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For the Liberal Transformation of Japanese Legal Culture: A Review of the Recent Scholarship and Practice

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AUS FREMDER QUELLE

For the Liberal Transformation of Japanese Legal Culture: A Review of the Recent Scholarship and Practice

Setsuo Miyazawa ***

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I. INTRODUCTION

In this paper, I wish to discuss two problems. Firstly, I wish to discuss what transformation of the Japanese legal culture is desirable. Secondly, I wish to discuss how such transformation could be brought about. These questions require me to review both the scholarship and the practice.

Stewart Macaulay wrote (Macaulay, 1992) that when Joel Handler went to Philadelphia in 1992 to give his presidential address at an annual meeting of the Law and Society Association and criticize postmodernist scholars for their disabling impacts on transformative politics (Handler, 1992), he rattled the cage. Handler actually rattled the cage strongly enough to produce a symposium in *Law & Society Review* and to make his successor, Sally Engle Merry, present her own vision of socio-legal studies and transformative movements in her presidential address (Merry, 1995). I would be happy if my paper had one tenth of that effect. This means that I will criticize some of the best and brightest of the socio-legal scholarship in both Japan and North America.

II. THE “INTERPRETIVE TURN” IN STUDIES ON LEGAL CULTURE AND CONSCIOUSNESS

Many recent works on legal culture and consciousness in English-speaking countries can be characterized as results of the “interpretive turn” in socio-legal studies (Harrington and Yngvesson, 1990). Among its various characteristics, the interpretive turn sees legal cultures both as a constraint and as a resource. A legal culture is a constraint when it sets a limit on the way people understand and respond to the reality. A legal culture is a resource

when it provides people with repertoires to express their interests. Therefore, a task for socio-legal studies is to describe how a culture works in specific situations and identify contingencies which affect the way a culture works. Such an interest requires scholars to focus on legal consciousness of actors in the given situation. What socio-legal scholars should do is observation of on-going social interactions, and identification of legal culture and consciousness through interpretation of observed interactions.

III. MY OWN INTERPRETIVE TURN

My own research method is participant observation and in-depth interview. It is fair to say that I am one of the very few Japanese socio-legal scholars who has actually carried out participant observation in a study of a legal institution (Miyazawa, 1992). Aaron V. Cicourel (1976) was my methodological inspiration.

With that background, it was natural for me to make my own “interpretive turn” in my approach to legal culture. I made that turn at the 13th World Congress on Philosophy of Law and Social Philosophy which was held in the Kobe International Conference Hall on August 25, 1987. I was asked to participate as a discussant in a session entitled “International Conflicts as Conflicts of Legal Cultures.”

There I saw heads of legal departments of major Japanese corporations report their encounters with the American legal system, which makes it much easier than in Japan for consumers, employees, and competitors to legally challenge their business practices. They described how much they were shocked by such encounters, and opposed introduction of similar devices into Japan on the ground that they are against the Japanese legal culture. There I realized that culture was being used to justify a status quo which was advantageous to them.

So I wondered how I should frame my comment on their reports, and chose Clifford Geertz (1973; 1983), the anthropologist, as my guide. In short, culture is a mechanism of social control which makes people accept the dominant social arrangement as just and natural. What the heads of legal departments at the above-mentioned conference were saying was that the status quo of the Japanese legal system fit the common sense of the Japanese people, so that any element of the American legal system should not be introduced. I presented a discussion paper entitled “How Does Culture Count?” which was later published in Japanese (Miyazawa, 1989).

This conception of culture led me to my present interest in the analysis of the process in which a culture succeeds in dominating the situation in the contest of competing cultures. Of course, cultures do not behave by themselves. People mobilize, challenge, and transform cultures and, hence, social arrangements. The question is how people do so, and who succeeds in making their culture prevail in that situation.

Therefore, we should not explain social relations by merely finding the culture which justifies these social relations, as is often done by those who invoke Japanese culture. This stagnates our discipline.

We must go further and seek explanations of why the supporters of the dominant form of culture and social relations won in this contest of cultures, and why they have been able to maintain their domination. My theoretical strategy has been to seek that explanation in social stratification and unequal distribution of resources. Donald Black (1976) has been my theoretical inspiration in this regard.

This conception of culture is different from more conventional interests in legal culture in Japan as a determinant of behaviors and institutions. So, I tentatively call myself a “neo-culturalist.”

