economic thought has antagonized the community due to its nature of oppressing individual freedom and lacking economic rationalism. As a result, community is confined into the minimum unit, such as the nuclear family.

I define the basic value of the community as "community principle," which is to unify or solidify the people together. It is true that nationalism and (global) humanism can be characterized as the expansion of this principle, although they are mixed and more strongly connected with the other two principles: command and market. However, this value is most effective in the local (neighborhood) and religious community, both of which unify themselves by the family bond and alike.

The community in this sense, has been diluted and even dissolved in modern Western societies in the course of the modernization and individualization of society, despite continuing effort to maintain or revive it toward new direction. As we discussed, the modern contractual society shows a strong contrast with the traditional one based on the collective memory and conventions of daily life in the community. In Asian countries, society is still rooted deeply in the communal bond, although ongoing globalization has been drastically dissolving and disbanding these communities.

The communal dimension of society is observable clearly in family, local,

and religious communities based on daily face-to-face and mutually confidential communication, which makes people solidify and feel happy to be together with their family, neighbors, and fellow members. It is also expanded to the national level, as we see in nationalism or patriotism, and even goes beyond national borders, as expressed by the term humanism. Religious communities are not bound within the state or national borders.

These three dimensions of society are theoretical components to analyze society and do not reflect the real structure of society, through which we may construct the multidimensional image of society based on different values and principles.

V. Three Levels of Society: A Multilevel Structure of the Global Society

In a modern state, the society is based on national identity, such as the same language and traditions. The society is nothing but a state or national society. It is true that there have been local and international communities, but both are rather sub or extra societies of the state society. However, globalization seemingly asks us to reconsider these sub or extra societies more seriously as independent entities. This is why I will propose a multilevel structure of society: local/communal, state/national, and super-state/global societies.

A. State /National Society

I will start with "state society," because it is the most important product of modern society, and still the basic unit of all branches of modern jurisprudence. This is very true, although the state has been losing its absolute importance through the globalization now going on. Within the modern sovereign state, law exists as national law, which generally applies to all citizens equally and universally within its territorial limit. With very few exceptions, national law is written and operated in its common national language[25] and applies to all people (citizens) on an equal base through the integrated state judicial mechanism.

The state, a sovereign authority, has the highest and conclusive power to force people to do or not do anything by its legislation, although the people (citizens) can stand against it through Human Rights which are guaranteed generally by its Constitution. All local laws and norms conflicting with state law (especially the Constitution as supreme state law) are void and ineffective.[26]

The state society, needless to say, is more distinct in the political dimension of its society, but it includes economic and communal dimensions more widely. The modern state intervenes in these two dimensions in order to secure the welfare of the people.

However, the economic dimension of the state society has been diminishing its effectiveness, because the ongoing globalization makes business activities cross over national borders without any state intervention. This is also why international regimes, like the IMF and the WTO, have been increasing their roles.

Similarly, the communal dimension of the state society has been losing its importance, as we see in the decentralization and privatization of the social security system, which has been designed mainly to be concern of a state or central government, and functioned to secure the national identity of the people. Further, the explosion of ethnic conflict causes doubt about national identity of the state society in some countries.

B. Super-State /Global Society

A genuine "super-state society" consists only of sovereign states in international law, although it has been increasing new membership, such as international organizations, gradually. However, *de jure* and *de fact* membership has been expanding to social and economic organizations, such as NGOs and international enterprises. This trend has been accelerated by the wave of globalization that has been speeding up since around the 1980s.[27]

The IT revolution has given people the chance to exchange goods and information and move beyond state borders more easily and rapidly and less costly. This has resulted in much significant of peoples' economic and social activities. We observe this influence in various aspects of the economic and commercial arena. The IMF, the WTO, and other international and regional economic regimes, like APEC, ASEAN, and NAFTA and AFTA[28], etc., have played an increasing role in the global economic area. As a result, the state has been losing its actual controlling power seriously in relevant fields. There has been a clear indication of the evolution of global society or regional society as a transitional step for a firm global society.[29]

It is true that the regional/global society has not evolved fully yet, and its dimension is limited to "economic" as we see in the above illustrations. It is natural that the political dimension is a core of the state society, and so the state fiercely resists losing its power. However, in the process of the democratization of post-collapse socialist states, as well as post-crisis Asian

states, it seems that core values of democracy, such as "constitutionalism," "good governance," "rule of law," and "human rights," have been shared by almost all state societies. This may build up the minimum common standard for creating a common political dimension of this society.

