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Taking Japanese Law Seriously

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TAKING JAPANESE LAW SERIOUSLY

LAW AND SOCIAL CHANGE IN POSTWAR JAPAN. By Frank K. Upham.* Cambridge: Harvard University Press, 1987. Pp. x, 269. $28.00.

*Reviewed by James V. Feinerman***

Frank Upham's study of the role of law in conflict resolution in modern Japan is a major breakthrough for the entire field of Japanese law. In this book-length analysis of the uses of law by significant social groupings in late twentieth-century Japan, Upham has both advanced the special claims of comparative law to unique understanding born of an outsider's perspective on a legal system and, at the same time, laid to rest many of the hoariest—yet oft-repeated—misconceptions about the actual workings of Japanese law and society. Moreover, the substantive analysis contained here advances the study of Japanese law in the United States far beyond the extensive description of earlier scholarship.[1] Japanese law and Japan's legal system can now take their proper place in the larger field of comparative legal studies, alongside their better known (and longer researched) European cousins. Comparative law and Japanese studies will both be richer for this impressive addition to their respective literatures.

In many ways, Professor Upham has built admirably upon the sound foundations laid by his predecessors in scholarly endeavor. Since World War II, enough of the law of Japan has become known to those who have access to it only through English translation so that it is now possible to broaden the audience for a more sharply focused work.[2] In fact, a happy

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1 *See, e.g.*, J. GRESSER, K. FUJIKURA AND A. MORISHIMA, ENVIRONMENTAL LAW IN JAPAN (1981); D. HENDERSON, CONCILIATION AND JAPANESE LAW, TOKUGAWA AND MODERN (1965); D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN (1975); LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY (A. von Mehren ed. 1963); Y. NODA, INTRODUCTION TO JAPANESE LAW (1976); I. SHAPIRO, M. YOUNG AND K. FUJIKURA, THE ROLE OF LAW AND LAWYERS IN JAPAN AND THE U.S. (1983)

2 To be sure, more narrowly focused studies have long been available to specialists. For example, the Asian Law Program at the University of Washington, Seattle, has supported the publication for over twenty years of LAW IN JAPAN: AN ANNUAL, which contains both translations of current Japanese legal scholarship and original articles in English by both foreign and Japanese

coincidence of circumstances at this moment should garner a wide readership for this book: as a new economic colossus, Japan is receiving considerable scrutiny; pundits and other observers of the contemporary scene are comparing and contrasting basic features of Japanese and United States society to explain the reasons for Japan's success; and disenchantment with the workings of the American legal system has reached a new high, accompanied by increasing interest in foreign legal regimes and their answers to common dilemmas of modern society.[3]

Upham's work is by no means a simplistic prescription for solving the ills of the United States legal system by applying Japanese remedies. Indeed, his clear-eyed rendering of Japan's law and its implementation would likely preclude recommending it to any other society as a nostrum. What he does do, with admirable care and clarity, is examine several parallel issues in Japanese and United States society—environmental pollution, civil rights of women and minorities, and competition policy—from the perspective of their resolution in contemporary Japan under contemporary Japanese legal standards. In most instances, Professor Upham allows the reader to make implicit comparisons with the treatment of these same issues under recent United States law, comparisons which would point up the difficulties facing a litigant in Japan in pressing an individual claim for compensation or other remedies in the face of numerous obstacles.[4]

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scholars of Japanese law. A number of these articles are cited by Professor Upham in his footnotes. Moreover, many of the same scholars who have produced descriptive studies of the Japanese legal system have also delved more deeply into analysis of its specific features. A superb example is Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923 (1984). See also the influential work of John O. Haley, particularly Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

3. Several recent popular books have analyzed Japanese society to determine both what the United States can do to meet the economic challenge of Japan and what features of Japanese politics and industrial organization might be adaptable in the United States. *See, e.g.*, J. FALLOWS, MORE LIKE US: MAKING AMERICA GREAT AGAIN (1989); C. PRESTOWITZ, TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD (1988); K. VON WOLFERN, THE ENIGMA OF JAPANESE POWER (1989). Upham cites a number of contemporary exponents of borrowing from Japan in reforming the United States legal system, including the former Attorney General of Connecticut (now a U.S. Senator) and the current president of Harvard University, a law professor and former Dean of Harvard Law School. F. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 221 n. 18 (1987).