From my perspective, analysis of encounters and transformations of legal cultures should take a bottom-up approach which starts from a micro level. Encounters of legal cultures would mean encounters of people with different legal cultures. Transformation of a legal culture would mean that the people in favor of particular culture prevailed in the contest of cultures fought by people representing different cultures. A macro-level transformation of a legal culture would be conceived as an accumulation of the results of such

micro-level contests of legal cultures. From my perspective, there is no inherent reason to believe that the currently prevailing legal culture is the only culture we could have in Japan. To transform our society, we must first expose how it serves certain interests, and tear away its taken-for-granted-ness. Then, we must introduce a vision of a different culture which we could and should have in our society.

So, how does my neo-culturalism differ from interpretism? Probably the most obvious difference is that I pay much attention to the impact of social structure and try to explain the domination of a certain culture in terms of the resources available to participants in the contest of cultures and consciousness. Interpretism stresses the need to abandon all kinds of dualism (Harrington and Yngvesson, 1990: 140). It would, therefore, deny the distinction between culture/consciousness and structure.

I believe that such self-imposed limitations would impoverish both our scholarship and practice. Our experience in Japan has told us that contests of different cultures and consciousness are often won by the side with more resources, and that disadvantaged parties have often been forced to withdraw from the contest or to compromise with a result far below what they initially expected. This is true whether or not the parties involved subjectively perceive the existence of a social structure which limits or promotes their respective interests.

IV. VISIONS FOR THE TRANSFORMATION OF JAPANESE LEGAL CULTURE

1. *The Liberal Vision*

What is the currently dominant legal culture in Japan? How should it be transformed?

For these questions, I wish to begin with a paper written by the legal philosopher Tatsuo Inoue, which is a most forceful and eloquent presentation of a position with which I feel much sympathy. Inoue presented this paper under the title of "The Poverty of Rights-Blind Communitarianism: Looking Through the Window of Japan," at a symposium on communitarianism where none other than Mary Ann Glendon was the general reporter (Inoue, 1993). While Inoue deals with general characteristics of Japanese society as a whole, legal culture is certainly a part of it.

Inoue finds "an eloquent jurisprudential expression" in Glendon's recent work, *Rights Talk* (Inoue, 1993: 526). When I read Glendon's book (1991), I was struck by her insensitivity to the process through which a community acquires its dominant culture, or "language of discourse," which determines what "the virtue" (MacIntyre, 1984) is in the given community. It must be a result of a contest of different cultures fought by people with different resources. Therefore, from my neo-culturalist perspective, there is no reason to force every member of the community to accept the culture which happens to be occupying a dominant status for the moment. Moreover, while she presents her belief in "the seedbeds of civic virtue" like "families, religious communities and other primary groups," she is silent about the mechanism through which integration is attained among people who belong to different "families, religious communities and other primary groups," namely the mechanism through which a broader society or country can reach a consensus on any significant issues. What she is saying toward the end of her book sounds to me like "America is blessed by God. If only we abandon rights and lawyers, a natural order will somehow emerge." This must be politically popular under the current political climate in the United States, but, intellectually, this is sheer irresponsibility.

In any event, Inoue presents a description of Japanese society as an epitome of communitarianism. He believes that the salient characteristics of Japanese culture and society are close to what the "communitarian vision" is seeking. He argues that (Inoue, 1993: 527-528):

... the primacy of group loyalty ... results in a weak commitment to such universal principles as human rights, justice, and fairness. the vagueness of self-other differentiation, which implies the importance of human interdependence (*amae*), connection (*en*) and the mutual responsibility of caring (*kikubari*), is often ascribed to

the core of the Japanese view of the moral world. On the other hand, individual autonomy and rights consciousness (*kenri ishiki*), which presuppose a sharp self-other differentiation, are regarded as alien to this view.

Inoue's conclusion (1993: 550-551) is that:

... the Japanese experience ... shows that ... [t]he closed community that neglects individual rights and absorbs its members' personality also impoverishes our communal life, as well as our individuality. Adequately conceived individual rights based on universalism, a non-absolutist trump and a sense of the worth of individuality are the bases for a richer form of communality--namely, open communality. This form of communality activates and widens our sensitivity to the wide range of our communal responsibilities. In other words, individual rights can sustain the delicate equilibrium of various competing communalities by checking the overgrowth of each of them. In this sense, the tension between rights and community is indispensable to their reconciliation.

