

# THE WORKS OF TAKEYOSHI KAWASHIMA

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Since the 1940s Takeyoshi Kawashima has been Japan's most distinguished legal sociologist. It is hardly an exaggeration to say that commenting on Kawashima's contributions to the sociology of law is almost equivalent to commenting on the sociology of law in Japan itself (1982–1986).<sup>1</sup> International readers have not fully appreciated his work for two reasons. First, few of his writings are in English and those pieces that are translated do not encompass his major contributions. Second, there are relatively few works published in English on the sociology of law in Japan.<sup>2</sup> Those studies that have appeared stress the uniqueness of Japanese legal culture. As a result, international readers have come to consider Kawashima's scholarship (while brilliant) irrelevant to theory building in the sociology of law.

Kawashima began his career just before World War II. Since then, it has evolved in several phases. Initially, he was inspired by the theory of living law (*das lebende Recht*) associated with Eugen Ehrlich. During the 1940s Kawashima clarified the basic ideologies and values expressed by state law, especially by modern civil law. His work was not sociological in a strict sense, but rather based on social philosophy, strongly influenced by Hegel and Marx. He dealt with the discrepancies between living law and state law from the perspective of modernization.<sup>3</sup> The most important of these early works is a lengthy book entitled, *A Theory of the Law of Ownership* (*Shoyuken Ho no Riron*, 7, 1949).<sup>4</sup>

Just before World War II, Kawashima's concern with living law prompted him to begin a long-term study of the attitudes of the Japanese people (Ishiki) toward law and the legal system. His studies of legal consciousness were shaped by the influence of German social science, especially Hegel's and Marx's terminology ("Ishiki" is the Japanese equivalent for "Bewusstsein"). For ex-

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<sup>1</sup> Hereinafter, when referring to a work appearing in Kawashima (1982–86), its English title (Japanese title, volume, and original publication date) will appear in the text.

<sup>2</sup> Kawashima himself wrote one of these works (see Kawashima, 1968).

<sup>3</sup> In terms of social anthropology, what is meant here concerns issues of cultural acculturation that Kawashima approached in terms of a time-lag model.

<sup>4</sup> The basic ideas in this book first appeared in "Economic Control Law and Civil Law" ("Keizai Tosei Ho to Minpo," 1, 1944). This article attempted to theorize on the relationship between modern civil law and modern civil society.

ample, Kawashima found that people did not comply with economic control laws, which were supposed to allocate scarce resources during the war. In an attempt to explain this failure of cooperation, he investigated legal ethos (the basic notions and ideas relating to law). He concluded that legal ethos depended on a spirit of autonomy, and that it was indispensable for effective working of the law (it was not positivistic or empirical activity, but rather social/philosophical work). At the same time, he found that the Japanese did not possess a spirit of autonomy and independence. Kawashima argued as well that significant discrepancies existed between legal ethos and the actual attitudes of Japanese people toward the law and the legal system. An important contribution during these early days was "Legal Ethos for Compliance with the Law" (Junpo Seishin 4, 1946). Kawashima argued that while "[legal] right" as a social frame of reference was an indispensable element for modern civil society, the Japanese people lacked such a concept.

After the 1950s he began to study the characteristics related to dispute resolution in Japan. At the same time, he tried to purge Hegel's and Marx's coloring from the concept of "[Ho] Ishiki" (legal consciousness) by replacing it with the functional equivalent of "attitudes [toward the law]" influenced by social psychology. [Ho] Ishiki, which had been regarded as a dependent variable determined by the economic structure of society, became an independent variable that was supposed to explain how people resolved disputes (see Rokumoto, 1983: 18). Eventually, he concluded that because the Japanese people lacked the notion of right, they seldom resorted to the courts to resolve their disputes.

Kawashima's most famous and representative work is *Attitudes of Japanese People toward the Law and the Legal System (Nihonjin no Ho Ishiki, 4, 1967)*. Its influence on the later study of sociology of law in Japan was decisive. This book deals with Japanese attitudes toward "right" and "law" in general, and the behavior patterns of Japanese people when they become involved in legal disputes.<sup>5</sup> To say that all subsequent scholarship dealing with Japanese attitudes toward law and the legal system have had to take into account Kawashima's hypothesis is not an overstatement.

