ROLE AND LIMITS OF "SHAKAI–TSŪNEN" IN LAW AND SOCIETY IN JAPAN

MITSUKUNI YASAKI
Japón

I. *Prefatory Remarks*

The aim of this paper is to make a partial analysis on the usage of the socalled "community-standard", "present-day standard of the community"[1] and so on, mainly, in judicial process in Japan, for the purpose of an understanding of incidental or necessary connection of both, philosophy of law and sociology of law. If we employ a term "Shakai-tsūnen"[2] in Japanese, it may well convey such standard in its nuance.

Shakai-tsūnen, or the standard of this sort, I think, still have a considerable weight in the judicial process, that is, a judicial interpretation and application of the law on the following reasons: First, the formal state law, whether statutory law or judicial precedent, has a fringe, or penumbra, though maintaining core of certainty.[3] Shakai-tsūnen, or the standard of this sort is vague by itself, and of flexible nature. Due to the nature, however, it is apt to be used in fringe case or penumbral case. Then, we may be confronted with a question of how to draw a borderline for such standard between proper use and abuse. abuse.

Secondly, as it is vague by itself, this standard is tended to be used as a generally maintained and observed standard in a given community, while in fact it may be a standard subjectively proposed and held by only a few members of that community. Then, there must be raised a

1 As to an example of American cases, see Roth v. United States, Alberts v. State of California, 354 U.S. 476, 1957. Cf, also R. Dworkin, Lord Devlin and the enforcement of morals, 75 The Yale L.J., p. 986, 1966.

2 I have written papers on this topic. Here, I shall cite then in a following order: a) M. Yasaki, Philosophy of law and sociology of law, Iwanamishoten, 1973. b) Yasaki, Shakai-tsūnen and the law, Hōritsujihō No. 632, May, 1980.

3 The technical terms used in the text are, mainly, due to modern thinkers, such as like G. Williams, H.L.A. Hart.

question whether shakai-tsūnen is a standard as it is or a standard as it ought to be (which means subjectively or partially wished, desired, and so on). With these points in mind, I shall make a brief survey.

II. *Shakai-tsūnen and the Judicial Process*

The term shakai-tsūnen has rather a long history of its usage in various fields of law in Japan.[4] Quite a few judicial decisions often have found their material justification in such standards, for instance, shakai-kannen, gojin no hōritsu-kannen, hōritsu no seishin, etc., in torts cases, criminal cases, or constitutional cases, and so on. And yet we may find a delicate difference in such standards used in a variety of cases. In a considerably older case of marriage, the Supreme Court (Taishin-in at that time, 1915, 4th year of Taisho), by repeating citation of shakai-tsūnen, permitted a reason in a claim of a "Naien" wife on her damage caused by one-sided dissolution of marriage, though the court finally rejected it by means of curious judicial logic.[5] On the other hand, the Supreme Court, 1957, decided against the defendants' claim of nonguilty for their translation and publication of "Lady Chatterlay's Lover" by utilizing shakai-tsūnen as a ma-material standard for punishment to be infringed.[6]

4 2) a) pp. 196f. 220f. 2) b) p. 15.

5 Judgement of Jan. 26, 1915, Taishin-in. A collection of civil Taishin-incases, vol. 21, P. 53. The term "Naien" may be strange for readers. According, to T. Kuki, it "is the relation between man and woman which is not legally admitted to be the lawful marriage on account of the failure of the registration which is laid down by the Family Registry Act... Generally speaking the spouses go through the process of the celebration of the marriage first, then the conhabitation. And most spuses make the registration after their cohabitation. Customary conception, however, is that man and woman become the formal couple by celebrating their marriage. Here lies the gap between our custom or general consciousness and the provision in the Act... The parties to Naien are disadvantaged in the code in comparison to the parties to the lawful marriage." T. Kuki, Naien: One problem in Japanese marriage law, 12 Osaka Univ. L. Rev., pp. 9f., 1964. The case cited in the text is of course related to this problem in Japan, though the situation around legal protection of Naien-wife has been getting better.

6 This case is concerned with an interpretation of Art. 175 of Criminal Code of Japan. It says: "A person who distributes or sells a pronographic writing, picture, or other object or who publicly displays the same, shall be punished with inprisonment at forced labor for not more than two years or a fine of not more than five hundred yen or a minor fine. The same applies to a person who possesses the same for the puspose of sale." T.L. Blakemore, The criminal law of Japan, 1950. This provision leaves judges a wider range of material judgement on what pornographic, obscene is. It is for this reason that shakai-tsūnen is used in this case, too, as a material standard for judgement. In the cases of this sort, shakai-tsunen has been referred to as a stable generally valid standard. But, it is worth-noticing that shakai-tsūnen in a recent decision is used rathen tolerantly to the matter, which was treated as pornographic before, for the reason of change in a popular consciousness to it. Cf. Realm of Passion case, Jedgement of Oct. 19, 1979 Tokyo District Court. Hanrei-Times, No. 398, PP. 60ff.

Putting aside the other interesting cases, we may well to classify at least three types of the usage of shakai-tsūnen in the judicial process.

1. Supplementary role Shakai-tsūnen is given a role to make a supplement for an interpretation of a written legal provision which does not have a proper concepts for the relevant case, or does not cover the case, and so on.