Before reaching this conclusion, Inoue takes up *kaishashugi*, or the ideology of total devotion to the welfare of the company, for his diagnosis of Japanese society. Inoue argues that "[t]he dark side of Japan's land of community is at least as dark as the dark side of America's land of rights. As for Japan, there is now an urgent need to heed the voice that calls for increased respect for individual rights" (Inoue, 1993: 531). He illustrates this dark side of Japan by his analysis of *karoshi* or death by overwork as it symbolizes "the tension and distress of a hyperindustrialized and secularized communitarian society."

According to him, "Japanese society is basically an intricate web of various intermediary communities," which have the ability "to maintain their internal order by extra-legal and informal sanctions." "Each community ... tends to narrow and homogenize the members' mental horizons and to apply the pervasive pressure of social tyranny on deviant individuals, who seek a form of life different from the community's shared life-style" (Inoue, 1993: 539-540). He calls this the "tyranny of intermediary communities," and presents several examples.

Inoue declares that "individual rights are an endangered moral species in the land of community," that "Japan's moral infrastructure is worn out," and that "society needs a moral reorientation which places a greater emphasis on individual rights" (Inoue, 1993: 544-545).

I agree with Inoue. In Japan, minorities are required to tolerate the intolerance of majority people. This requirement is enforced not only by informal community pressure, but also by governmental authorities, judiciary, employers, and all other conceivable agents of social control. Therefore, I do not agree, for instance, with John Braithwaite's description of social control in Japan as "reintegrative" in his award-winning book, *Crime, Shame and Reintegration* (Braithwaite, 1989).

Returning to more general issues, it is inevitable to mention the implications of the Emperor system for the development of respect for individuals. Norma Field's *In the Realm of a Dying Emperor* (Field, 1993) provides a poignant description of case of the former mayor of Nagasaki who was shot when he publicly stated that the Showa Emperor was responsible for the war. Inoue forcefully discusses in another paper (Inoue, 1992) the incompatibility of the Emperor system and liberalism, which respects differences among people.

On the other hand, there have been some promising signs for change even among members of the establishment. For instance, companies and other employers have finally realized the value of respecting the individualism of their employees when many of them asked their employers to give them leave to come to Kobe as volunteers to rescue and help quake victims. As a result, 1995 has been called "Year One" (*gannen*) for volunteers in Japan.

This is another clear example of how respect for individual rights could contribute to the interests of a community which is even broader than actors' immediate life sphere. It must be noted that extreme group loyalty has hindered development of the sense of caring for a wider community.

2. *Japanese Critics of Rights*

I must note, however, that a quite different perspective has been presented recently by socio-legal scholars as a vision for the transformation of Japanese legal system. Their writings appear to be a combination of critical legal studies, postmodernism, and communitarianism.

Critical legal studies are cited to stress the hegemonic power of legal rights and the formal judicial system to limit the ways people can deal with their problems and express their own perspectives. Postmodernism is cited to argue that grand narratives or theories lost their effectiveness in the transformation of society, and that activist lawyers who impose their own grand narratives on their clients are exerting their hegemonic power, like that of legal rights and the formal judicial system. Communitarianism is cited to argue for the need to base our legal system on people's natural sense of morality.

They have also made various practical arguments. They emphasize negotiation, mediation and settlement, as opposed to formal adjudication (Wada, 1991). They emphasize prose litigation over representation by *bengoshi* or attorneys (Tanase, 1988). They emphasize the role of *shihô shoshi* or judicial scribes, as opposed to *bengoshi* (Wada, 1993). They emphasize that the *bengoshi* should totally immerse herself in the perspective of clients and should never impose her own legalistic perspectives (Tanase, 1995).

The leading proponent of this perspective is Takao Tanase, who was said by a reviewer (Kaino, 1995: 219) to have caused a turning point in the recent socio-legal studies in Japan. He is very circumspect in his criticism of rights in Japan. He only says, for instance, that while direct importation of negative views about legalization from the United States would simply ignore the differences in backgrounds of two societies, it is at least important to learn from the experience of other countries in anticipation of the inevitable legalization of Japanese society (Tanase, 1991: 68). However, judging from his affirmative reference to Glendon's works (Tanase, 1995) and his criticism of Kawashima's modernist criticism of Japanese society (Tanase, 1993), it is fair to say that he is skeptical about the liberal perspective for the transformation of Japanese society in the direction of emphasizing the rights of individuals.

His students are more candid. For instance, Masaki Abe (1994: 131) states that:

Isn't it true that in Japan as well, many people are too accustomed to understanding the relationship between themselves and others in terms of legal concepts of rights and duties, and have become insensitive to the possibility of other ways of understanding?