4. One of the most interesting features of this book, particularly for readers who are conscious of parallels with United States social history, is the eerie resonance between Japan and the United States in resolving the same sorts of social problems. Acknowledgement of ethnic, racial and gender discrimination arose at almost the same time in the two societies, as did popular concern about environmental pollution. Yet, as Upham illustrates, the political fallout and the legal consequences

The ultimate message is not, as some other observers—Japanese and foreign—have suggested, that Japanese society is quintessentially nonlitigious, allergic to law or otherwise compelled to compromise all serious disputes through nonconfrontational means because of factors unique to Japanese culture.[5] Rather, Upham shows that various disaffected or disenfranchised groups in Japanese society can and do use litigation as a means for achieving discrete goals such as compensation or better treatment. At the same time, his narratives of specific cases make it clear that both the alacrity with which these groups choose to litigate and the subsequent course of such proceedings bespeak a vastly different social background for the law than it enjoys in the United States.[6] The real story contained in this book is how the Japanese legal system, like its United States counterpart, has provided a means for defusing discontent or remedying violations of rights, but by a very different process.

In the introductory chapter which sets out his model for analysis, Professor Upham contrasts two basic Western approaches to jurisprudence as "intellectual reference points."[7] The first he calls "rule-centered" adjudication; the latter is dubbed "judge-centered." The rule-centered approach largely tracks the nineteenth-century formalist hypothesis of a legal system where clearly delineated legal rules are uniformly applied by a cadre of well-trained legal specialists, leaving individuals and other private parties to create a universe of separate arrangements insofar as their

were vastly different. One fascinating example Upham alludes to in a footnote, F. UPHAM, *supra* note 3, at 15 n 20, involves apportionment, a subject of constitutional litigation in both the United States and Japan. The Japanese courts have never mandated the one-man, one-vote measures ordered by the United States Supreme Court in a series of 1960s cases. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962). *See generally* Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1.

5 Upham thus refutes the nonlitigiousness hypothesis advanced in T. KAWASHIMA, *Nihonjin no ho ishiki* (1967) (English translation. The Legal Consciousness of the Japanese), perhaps better disseminated in the English speaking world in the version contained in an article of the same author, Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY, *supra* note 1, at 41-72. *See also* Haley, *supra* note 2, for a critique of Kawashima's thesis and other commentary describing innate Japanese preference for harmony and avoidance of confrontation.

6 After citing CONFLICT IN JAPAN (E. Krauss, T.R. Rohlen and P.G. Steinhoff, ed. 1984), Upham notes that the index to that book "contains not a single entry under 'law', 'litigation', or 'lawyers.'" F. UPHAM, *supra* note 3, at 230 n 4. Upham infers that scholars are aware that law may play a significant role in dispute resolution but have not recognized it as a separate topic for general analysis. I would suggest that their omission is more than a mere oversight and reflects Japanese preferences and attitudes, not to mention actual behavior in conflict resolution.

7 F. UPHAM, *supra* note 3, at 7-16 ("Two Western Models").

conduct is not affected by those legal rules.[8] On the other hand, his "judge-centered" model envisions a world where litigation becomes the significant mechanism for resolving all manner of social controversies, with judges either enforcing existing legal rules or creating new ones based on the dictates of social policy concerns—perhaps reflecting the activist trends among the United States federal judiciary in the quarter-century since *Brown v. Board of Education*.[9]

Contrasted with both of these Western models is Upham's "Japanese model," one of informality in dispute resolution which has the attendant effect of limiting the judge's role in solving the dispute. Moreover, Upham argues that this limited judicial role in the Japanese legal system is the result of purposive behavior on the part of the Japanese elite to discourage use of the courts and to encourage informal resolution of disputes.[10]

His central thesis breaks new ground by contending that this "preference" for informal dispute resolution stems not from any basic proclivities of Japanese culture but rather from the maintenance of a legal system and an elaborate bureaucratic structure which encourages and rewards those who eschew litigation. Out of self-interest, rather than any other impulse, do Japanese citizens generally avoid the courts.[11]

Yet Upham does not end his reexamination after making this important point; rather, he proceeds to an even more sophisticated analysis—the bulk of the rest of the book—of those circumstances which lead the usually reluctant Japanese to the courtroom. In this analysis, Professor Upham provides both a trenchant critique of shortcomings of the Japanese style of informal dispute resolution and a new perspective on the role which litigation plays in the national political life of Japan. As his case studies illustrate, certain contested issues which are particularly ill-

8. Criticism of this model, and its underlying presuppositions, has spurred the development and growth of an important school of legal analysis known as Critical Legal Studies. *See, e.g.*, Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983). See also 36 STAN. L. REV. Numbers 1 & 2 (1984), a combined issue devoted to articles detailing and criticizing the Critical Legal Studies Movement.