As exemplified establishment of "International Criminal Court" in 2002,[30] in addition to the well-established International Human Rights mechanism of the UN, the global society infiltrates liberal values into the political dimension of the state society, through treaties and other international arrangements.

Further, it should be emphasized that the post-9-11-2001 world has strengthened the political dimension of the global society in the process of the World War against Terrorism.[31]

In the communal dimension of the global society, the situation is more complicated because of its nature. First, we can clearly observe that religious communities are now expanding and globalizing themselves, as seen in the recent Islamic movement. Second, even in rural villages of developing countries, there have been political and economic reform movements in cooperation with international NGOs. These are other aspects of globalization.

C. Local / Communal Society

How about the "local/communal society," where our communal dimension is crystallized?[32] The communal society here means communities based on spiritual or ideological relation, but not necessarily based on locality. They can unite themselves even beyond state borders. However, we are focusing here on local society, because it has become increasingly important in the concept of society.

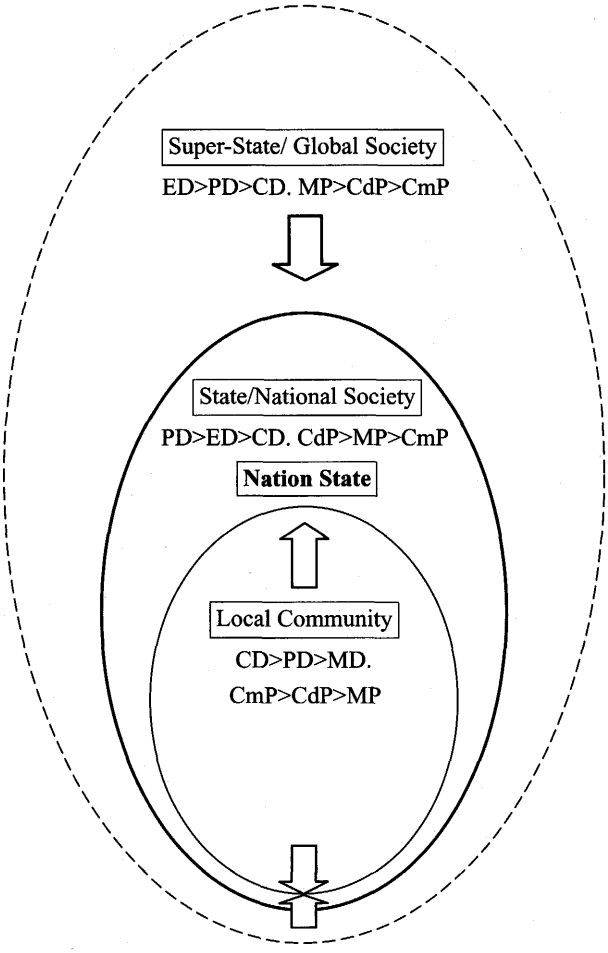
Local society or community is a place of daily life of people. In a modern state system, substantial parts of its political dimension have been absorbed by the state society in the process of modernization of the state system, and political affairs have been confined to the area of "local autonomy" which should be recognized by state law. Similarly, the economic dimensions have been invaded by national or even global economic or business systems in the modern era. Therefore, at present, the community plays only a limited role in the narrow communal dimension of the society which I defined in the former section.

However, it is remarkable that globalization has forced the state society to delegate or transfer its political power not only to the international/global society but also to local society, in the process of decentralization of state power. A major reason why decentralization becomes an important political

agenda is that globalization requires even state government to achieve economic rationalization and efficiency of its management, by the pressure of marketization. Since the 1990s, all governments, whether in developed or developing nations, have been compelled to take steps for financial and

Figure 2
Multilevel Structure of Society

ED, Economic Dimension; PD, Political Dimension; CD, Communal Dimension; MP, Market Principle; CdP, Command Principle; CmP, Communal Principle



administrative reforms, by means of privatization and deregulation. In this process, certain functions of the central government are either sold to private businesses or delegated to local government.