How would Takeyoshi Kawashima respond to such a statement if he were alive and here?

3. *Hegemonic Power of the Legal System and Legal Culture*

The question is whether their criticism applies to the vision I have already presented.

First of all, we cannot deny that many parts of the current Japanese legal system and the dominant legal culture are fundamentally based on individualistic concepts of rights in the context of capitalism. For instance, property rights, particularly land ownership, have been given almost sacred status by the central government and the judiciary in Japan. This situation makes it extremely difficult, for instance, to give local governments the authority for effective zoning and other land-use planning, or to expand the standing to sue to prevent pollution beyond those who own lands or have other clearly recognized rights.

However, what we are emphasizing are new types of rights which are designed precisely to challenge this hegemonic status of property rights. A good example is the *kankyoken*, or right to an unpolluted environment. This right has been constructed based on Articles 13 and 25 of the Constitution, which prescribe the people's right to life, liberty, and the pursuit of happiness, as well as their right to maintain the minimum standards of wholesome and cultured living.

Other examples of newly proposed rights also challenge various aspects of the existing legal system and the dominant legal culture. Think about the right of patients to seek informed consent; the right of resident foreigners to participate in local politics; the legally

enforceable right of women to seek equal employment; the right of the accused to have free legal counsel before indictment; the rights of children in school and community; and the right of consumers to protect themselves from defective products. There is even a movement for the right of animals to protect themselves from cruel treatment or the risk of extinction. In fact, a law suit was filed in March 1995 in southern Japan on behalf of endangered species of rabbits and other animals to prevent destruction of their habitats. We can go on forever. These movements are not seeking to extend the hegemonic power of the present legal system and its culture, but to replace present system and culture.

4. *Participation and Negotiation as Solution*

Probably radical postmodernists in North America would oppose even these rights, since they seem to believe that any predetermined goals, standards, and values are hegemonic, so that everything should be left contingent on micro-level interactions. Allan Hutchinson's response to Handler's address (Hutchinson, 1992) is a straightforward example.

Japanese postmodernists seem to share such a view to some extent. A good example is Tanase's compact summary of his proposals for reforms of law enforcement and judicial systems (Tanase, 1991).

(1) The public should participate in the process in which administrative agencies determine their general enforcement policies.

(2) Reforms should be introduced to encourage private prosecution.

(3) Administrative regulation should be carried out in an indirect way in which only a target is given to the regulated business, so that regulated business has the discretion to determine the details of how the target is to be achieved. The public should participate in this enforcement process.

(4) Adversarial judicial proceedings should be reformed to emulate as much as possible the structure of autonomous negotiation outside the court, so that the parties will be able to bring their own visions about the desirable society into the judicial system.

One problem with these proposals is that Tanase does not mention the fact that business already enjoys almost monopolistic access to the legislative and administrative process (Miyazawa, 1994: 79-103). Both general targets and details of implementation are agreed upon between the regulator and regulated. His proposal could legitimate this situation.

A more fundamental problem is that Tanase does not discuss the possibility that the people's legal consciousness is limited by the hegemonic power of the dominant legal culture, so that simply bringing them into the administrative and judicial systems might not have any transformative impact. This problem has been illustrated by Shiro Kashimura's ethnomethodological study on labor negotiations in Japan (Kashimura, 1989). Not only management, but also the union does not perceive labor law as relevant to their negotiation. Since Tanase seems to reject activities by lawyers to provide alternative perspectives to the parties, on the grounds that they are an exercise of hegemonic power, I am afraid that his reforms would simply reproduce the status quo and please the establishment, unless they are coupled with strong measures to correct imbalances in resources between the parties, including active legal assistance, which he is likely to oppose.

On the other hand, his reforms certainly require the establishment of new legally-enforceable procedural rights. They can be easily incorporated into our vision.

The next issue is whether procedural rights are enough. Since Tanase rejects the paternalistic involvement of lawyers in the disputing process, those who have the resources and capabilities to explore all conceivable issues which could affect their interests, to survive lengthy negotiation processes, or to force the other side to accept their terms, would enjoy advantage.

Here is a great disagreement about the role of substantive rights between us. I believe that his reform proposals implicitly assume equally resourceful actors. I believe that such an assumption is totally unrealistic and unfounded.