9. 347 U.S. 483 (1954).

10. F. UPHAM, *supra* note 3, at 17-27 ("A Japanese Model").

11. Yet, as Upham describes in his case studies, resort to the courts is possible when informal systems of control prove inadequate for the task of providing redress of grievances. Also, the courts may not necessarily provide a more receptive forum than that offered by less formal institutions. F. UPHAM, *supra* note 3, at 26.

suited to the informal mode of dispute resolution seem to necessitate lawsuits.[12] In these cases, the carefully constructed model of informal social controls has broken down, and broadening social conflict threatens the perhaps illusory national consensus so crucial to the Japanese leadership's hegemony. Upham notes that, in a system accustomed to stasis, litigation acts as an important safety valve:

> Litigation in Japan can thus be the vehicle for the transformation of diffuse discontent or isolated instances of individual conflict into social issues. It can help disparate groups recognize common interests and form alliances, and it can help associate these interests with wider social values. To a certain extent, this process can occur regardless of the outcome of the litigation: the antipollution movement had achieved virtually total political victory before the Big Four suits had been decided. But in most situations, the judges' proclamations of support in the form not only of plaintiffs' victories but also of moralistic opinions endorsing the plaintiffs' cause are crucial to the political and social progress of the movement.[13]

The relationship between law and social and political realities in Japanese society—the central focus of Professor Upham's study—then provides the necessary elements of an answer to a crucial conundrum: Why does law ultimately come to the assistance of the groups studied here? Essentially, the power elite, or some significant segment of it, comes to share the convictions of the aggrieved parties or to believe that preservation of the Japanese social compact requires some accommodation of their claims. Nothing else will explain why sophisticated specialists who normally use their expertise to neutralize or to deflect the pressure of less powerful individuals and groups struggling for social justice did something very different in the instances Professor Upham adduces. Yet, as he warns, their capitulation to the "popular will" is quite limited; they yield only to preserve, in the longer run, their ultimate control:

> Instead of tolerating the continuation and expansion of the judicial role, the bureaucracy steps in to recapture control of the social agenda. It can do so only by recognizing the new direction of social change established partially by the litigation vehicle, but it need not and will not recognize an institu-

12. Upham states:

> In both the environmental and employment-discrimination cases, litigation provided a forum for interests that had hitherto been ignored or discounted. In the pollution cases, plaintiffs and their supporters used the periodic court hearings to attract media attention and mobilize political allies, eventually succeeding in substantially weakening the national consensus for economic growth that had dominated postwar Japan.

F. UPHAM, *supra* note 3, at 23.

13. *Id.* at 27.

> tional role for the judiciary in shaping the ongoing course of that change. Although legally developed norms are recognized as socially valid and binding, the details of their implementation will continue to be worked out through the processes of bureaucratic informalism.[14]

This theme recurs in the four subsequent chapters. These chapters provide the raw materials which Upham refines to develop his thesis, ranging from a recounting of the environmental tragedy at Minamata and the ensuing litigation to a study of the legal basis for Japanese industrial policy. Just as the popular mood is being swayed by the publicity and the sympathy which the horribly deformed plaintiffs generated in the environmental pollution litigation, the previously implacable opponents in the government and private sector give way. In another vein, the eroding legal power of the Ministry of International Trade and Industry (MITI) and the new financial muscle of Japanese multinationals combine to weaken the force of the once-feared administrative guidance which MITI had long used to discipline Japanese industrial companies.[15] In each of the individual studies, an almost last-minute capitulation by those in the power elite who face certain defeat or political embarrassment seems to demonstrate at once both the success and failure of litigation or other legal strategies as a mechanism to change Japanese society. The very existence of the underlying law and the potential for an adverse outcome are a potent weapon, but whenever their potency is about to be demonstrated there is inevitably some attempt to avert final judgment.