The basic attitudes toward [legal] right, that is, the notion of right as a social frame of reference, is a key concept in Kawashima's work. A claim to legal rights is theoretically integrated into tolerance of others' exercise of legal rights. In addition, attitudes toward rights in civil law and the constitution are also theoretically integrated. Therefore, he has the advantage of not dealing with attitudes toward any specific field of law individu-

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<sup>5</sup> One chapter of this book deals with Japanese attitudes toward contracts (Kawashima, 1974).

ally, but instead treats attitudes toward [legal] rights generally (see Rokumoto, 1983: 17). However, Kawashima and Japanese legal scholars in general overemphasize the normative aspect of these attitudes, and neglect the instrumental exercise of one's own legal right. This is because they probably have been too strongly influenced by Ihering, a nineteenth century German legal scholar (1915).

Kawashima has also imbibed the stream of American social science literature that has flooded Japan.<sup>6</sup> For example, "Status of Human Beings in the Social Sciences" (*Shakaikagaku ni okeru Ningen no Chii*, 2, 1956) reflects a strong American influence. Two other works were also important. "Nature of 'Ought' of Legal Norms in Terms of Empirical Science—for the Foundation of Sociology of Law" (*Hokihan no Toisei no Keikenkagakuteki Imi—Hoshakaigaku no Kisozuke no tameni*, 2, 1961) translates the normative character of law into the terminology of empirical science, and it shares a common concern with Scandinavian legal realists. In *Sociology of Law: First Volume (Hoshakaigaku Jo*, 2, 1958), Kawashima aims at general theory. From the sociological perspective, he utilizes social control as a key concept and, from the psychological perspective, he investigates how societal members comply with law.

Subsequently, Kawashima investigated two dimensions of the legal process as aspects of social control through law. One dimension was the control of the behavior of societal members through judicial decisions; the other was the process of social control of judicial decisions through law. Kawashima focused on the latter, relying on theories of social control developed by LaPiere and Parsons and on theories of language, symbols, and communication from scientific philosophy. Around 1960, Kawashima established a new research group. He and his associates termed their activities "empirical jurisprudence" (*Keiken Hogaku*). Their efforts crystallized in *Study on Empirical Jurisprudence* (1965) a work strongly influenced by logical positivism.

During the 1970s, Kawashima moved in still another direction, turning his attention to the theory of law and disputes in a comprehensive series on the sociology of law (1972-73).<sup>7</sup> Two of the most important works included in the series are "Conceptualizing Law by Sociological Theory—Focusing on Social Control through Law" (*Ho no Shakaigaku Riron no Kisozuke—Hoteki Shakai Tosei o Chushin toshite*, 2, 1972), and "Disputes and their Management" (*Arasoi to sono Shori*," 3, 1972; original title "Dispute Reso-

<sup>6</sup> Kawashima wrote in his bibliographical introduction in volume 2 that when he visited universities in the United States in the late 1950s, most scholars were negative toward the sociology of law and only Hans H. Gerth advocated its importance.

<sup>7</sup> Kawashima (1975) is a work written in English aiming at a general theory of law and disputes.

lution and Legal Control—Dispute Model in Legal Control” (Funso Kaiketsu to Hoteki Seigyō no Funso Moderu). On the one hand, he approaches law in terms of social control, which is not only based on Parsons and LaPiere, but also on the field of engineering of control. On the other hand, he gives close attention to dispute management. He conceptualizes law as indispensably connected with both of these concepts.

Sociology of law in Japan has developed from the study of civil law. Kawashima has engaged in the study of sociology of law, published several prominent works, and, at the same time, has contributed many excellent books and monographs on the doctrinal study of civil law. His concern with the sociology of law has always been deeply connected with his belief that law is a technique that relies on symbols to control the process of judicial decision.

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