5. *Priority in Japanese Society*

The final question is which is our more pressing problem between the following two: the danger of becoming like the United States or the danger of remaining a rights-blind society. I believe that it is highly unrealistic to argue that there is an imminent danger of a tyranny of rights and lawyers in Japan. One obvious factor is the enormous difference in the number of lawyers between Japan and other developed countries. There are other factors as well.

Firstly, unlike the judiciary in the United States, the Japanese judiciary is not likely to give absolute nature to rights because our Constitution has clauses about public-welfare limitations. For instance, Article 13 provides that “the people[‘s] ... right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”

Secondly, the judiciary has been extremely reluctant to apply the Constitution and hold unconstitutional any governmental policies, and judges are closely controlled to conform with this policy (Miyazawa, 1991; Ramseyer and Rosenbluth, 1993).

Thirdly, it is an established fact that whenever a new dispute processing mechanism was required, the government always tried and succeeded to establish it as a mediation or other non-judicial proceeding under its control. Frank Upham wrote a classic on this subject (Upham, 1987). This pattern still continues.

For instance, 1995 is the 10th anniversary of the implementation of the Equal Employment Opportunity Act (*Danjo Koyô Kikai Kintô Hô*). However, it is hardly a celebration. There are serious problems with both substantive clauses and the dispute processing system. Substantively, equal treatment is not a legally enforceable duty, but a target for effort (*doryoku mokuhyô*) of the employer. As a result, under the current unfavorable economic environment, employers have returned to earlier practices.

Procedurally, in addition to the regular judicial system, a mediation proceeding was also introduced as a much speedier mechanism. However, in order to use it, the plaintiff must obtain the consent of the employer and the approval of a Labor Ministry official. Therefore, applications have been filed against only 11 companies: two applications were rejected by companies; eight applications were rejected by the Ministry. Only one case reached a recommendation, which was unacceptable to the plaintiffs. The official who handled this case said that “They expected a mediation which is very close to adjudication,” but “a mediation is not a place to decide right or wrong” (Yomiuri Shinbun, 1995). On August 9, 1995, nine women employees of three companies of the Sumitomo group, including the plaintiffs of this mediation case, filed formal law suits against their employers to seek wages lost by discrimination and damage awards for their psychological distress. Two of them even sought damage awards from the government for its refusal of their petition for a mediation.

Another example is the plight of uncertified victims of mercury poisoning (*Minamata* disease) by water pollution. Initial law suits produced an administrative system to certify victims so that they can receive compensation. However, the certification system was administered so restrictively that the second wave of *Minamata* litigations started around 1970. The cases are still pending in three high courts and five district courts, while the courts have been recommending settlement to the parties. The polluting company and the local government have agreed to settle, but the central government has refused. Not until June 20, 1995 has the coalition government decided to expand the range of uncertified victims to receive compensation, on the condition that the settlement will not include admission of the legal responsibility of the government.

I can add many other examples. Under these circumstances, it should be obvious that there is no imminent danger of having a tyranny of absolute rights in Japanese society. On the contrary, we need more rights to escape from the tyranny of communities.

V. AGENTS OF TRANSFORMATION

I hope that I have presented a persuasive argument for the necessity of a liberal transformation of the Japanese legal culture and legal system. The next question is the agent for such transformative politics. As I have stated when I explained my own interpretive turn, we must find them among ordinary people.

Among postmodernist scholars, for instance, Austin Sarat (1990) presents “a story of a woman who refuses to cooperate with her welfare attorney,” and Patricia Ewick and Susan Silbey (1992) present a story of “a black domestic worker who gloats that the unjust punishment she has received from the court is in fact no imposition on her life.” While these authors accord much significance to these stories for their transformative potentials, Handler (1992) is not impressed. “While these moments” may be “often cathartic for the individuals involved,” they “mark no more than a small break in a world of despair and marginality.”

To add my favorite quotation from Handler, he said that:

James Scott (1990), in his book on protest below, starts with an Ethiopian proverb: “When the great lord passes, the wise peasant bows deeply and silently farts.”
Progressive forces need trumpets, not farts. (Handler, 1992: 746).

I liked this sentence because, in Japan, there is a word often used by the establishment when they realized potentially dangerous complaints among their subordinates. For instance, when a dean of a law faculty sensed a hidden opposition to his agenda, he would say to his aid: “*gasunuki shiyō*” or “let’s let the gas out.” Opposing faculty members would be allowed to express their unhappiness about the proposal at a faculty meeting, but a decision would nonetheless be made according to the dean’s plan. A wise ruler knows how to allow her subordinates to privately ridicule her if it serves to maintain the order.

