

## **LEGAL EDUCATION REFORM AND THE IDEA OF LAW**

### **INTERNATIONAL CONFERENCE ON LEGAL EDUCATION REFORM: REFLECTIONS AND PERSPECTIVES**

#### **GENERAL REMARKS**

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First and foremost, I wish to note that it is my great honor to be one of the organizers of this significant conference; also, it is such a pleasure for me to work with my friends from National Taiwan University College of Law, the University of Wisconsin Law School, and Hokkaido University School of Law, as well as with other guests from various parts of the world. In particular, I wish to express my appreciation, with the warmest friendship, to the NTU people led by Dean Chang-fa Lo, who arranged this conference in Taipei with such enthusiastic administrative efforts. This *International Conference on Legal Education Reform* is, I believe, significant in that it is one of the first endeavors by the distinguished scholars from East Asia, the United States, and Europe to examine the recent transformations of legal education in East Asia and to achieve a better perspective from which to assess and propose future developments.

#### **I. THE POSSIBILITIES OF LEGAL EDUCATION REFORM IN JAPAN**

As the entire world is changing very rapidly, particularly after the end of the last century (though the directions of the change are indeterminate and sometimes unstable), the roles of law and its guardians are becoming more important. Law and its guardians need to cope with complex worldwide problems in politics, economics, and culture. Legal education is also becoming more critical. What, how, and why to educate young people for the new role of law is now to be reflected upon, discussed, and possibly shared. I firmly believe our conference is a significant occasion for this exciting task.

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As you all know, a major legal reform is now underway in Japan, my home country, including legal education reform. The general reform is commonly considered as the third historic reform since the Meiji modernization in the late nineteenth century. In the course of this reform, the real establishment of the rule of law in Japan has been emphasized, and the objective of legal education reform has followed this agenda. Of course, the realization of the rule of law was an ideal for Japanese society since 1945, but the reasons for its current reemphasis show that Japan, like other parts of the world, is now deeply involved in a great social transition and must try to somehow make the ideal of the rule of law more concrete throughout all of society.

I think here we have to be careful in thinking about the real significance of the rule of law for today's Japan. Of course, the rule of law is an enduring idea of just public order for any society, as great heritage of modern civilization. Still, the real question to be considered is why Japan needs it now, after sixty years of democratic experience. We must be aware that the recent emphasis on the rule of law is taking place in the context of the so-called "structural reform" of Japanese society, and that this reform is promoted mostly by marketists, whether in business or in politics in Japan. I, myself, harbor certain suspicions about this trend, but I will not engage in the political issues here. It is, however, important to mention this to make clearer the background of the reform in Japan.<sup>1</sup>

I wish to address another question: how should we respond to this situation in terms of legal education? In addition, considering that political background, we can specify two alternatives: should we try to train skillful lawyers to deal with novel technical legal problems, or should we raise sensible and able lawyers with broader perspectives on various and complicated legal problems? The current climate in Japan is, it seems to me, heading towards the pursuit of the former perspective. However, I sense that the real question to be asked about the meaning of legal education reform is not simply how to produce practical lawyers efficiently but rather how to adapt ourselves to the changing social conditions with the wider knowledge and training of just law.

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<sup>1</sup> See Katsumi Yoshida, *Legal Education Reforms in Japan: Background, Rationale and the Goals to be Achieved*, 24 WIS. INT'L L.J. 209 (2006).

## II. THE HISTORICAL CONTEXT OF THE IDEA OF LAW IN JAPAN

I think the key to this question, from the perspective of a specialization in legal philosophy, lies not simply in how to educate law students; rather, it lies in how to understand the idea of law to be pursued by that education. A brief exploration of the idea of law is relevant here.

The modern development of the idea of law may be recapitulated as the pursuit and furtherance of *law as standard* against *law as command*. Indeed, there are several forms in law as standard: ancient custom, reason, sovereign parliamentary law, predictable court's law, evolving law, cluster of rules, or seamless web of principles and rules.<sup>2</sup> However, the common thread among these views is the appreciation of shared normative standards that can constrain the power relations between the governing and the governed. Since the contrasting view of law as command tends to underlie the arbitrary will of the governing body, law as standard views the fundamental task of law as to serve as the bulwark against it.