However, a more important reason is that there has been a vitalization of civil society movements in human rights, environments, consumer protection and other social areas, during this period. Many of these movements, by nature, are local or community based, but they have expanded their activities at a global level, as these problems become "global issues." They cooperate with local governments, and often conflict with state governments, which generally with national or global business.

Actually, decentralization and widening local autonomy have been supported by the active participation of these civic groups (NGOs), both in developing and developed countries. The local societies have become an important mechanism to attain "participatory democracy."

Nowadays, the economic dimension of a local society is very limited and subordinates totally to national and global business enterprises. However, even in this dimension, it is observable that local societies have been creating their own systems alternative to the dominant national or global market system, in cooperation with NGOs. "Local currency movements" and "fair trade movements" are good examples.[33]

We can conclude that the "community principle," a core value of the communal dimension based on local society, expands its effective area beyond the state society, and gains a kind of universal value for the global society, as standing against the "market principle" mobilized by "global marketization" in the business world.[34]

VI. Globalization and Legal Transplantation of Competition Law in Southeast Asian Countries: A Case Study of Law Reforms in the Economic Dimension of State Society

Hereinafter, I will briefly examine the process of the introduction of competition law in Southeast Asian countries, especially in Thailand and Indonesia,[35] applying the methodological framework I proposed in the earlier sections.

Competition law is the fundamental law to maintain healthy and efficient operation of a market system. This law is, therefore, characterized as basic legislation which aims to govern and secure market system: the core of the economic dimension of the state society. However, in non-Western countries where market economy is not established well, this legislation is often forced by global and regional society based on the Western liberal idea.[36] The

striking example is Japan's experience of introduction of Anti Monopoly Act (AMA) of 1947, which was enacted in the process of the economic democratization in the post-WW2 under the occupying power. Its aim is declared in Article 1 of this law, as follows:

> This Act, by prohibiting private monopolization, and unreasonable restraint of trade and unfair trade practices; by preventing excessive concentration of economic power, and by eliminating unreasonable restraint of production, sale, price, technology and the like, and all other unjust restriction of business activities through combinations, agreements, and otherwise, aims to promote free and fair competition, to stimulate creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy, as well as to assure the interests of consumers in general. (underlining added)

It is true that AMA has played an important role in the economic development of Japan, but some scholars point out that competition law and policy started functioning effectively only after the end of the 1970s, when Japan's economic system became mature enough to require this regulation.[37] As the newspaper often shows even now, collusion on bidding is still common practice in government contracts, and the FTC, the enforcement authority, is racked by this illegal practice. This fact leads us to consider that there are still deeply rooted cultural obstacles to achieving an efficient market mechanism, even half a century after the enactment of AMA.[38] Here we can illustrate the conflict between laws as norm and institution and law as culture, or in other terms, between the formal legal system and informal ones or peoples' attitudes toward (formal) law.

Competition law is now a focal topic of economic law reform in Asian developing countries, since the 1997 Crisis. This crisis revealed that the East Asian Economic System had been affected by nepotism and an absence of market rationality. It is essential to introduce more market-based rationality, to meet the wave of globalization. This is why these countries have been forced to improve their economic systems in the direction of becoming more responsible for transparency and accountability.[39] In the process of recovery from the crisis, drastic reforms, such as that in the financial system, bankruptcy and insolvency law, and more fundamentally, comprehensive judicial reforms, have been designed and implemented in these countries.

Among them, competition law is one of the most important measures to establish a more market-friendly economic system. This is a main reason

why competition laws in Thailand and Indonesia were enacted in 1999, as the products of strong guidance by the IMF and WB, probably on conditionality for their assistance.[40]

Further, it is reported that Malaysia has prepared a draft bill of competition law (Fair Trade Bill), although Mahatir government resisted fiercely against the intervention by the IMF. And Singapore reportedly plans to enact a comprehensive law. The Philippines also has drafted a law, to renew an old dead-letter anti-trust law that was introduced during the U.S. colonial rule. Further, even transitioning socialist states like China and Vietnam, have been preparing draft bills for competition laws.

Nonetheless, competition law is new in these countries, and there is no cultural basis supporting this kind of legislation. In contrast, there is a firmly rooted culture that regards "harmony" as a more important value at all levels of East Asian society. This naturally tends to avoid competition, because it may cause conflicts among people, which is against the fundamental value of harmony. The attempted introduction of competition law, therefore, is an effort to build up a more effective market system in order to meet the globalization that comes from the outside region. It is natural to assume that the law as norm of competition law would face serious resistance from law as culture based on the traditional value of "harmony." I will examine this problem, applying the framework discussed earlier.