In fact, I had the feeling when I read these works of postmodernist scholars that they believe that the wall of the establishment will somehow collapse without actually touching it. In that sense, they seem to be extremely optimistic. Perhaps they can afford to be optimistic in the United States where judiciary or other governmental agencies are less bureaucratic and less tightly controlled internally, so that it may be relatively easier to form a coalition with insiders. However, we cannot be that optimistic in Japan where everything is so tightly organized and so tightly controlled. For instance, a Japanese court would never fail to confiscate the nullified driver’s license of the black woman described by Ewick and Silbey.

Moreover, they seem to be giving too much significance to individual, unrecognized resistance, against their own methodological tenet. When they declare that these cases of resistance are potentially transformative, they are certainly evaluating them from a more general, abstract perspective. However, does this not violate one of their most fundamental tenets that we must abandon grand narratives? As Merry said (1995: 13), postmodernists believe that “no group is authorized to construct for others a vision of a socially just world.” Of course, they can argue that their ascription of significance to these cases is truly postmodernist, namely, totally ad hoc, contingent, and malleable. If so, they are politically irresponsible.

These are the reasons why I am interested in Merry’s discussion in her presidential address (1995). She presents three examples of resistance in and through law. The point is that each of them “foregrounds the way law contributes to enhancing the power of subordinates through processes of cultural redefinition.”

Before commenting on her stories, however, I should discuss Merry’s major work, *Getting Justice and Getting Even* (Merry, 1990). The story is about the legal behavior of working-class people in two Massachusetts towns. They bring neighborhood or family matters to the court, where court officials might refuse to accept on the grounds that these matters are better handled outside the court. The theoretical point she makes is a paradox that while law can be a powerful weapon even for working-class people, there is also a danger for them of losing control over their cases to court officials. Therefore, law is both enabling and disabling.

One question I felt from this study was whether law was really disabling. After all, those people could always handle their problems informally. We can say that law simply provided an additional repertoire.

But more fundamental questions arose when I read the final chapter of the book, which provided a historical background for the legal consciousness of working-class people that they are entitled to have access to the court. This consciousness is said to have developed as a result of a series of legal rights activism which “affected the poor and unrepresented themselves, suggesting to them the possibility of seeking the court’s help in dealing with their problems” (Merry, 1990: 177). I had two questions. Firstly, after a painstaking, micro-level description of legal consciousness and behavior which involve subtle differences among working-class people, suddenly a macro-level characterization of the legal consciousness of working-class Americans as a whole appears. Is this consistent with a methodological position which stresses the primacy of micro-level observation? Secondly, if her description of the historical background is correct, is not it a social movement with a grand narrative that really counts?

Returning to Merry’s presidential address, her third case is most interesting to me. She characterizes it as resistance which redefines the meaning of law.

The People’s International Tribunal was held in Hawai’i in the summer of 1993 to put the United States on trial for its takeover of the sovereign nation of Hawai’i and its acts of resource appropriation and cultural destruction to the Native Hawaiian people. The tribunal took the form of a criminal trial, and the complaint was sent to the United States, which did not appear and was represented by an empty chair during the trial. The judges represented the community of international indigenous rights groups and scholars. The verdict was based on the five principles of law (Merry, 1995: 22):

- (1) Kanaka Maoli law
- (2) International law
- (3) The Constitution of the United States, other federal and state laws, and federal and state judicial decisions
- (4) The Law of Peoples as Nations
- (5) The Inherent Law of Humanity

Thus, this case represents an exercise of legal pluralism by which “the law of the nation is nested between indigenous law and global human rights law” (Merry, 1995: 21). Merry concludes this case by saying that “[i]f we see law as constituted by social practices and meanings, such movements have larger implications for law itself” (Merry, 1995: 23). I agree. However, must we become postmodernists in order to understand the transformative potentiality of this movement?

In any event, she concludes her presidential address by emphasizing “the importance of research on the cultural meanings produced by law in the habitual, possibly resistant, practices of everyday life as well as through major social movements” (Merry, 1995: 25). No one would disagree. However, must we become postmodernists to agree with this conclusion?