In fact, two of the studies taken together—those of the Buraku Liberation League (BLL) and the movement for women's rights—provide an ample illustration of the pitfalls of reliance on formal law to eventuate basic changes in Japanese society. In Chapter Three of his book, Professor Upham introduces the problem of discrimination in Japan with the history of the Burakumin. These descendants of premodern outcasts continue to suffer discrimination today despite the lack of distinguishing characteristics—other than their presence on lists derived from family registries—which differentiate them from other Japanese citizens. Eschewing litigation, the BLL has engaged for many years in a tactic known as "denunciation"[16] to attack those seen as primarily responsible

14. *Id.*

15. *See, e.g.*, Yamanouchi, *Administrative Guidance and the Rule of Law*, 7 LAW IN JAPAN: AN ANNUAL 22 (1974). *See also* Young, *supra* note 2.

16. One of the significant contributions of this work is the succinct history of the Buraku rights movement, stretching back to its prewar founding. Upham narrates the beginnings of the Suiheisha, predecessor to the BLL, in 1922, its militant ideology and determination to use means easily avail-

for anti-Burakumin discrimination. Denunciation may consist of "no more than two or three Burakumin explaining the BLL's wishes to a local bureaucrat,"[17] but it nearly always carries with it the threat of physical force by larger groups of Burakumin. Indeed, before World War II, there were often large scale violent confrontations involving the BLL's predecessor organization.

In contrast, according to Upham, Japanese women have sought to achieve equal employment opportunities almost solely by means of a series of lawsuits, begun in the middle of the 1960s, which challenged the rather blatantly discriminatory practices of the vast majority of Japanese employers. Upham describes this litigation campaign in considerable detail in the fourth chapter of the book,[18] with attention to the small victories over the years, including the recent passage in 1985 of the Equal Employment Opportunity Act (EEOA). Yet despite this long struggle, and notwithstanding the presence of an equal rights provision in the Japanese Constitution,[19] Upham voices considerable skepticism about future gains for Japanese women in employment:

> There are indications that the plaintiffs of the second period, like their predecessors, will be largely successful in specific cases, but employers have countered with further measures that have been successful in continuing the general exclusion of women from equal participation in the Japanese economy.[20]

Thus, in seeming contradiction of Professor Upham's connective thesis, litigation and the provisions of formal legality seem to have failed women, while extrajudicial—possibly extra-legal—means have proven more availing to the Burakumin. A possible explanation of this anomaly is suggested at the end of the chapter about women's search for equal employment opportunity. Upham suggests that, with the passage of the EEOA, women may have won a moral victory but lost the chance to

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able to the outcasts to achieve their own liberation. An important theme, also well outlined by Upham, is the Burakumin disenchantment with law arising from the failed promise of the postwar Constitution. Denunciation is thus the last resort left to the Burakumin. F. UPHAM, *supra* note 3, at 103-06, 81-86.

17 *Id.* at 78.

18. *Id.* at 129-44 ("The Litigation Campaign").

19. The Japanese Constitution provides:

> (1) All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, *sex*, social status or family origin. . . .

CONSTITUTION OF JAPAN, Article 14 (emphasis supplied).

20 F. UPHAM, *supra* note 3, at 129-30.

wrest control of the social agenda from the bureaucracy.[21] The Burakumin, on the other hand, have remained willing to act outside the realm of the state legal system and to engage in a form of political and legal "self-help" by employing denunciation to achieve their goals. Direct political action gives the BLL a kind of leverage not yet enjoyed by the women's movement in Japan. Interestingly, Upham would condition the BLL's effectiveness on its independence from governmental actions.[22] In this area, as in so many others where social issues demand significant change, the Japanese bureaucracy has proven its ability to delay and to bemoan its powerlessness to enforce fundamental civil rights.[23]

Seen from the perspective of Professor Upham's basic argument about the role of the bureaucracy in enforcing a norm of informality on the Japanese polity, the cases he recounts assume a new significance. As he points out in the closing chapter, these cases both serve a useful social function as a safety valve (comparable in Upham's view to the historical role of peasant rebellions) in venting popular indignation against the current regime and provide a further impetus for reform of deeply rooted social ills that even legislation cannot extirpate in the face of a backward social consciousness.[24]

In a particularly telling observation, Professor Upham makes clear the relationship between Japanese law and culture from a standpoint he admits "reverses the usual sequence of discussions of Japanese law and

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21. Upham states:

> In the women's movement, however, the plaintiffs have been less successful in galvanizing political support. The primary importance of these cases has been doctrinal, and their role has been to apply legal, not political, pressure to their opponents in government and industry. However, if my speculations about the eventual denouement of the women's litigation are correct, this transformation in the role of litigation in social change will have had little effect on the eventual result—the incorporation of the forces of social conflict and change into the machinery of the state bureaucracy.