Take the cartel regulation as an example.[41] As I quoted Article 1 of Japan's AMA, "preventing unreasonable restraint of trade," or cartel regulation, is a typical measure to maintain efficiency of the market mechanism. Cartel regulation forms an essential part of competition law.

When competition law was enacted both in Thailand and in Indonesia, it was hardly understood why cartels should be regulated, although very few cases are reported in Thailand in the early 1990s. The main reason for this was that there was no cultural basis to promote competition as mentioned above. The business community was inclined to promote cartel agreement because it meets the traditional culture of "harmony." In addition, there has not been a mature "market" system yet. Remember that, even in the early 1980s, the cartel itself was not condemned but rather promoted by the state, because national economic planning, which can be defined as a system of "official or government-made cartels," was commonly recognized as an effective measure to achieve rapid economic development. The legislation of competition law in these countries was, therefore, motivated strongly by external pressure based on globalization.

In this situation, the legislative process in which law as institution at enactment takes place, plays a different role in two directions. One direction

is toward law as norm. In this direction, it reflects the basic nature of law as culture of "harmony" conflicting against "competition" among people. When it molds itself into "competition law as norm," the definition of a cartel tends to limit itself by the strong influence of law as culture, which stands against competition. This is why cartel regulation is based substantially on the principle of "rule of reason," but is not "per se illegal" principle, even in so called "hard core cartel" in these laws, and there is a wide exemption clause of application in these and other legislation.[42]

The other direction is to the influence on law as culture. The debates in the legislative process and related media reports have been enlightening and educating people to understand how important competition is to establish and maintain an efficient market that may result in consumer welfare. We can expect that "competition law as culture" in the global society would penetrate the dominant law as culture of "harmony" in these state societies steadily and corrupt them in the future. These two directions are nothing but a process of socialization of universal norms of competition law. This is why I define this process as "socialization of law."

It may be too early to conclude what has evolved in competition law as institution at the enforcement level, because the institution-building has just started in these countries. Independent enforcing institutions, such as the Trade Commission (Thailand) and the Business Supervisory Committee (Indonesia), have been established and started operation already, but it is reported that procedural rules and regulations have not yet been formulated.

However, common people have begun to understand that certain types of cartels, like "price fixing," are bad and should be prevented, not only by way of civil remedy (void of agreement and compensation) but also by criminal and administrative sanction. The main cause of this change is that the market system has developed and penetrated the economic dimension of the state society, through the rapid economic development of both countries since the early 1980s. As a result, consumers have appeared as agents of countervailing power against the dominant business communities, which often distort the market system by cartels and other anti-competitive measures.

This evolution is a result of maturity of the market system as an effect of globalization, but it should not be disregarded active advocacy activities which have been initiated and promoted by policy makers, consumers, NGOs, and media during the enactment of law and establishment of enforcement institutions. These made people understand the importance of regulating cartels for healthy economic development.

This means that the anti-competition- and "harmony"-based law as

culture has been changing slowly but steadily to the direction of recognizing pro-competition law as norm. This process is an example of the "legalization of society." The law as institution plays an indispensable role in bridging the gap between two laws: law as norm, and law as culture. This might be a reason why many proponents of New Law and Development Movements (NLDM) understand that it is indispensable to take a step of "institutional building," to achieve the effective law reforms in developing countries, although they appears to design the "institutions" simply on the basis of what I define as "market principle."[43] It might be right if the competition law aims purely to achieve economic efficiency, but when we define it in wider direction including "fairness," it seems necessary to consider another principles such as "community" and "command" even in this field of laws.

VII. Conclusion

As we discussed earlier, "law as norm" can operate effectively only when "law as institution" is well-established. More importantly, however, the effectiveness of both laws depends on "law as culture," peoples' attitudes towards law .The serious problem of present law reform movement in Asian countries focuses their target only on "law as norm" and "law as institution," because of the influence of Western understanding of law. It is natural that, in Western legal tradition, law reform can be confined its scope to the narrow concept of law (laws as norm and institution), because "law as culture" is embedded in laws as norm and instrument, and is not an essential topic to be considered.