2. Modifying role Shakai-tsunen, furthermore, is sometimes given a role materially to modify a written legal provision.

3. Facts-ascertaining role to speak principally, shakai-tsūnen has been used at the level of interpretation of law. But, it is hard to say that there was no case to use shakai-tsūnen as a role for facts-ascertainment.

The examples above probably indicate such standards being used in a very complicated way and often arbitrarily. Judicial decisions cite such standards, as if those were objective and evidental truth in a daily life, by saying "according to shakai-tsūnen," or "in terms of shakai-kannen" prevailing in the community. But what irritates us is their vague, or ambiguous usage in the judicial process. Should we then propose to give up such standards? No. As far as the formal state law, or the black-letter law is accompained by opentexture, we can't help to take into account that judge or official may utilize some other standards of similar nature, even though we might give up it. At the moment, it seems better for us to collect and arrange a great deal of the decided cases on the ground of shakai-tsūnen to order for avoiding possible judicial interference in private individuals' freedom and right through this convenient means.

III. *Term and Reality of Shakai-tsūnen*

Shakai-tsūnen is not only spoken of in the narrower field of law, but in a daily life. This is very natural, since shakai-tsūnen originally means standard or idea which supposed to be dominant or prevalent in a given community. Here too, we must be careful about the expression "supposed to be." It may show and interesting distance of a *term* shakai-tsūnen from a *reality* to be designated by this term. Judges, Officials, and individuals, too, mostly believes (heartily or lipdeeply) in the term fitting the reality. But, to look at in detail, the term does not always designate the reality. A relation of the term to reality may be expressed in the following approaches.[7]

7 M. Ossowska, Social determinants of moral ideas, pp. 12ff., 1970, is one of interesting examples for us to make such a tentative classification.

1. An approach to understand shakai-tsūnen in terms of the empirical facts clarified by means of sociology and psychology. It may be called a naturalistic approach to translate value-related concept into facts-related concept, or normative concept into less-normative natural concept.

2. Pseudo-naturalistic approach. Though adopting the first approach on a surface, it, in reality, manipulates, consciously or unconsciously, relevant matters from its normative (subjective) point of view in order to show them as less-normative (objective) shakai-tsūnen.

3. Non-naturalistic approach. Permitting normative factors in shakai-tsūnen which, more or less, can not be reduced to empirical or natural facts, it still aims objectively to grasp shakai-tsūnen through reflexion, intuition.

4. An approach to give up a way for an objective cognizance of shakai-tsunen for the reason of normative or emotive factors involved in it. But, there remain perhaps two possibilities, that is, to make a distinction, if possible, between factors in shakai-tsūnen which can not be cognitive due to that emotive factors dominant and factors which can be cognitive on the one hand —Noncognitivistic approach—, and to see in shakai-tsūnen a kind of "fiction" on the other hand.[8]

To apply these approaches to the examples in the judicial process mentioned above, we may perhaps find an interesting set of combination. The first approach may be a main concern of Sociological jurists. By contrast, critical thinkers may adopt the fourth approach, and yet the latter. If we look at daily life, from which shakai-tsūnen is supposed to arise, in a distance, critically, in a cold attitude, it may appear as one of typical examples symbolyzing snobbery, ugliness, and furthermore, falseness in the capitalistic society.

In this context, the latter of the fourth, that is, an approach seeing in shakai-tsūnen a kind of fiction may appeal us very strongly.

IV. *Shakai-tsūnen in Law and Society*

Even though we may admit this fact, it must be also recalled in mind that shakai-tsūnen has been used in the social context. Human beings in daily life are principally working together despite of the very fact of, so to speak an apparently opposite relationship of ego to alter-ego. Each one is working mainly in terms of inter-subjective,

8 2) a) P. 262.

though often conflicting, stream of thinking or consciousness which in turn, becomes a part of the social context.[9]

Viewed in the short term, certain type of shakai-tsūnen appears predominant in a given society. Viewed in the long term, however, it is getting clearer that each different value-ideas of society are so keenly competing with another for a win that one occupies a post and role of shakai-tsūnen only for a while. Here again we are faced with each different sceneries of the term shakai-tsūnen and the reality to be designated by it.

Returning to the starting-point, "Shakai-tsūnen" in the judicial process has been used in an ambiguous way reflection of which requires us to find more secured usage for our freedom and right. For this purpose, it is necessary to pay full attention to both, judges, councils in law, public prosecutors and individuals, each of whom mentions to and adopts shakai-tsūnen from their own unique point of view, on the one hand, and types and structures of the law[10] which again make it necessary for them to use it as a material standard for judgement, which underlies in a inter-subjective stream of great members of the society, on the other hand.

[9] Intersubjective stream of thinking or consciousness is a sweeping expression. But, here I take into account a long series of consideration on this topic through thinkers, W. Diethey, W. James, Ed. Husserl, M. Weber, A. Schütz, and others. Cf. 2) b) PP. 10ff. P.L. Berger & S. Pullberg, Reification and the sociological critique of consciousness, 35 new left review, pp. 60f, 1966, and K. Klare, Law-making as a praxis, 40 Telos, 123, Summer, 1979, also offer relevant materials for this topic.

[10] 2) b) P. 15. Types and structures of the law in connection with shakai-tsunen may well be illustrated by those which, for instance, R.M. Unger, Law in modern society, 1976, P. Nonet and P. Selznick, Law and society in transition, 1978, try to propose, classify, and analyze.