

# INDIVIDUAL AND COLLECTIVE DECISIONS: CONCEPT OF LAW AND SOCIAL CHANGE

Itaru Shimazu  
Chiba University (Japan).

## ‘GOOD THEORY’ OF LAW

In the long run, changes in society, both local and global, are inevitable. What, then, is and should be the relation between a general theory of law and social change? In the 1995 Kobe Lecture in Japan, Josef Raz said, “By and large, only bad theory can lead to change.” But a ‘good theory’, intended only to describe the normative world and not directly to change it or society, enlightens us in a way that changes our outlook in one way or another. As our picture of the world changes, to that extent the change will be reflected in our practice. The change in practice in turn will affect society bringing about its change in the long run. That change can be either what was intended by the theory or an unintended consequence of it, sometimes favorable and sometimes disastrous. A theory may change the course of things as well by putting a halt to change. But if we can tell in advance that the theory will not lead to any social change whatsoever, it only means that the theory is trivial, or valueless even as a description. Contrary to Raz’s view, a ‘good theory’ of law must be like an explosive; dangerous for the unprepared to play with. As we all know from the case of nuclear fission, descriptive theories, once they are widely known, change the world profoundly by opening up new alternatives, or sometimes by prohibiting people from taking would-be possible choices which are favorable or harmful. I believe a vague presentiment of great potential consequence is implied in our judgment of a theory as important, valuable or dangerous.

The main issue I would like to discuss here is the way the concept of law contributes, positively or negatively, to social change, intended or otherwise. Basically there are two ways for social change; through individual and through collective decisions. And we have different concepts of law accordingly, each of which does not necessarily conflict with the other. Individualist law takes the social change as legitimate because concerned individuals had made the decisions on their own and the social change was brought about without infringing anyone’s right. Collectivist law deems the social change legitimate because the change was the result of a legalized process of collective decisions. F. A. Hayek would call the former *nomos*, the law of spontaneous order, and the latter *thesis*, law of organization. And his view of free society is inseparably connected with the former.

## CASE OF SOCIAL CONTRACT THEORY

The West has a long tradition of Civil Law or Common Law in which each individual, or in early stages each patriarch, is given a protected sphere of free activity. At the core of this sort of law is so called private law, or *Privatrecht*, which deals with horizontal, rather than vertical, relations between agents. I believe it is against this historical background that liberal political theories of the 17th and 18th century prospered. When social contract theories appeared in the Western World, there were already such legal concepts as ‘right’, ‘contract’, and ‘person’, together with other related terms like litigation, court, judge, attorney, prosecution, ground for claim, damage etc. developed through the judicial practice of the Medieval Age, not to mention the Roman Era. Without this practice behind it the idea of ‘natural right’ would not have come to the philosophers’ mind. Western society was a comparatively individualist society by then. And legal practice provided the terms with which to conceptualize it as ‘society’ in contrast to ‘polity’ or state. Although the picture of society as constructed by totally independent individual persons was a fiction such a picture was inevitable to contemplate liberal feature of human existence, i.e. the possibility for our relative independence of culture, social environment, political institutions etc.

Sometimes Hobbes is taken as a totalitarian thinker. But in his theory of social contract the main task of sovereignty is to introduce to the world of natural condition the system of exclusive property rights of individuals. The inconveniences of the state of nature are described by him as;

Whatsoever therefore is consequent to a time of war, where every man is enemy to every man, the same consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for industry, *because the fruit thereof is uncertain*: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.