Id. at 165.

22. "A second limitation on the political effect of denunciation is its eventual dependence on governmental action." *Id.* at 122. Upham goes on to state that unless the government really does become interested in alleviating discrimination against the Burakumin, reliance upon the government may foster an unfortunate dependence which could hinder the equal treatment of Burakumin.

23. *Id.* at 214-15.

24. Upham notes:

> In circumstances where plaintiffs can demonstrate that they have been excluded not only from the political process but also from a fair share of social benefits, litigation can provide a forum for the dramatic presentation of their plight to the nation. Its formal processes and universalistic rhetoric help to identify political allies and rally popular support, win or lose, in a way that other political strategies such as protest marches or instrumental force along the lines of denunciation or direct negotiations cannot.

Id. at 216.

society"[25]:

> [A]sk not what kind of society will produce a particularistic and informal legal system like that of Japan, but instead what social values would be encouraged by the type of legal system portrayed in these case studies. I adopt this view of the causal relationship not because I believe the legal system is immune to the influence of social values but in order to dramatize the incompleteness of the conventional view of law and society in non-Western cultures, which all too often assumes a unilateral influence of culture on law.[26]

Here lies some of the valuable new thinking that Upham has brought not only to the study of Japanese law but to comparative law and jurisprudence generally. The lingering notions that law is somehow inevitable, culturally conditioned and produced by a peculiar concatenation of people, cultures and circumstances is demolished quite effectively by the evidence Professor Upham draws together in this work. He demonstrates that the current legal order is the product of quite voluntary acts on the part of an influential segment of Japanese society, a group easily able to choose differently, were it so disposed. These elite have deliberately created a system which discourages litigation except in extreme circumstances, rewards compromise and informality, and reinforces hierarchy. The interesting question, ultimately, may be how this vision of a legal order retains its vitality, or at least its legitimacy, in the face of persistent challenges.

Towards the very end of his book, Professor Upham observes quite tentatively some contemporary currents in Western legal scholarship which suggest possibilities for a convergence of analysis. At a time when many students and critics of both the United States legal system and the underlying social consciousness which has provided its dominant ideology for most of American history are examining the myths used to legitimate our notions of law,[27] Professor Upham has undertaken the corresponding exercise with respect to the Japanese legal system, providing an important counterpart to such work. First, the material he brings to light regarding Japan allows consideration of the universality of processes whereby legality and ideology become enmeshed. Second, his contribution provides an additional, and extremely useful, corrective to

25 *Id* at 218.

26 *Id.*

27 *See, e.g.*, Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). *See also* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

much of the American scholarship on Japanese law which had previously stressed the difference, the "otherness," of Japanese law and legal thought.[28] Finally, Professor Upham sounds an important cautionary note addressing those who would borrow elements of Japan's legal system to redress failings perceived in the operation of our own. He provides the wisdom to assess Japanese law intelligently, born of a clear-eyed vision of all the many facets—the achievements as well as the shortcomings—of a complex legal tradition. As he states in his conclusion:

> But advocates of the introduction of Japanese-style informality have not only to overcome cultural suspicion but also to devise ways to cope with institutional and structural aspects of both the formal legal system and society at large that are part of and have developed in response to the formalism that reformers want to decrease.[29]

It is this kind of serious reflection, well supported by the rest of his work, which makes Frank Upham's study so rewarding. It deserves the attention not only of specialists in comparative law and Japanese studies but also of all those who ponder the role of law in modern society—its ability to foster social change and resolve our contemporary dilemmas and the possibility of positive adjustments based on an understanding of the experiences of our fellow human beings.

28. *E.g.*, Kawashima, *Dispute Resolution in Contemporary Japan*, *supra* note 5.

29. F. UPHAM, *supra* note 3, at 220.