However, it is unavoidable to take the third concept of law, "law as culture," more seriously, especially in the Asian jurisprudence, because these two concepts of law have been imported or transplanted from Western modern states. There is a serious gap between formal state law (both in law as norm and law as institution) and informal living law (law as culture), although the gap has been narrowed gradually in the process of modernization in the nearly 50 years since independence of these countries.

It should take a long and tough process for "law as culture" to change, because culture is embedded in the long and deep tradition of the peoples' life. We shall consider the influence of "law as culture" in the process of reform of "laws as norm and institution." To understand culture more deeply, it is essential to examine the substantial structure of society in more detail. This is why I propose three dimensions of society: political, economic, and communal, by which we can understand three major aspects of society

from the view of its values or culture. Further, it is vital to set up this concept of a multilevel structure of society when we try to examine the impact of ongoing globalization, which seems to fuse the concept of state beyond and within the nation state. This is also why I propose the concept of three levels of society: super-state/global, state/national, and communal/local societies.

I tested my methodological hypothesis in the recent law reform in the area of competition law in Southeast Asian countries, through applying these tools. It is undeniable that the process of recent law reform in Asian countries has been motivated by globalization, which has been forcing these countries to transform their national legal systems to meet the global market system. However, even in the competition law, which is a core of the market system, it seems that these countries have created different systems from the global standard modeled after Western developed countries. This shows that law reform movements must take "law as culture" more seriously.

This brief case study also shows that "law as institution," both at the enactment and enforcement levels, is essentially important for effective law reform, as NLDM emphasizes. However, it is true that NLDM still relies substantially on market-based institutions. It defines institutions, or what I call law as institution, totally on the model of Western modern societies, especially the Anglo-American model, which reflects strongly the modern market system. It may be right, when we apply this to economic law like competition law, although how we can infuse "fairness" in this area is left to be answered. It shall be noted that "law as institution" is not necessarily based on a market model, and there is a wide area of social and community laws that should be based on a different principle from a market.

Notes

1 The term "Legal Technical Assistance" was used in World Bank, *The World Bank and Legal Technical Assistance: Initial Lessons*, WB Policy Research Working Paper 1414, 1995. This term is followed to use by many Japanese institutions using its translated Japanese "Ho seibi shien."

2 See Burg, Elliot M., "Law and Development: A Review of the Literature and a Critique of 'Scholars in Self-Estrangement'," *The American Journal of Comparative Law*, Vol. 25, 1977; Merryman, John Henry, "Comparative Law and Social Change: On the Origins, Style, Decline, and Revival of Law and Development," *The American Journal of Comparative Law*, Vol. 25, 1977;

Tamanaha, Brian Z., "Review Article: The Lessons of Law and Development Studies," *American Journal of International Law*, Vol. 89, 1995.

3 For recent works, see Chua, Amy L., "Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development," *Yale Law Journal*, Vol. 106, 1998; Rose, Carol V., "The New Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study," *Law and Society Review*, Vol. 32, No. 1, 1998; Messick, Richard E., "Judicial Reform and Economic Development: A Survey of Issues," *The World Bank Research Observer*, Vol. 10, No. 1, 1999.

4 Barber discussed this by the contrasting terms of "Jihad v. Mcworld." See Barber, Benjamin R., *Jihad v. McWorld, How Globalism and Tribalism are Reshaping the World*, Times Books, 1995. It seems that this confrontation changed to the real war by the Declaration of War by American President Bush against the terrorist attack to World Trade Center on September 11, 2001.

5 I believe other Non-Western countries such as in Africa and Latin America should have a same problem, but hereinafter my arguments will be limited to Asia, because of capacity of my knowledge.

6 Yasuda, Nobuyuki, "Law and Development in the Southeast Asian Perspective: Methodology, History, and Paradigm Change," in Antons, Christoph (ed.), *Law and Development in East and Southeast Asian Countries*, Routledge Curzon, 2002.

7 Tamanaha defines law as "a mirror of society, which functions to maintain social order." Tamanaha, Brian Z., *A General Jurisprudence of Law and Society*, Oxford University Press, 2001, p. 1.