*(Leviathan, Chap.13, with my emphasis)*

The solution for this is obviously to secure the ‘fruit of industry’ to the one who has produced it by one’s effort. As any textbook of private law (‘private law’ includes continental ‘Civil Law’ and British ‘Common Law’ hereafter unless specified) tells us, the right to acquire the fruit is part of property right. In short what is required here is not the law of organization, or law of vertical relation of agents, but that of social order within which people can move and work freely and transact each other with trust. Once this result is achieved it is irrelevant in Hobbes’ context whether the power to realize this has been established by force or by democratic process. A warlord could become such a sovereign if he proclaims

after winning the hegemony that he will respect and protect private property rights of the individuals. So, Hobbes may not be a democrat but is a liberal. He does not entrust the sovereign with any collective goal to achieve or a perfectionist task of taking care of people's soul. What the sovereign is to accomplish is a legal framework for people to work peacefully and to enjoy the fruits of the work within. Even if the one who reigns over the state has come to power by usurpation he will be welcome by the people so far as he maintains the peaceful order of exclusive rights among the individuals. Contrary to the popular understanding of Hobbes, the authority of the sovereign here does not reside in the legitimacy of the process in which he has come to power but the result of his achieving peace. The political entity thus established by the social contract provides for the means and not the end for the agents of the contract.

In social contract theories the starting point is crucial. In the condition of nature people are taken to be individuals with their ends at the beginning. They, as individuals, have problems which they cannot solve without some contractual device. They are in the condition of mutual war because the property right they have lacks the feature of exclusivity. In such condition of nature the fact that something is mine can well coincide with the fact that it is yours. So the conflict between you and me does not come from the difference of our understanding or interpretation of justice. We have to fight each other while we share the view of the normative status of the object which we fight over; i.e. it is at the same time yours and mine. This, I have to say, is a rather queer conception of right because the main social function of the concept of right must be to rescue us from such a dilemma. In logical consequence of this the more people try to defend their rights the severer the confrontation among them will become. Meanwhile the incentive for work will be totally lost as described above by Hobbes.

It is enough for the purpose of this essay to underline that the concept of law which Hobbes supposed the sovereign to introduce was predominantly that of private law. As every theorist has noticed, Hobbes' theory has a weakness in coping with the abusive use of power by the sovereign. The introduction of sovereign power is justified because it establishes private law which embodies exclusivity. By means of sovereign and private law so established, people are rescued from the 'natural' condition of mutual war. The sovereign is in charge of securing each agent his/her belongings. That is the legal framework within which peace among people is secured. But in the relation between the sovereign and the people there is no safety concern in his theory against the abuse of the political power that the sovereign is entrusted with. It might be used to serve the sovereign's personal interest while damaging that of his subjects.

When exclusive property right is established for the first time any initial distribution of it can be logically justified. In the state of nature every one could claim the right for anything he thinks he needs. That means anyone could be the owner of anything. So, when the sovereign allots exclusive rights to each one, any distribution can be just understood as recovery because one gets back something as his own that he had originally, though not exclusively. The sovereign only adds the

feature of exclusivity to one's right to something which one already had as natural right before the social contract. And since any initial distribution is a recovery, it can never be arbitrary no matter what the sovereign might decide upon.

But once the system of exclusive right is initiated by the sovereign, people start living in a completely different situation. Now they live in the system of exclusive right so that they can talk about theft, robbery, assault, murder etc. But what if such illegal deeds are done by the sovereign himself? That is the problem of abusive use of state power. Who can protect individuals from the infringement of their rights by the state? Hobbes does not talk much on this subject. And that I believe is the reason why he is sometimes misunderstood as a totalitarian thinker. But I would like to skip this point since the issue I am addressing here is the concept of law rather than the theory of state power as such.

No emphasis is needed in saying that Lockean theory on civil government is liberal or libertarian as was well re-established by *Anarchy, State and Utopia* in which Robert Nozick rested his theory on the Lockean theory of natural law. I would just like to give a short comment on the passage that I like most in the *Second Treatise*.