While this kind of development of the idea of law is found especially in the Anglo-Saxon context, the experience in East Asia has been quite different. Especially in Japan, law has been grasped with a sort of command view. Until the Meiji Restoration in the middle of the nineteenth century, law had been the supreme decrees from the authority, whether from the Emperor or from the Shogunate, though the power structure in society was decentralized to some extent. The transplant and adaptation of modern European law in the Meiji modernization was also conducted in the spirit of authoritarianism toward the realization of the strong state of the Japanese Empire. When the Japanese Empire collapsed in the middle of the twentieth century, Japan first encountered legal realism, which had flourished in the United States by that time. Though this was not the first time that Japanese legal thought had encountered the Anglo-Saxon kind of

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<sup>2</sup> Here I am talking about the historical lists of the conceptions of law in the Anglo-Saxon context since the 17th century. See generally, e.g., BRIAN Z. TAMANAH, ON THE RULE OF LAW (2004).

law, it now poured into Japan on both the practical and theoretical fronts.<sup>3</sup>

The aftermath of this regime change in law may be briefly stated to be the amalgamation of heterogeneous legal thoughts. As is often claimed in the context of Japanese culture in general, hybrid thought is also the case in law in Japan, featuring aspects of the extension of the German statist perspective of law and politics; the survival of the French civil law thinking since the establishment of the so-called Old Civil Code; the adaptation of the English parliamentary practice; the introduction of the American constitutionalism with the judicial review system after 1947; and, needless to say, the surviving groupistic social structure and customs in Japan. The complex balance and tension among these heterogeneous factors shaped the bizarre character of the idea of law in Japan, though at its core, the command view of law seems to be persistent.<sup>4</sup>

It may not be so difficult to claim that Japanese society has not yet attained the real idea of law, in the sense of law as standard, but it would be too simple a view. We are living in a society that has been transforming itself through various transplants of law from outside; we are living in a society that has preferred the flexible work of situational judgments; we are living in a society in which the rule of rationality was once usurped by State Shintoism; we are living in a society that tried to imitate celebrated American liberal democracy; and, further, it should be recalled, we are now living in a society in which postmodern frivolity and plurality are expanding at the bottom. All of this may mean that we are now in a chaotic situation even in regard the idea of law. Even if our legal system has been developing rapidly with various complexities in this age of globalization, the root of such a system may remain untouched: the system of positive laws has expanded to adapt itself to the wave of globalization, while the core of it remains intact.

Nonetheless, it is also evident that in this new century we need to pursue a more just system of law and politics in Japan,

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<sup>3</sup> See, for example, HIROSHI ODA, *JAPANESE LAW* 12-33 (2d ed. 1999) for a brief history of the law in Japan.

<sup>4</sup> See Ko Hasegawa, *The Structuration of Law and Its Working in the Japanese Legal System*, in *LA STRUCTURE DES SYSTÈMES JURIDIQUES: COLLECTION DES RAPPORTS* 319 (Jacque Vanderlinden et al. eds., 2003).

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and we need some adequate idea of law, if only because we cannot turn back to nor be satisfied with the rule of person or elites, or of some hyper-rational plans, or of frivolous relativism, or of rampant marketism. It is mainly due to, I believe, our awareness of humanity that has been raised by various democratic experiences since 1945. The efforts since then have not totally failed; yet they have not totally succeeded, either. I think that we are now at the critical stage at which a good part of our sixty years' experience may take root in our society.

Thus we should care about law, even if only partially and not totally, because we have to make our human sensibilities work in a proper political form in this new century. Only in so doing, I believe, we can have a clearer idea of legal education reform in Japan.

### **III. THE PLACE OF LEGAL EDUCATION IN JAPAN TODAY**

In this context, the traditional idea of law as command will generate some unfavorable effects: one, for the part of the governing, is that law tends to be what they want to advance; the other, for the part of the governed, is that law tends to be what they want to avert. In this double-faceted situation, law tends to be a bulk of formalistic maneuvers, though it, itself, is simultaneously expanding in complex ways. Thus, we must somehow change this pattern.