8 Raz argues that "orders backed by threat are norms," although orders themselves should be distinguished from law. Raz, Joseph, *The Concept of a Legal System*, Clarendon Press, 1970, p. 128. He differentiates norms from order by saying that "norms are necessarily justified demands, whereas orders ... not necessarily so." In this sense, my concept of norm here is nearer to what Raz defines as order. *Ibid.*, p. 131.

9 There is a difference between "law forcing people to do or not to do directly in the name of state or public interest" and "law supplying rules and standards to solve the disputes among the people." This deference are similar to what Hart mentions as distinction between "first norms" and "other norms," and more generally the categories of substantial law and procedure law, but not same, and have more affinity to the distinction between public law and private law in civil law jurisdiction.

10 There is no clear definition of "institution," but almost all of recent literatures on development studies deal with "institutional building" as a magical tool, to solve any problems and difficulties concerning development. See World Bank, *Building Institutions for Markets: World Development Report 2002*, Oxford University Press. It defines "institution" simply as "rules, enforcement mechanisms and organization," and distinguishes from "policy" at p. 6. This seems to be close to what I define "law as institution."

11 Rokumoto categorizes 6 legal institutions (*hoteki kiko*) such as legislative, judicial, legal service, investigating (police), regulatory and enforcement. Rokumoto, Kahei, *Ho shakaigaku* [in Japanese] (Sociology of Law), Yuhikaku, 1986, pp. 135–136.

12 The affinity among market system and judiciary or more generally (formal) legal system, is often discussed by legal sociologist, such as Max Weber debates the

relation between rational system and capitalism. This is why I name "market principle" as a basic concept characterizing the modern legal system. See Table 1.

13 For the distinction between formal law (legal system) and informal law, see Chiba, Masaji, *Legal Pluralism, Toward a General Theory through Japanese Legal Culture*, Tokai University Press, 1989. Basically, I accept his definition.

14 Friedman defines "legal culture" as "idea, attitudes, expectations and opinions about law, held by people in some given society." Friedman, Lawrence M., "Is there a Modern Legal Culture?" *Ratio Juris* 7, 1994. However, law as culture here has more vague and wide meanings, which is composed of a complex of legal norms, legal institutions and legal culture.

15 The various law reforms in the post 1997 crisis era of East Asian countries evidences it especially in economic and business laws. See Nelken, David & Johannes Feest, *Adapting Legal Cultures*, Hart Publishing, 2001, for the arguments on the theories of legal transplants especially under the current globalization.

16 For the limits and problems of OLDM, see Trubek, David M. and Galanter, Marc, "Law and Society: Scholars in Self-estrangement—Some Reflection on the Crisis in Law and Development Studies in the United States," *Wisconsin Law Review*, 1974; Tamanaha, *supra* note 2.

17 It might be too early to give a clear definition of NLDM, but this is mentioned by Trubek, David M. et al., "Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transitional Arenas," *Case Western Reserve Law Review*, Vol. 44, 1994; Chua, *supra* note 3; Rose, *supra* note 3.

18 World Bank, *supra*, note 10. This seems a common view of Western New Institutional theory represented by North. He defines institutions as "the framework within which human interaction takes place. ... perfectly analogous to the rules of the game in competitive team sport." North, Douglas C., *Institutions, Institutional Change, and Economic Performance*, Cambridge University Press, 1990.

19 EU is the most advanced example, but various regional organizations such as APEC, ASEAN and SAARC is also remarkable although many these regimes are motivated by economic reason. In the political field, international human rights mechanism under the UN is also playing an increasing role for the political welfare of the people beyond the state.

20 Typical example in Asia is Indonesia, which face many claims of independence by East Timor, Ache and West Papua New Guinea.

21 Schumpeter defines democracy as an 'institutional arrangement for arriving at political decision in which individuals acquire the power to decide by means of competitive struggle for the people's vote' in his *Capitalism, Socialism and Democracy* (1950) by Chua, *supra* note 3, at p. 9, footnote 27.

22 Now single parent (and even homosexual) families become common. See Giddens, Anthony, *Runaway World*, Profile Books, 1999, on the recent rapid change of the family concept.

23 See Strange, Suzan, *The Retreat of the State*, Cambridge University Press, 1996.

24 Harbamas, Jurgen, *Theorie des kommunikativen Handelns*, Bde.1–2, Suhrkamp Verlag. Ffm (*Komyunikeshonteki koi no riron*, 3 v. translated by Kawakami et al., Miraisha), 1981.