...nay, where an appeal to the law, and constituted judges, lies open, but the remedy is denied by a manifest perverting of justice, and a barefaced wresting of the laws to protect or indemnify the violence or injuries of some men, or party of men, there it is hard to imagine any thing but a state of war: for wherever violence is used, and injury done, though by hands appointed to administer justice, it is still violence and injury, however coloured with the name, pretences, or forms of law, the end whereof being to protect and redress the innocent, by an unbiassed application of it, to all who are under it; wherever that is not *bona fide* done, war is made upon the sufferers, who having no appeal on earth to right them, they are left to the only remedy in such cases, an appeal to heaven.

(*Second Treatise*, Sec. 20)

In the case of Hobbes, the problem of the state of nature was solved by introducing the exclusive right. In other words, the genuine concept of law, to give each his due, was lacking in his state of nature. But in Locke's state of nature, people have that concept of exclusive right already. That is the reason why the 'sufferers', mentioned above, would 'appeal to heaven', which the people in Hobbes' state of nature would not and could not have done. The only trouble in the Lockean state of nature is the application and enforcement of law, i.e. private law. Locke discusses in detail natural law. But I believe what is logically needed here is not necessarily *natural* law as valid in a state of nature, but the concept of law in the sense of private law as binding the king or the state which could well be *conventional* rather than *natural*.

Natural right is not something like material reality that you can test in a laboratory. But the belief people hold is a social, or sociological, reality. And the society in which people believe firmly in something like natural rights has specific features that other societies do not. I would like to give a Humean turn to Locke.

If people believe in rights which the state or the sovereign should not violate, and if they react accordingly in case of violation of their rights, it is practically irrelevant whether the right is natural or conventional. Here the concepts of right and law exercise their function in steering politics.

## INDIVIDUAL RIGHTS AS SOCIAL ARRANGEMENT

Marxists, following the idea of 18th century French socialists like Saint-Simon, pointed out insistently the ideological feature of 'law' in the sense of private law. They were right to the extent that law is not a natural but social arrangement. But they were wrong in inferring from this truth that such an arrangement can easily be substituted by a better one, i.e. rationalistic and egalitarian social engineering. F. A. Hayek used to call this tendency 'hubris of reason'.

Scarce resources are valuable for us all. So, it is an easy course of reasoning to imagine that if all the available resources are utilized collectively for human happiness we will arrive at a utopian happy world. But the history of the 20th century tells us that this is wrong because this attempt will involve such an extreme amount of collective decisions that they cannot be made but by suppressing the opponents at any single step. Moreover, no one can have enough information to run correctly the whole machine of collectivist economy. The world of economy, or 'catallaxy' in Hayekian terminology, is too complicated for human mind precisely to control. And any decision in economic management is partly a gamble, as is shown in the fate of many companies which were once prosperous but declined later. Innovations are impossible to predict and so are the success of each managerial decisions. So pretence of omniscience was politically inevitable in the collectivist project as was shown in Stalin's Russia. The trial and error process run by each individual in the market is a better solution in the world of limited information. This sort of understanding is now widely accepted in the field of economics. Practically nobody demands the nationalization of means of production nowadays. But I believe the situation is similar in the field of morality to the extent that we cannot tell the long-run consequences of each moral aspiration. So, as M. Oakeshott once wrote, social pursuit of perfection by coercing one of them to all is a 'folly', while brave pursuits of perfection by individuals are impious but admirable.

The positivist theory of law, especially its Continental version, once tried to alter our conception of law, from that based on private law to that based on public law. In the latter version private individuals are treated like civil servants. They can own something and make contracts because the law, in positivist sense, authorizes them to do so. In the case of civil servants their acts are valid as acts of the state because they are authorized to do so by the government and the law of organization. If there were no distinction between the law of spontaneous order, or private law, and that of organization, or public law, the legal acts by individuals in their daily life would be deemed to be valid in the same way; individuals act legally as organs of the state.