Reading Merry’s presidential address this way, my position is probably very close to that of Michael McCann’s *Rights at Work* (1994). Reliance on laws, rights, lawyers, organizations, and grand narratives is inherently neither enabling, nor disabling. They are simply resources for the actors, and their impacts are contingent upon the concrete conditions of and around the actors. While existing laws and rights certainly have limitations, their innovative use can still enhance the position of the actors, although the pace of the progress may be slower than desired. Having a long-term strategy does not preclude short-term tactics which fit the given situation. Indeed, a long-term strategy may be indispensable in order for the actors to perceive the significance of their small, tactical victory, so that they will not be frustrated by the difference between their ultimate goal and their limited success at any given moment.

When Stuart Scheingold came to Kobe soon after the quake on January 17, 1995, and interviewed with me activist lawyers in Osaka, Kyoto, and Tokyo, he was surprised by their lack of cynicism and their political versatility. Probably because there has never been

the “myth of rights” (Scheingold, 1974) in Japan, these lawyers have anticipated a tremendous gap between what they aspire to, and what they can realistically expect. Moreover, since there is little prospect of achieving anything significant through formal judicial proceedings, they have by necessity expanded their repertoires to include extra-judicial activities. In this sense, it is contrary to the reality in Japan to say that the involvement of activist lawyers mean the imposition of their legalistic perspective over the will of the party.

Therefore, in the final section of my paper, I wish to present a case of a transformative movement which utilizes not only indigenous ethnic concepts, but also local governments, national laws, and international human rights instruments in its effort to challenge the central government and its law.

VI. A STORY OF A TRANSFORMATIVE MOVEMENT IN JAPAN

I would like to tell a story about a movement which challenges not only tacit assumptions of Japanese constitutional scholarship, but also one of the most prevailing myths about Japanese society, namely the myth that there is no ethnic minority in Japanese citizens. That is the movement of *Ainu* people to establish the right of indigenous people (*senjūken*).

The *Ainu* are an ethnic group who are ethnically different from the *Yamato*, the ethnic majority of Japanese population. They used to live throughout eastern Japan. As the *Yamato* gradually expanded their political control over Honshu, the main island of Japan, the *Ainu* were pushed eastward, and were finally expelled to the island of Ezo, which is now called Hokkaidō. Their estimated number is approximately 25,000.

The Japanese government changed the name of Ezo to Hokkaidō in 1869 and granted the citizenship to *Ainu* in 1870 (Hokkaidō Shinbun Shakaibu, 1991). In 1877, the government declared lands occupied by *Ainu* as lands without owners and confiscated them into the state-owned lands. At the same time, the government prohibited the use of the *Ainu* language and *Ainu* customs such as tattooing. The government forced the *Ainu* to adopt Japanese names, while it registered them in civil registers (*koseki*) as former aborigines (*kyū dojin*). In 1889, the government enacted a law called *Kyū Dojin Hogo Hō* or the Law for the Protection of Former Aborigines.

This law provided that the prefectural government may grant land of up to 50,000 square meters free of charge to *Ainu* who wish to engage in farming. However, since the governor of the prefecture lost the authority over state-owned lands by legislation after the war, this provision has no effect now. However, if an *Ainu* was granted a free land by the government when the law was effective, it is still prohibited to trade that land without the consent of the governor. *Ainu* consider this law as a symbol of their discrimination.

The Hokkaidō Utari Association, the *Ainu* organization which covers Hokkaidō as a whole, decided in 1982 to seek abolition of the law and enactment of a new law. The association also declared that *Ainu* have the right of indigenous people over Hokkaidō and the southern four islands of the Kuril Islands. In 1983, a socialist governor was elected in Hokkaidō who supported the proposal of the association. In 1984, the association drafted a new law. It contained, among other demands, a demand for the establishment of special seats in both the National Diet and the prefectural legislature. In the same year, the Hokkaidō prefectural government established a committee to discuss the content of the proposed law.

In 1989, the Utari Association organized demonstrations in Hokkaidō and held its first meeting in Tokyo. The central government established a committee to study the proposal with representatives from governmental ministries, which held its first meeting in 1990.

In the election of the Upper House of the National Diet in 1992, the Socialist Party included a leader of the Utari Association among its candidates for proportional representation. He ended as a runner-up that time, but later became a member of the Diet by filling a vacancy.

There is opposition among *Ainu* to the proposal of a new law. Some left the Utari Association stating that they wanted to live as Japanese. Others believe that special treatment will simply create new discrimination. The central government is still reluctant to enact the law. The socialist governor left office, and the Socialist Party lost badly in the most recent election. Nevertheless, the movement continues, and it shows remarkable versatility in mobilizing both legal and political instruments.