I think the idea of law needs, in our context, to solve the double task by constructing a public consciousness for the realization of genuinely democratic practices. Against the governing, the task of law has been the same in Western history: to hold the bulwark against the arbitrary decisions yielded by partiality. Even if the governing tends to perceive that the governed is unenlightened and demanding, law requires the governing to acknowledge the limits and the real objective of their powers in society. Against the governed, the task of law is also important in cautioning the partial awareness of the people. The basic unit of the Japanese society is often said to be a small group such as family, fellow businessmen, or a neighborhood. In a small group, it is not rules but affectionate fellow feeling that keeps their order, and members of the group are significant as individuals only

when placed in rank order in the group. If members cannot conform to the group, they are excluded from it or placed aside within it.<sup>5</sup> At play here, I think, is the awareness of normality/exclusion without any awareness of genuine individuality. Law must, then, cut into this state of normality/exclusion, even if in a limited public sphere of law and politics, and must tell the public that the respect and concern for the commonality/difference in individuality is the basis for a proper public order.

Another important point for law in this regard is the positive public role of its idea. We need the idea of law to further mutual deliberation among the people in society. It is not that we should simply accept the idea of democracy, particularly because democracy in our social setting tends to become, as it were, “oligarchic demagoguery,” as shown in the recent election experiences of 2003-2005.<sup>6</sup> It seems that, while authoritarian conditions persist in many aspects in our society, traditional societal conditions have also broken down, especially since the 1990s. In this regard, Japanese society has been losing its moral grip. With the collapse of the so-called “bubble period” in the late 1980s, we lost the significant societal objective; the recent situation may be characterized as a kind of moral corrosion. Real democracy in our context requires underlying conditions for its reflective directionality, and the central aspect may be provided by an adequate idea of law.

Furthermore, the idea of law regulates the handling of the expanding complexities of positive laws. As the complexities of positive laws grow, people tend to consider technical handling of various laws important in making them effective in society. However, this also provides a route to the bureaucratization of law in a positivist fashion. Here law is law, and we tend to have either the blind technical operation of explicit rules or the fear of no visible rules to make this operation perfect. This is the paradox of legalization. Yet, I believe that the sense of law is important, because, even if it may sound odd, it is only this sense that can provide us the proper significance of the expanding complexity of laws. We need the creation of a new ecology for law and

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<sup>5</sup> This is not only a perennial theme for the modernization in Japan but also, probably, one for other Asian societies, to the extent that they tend to be groupistic. *E.g.*, NANCY ROSS ROSENBERGER, *JAPANESE SENSE OF SELF* (1992).

<sup>6</sup> I am aware here appears my political inclination against the recent political trend in Japan, which may be controversial.

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politics in Japan; our legal education should be turned toward this project, simultaneous to the renewal of our ethical environment.<sup>7</sup>

#### **IV. ALIGNING LEGAL EDUCATION WITH THE IDEALS OF LEGAL REFORM**

To realize this ecology, the idea of law and the following idea of legal education must generally fight against three kinds of counter-forces today: the positivist expansion of technical legal knowledge; the postmodernist challenge to law's authority; and the relativist containment of the universal ambition of modern ideals in law and politics. In this regard, the idea of law must be, so to speak, abstractly regulative, flexibly constitutive, and humbly ambitious, though this is a difficult task. What I suggest here is that with various communicative channels in modern media, including this kind of sincere efforts by scholars in legal education, such conditions will change over the long term; the West has already spent about four hundreds years on such changes.<sup>8</sup> In particular, through a new attempt at adequate legal education in law schools and other relevant institutions, we will be able to produce better prepared human resources to lead a future change.

In this sense, legal education reform has to be considered a long-term strategy for a just society in Japan as well as in East Asia. The greater the richness in layers and dimensions of legal knowledge becomes, the more the directionality of the sense of law will be effective and stable.

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<sup>7</sup> On the significance of ethical environment, see, for example, SIMON BLACKBURN, *BEING GOOD: A SHORT INTRODUCTION TO ETHICS* 1 (2000).

<sup>8</sup> Here I have in mind the history of modern constitutionalism since the beginning of the 17th century. See, e.g., J. M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 203-454 (1992).

