WHAT'S HAPPENING IN JAPAN, SOCIOLEGALWISE

FRANK K. UPHAM

Japanese Association of Sociology of Law (ed.). *The Sociology of Law*. (Tokyo: Yūhikaku, 1983–88). Six issues (numbers 35–40). 1,447 pp. ¥ 19,900.

The study of the role of law in contemporary Japan should be of extraordinary interest to anyone concerned with the function and meaning of law in the modern world. As the only fully democratic industrialized society with a cultural tradition independent of Western Europe, Japan presents Western students of law and society with a unique opportunity to move beyond the intellectual and conceptual limitations of our own cultural tradition. The political, economic, and social success of Japan should force us to question the validity of our Western assumptions about the structure of contemporary society and enable us to give new accounts of the meaning and relationship of democracy, capitalism, industrialization, and law.

Japan is a unique source of empirical data directly bearing on our most fundamental assumptions about human nature, economy, and society. No other legal culture is at once so similar in its economic and political context and so different in origin and history from our own. And yet Western sociolegal scholars have historically paid little attention to Japan. Instead, when they have looked for non-Western paradigms of law and society, they have chosen to study the "grand" traditions of China or India (Weber, 1978; Unger, 1976) and have trivialized Japan as a subsidiary variant of the Chinese Confucian tradition. Even contemporary attempts at universal theories of law and society have preferred to deal with idealized accounts of China's past rather than with the empirical reality of contemporary Japan (Unger, 1976; but see Alford, 1986). Indeed, it is as if the very political and economic suc-

I would like to thank Professor Takashi Maruta of Konan University and Professor Setsuo Miyazawa of Kobe University for their generous and indispensable guidance in approaching this review. They, however, bear none of the blame for errors in interpretation or translation or for my choice of emphasis in discussion and criticism. Throughout this review I have adopted, where available, the English translations used in the *Sociology of Law* unless I found those translations extremely awkward or misleading. I have also used the English order for Japanese names. For those interested, the Japanese title of the *Sociology of Law* and for the Japanese Association of Sociology of Law are *Hōshakaigaku* and *Nihon Hōshakaigakkai*, respectively.

LAW & SOCIETY REVIEW, Volume 23, Number 5 (1989)

cess of Japan has paradoxically made its legal system of less interest to the grand theorists, rather than more.

Ignoring Japan may perhaps have been excusable in the past. The direct relevance of Japan to Western sociolegal theory was hardly obvious in the early twentieth century, and for much of its history Japanese legal scholarship has been more concerned with the "immaturity" of Japanese law relative to European or American legal systems than it has been with empirical analysis of domestic phenomena. In the recent past, however, just as Americans have begun to look to Japanese law for possible models in areas such as alternative dispute resolution or administrative rulemaking, Japanese legal scholars have begun to amass an impressive body of sociolegal scholarship on their own legal culture. Unfortunately, little of this work has been translated, so non-Japanese readers have had to rely on the occasional English article by Japanese scholars and the interpretative work of American scholars of Japan. Much of this work is excellent, but it cannot provide adequate access to Japanese sociolegal phenomena. First, there is simply too little of it. Second, it is consciously directly at a non-Japanese audience. Nor is this situation likely to be alleviated by the translation of significant amounts of Japanese scholarship, at least as long as translation remains so severely undervalued in the American academic world.

I assume it was a combination of this awareness of the growing volume and importance of sociolegal scholarship in Japan and frustration with its relative inaccessibility to most foreign scholars that prompted the editor to review six issues of the *Sociology of Law*, the annual publication of the Japanese Association of Sociology of Law. Unfortunately, even were I knowledgeable on the range of topics from "A Study of the Method of the Sociology of Law" to "The Modern Problems of Commons in Wales," the simple physical scope of the task—imagine "reviewing" the equivalent of two years of the *Law & Society Review*—dooms it to idiosyncratic superficiality. At best I can alert readers to the value and richness of sociolegal scholarship in Japan and, more important, deepen their frustration with its continued inaccessibility. As awareness and frustration increase, I hope that European and American readers will accelerate the communication and active cooperation with Japanese scholars that has begun in recent years.