The basis of their demand is their desire to maintain their cultural traditions and ethnic identity. They try to utilize the Japanese Constitution, particularly Article 13 (the right to pursue happiness), Article 14 (equality before the law), and Article 25 (the right to healthy and cultured life). The point is that with their independent ethnic identity, *Ainu* are entitled to pursue their happiness in their own way, but are still entitled to enjoy equal treatment before the law while keeping their ethnic identity.

Recently they have been trying to utilize international human rights documents. Article 29 of the International Covenant on Civil and Political Rights, which Japan ratified in 1979, provides that “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” The Utari Association has been active in the UN Human Rights Committee. Potentially, international law could be a most effective weapon because Article 98 of the Japanese Constitution requires the country to abide by the ratified international treaties and established internal law. In fact, the utilization of international human rights documents is a common strategy of various social movements in Japan, ranging from the right of the accused, to the right of Asian women who were forced to serve Japanese army as its sex slaves. This is because domestic law is usually hostile to their demands, and because they often lack access to legislative, administrative, and judicial processes in Japan.

Takashi Ebashi, the constitutional scholar, writes about the transformative implications of the proposed law for both the legal system and the constitutional scholarship (Ebashi, 1991). He particularly discusses some “widely accepted views” (*jōshiki*) which have dominated the constitutional scholarship. We might call these views a hegemonic aspect of the prevailing legal culture.

Firstly, previous constitutional scholarship has widely accepted the concept of reasonable discrimination in regard to the equal treatment clause of Article 14. The constitutional scholarship has been content with the lack of formal discrimination by law, and has rarely discussed the necessity of affirmative actions to correct discrimination in various aspects of politics, economy, and social life.

Secondly, the constitutional scholarship has no notion that Japanese citizens could be divided into several ethnic groups. Hence, it cannot understand why a certain group should receive special rights.

Ebashi, then, discusses the implications of the proposed right of indigenous people being defined as a right of a group. First of all, the Japanese Constitution is clearly an individualistic constitution, as its Article 13 requires respect for individual rights. Therefore, if the proposed group right was enacted, the right of individual members of *Ainu* to leave the group would have to be guaranteed.

The second issue of the proposed right of indigenous people is that it includes entitlement to lands and resources. In order to recognize such an entitlement, we must recognize the following two doctrines: firstly, healthy and cultured life for *Ainu* means the life according to *Ainu* culture; secondly, the survival of *Ainu* depends on access to lands and resources which used to be their own. These doctrines would require a reinterpretation of Article 25 of the Constitution about the right to healthy and cultured life, which has been interpreted from the perspective of the *Yamato* way of life based on farming and, more recently, from the perspective of an industrialized, urbanized society.

The third issue about the right of indigenous people is the claim for self-determination or a special right to participate in politics. This strongly clashes with prevailing views in constitutional scholarship. The constitutional scholarship so far has paid much attention to the equality of the right to participate in politics, so that, for instance, apportionment has

been a dominant issue. However, several other countries have already faced the problem of the effective political participation of ethnic minorities. In light of that, Ebashi says, it is utterly amazing that the Japanese constitutional scholarship rejects it without discussion.

VII. CONCLUSION

It is difficult to predict whether and how a new law for *Ainu* will be enacted. However, as you can see easily in the media these days, resident foreigners, disabled people, women, and various other groups of people are demanding equal opportunities to pursue their lives. This requires us to develop a radically different conception of Japanese society which is free from the myth of homogeneous community. We must aspire to a society where people with different resources are guaranteed equal access to the democratic process, so that consensus is pursued through reasoned discussions. We need more rights to realize such a society.

Such a liberal transformation of Japanese legal culture and institutions requires a movement of citizens who mobilize lawyers and other intellectuals as well as other resources. They must both be idealistic in holding a grand narrative as their long-term goal, and realistic in adopting tactics which fit local conditions.

I hope that my paper has shed some light on this debate.

Notes

- * This paper is a slightly revised version of the paper "Taking Merry Seriously: A Neo-culturalist Review of the Recent Scholarship and Practice in Japan," which the author presented at the Plenary Meeting 2 "Legal Culture: Encounters and Transformations" of the 1995 Annual Meeting of the Research Committee on Sociology of Law of the International Sociological Association, on August 3, 1995, at the Yasuda Auditorium Building of the University of Tokyo. The original full paper was twice as long, but an abridged version was used for the oral presentation.

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