

BOOK REVIEW

Yasaki, Mitsukuni (ed), *East and West. Legal Philosophies in Japan*. Annual Conference, Japanese Association for Legal and Social Philosophy, 13-15 November, 1986. Stuttgart: Franz Steiner verlag Wiesbaden GMBH, 1987 (Beiheft Nr. 30, *Archiv für Rechts- und Sozialphilosophie* (ARSP)).

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The papers collected in this book were initially given at various meetings of legal philosophers in Japan, most notably the annual conference of the Japanese Association for Legal and Social Philosophy held in November, 1986. The explicit intention is to "present a picture of contemporary legal philosophy in Japan to participants in the 13th IVR World Congress to be held in Kobe in August of 1987" (Foreword). All authors are ethnic Japanese.¹

Among the 21 essays included in this volume, 8 articles are in German, the remainder in English. *Nakamura Kouji's* article on 'The establishment of 'individual' in Japan' would have gained from greater care as far as the English translation is concerned; most other articles are written in a readable, at times even in an appealing style, and accompanied by copious scholarly annotations and bibliographic references. Despite the modest intentions of the editor this volume clearly deserves a wider audience than only legal philosophers. Particularly the first part, 'Legal Philosophy in Japan', which contains articles on the legal, cultural and historical background of the introduction of Western concepts of law in Japan, will be of interest to readers of the *Journal of Legal Pluralism*. The larger, second part is mainly concerned with topics commonly treated also by Western authors. It is striking that the authors represented in this second section refer, with very few exceptions, to

1. The volume contains hardly any biographical information about the contributors. In this review, family names precede the authors' given names.

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the body of sources and secondary literature well-known among 'Western' researchers.

The volume opens with a theoretical article by *Chiba Masaji* on 'The identity postulate of a legal culture' (pp. 7-13). Chiba argues that

two phases of legal pluralism in the contemporary world are of particular interest and importance because they have been left hidden or suppressed under the alleged universal theory of prevailing jurisprudence of Western origin. One is the legal pluralism mostly pursued by legal anthropologists: that seen in countries which are ruled by a state law but also include tribal, local or other minor laws. The other is the pluralistic structure of law throughout the world which is typically noted by legal comparatists. (p.12)

Such a 'revisionist' approach forms a stepping stone to articles that provide a succinct, yet highly informative survey of phenomena in Japanese legal culture that bear out the introductory statement: present day Japanese legal culture is in essence pluralistic. Perhaps not only its legal culture, but its culture in the more general sense as well. *Kobayashi Naoki* ('Rechtsbewusstsein und soziale Struktur in Japan. Eine Einführung in das japanische Rechtsdenken' ['Legal consciousness and social structure in Japan. An introduction to Japanese legal thinking']) focuses on the question of the role of the legal subject in a society which found and still finds it difficult to accept the idea of an 'autonomous individual'. He divides Japanese society into areas where 'modern' human relations dominate and those where traditional ethos remains very important (p.15). Kobayashi follows popular concepts which see Japan as a 'vertical society' made up of numerous groups that are ordered in pyramidal fashion, and he does not omit the over-used reference to the 'harmony-loving Japanese'. He points out that 'logical' Western and Japanese 'indigenous' notions are often applied selectively in a rational way to serve a rather pragmatic self-interest (p.20). Although traditional Japanese attachment to 'group identity' seems to stand in the way of modern concepts which demand the formation of an 'autonomous, free legal subject', Kobayashi sees a role for traditional ethos in overcoming the alienation of individuals in this technological and bureaucratic age.

Moriya Masamichi ('Disequilibrium dynamics and the law of modern society') moves the discussion from the level of 'law and society' to the relation between law and the economic system in Japan. Although the most influential approach is still dominated by "Marxists and

many of their sympathizers, including those who tried synthesis from Marxism and Max Weber's sociology" (p.23), Moriya advocates a highly interesting approach relatively new in Japan which leaves behind the axiom adhered to by both neo-classical and Marxist economists, namely the idea that market and price mechanisms ought to be able to achieve a 'natural balance'. Any disruption of the equilibrium requires the search for a remedy for perceived 'market failures'. Following Uzawa² and Iwai³, Moriya argues in favour of 'disequilibrium economics':