One of my contentions is that the idea of ‘the rule of law’ makes sense only when the concept of law based on private law is accepted among lawyers, civil servants and lay people. In short, the rule of law is the rule of private law which is enforced by the court. But since the positivist conception of law took hold of the legal profession in the era leading to World War II, especially in Germany and Japan, the idea of the rule of law became blurred and almost unintelligible. Consequently, conscientious judges in both countries could not but apply oppressive laws faithfully, because they were taught, by general theorists of law, that judges should not evaluate the content of laws in so far as they were made through an impeccable process. This is only another grave case of our becoming captives of ideas. If people, judges in this case, believe that they cannot do something, they do not try. And the teaching that we cannot fulfill itself. But it does not mean it was true at the outset. On the contrary when the concept of law had close ties with people’s sense of justice too oppressive commands by the power would not have been deemed as ‘law’. This is one of the ways a descriptive theory leads to change, by telling us in the name of logic what is, and is not, possible.

In the case of Hans Kelsen, his theory on the concept of law was closely connected with his view of democracy, or the idea of socialist revolution through the legislative process of democracy. If individual property and freedom of contract constitute essential features of law, “legislature”, i.e. the governmental organ of changing law, is in no position to abolish the system of law in this sense as a whole. But since Kelsen’s concept of law, in the name of logic, urged us to drop the distinction between private and public law in favor of the latter, a revolutionary legislation to bring about total social change by abolishing private law as a whole became ‘logically’ possible. The main tenet of the recent critical legal studies movement, or CLS, that *law is another politics* falls in line with Kelsen. These theorists of law belong to a group who envisage the wholesale social change as brought about through legislation, by collective decisions, or by politics.

I would rather uphold the long cherished distinction between law and politics. In that context, the peculiar feature of law resides in the fact that an agent can bring an issue to court without being involved in power games among various groups. In the logic of legal justice, whether one belongs to a majority or minority group has nothing to do with the question of his right or guilt.

After the collapse of communism at the close of the 20th century we have been taken back to the system of private law and individual decision making. But such a system of freedom is possible only when others respect and honor the decisions made by the concerning agent. It cannot flourish under the ‘social tyranny’ as was put by J. S. Mill. The system of individual freedom requires several conditions: tolerant culture, suitable morality and mind-set, wisdom to refrain from political enthusiasm, and adequate arrangement of legal system. Asian countries seem to have still long way to go in this direction. What is necessary at most for individual freedom is the respect or faith in law. And here what law we are talking about is the most crucial. The theory of the concept of law must answer this question.

## LAW OF SOCIAL ORDER AND SENSE OF JUSTICE

As I discussed briefly in a workshop of IVR in Lund in 2003, there are two ways of relating a social order with ordinary people's sense of justice. One is to keep the two entirely separate and try to bring about social order by rules which are totally independent of, and even alien to, the common people's sense of justice. Since numerous conceptions of justice held by people are irreconcilable with each other, this approach believes they would introduce widespread rifts in the social fabric if let run freely. So, strict formalism in law is the only way to realize peace in a pluralistic society. The alternative approach is to trust and rely upon the people's sense of justice as the source of social order and try in various ways to reflect it in law; in both the legislature and judicature as well as in daily transactions; e. g. a representative body in legislature, jury system in judicature, free contract in transaction.

The first approach, which I would like to call a 'distrustful approach', presupposes some positivistic concept of law; law, once 'made', is an object which we can recognize clearly without being involved in the value judgments which are presumably subjective and divisive. This positivist conception of law would be appropriate or even inevitable in some social settings. In the case of pre-1st World War Austria where different groups of people spoke Slavic, German, Hungarian, languages with different cultures and religions, and in which Kelsen had built the core of his theory of law, this situation might be the reality. That also applies to the early stage of the introduction of Western law into Japan in the late 19th century. The content of the law newly introduced in Japan had little to do with people's daily practice or their sense of justice. In such a circumstance of importing laws from other countries, law must be found solely in law books. We were in no position to search for the answers to various legal questions within ourselves, as the law was not indigenous and not rooted in people's lives. It was as if we had to speak a foreign language to deal with formal and public matters. And it may be difficult or even dangerous to mix the native tongue with originally foreign system of rules since our *Sprachgefühl* (sense of language) does not work.