25 In some multi-ethnic states, common language different from its national language is more important especially at state level, as we see in the Philippines, Malaysia,

and India etc.

26 There is a long argument on which is superior between Constitution (state law) and international law. But it seems many states tend to accept the supremacy of international law.

27 Jayasurya, Kanishka, "Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance," *Global Legal Studies Journal*, Vol. 6, 1999.

28 These organizations are generally distinguished as "regional organization" from "multilateral institutions" such as UN, OECD and WTO. Here, I define both of them as super-state/global institutions, because these regional institutions are thought to be in the process of wider global ones.

29 I mean here "regional society" by APEC, ASEAN and other regional institutions. Of course, its example is the Europe Union (EU), which is now in the process to create Super State or United States.

30 See, http://www.un.org/law/icc/index.html (accessed: March 1, 2003).

31 The attack against "the axis of evil" advocated by President Bush of the US is a clear message going beyond the traditional modern theory of state sovereignty which never distinguishes between good and evil states.

32 Religious community, another society based on community principle, has no "local" boundary by nature, but we can discuss it in same way, as far as it relates to community principle.

33 Many authors have been proposing the new ideas on post modern economic systems of Western countries, such as "Associative Economy" or "third sector" (Archibugi), "Civil Economy" or "Community oriented Economy" (Bruyn) and "Community Economic Development" (Simon). See Archibugi, Franco, *The Associative Economy, Insights beyond the Welfare Stare and into Post-Capitalism*, MacMillan Press, 2000; Bruyn Severyn T., *A Civil Economy Transforming the Market in the 21st Century*, University of Michigan Press, 2000; Simon, William H., *The Community Economic Development Movement*, Duke University Press, 2002.

34 I proposed a hypothetical assumption on the international system using these two principles that "uncompromising disputes between business/economic interest groups based on the individualistic market principle, and social/community groups based on the holistic community principle in various fields of development policies especially with regards to environmental problems, are inevitable." Yasuda (2002), *supra* note 6, at p. 52.

35 For details, see Yasuda, Nobuyuki, "Indonesian Competition Law in ASEAN Perspectives," *Competition Law and Policy in Indonesia and Japan*, Joint Research Project on Supporting Economic Structural Reforms in Asian Countries, IDE-JETRO, 2001, pp. 136–159.

36 See Yasuda, Nobuyuki, *The Evolution of ASEAN Competition Law within the APEC Framework*, APEC Discussion Paper Series No. 32, APEC Study Center, GSID, Nagoya University, on global and regional cooperation of the competition law and policy.

37 For the history of Japanese competition law, see Matsushita, Mitsuo, *Introduction to Japanese Competition Law*, Tokyo:Yuhikaku, 1990

38 Many news suggest that the government itself has committed to the collusion on official bidding. *Asahi Shimbun* (November 12, 2002) reports us that Hokkaido

Local Government Officials played a substantial role in the collusion by private companies in the public offer of bidding of public construction works.

39 I discussed this topic by contrasting Asian Community based Capitalism with Western Market based Capitalism in Yasuda, Nobuyuki, "Southeast Asian Law in Transition: The Law and Political, Economic, and Social Systems in the Post-Crisis of 1997," *Proceedings of the Roundtable Meeting; Law, Development, and Socioeconomic Change in Asia 20–21 November 2000*, Manila, IDE-JETRO, 2001, pp. 119–135.

40 Yasuda, *supra* note 36; Yasuda, *supra* note 35.

41 Competition Law and Regulation generally consists three regulations, monopoly (dominant status), cartel (restrictive practice) and merger, and some laws include regulation of unfair competition. See UNCTAD, *Model Law on Competition*, UNCTAD Series on Issues in Competition Law and Policy, Draft Commentaries to Possible Elements for Articles of a Model Law and Laws, United Nations, 2000 and WB/OECD, *A Framework for the Design and Implementation of Competition Law and Policy*, 1999.

42 In Indonesian law, only three types of cartel agreements such as prices determination, boycott and closed agreement are prohibited by *per se* illegal principle, although it seems possible to introduce "reasonable" by interpretation of law in this area, and all agreements are regulated by the rule of reason in Thai law. Yasuda, *supra* note 35.

43 World Bank, *supra* note 10.