[The] proposition that individual 'rationality', in terms of utility, implies social 'rationality' has been the fundamental principle of the traditional economics. However, it is possible to prove that this principle, in fact, depends on a tacit assumption (really a fiction) that all the price-adjustments are decentralistically managed by an auctioneer in the market. If we instead construct a theoretical framework in which prices in the market are decentralistically decided by individual economic agents without such an auctioneer, the full development of individual rationality will in many cases result in a social irrationality. Further, it can be demonstrated by means of social situation called 'prisoners dilemma' in the game-theory that in order to secure social rationality to a certain degree, there must be some 'non-economic' factor such that it hinders the full development of individual rationality. This dilemma being well known, we shall omit explanation of what the dilemma itself is. (p.25)

Among the numerous non-economic factors are "institutional factors regulating movements in the labour market" well-known in traditional economics. Once it is accepted that the "monetary economy itself contains cumulative disequilibrium processes" it is possible to adopt quite a different approach. Rather than viewing such non-economic factors as 'disruptive' to market mechanisms, Moriya argues that

non-economic factors which include the labour law, the economic law, or the law in general ... should be recognized not as 'negative' but as 'positive' factors which exert their influence to the advantage of any stable economy (p.29).

2. H. Uzawa, *Reexamination of the Modern Economics*. Tokyo, Iwanami, 1977.

3. K. Iwai, *Disequilibrium Dynamics*. Yale University Press, 1981.

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It would thus be possible to "talk about both economic efficiency of law and fairness of economy equally". This is, of course, in essence, an important theoretical underpinning for the Japanese concept of a free-market economy which is clearly not identical with current popular ideas in Britain and the United States.

It should be stressed that both Kobayashi and Moriya show a marked (Japanese?) aversion to theoretical models that rely on 'simple, rational' argument and argue for an approach that takes into account the basic pluralism of all social, economic and legal phenomena. The next contribution, by *Nagao Ryuichi* ('The 'Japanese School' in the Edo Period: Kamo-no Mabuchi and Motoori Norinaga') is an additional warning against overemphasizing the 'rational' aspects of Japanese society. He sets out to prove that Japanese society and thinking are not simply dominated by 'rational' Confucian ethics (often adduced as an underlying factor for Japan's success), or Buddhist spiritual concepts:

But, just as there has been a wide-spread nostalgia for the pre-Christian and pre-Roman ancient Germanic world among the Germans, there has existed a nostalgia for the pre-Buddhist and pre-Confucian ancient Japanese world among the Japanese.
(p.30)

Nagao refers to the 18th century scholar Motoori Norinaga who said that we

must obey a divine dispensation irrespective of its moral quality.... This theory of unconditional obedience to the gods was transferred to the political sphere. Here his political theory turned from the idea of natural order ... to a distinctly positivist doctrine of law and politics, that is, of unconditional obedience to positive law and authority. He repeated his thesis in the following way: 'One must obey one's superiors even though they are evil.' (p. 37)

Nakamura Kouji ('The establishment of 'individual' in Japan'), however, ascribes the weakness of democracy as a value system to the lack of religious values among the Japanese as a people. *Nomura Yoshiaki* ('Some aspects of the use of commercial arbitration by Japanese corporations') discusses the often-quoted Japanese tendency to solve conflicts 'in harmony' and the supposed widespread reluctance to employ 'Western-style' arbitration as a means to settle commercial disputes. He shows convincingly that the choice between

one or the other method of settlement depends on its perceived usefulness:

Where a consultation or negotiation process fails to function, resort to arbitration becomes a reasonable choice for Japanese businessmen.... There is more business judgement involved here than *wa* ['harmony'] or *kokuminsei* ['national character'].... To put it in a broader perspective, what is at the root of this difference in practice is the Japanese businessmen's awareness that they should apply rules of behaviour which often deviate from their social norms. Therefore, they learn, often the hard way, that their belief and expectations toward *hanashiai* ['amicable consultation'] are not always shared in the international business world. (p.62-3)

Yasaki Mitsukuni ("The acceptance and application of Max Weber's ideas of law and legal thinking in Japan") returns to a more theoretical question and traces the "acceptance, interpretation and discussion of ... Max Weber" in Japan (p.66). Perhaps most valuable is his remark that Japanese society, "has not developed along the line of formal rationality or predictability which law and society in the modern West have developed" (p.75). Japan did in fact to a considerable degree realize many features of Western modern formal state law necessary to achieve predictability, such as "freedom of contract, freedom of property, individual freedom, and a free market economy". *Yasaki* remarks that people doing Japanese-style business appear to act "in a way understandable or expectable to another party," but that this is not the same type of Weberian predictability associated with formal rationality in the West (p.75).