Under these circumstances, only legal specialists who have learned the foreign system well could be allowed to speak for and interpret the law. While the daily lives of people were run more or less independent of the law introduced, judges had to apply the written law faithfully to the cases brought to the courts. The writings of Western scholars, mainly Germans, had authority when Japanese scholars interpret their positive laws. Law was something to learn rather than to feel within for Japanese judges and law scholars.

We face a similar situation during revolutions. Suppose a new set of rules is to be introduced on a large scale whose main purpose is deliberately to change the ongoing pattern of people's behavior. It is obvious that in such a circumstance we cannot rely upon daily feeling in deciding what is to be allowed or taken for granted in people's transactions. Some authoritative body is to lay the new set of rules and other institutions both public and private must learn and obey them. In

this context, the positivist concept of law, or the ‘distrustful approach,’ provides a measure for radical social change.

With the ‘trustful approach,’ in which social order is expected to be based on ordinary people’s sense of justice, the contrary applies. I believe Adam Smith’s *Moral Sentiments* was written presupposing such a circumstance; his vision of the ‘impartial spectator’ obviously represents the roll of the judge in court. In the most cases, people may not even notice that they are following the abstract rules, just as they fail to notice the abstract rules of language when they speak their mother tongue. But though they may not be able to describe the complex rules governing their behavior, they know how to follow them in practice. They can detect when the rule is not followed and they can tell in each concrete case how it should be followed.

In a typical case of the legal positivist, or distrustful approach, it is law that justifies something, say the act of a governmental official, but it is not required or even possible to justify the content of the law itself. While obedience to law as a whole might be justified for the sake of ‘peace and order’, its final legitimacy resides in the authority of the institution or the process of making it. By contrast, in the trustful approach, individuals involved with law, including public servants and private agents, can be required to explain why the content of a particular law which they invoke is just. Though there may be more than one right answer to this question, one who invokes law has a moral, and maybe political, obligation to provide some explanation to justify the law invoked. While in the former approach law is always treated as *explicans*, i.e. something to explain other things, in the latter sometimes as *explicandum*, i.e. something to be explained by other things. Explicitly defending why the law is just has consequences. The particular justification offered can constrain how the same law will be applied in the future cases.

A society in which people, both public officials and private agents, can explain why the substance of their law is just is, in a sense, a decent society. Those laws which people find difficult to justify will be given a more limited scope. Some way of escaping their application will be sought. If people learn to talk and care more about justice than interest, only those proposals for law that fit the sense of justice of the politicians and ordinary people are politically feasible in parliaments. Only now is Japan realizing this possibility. Perhaps more than a hundred years is long enough to digest the foreign import and it is time for her to return to the ‘trustful’ approach to law. The issue of historical and global importance in this context is the present and the future of law in China. A great deal of our future, I believe, depends upon the development of the concept of law as private law among Chinese.

In the trustful approach the main challenge is to distinguish law based on the people’s sense of justice from degenerate forms of law produced by parliaments; notorious politicization, log-rolling, patchwork etc. Hayek’s answer, which I take correct in principle, is that legislation should reflect the sense of justice of the lawmakers rather than their considerations of particular interests. This theory as-



sumes that people are able to distinguish different answers to two sets of questions; those concerning justice and those concerning interests. The first has to do with universal rules which we are following sometimes without noticing, and the latter has to do with the calculation of particular gains and losses of specified agents or groups. And to the extent that the parliamentary body tends to reflect the latter, the existence of an institution like judicature which reflects the former can be justified as an organ independent of the logic of democracy which is intrinsically that of collective decision making.