I. THE JAPANESE ASSOCIATION OF SOCIOLOGY OF LAW

The journal *Sociology of Law* reflects the history of sociolegal studies in Japan, and a brief review of this history may not be out of place. The study of sociology of law began in the prewar era under the influence of Pound and Ehrlich, but it and most other social sciences were suppressed before and during the war years. Indeed, the very word *shakai* (society/social) was considered dan-

gerously leftist. The Japanese Association of Sociology of Law was formed in 1948 as a part of the reaction to this experience and began with a Marxist and antistatist bias that still influences its membership and scholarship today.

Most of the association's approximately 800 members are doctrinal legal scholars rather than social scientists or law and society scholars. Their interest in sociolegal research, at least as it appears from these six issues, frequently seems to be focused on the use of empirical data or social science methodology for the reform of their doctrinal field as much as with the objective description and analysis of sociolegal phenomena. The reform flavor was strengthened in the six issues under review here by the active participation of a large number of practicing lawyers. Three of the five papers given in the symposium "The Formation and Evolution of Rights" in the 1986 issue were by lawyers who spoke on environmental rights, criminal suspects' rights, and nonsmokers' rights. While perhaps lacking the objectivity and methodological sophistication expected in social science research, these are fascinating accounts of the role of law in contemporary social movements by the participants themselves. Yoshiro Isayama in "On Non-smokers' Rights" (1986), for example, explains how he and others structured the legal concept of nonsmokers' rights, how that legal concept was integrated into the social movement, how the movement utilized the media, and what the role of litigation has been.

Another aspect of the association membership that influences the *Sociology of Law* is the relatively small number of sociology of law chairs in Japanese law faculties and the indifference of nonlegal scholars to legal phenomena. Although the founder of postwar sociology of law in Japan, Professor Takeyoshi Kawashima, occupied a civil law (*minpō*) chair during his career at Tokyo University, it is difficult to devote oneself primarily to law and society research without a specific chair in the field. The number of chairs is growing, however, and the association is also trying to encourage participation by social scientists outside of law. Most law faculties (*hōgakubu*) in Japanese universities have historically encompassed political science and economics as well as law, but until recently the association has had few members from other disciplines, and there has been little attention to law by Japanese social scientists outside of the law track of the law faculties (Miyazawa, 1987a: 159).

II. THE STRUCTURE OF EACH ISSUE

The *Sociology of Law* is the report of the proceedings of the annual meeting of the Japanese Association of Sociology of Law. Each year the meeting consists of a symposium on a particular topic and a series of panel sessions. Reflecting this format, the journal devotes about half of its space to the papers of the sympo-

sium reporters followed by a transcript of discussion among the association's members. The individual panel papers, which may or may not relate directly to the symposium theme, come next. The remaining third of the volume consists of the business notes of the annual meeting; book reviews, including a special series of reviews of the four volumes of Kawashima's *Collected Works* in Number 39 (1987); and a thorough and extremely useful bibliographical section that not only lists recent Japanese work on law and society by subject but includes foreign scholarship as well. Number 36 (1984), for example, included a sixteen-page bibliography of law and society literature in Spain, Central America, and South America, and Number 40 (1988) included summaries of eighteen articles from *Law & Society Review*, *Journal of Law and Society*, *Zeitschrift für Rechtssoziologie*, *Jahrbuch für Rechtssoziologie und Rechtstheorie*, and *Droit et Société*. Besides these regular features, different issues variously included a report on a joint research project, "Sociology of Law of Business Enterprises," in Number 38 (1986); a special lecture by Professor Kawashima in Number 40 (1988); and a report by Professor Setsuo Miyazawa of Kobe University on the 1986 annual meeting of the Law and Society Association.

The range of the journal is extremely impressive. The bibliography alone makes it invaluable for any observer of law and society research and is evidence of the organizational strength of the association and the breadth of its members' interests and capabilities. The attention paid to international scholarship and developments is even more striking and contrasts strongly with the entirely Western subject matter and, with one exception, English language of the works chosen for review in the 1988 *Law & Society Review—Fifth Issue*. The international orientation of *Sociology of Law* goes so far as to include short English summaries of selected articles and an English table of contents on the back cover. While the at times opaque English of the summaries limits their usefulness, they do enable the non-Japanese speaker to identify articles of potential value.