Most contributors to the first part seem to agree that the Japanese absorption of Western law has been largely successful, and that Japanese use of Western institutions exhibits pragmatic, goal-oriented behaviour. On the other hand, the role of Western type 'rational organizations' in Japan seems to be limited to certain areas of social, economic and legal life.

The second part of this volume differs considerably in its approach from the first part. Were we not told that the authors are ethnic Japanese it would not always be apparent that these contributions were written by non-Western scholars. The footnotes attest to the thorough acquaintance of most authors with Western standard literature. The reviewer only regrets at times that most contributors do not stop to wonder whether the structure of their argument is wholly universal and thus equally valid in the Japanese context.

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Aoyama Haruki ('Lebenswelt und Recht' ['Social environment and law']) provides the theoretical introduction to the second part. He points out that

nowadays it is the task to find proof for doctrines of natural law and positivistic legal and moral sciences in everyday experiences, whereas before the phenomenology of law and ethics accepted the existence of the doctrine of natural law as an axiom, or strove to formalize natural law and connect it to a scientific framework. (p.81)

To Aoyama the objective world is "nothing but the intersubjective communality of work outlook" and "intersubjectivity is not social concurrence, but an opening up of potential alternatives which reveal that the world does not have to be the way it is, but might be different." (p.82)

A number of articles center on abstract themes in legal philosophy, such as *Hasegawa Ko's* article, 'Ronald Dworkin's theory and the possibility of interpretative game in law'; *Noguchi Hiroshi's* 'Die 'Natur der Sache' in der juristischen Argumentation' [The 'nature of things' in legal argument']; *Morisue Nobuyuki's* 'Rechtsperson und Staat in der modernen Zeit' ['Legal person and state in the modern period']; *Nishino Mototsugu's* 'Versuch zur Rekonstruktion der Rechtsontologie' ['The reconstruction of the ontology of law - an essay']; *Morimura Susumu's* 'Justifying contractual enforcement'; *Sato Setsuko's* 'On the concept of binding force'; *Takeshita Ken's* 'Von der normativen zur ontologischen Auffassung des Rechts' ['From normative to ontological concepts of law']; and *Yoshino Hajime's* 'Logical structure of law and the possibility of computer aided legal reasoning'.

Katsuragi Takao ('On the ethics of competition') discusses the link between the 'goodness of competition' and 'mutual tolerance and respect'. He thus deals with a topic that is of considerable interest not only to Japan with its ideal of 'controlled competition'. Unfortunately he does not ask the question whether the 'ethics of competition' operate at different levels in Japan and Western societies.

Several writers deal with questions that at first sight would seem to be mainly of interest to Western scholars, such as *Kobayashi Isao's* "Bonum' in Ockham: a general outlook," and *Tsunoda Takeshi's* 'Adam Smith's jurisprudence and Scottish legal tradition: concerning their ways of treating the Scottish and English law.'

Nawata Yoshihiko points out that Western scholarship on Weber has hardly dealt with the importance of the concept of 'appropriation' for the understanding of the systematic structure of Weber's legal thinking, and provides a revised treatment of a concept previously dealt with by another Japanese scholar, *Takeyoshi Kawashima* ('Max Weber's Theorie der 'Appropriation)').

This reviewer was particularly charmed by *Takahashi's* exposé on 'Das 'natürliche Recht' bei Aristoteles' ['Natural law in the work of Aristotle'] in which he pays attention to the "soft *lógos*", i.e. "*phrónesis*" on which Aristotle's doctrine of natural law depends. It is thus "basically not a system derived by syllogism from one or the other inflexible legal principle" (p.166). At a time when quite a few Western legal specialists are not able any more to read Aristotle's work in Greek it is comforting to see a Japanese scholar writing an article in which he presupposes knowledge of that language. It would be highly interesting to see such a scholar analyze terms such as *phrónesis* ('practical reasoning') with its 'suppression of egoistical interests' and *dikaion* with its 'norm that exists independent from practical application', and compare such Aristotelian concepts with possible parallels in the Japanese tradition. These days, the Roman or Greek traditions are not the exclusive property of a fictitious modern 'Western culture', any more than Japanese culture is the sole possession of present-day Japanese.

Taken together these papers provide a highly interesting collection of Japanese scholarship in the realm of legal philosophy. One can only hope that despite the undeniable difficulties of cross-cultural communication such volumes provide sufficient inspiration and incentive to engage in further reading of each other's work, and thus contribute to a growing conscience among scholars everywhere that scholarship has a truly universal character.