### INDIVIDUALISM; LIBERATING ASPECT

Contemporary 'liberal' theories of justice tend to put focus upon plurality of cultures and values. In this trend, which is usually called 'multiculturalism', the value of Western civilization seems to shrink as if it were nothing but one of many cultures in the world, all of which are to be evaluated evenly against one another. This insistence on cultural relativity or egalitarian approach to different cultures and civilizations, if defended by Western thinkers, can be understood as a remedial process for the past Western 'imperialism' since 'the Age of Great Voyages'.

But I would like to argue that we should not be taken too far by this trend, because we, especially Japanese, Korean and maybe Chinese legal scholars, have already acquired Western civilization, distinguishable by its peculiar culture and religion, as our constituent at the very core. The central feature that we have learned from the West and should maintain in our socio-legal philosophy, I contend, is 'true individualism'.

Individualism has two aspects. One is that individualism believes that one can stand on one's feet to be relatively independent of one's cultural environment into which one has been born by chance. This could be called the liberating aspect of individualism. In this context one's nationality, either political or cultural, is taken not to be one's essential or fatal attribute. On the contrary nation states are deemed as only of instrumental value for each individual. This aspect, as discussed above, is clearly shown in case of social contract theories from Hobbes to Rawls. According to their view everyone is born equal with unalienable natural or human rights. The protection of such rights is the goal of any state. In short, states exist for individuals and not *vice versa*. This is the normative aspect of individualism that mainly modern legal studies have been dealing with.

Independence of individuals is assumed at the basis of law as such, i.e. law in the sense of private law. In it, individual's will is the sole origin of valid legal transaction. And valid expression of the will of the individual relevant to the matter changes the part of the whole network of law as it is expressed. If the owner of a good says 'I sell this to you at such and such price' and you say 'I buy it on those terms', the legal world will be changed accordingly. And the whole legal institution, courts, enforcement organs, police etc. will respect the change and

will act accordingly. One's expressed will is the sole source of this change and no one else but the concerning agent can bring this about. In short one is in a sense omnipotent in the field of private law. And law as such, relatively independent of and distinguishable from political power, is the inevitable condition for individualist society.

The purpose of constitutionalism resides in articulately protecting by a written constitution this feature of law. This purpose, i.e. protection of individuals, is practically the same as that of what was meant by the political idea of the 'rule of law'. And constitutionalism was an experimental project to express and institutionalize what was meant by rather vague idea of the rule of law. This experiment, which was started by Americans in late 18th century and spread since to the world was a great success. But it would be a mistake if we think that constitutionalism has inherited all from the rule of law that is necessary to protect individuals and that we just can forget the latter. On the contrary we need at the basis of constitutionalism faith in the existence of law that is relatively independent of politics. Law rules but not men; general principles rule but not human will.

What is involved is another example of self-fulfilling process of ideas. If people believe in one idea, in this case the existence of 'rights', firmly enough and learn how to behave accordingly, that idea will gain power in the real world, in the world of social behaviors of the people, so that no one could describe the social phenomena without mentioning the idea, i.e. 'rights' held by each. Even rulers cannot rule without considering the idea believed by their subjects. They will try to keep power by insisting on their authority in interpreting the idea rather than by ignoring it. The case of 'rights', I believe, is quite similar with that of religion. It has been proven in human history that few rulers could resist the influence of religious faith broadly and firmly held by the people; even the most powerful emperors of Rome after all could not resist Christianity.

From internal point of view natural rights are to be held by all human beings at all time and places. But as a matter of historical fact, they came to our recognition only in the last 400 years. The faith in natural rights is rather a new phenomenon or a new faith in world history. But we should not be taken too far by this idea. We cannot design and set up all social institutions from scratch. The concept of natural rights is a social entity. And this 'society' only in which natural or human rights make sense is not something we have produced at our will but something in which we find ourselves.

My argument may sound just a common place. But from such an understanding we may deduce some corollaries. For example, insistence on natural or human rights can be better understood in some context, e.g. in Iraq or China, as insistence on such a social setting within which those rights make sense. Or it might happen that too simple a claim for more extreme rights as 'natural' or 'human' may destroy this background condition. And that is one of the reasons why we need specialists for this; lawyers with accumulated knowledge of cases and rhetoric.