III. THE PANEL PAPERS

Unfortunately, the purpose and nature of *Sociology of Law* mean that its content does not entirely live up to the promise of its table of contents. Because it is essentially the proceedings of the association's annual meeting, space is extremely limited, and most panel papers are brief condensations of longer works published elsewhere, usually in the law review of each author's university. At their best, these papers are fascinating promises of more to come; at their worst, they are so abstract and general as to be virtually incomprehensible, at least to a reviewer not familiar with their context.

As a result, the nonsymposium sections of *Sociology of Law*

function better as a guide to Japanese law and society research than as a presentation of it. By reading the papers, one gets a fairly comprehensive view of who is using what methodology to do what research in Japan, but to get a sense of the depth of the work, especially its empirical basis, one must consult works cited and the author's own further work. In "The Contemporary Significance of Japan's Jury System" (1988: 117), for example, Professor Takashi Maruta of Konan University raises the intriguing hypothesis that the failure of the jury system in prewar Japan may have had more to do with a high acquittal rate than with judicial structure or national culture, an interpretation that runs directly counter to the conventional wisdom in Japan. Maruta raises and refutes the accepted explanations for the discontinuance of the jury and provides provocative statistics to support his conclusion, but his space is so limited that he is barely able to raise the fundamental questions, much less answer them. Similarly tantalizing is "An Analysis of Internal Order in Ainu Culture" (1986: 154), an anthropological study of Japan's aboriginal people by Tao Kitakamae of Hokkaido University. This paper is a good example of the legal anthropology now being done by students and former students of Professor Masaji Chiba of Tokai University, Japan's leading postwar anthropologist of law. Here, again, however, the issues are raised and conclusions presented, but for the field research and data one must go to fuller presentations of the author's work elsewhere.

A frequent topic of panel papers is survey research. An example in the area of criminal and constitutional law is "Attitudes toward Constitutional Rights Regarding Criminal Procedure" by Professor Nobuho Tomita (1986: 169; see also Tanaka, 1985:25, and Toyokawa, 1984: 90). The results of Tomita's preliminary survey of 561 university students led him to conclude tentatively that Japanese attitudes toward the interaction of civil rights and criminal procedure can be clearly divided into two groups. Those sympathetic toward the rights of freedom and equality consistently valued the strict protection of constitutional rights in criminal investigations and were more reluctant to invoke criminal sanctions for behavior than those who put a lower value on freedom and liberty. While space limited his paper to a short statement of methodology and partial conclusions, the paper is representative of several that present research work in progress. Others, such as a paper by Yasuhiro Wada on dispute formation present results of completed work (for discussion of Wada's work, see Miyazawa; 1987b: 235–36).

Consistent with the association's attention to foreign developments, there were frequently panel papers introducing or commenting on foreign scholars and scholarship. Numbers 35–40 included papers reworking the classics of legal sociology (Marx, Weber, and Ehrlich) and papers introducing the work of Rehbinder, Posner, Selznick, Hunt, Cotterrell, Black, and the

Scandinavian legal realists. Some of these are insightful—Rokumoto on the concept of rights in Luhmann and Selznick (1986: 140) is one example—but one gets the feeling that occasionally these reports are rites of passage for graduate students. (Or, perhaps, the expense reimbursement policies of Japanese universities are similar to American policies, and these are better understood as the means to travel money!) Another frequent topic of panels was foreign law studies, often under the leadership of Professor Chiba. Topics included land reform laws in Spain and Mexico, indigenous law in Sri Lanka, legal consciousness in Vietnam, and aboriginal land rights in Australia.