## INDIVIDUALISM; RESPONSIBILITY ASPECT

The second aspect of individualism is more intricate and might sound as if it were contradictory to the first, that this individualism is a viable and feasible idea of social ordering. I would like to call this the responsibility aspect of individualism. The main problem here is how the behavior of innumerable individuals chosen freely and changing frequently can be made more or less coherent to one another and as a whole brings about a neat social order. Well, that is the great puzzle that various branches of social science must tackle. Until now mainly economic theories have been concentrating on this issue by analyzing the function of the market. But from my point of view assumptions laid by mainstream economics were more misleading than illuminating in the sense that they tend to lead us to 'false individualism'. Especially the rationality assumption, or so called 'economic man' model, together with that of equilibrium, was the most harmful. If it were possible for society to reach equilibrium, every individual must be given complete knowledge concerning both production and consumption. But if this were the case, there would be no room for competition, which is the most important feature of the market. Hayek called this feature 'competition as discovery process'. Actually our market never reaches equilibrium and as such, as a dynamic system changing its shape all the while, it carries out the task necessary to harmonize the numerous individuals' behavior.

In order for each action of the people at any particular time to tend to become coherent, each actor must be given somehow information concerning what he or she is to do and what not. In a centralized system, someone or some board of leaders acts as the director to tell this to each one. But in an individualist system, or in a decentralized ordering, each one must be able to tell this to oneself. This is called by Randy Barnett 'the problem of knowledge'. Although the latter system, a decentralized system, looks disorderly and anarchical, in the complicated modern world it is proven to have much better potential than the first, centralized system, to cope with this problem of knowledge. The main reason is that nobody can have all the knowledge necessary to harmonize from-top-to-bottom the numerous individuals' behavior at each moment.

As a matter of fact, those individuals, who were 'liberated' from political restraints mentally and politically, by the first aspect of individualism, did not and cannot behave just as they wish. Instead we have to learn how to behave in order to be responsible citizens of a free and individualist society; e.g. discipline, good manners, efficiency, tolerance of others, etc. Here although we have rights not to be coerced by anyone including the state, we are not free from various restrictions both social and economic or financial.

The second aspect of individualism, in short, has to do with the whole social system that makes each free action of each individual compatible with a feasible social order. Only under this sort of system is each one allowed to use one's full-fledged knowledge, articulate and tacit, universal and particular, for the happiness of oneself and of others. Usually this system is understood to require a legal system

including property rights, freedom of contract, etc. Individuals are free to utilize some limited sphere of resources, what is called one's property, for one's own use or transfer some of his belongings on terms that one finds satisfactory to another who believes that he can use it more efficiently. But they have to accept the results of their decisions whether they turn out to be favorable or otherwise.

Let us suppose you want to be a movie star. Does the fact that you want it give you a right to be one? Of course not. Only through competition can you find if you are allowed to be one. Remuneration of different jobs reflects the scarcity of each job relative to its supply. Although simple and non-intellectual jobs cannot make one earn much nowadays, if the number of the people who are ready to take it diminishes because of the popularization of higher education, these jobs may become highly-paid ones. The function of different wages is that they inform us of the relative scarcity of each job and steer each of us to fill the position which is the most needed by others among those that our capacity allows us to take.

This process sometimes looks 'inhuman' because the result will not always fit our concept of 'deserts'. The result caused by an accident, or extraordinary weather, which no one could have predicted, may betray our expectations. Bankruptcies happen not because one was lazy or careless. In many cases nobody can explain the real cause of the failure. But this is the way how an individualist system, especially the market, works.