IV. THE SYMPOSIA ON JAPANESE LEGAL CONSCIOUSNESS (NUMBERS 35–37, 1983–85)

Each annual meeting of the association is organized around a central theme, which is the topic of a one-day symposium. Topics in the recent past have included the sociolegal study of the emperor system (1978), children and the law (1980), compensation for injuries (1981), and the budgetary process and the law (1982). Since 1982, however, the organizers have carefully chosen the topics to build on themselves (Toshitani, 1983: 2; Tokoro, 1986: 2). As a result, the meetings of 1983–85 were devoted to the study of legal consciousness; those of 1986–88 were devoted to the social process of formation and evolution of legal rights; and those of the next two years will focus on the sociology of adjudication.

It is in these symposia that the immediate value of *Sociology of Law* lies. Like the panel papers, the individual reports are quite short, but unlike the panel papers, they are integrated with the rest of the symposium papers so that the reader can usually understand the context. They are also, at least for the six issues under review, topics that have already been well developed in the literature so that abstract critiques or general commentaries appear against a backdrop of shared knowledge and experience. What really makes the papers valuable, however, is the 30–60 page transcript of the "discussion" (*tōron*) that follows. While apparently not always spontaneous, the give and take between the reporters and their colleagues belies any notion that Japanese are always circumspect in their expression of disagreement. More important, the questions and answers often supplied just the clarification and explication that the outside observer sometimes needs to make sense of the original paper.

The symposium papers in the three issues devoted to the study of Japanese legal consciousness constitute a more or less complete summary of research and discussion concerning this apparently irresistible subject. While I fully sympathize with those who had hoped never to hear the phrase "Japanese legal con-

sciousness" again, the choice of this topic was probably inevitable given its dominant role in the history of sociolegal studies in and about Japan and its ultimate importance to fundamental questions of the role of law in modern society. The existence, nature, and future of the "gap" between the attitudes of Japanese toward law and the norms of their formal legal system first identified by Kawashima were the central questions on which most students of Japanese sociology of law cut their intellectual teeth from the 1950s up to the 1970s. (In the mid-1970s, "conflict in the land of consensus" took over.) Chewing it over one more time could do little harm, and the systematic approach taken in these three symposia (Toshitani, 1983) may actually have moved the enterprise to a new stage where definitions are clarified and the research agenda taken beyond the rehashing of old arguments. In this respect, the papers of Professors Nobuyoshi Toshitani and Kahei Rokumoto (1983: 14) delivered at the outset of the first session set the tone by rejecting the repetition of the ahistorical theory of a unique and impenetrable Japanese legal consciousness (*nihonjin ron*) and urging its replacement by new and more rigorously developed empirical data and a redefined and clarified conceptual framework.

Rokumoto's paper is also notable for its restatement of the historical development of the central theoretical problem, but it is his call both for the treatment of legal consciousness as a dependent as well as independent variable within the legal system and for research that goes beyond the conceptualization of Japanese legal consciousness in terms of Western legal consciousness that demonstrates the value of these symposia. It has long seemed to me to be a fundamental weakness of much scholarship about Japanese legal culture that the interaction between the legal consciousness of the Japanese and the formal legal system has usually been assumed to be unidirectional—a "weak" legal consciousness leads to low litigation rates, for example—while the truth has certainly been that legal consciousness is affected by legal phenomena at the same time that it influences legal behavior. Rokumoto's second point is that discussion of Japanese legal consciousness should not be limited to what it "lacks" in comparison with an implicitly more advanced Western legal consciousness but should include a positive examination of Japanese phenomena on their own merits as part of Japanese history and culture. I would go further and state that the Japanese experience requires a whole new theoretical framework that attempts to integrate the experience of all advanced societies. While nothing in these symposia approaches such a theory explicitly, several papers took a more positive approach to the theoretical value of Japan (see, e.g., Tanase, 1984: 14), and there is reason to hope that future research on legal consciousness in Japan will not be so tied to Western paradigms.

V. THE SYMPOSIA ON THE FORMATION AND EVOLUTION OF RIGHTS (NUMBERS 38–40, 1986–88)

The symposia of 1986–88 were meant to take off where the previous three had ended. When polled at the end of the 1985 legal consciousness symposium, the association members indicated that they wished to continue the general themes of the previous three meetings but with more concrete attention to actual problems of positive law. The process by which legal consciousness can lead to rights consciousness and rights consciousness to positive legal rights offered continuity while it promised to move the discussion into the area of actual legal and social change (Tokoro, 1986). An awareness that rights not only are created but can also wither and disappear led to the inclusion of the decline and disuse of rights in the final formulation of the symposia theme.

The resulting seventeen papers introduce the reader to the myriad popular movements that have used the rhetoric of rights and the institutions of the formal legal system to pursue social change. They begin with an excellent overview by Professor Takehisa Awaji of Rikkyo University (1986: 8), a leading commentator on the social and legal influence of the antipollution movement of the 1960s and 1970s. Awaji puts the contemporary phenomena in historical context by pointing out that modern Japan's first "rights creation" movements were those of early twentieth-century villagers and tenants who discovered that Japan's adoption of the Civil Code in 1898 meant that many of their customary interests were no longer legally protected and who successfully turned to the courts for redress. Awaji interprets their grievances as arising from the new law's lack of connection with a relatively static social reality and contrasts them with the postwar movements, which he sees as arising from the failure of law to adapt to the change in social conditions brought about by industrialization and affluence. Awaji then traces the evolution of the postwar movements from the dramatic success of the "Big Four Pollution Cases" to the much more problematic ongoing movements seeking recognition for, *inter alia*, the "right to live in peace." In doing so, he introduces two problems that become common themes for the rest of the three meetings—the increasing difficulty in the legal conceptualization of emerging social interests and the search for the preconditions for the successful creation of positive law rights.

Awaji attributes the increasing difficulty in rights creation to what I see as two interrelated trends. The first is that the interests asserted have evolved from those clearly recognized, if unenforced, by positive law to those for which new legal concepts have yet to be devised. These differences can be roughly represented by the contrasting legal natures of the right to redress for pollution-induced physical injury or death and the right of public access to

the coast. The former is a clearly established tort right exclusively enforceable solely by an ascertainable individual or group of individuals. The latter, on the contrary, conflicts with established property concepts and belongs simultaneously to everyone and no one. Even the right of coastal access, however, protects a tangible interest whose legal nature is recognized in other contexts, but much of the current rights rhetoric such as the "right to live in peace" or the "right to a healthful environment" deals with "rights" that are extremely difficult to define as a measurable interest. Exacerbating these conceptual problems is what Awaji sees as a breakdown in common values in contemporary society typified by the universal conflict between development and environmental protection. As the interests at stake become more general and abstract, the creation of a public consensus behind the movement becomes more difficult and opposition more determined and legitimate.

Despite these increasing difficulties, of course, the evolution of legal rights continues in Japan, and many of the other papers provide varying views of several of the movements behind them. Besides the attempts to gain recognition of rights to coastal access, to a smoke-free environment, to a peaceful life, and to a healthful environment that have already been mentioned, there are discussions of the development (and lack thereof) of adolescents' rights to autonomy in certain decisions regarding sexual activity, of taxpayers' rights, of the rights of all citizens to certain levels of amenities in life (unfortunately translated as the "right of liver"), and of the rights of criminal suspects and defendants. There is also discussion of rights formation from the perspective of various doctrinal fields, including administrative and constitutional law, social welfare law, and international law. What is lacking is a historical perspective that would pick up on Awaji's initial paper and compare prewar and postwar movements both with each other and with Meiji and Tokugawa functional equivalents. Awaji mentions in passing the similarity in tactics between twentieth-century conflicts over legal rights and those of Tokugawa peasant uprisings (*ikki*), but it is nowhere developed. Nor is the potentially more interesting comparison with Tokugawa litigation even mentioned, despite the work of legal historian Professor Ryoji Igeta of Doshisha University and others on rights assertion in feudal Japan. Certainly there would have been fruitful parallels to be made concerning the role of law in social movements during these three periods of Japanese history.