This is the cost we have to pay if we want to live in an individualist society. But we can understand this as if it were a game for us to play. We may try to make the games more interesting, effective and 'human' by improving the rules, or by legislation. For example, NBA (National Basketball Association) in the U.S. changes its rules almost every year. One of the most successful revisions of NBA rules must be the introduction of three-point shot. Before the introduction of this rule basketball was a game mainly played by big players. But this revision of the rule opened up the possibility for small and quick players to compete with the tall and big. As the result, the game had become more interesting both to watch and to play. NBA gained more spectators to come to watch their games and the teams could pay more salaries to the players.

My point here is as follows. We should not take the game of the market too seriously. We play the game because we want the system that allows each of us to utilize our knowledge and ability to contribute both to ourselves and others. This system requires a mechanism which communicates information concerning scarcity of different goods and resources to each one of us. We are also confronted with an 'interest problem', especially an incentive problem; incentives for everyone to cooperate in the achievement of different aims the whole set of which no single person can grasp should be supplied somehow. The twin system of modern private law and the market also provides us with a solution of the incentive problem. In the twin system, these individual aims are achieved in a decentralized manner while not known as a whole by single person.

We have to face the market as no more than such a mechanism. The information it supplies us with is important even if it is negative. The information we

get from failure in the competition is nothing but that we should not keep doing what we have found unsuccessful. Otherwise we waste society's resources, and our own, which could have been used for other purposes.

#### CHANGE IN LIFE STYLE; SPONTANEOUS AND COERCIVE

It is obvious that this system of individual freedom provides for the innovation of people's lives. We find the goals for our aspiration usually by seeing what other people are doing. In the free market not only innovations in what goods are to be supplied and how are abundantly but also those in consumption models. What for and how to live will be shown by the market in a broader sense. In an individualist society, many people live in many different ways. And one can choose from the many different models offered by others. Without such a circumstance it will be difficult for each of us to invent one's own from scratch. Different ways of evaluating one's life will be offered too. Some of them will stay and some not. Those sets of values connected with some comprehensive doctrines such as religions will have strong influence on some groups of people. Holy books will supply models of life and aspirations. But a great portion of people's aspirations will change from time to time. That is what freedom is all about.

But what if some doctrine or plan cannot work unless everyone in the area believes in it and cooperates? And many residents of the area in fact want such a doctrine or plan to apply. Many issues like environmental protection, town planning, and maybe some religious creeds may fall in this category. There are many ways to cope with this sort of demand that do not resort to coercive measures; donation, national trust, private developers, voluntary cooperation, moral campaigns and the like. But if some coercion is inevitable to achieve something which people find very important for their life, e.g. to live in a neatly planned town, the utilized coercive measure must be minimum in intensity and sphere. At the same time I believe we must learn to pay some costs for freedom. It may be easier to get a newcomer, or your children, to believe in your religious creed if all others in the region are believers. If everyone believes in something it looks as if it is true. And it will be much more difficult not to believe in it. But such a static happy circumstance for religious belief, which some religious fundamentalists would cherish, is gone in a free society where any critical opinion can be expressed against your dear faith. The case is the same with political faith.

Recently some social movements like that for political correctness or diversity and some versions of feminism too easily resort to collective decisions to force some value onto other individuals. Although we have to scrutinize each case in detail in order to reach a conclusive evaluation, coercive measures must be the last resort. In the case of racial discrimination in U.S. the measure of affirmative action was taken by the court in order to counter unfair political treatment or purposeful sabotage of the local authority to prolong segregation. And affirmative actions were justified only as provisional programs to provide a remedy for injustice.

In the field of private law the seemingly irrelevant particular decisions by powerless individuals add up to change society. Those decisions which lead to social change are sometimes made on purpose but usually not. The change is brought about as the consequence of numerous individual decisions. But the upshot would not be possible without law: law is indirectly providing change by protecting individual choices in the legal sphere. And the social changes which are realized through this channel are usually more profound and stable than those brought about through collective decisions or politics.

itaru@faculty.chiba-u.jp