A more fundamental shortcoming of many of the papers was obliquely raised by Professor Setsuo Miyazawa of Kobe University in his paper tracing the development of the environmental right (1988: 33). He argued that a strong rights consciousness among aggrieved persons does not necessarily coalesce into a social movement and that a social movement, even when backed by rights con-

sciousness, will not succeed unless certain conditions are satisfied. In addition to the legal nature of the right asserted mentioned by Awaji, Miyazawa lists a number of factors affecting success: the conventionality and respectability of those advocating the creation of the right—a particular problem with the development of criminal procedure rights; the immediacy of the advocates' deprivation—physical injury versus a loss of amenities; the size and solidarity of the aggrieved group; the organization of the group and especially whether it is coextensive with a preexisting organization such as a fishing union or neighborhood council; access to preexisting political institutions; relationship with the group's adversary—in many pollution instances, the aggrieved persons are economically and socially dependent on the polluter; and the availability of leadership and networks of resources—in some cases both were provided by local bar associations. Unfortunately, Miyazawa's paper was the last substantive paper of the three symposia, and it was too late to test his hypothesis against the many actual instances described in the preceding papers. He did, however, draw attention to what had became a preoccupation with a certain form of normative consciousness and to the neglect of the surrounding social, economic, and political circumstances.

Miyazawa also noted in passing that legal rights do not have to be formally recognized by courts or legislatures to be effective in changing social conditions (1988: 34). I would have liked to see this idea developed further, since one of the strongest impressions I got from these six issues was the importance of legal action and rights rhetoric in Japan even when neither the courts nor the legislatures respond favorably. The environmental right is an excellent example. As a legal concept based on Articles 13 and 25 of the Constitution of Japan, it has been consistently rejected by the courts, the National Diet, and the national bureaucracy. The underlying interests that it represents, however, have been realized to a limited extent, particularly at the local level. It would have been interesting, therefore, to see an analysis of the social and political effect of the failed litigation on concurrently adopted environmental policies. It would seem likely that, although a complete failure in achieving conceptual recognition of a constitutionally based right to a healthful environment, the movement had by the late 1970s been successful in achieving a certain number of other kinds of legal rights. Such an inquiry would have been especially interesting in that it could then have analyzed the manner and degree to which social and economic factors in the 1980s have subsequently eroded those rights.

I started this review with a call for a reformulation of our "grand theories" in light of Japan's experience with law, capitalism, and democracy. While nothing in these issues of the *Sociology of Law* has moved us appreciably closer to that goal, I hope I have

been able to convey some sense of the important scholarship now being pursued in Japan. I am going to subscribe. Why don't you?

FRANK K. UPHAM is Professor of Law, Boston College Law School. He received a B.A. from Princeton University in 1967 and a J.D. from Harvard Law School in 1974. His most recent book is *Law and Social Conflict in Postwar Japan* (Cambridge, MA: Harvard University Press, 1987).

REFERENCES

ALFORD, William P. (1986) "The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past," 64 *Texas Law Review* 915.

AWAJI, Takehisa (1986) "Minjihō no ryōiki kara" (From the field of civil law), 38 *Hōshakaigaku* (Sociology of Law) 8.

MIYAZAWA, Setsuo (1988) "Kenri keisei tenkai undō no shakai undō moderu o mezashite" (Toward a model of activities to institutionalize new legal rights as a form of social movement), 40 *Hōshakaigaku* (Sociology of Law) 33.

——— (1987a) "Hōshakaigaku" (Sociology of Law), 59 *Hōritsu Jihō* 158.

——— (1987b) "Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior," 21 *Law & Society Review* 219.

ROKUMOTO, Kahei (1983) " 'Nihonjin no hōishiki' kenkyū gaikan" (An outline of research on Japanese legal consciousness), 35 *Hōshakaigaku* (Sociology of Law) 14.

TOKORO, Kazuhiko (1986) "Kadai settei no shushi" (The significance of the choice of topic), 38 *Hōshakaigaku* (Sociology of Law) 2.

TOSHITANI, Nobuyoshi (1983) "Joron" (Introduction), 35 *Hōshakaigaku* (Sociology of Law) 2.

UNGER, Roberto Mangabeira (1976) *Law and Modern Society*. New York: Free Press.

WEBER, Max (1978) *Economy and Society*. Berkeley: University of California Press.