

Foreword

This issue consists of four invited papers and four submitted papers. I would like to write a few words as a reader, rather than as an editor. While my reading may have many misunderstandings, this note will hopefully convey the significance of those splendid papers.

The first invited paper is Gunther Teubner's "Law and Social Theory: Three Problems." Teubner is one of the giants in the socio-legal community in the world. We are honoured to have his paper at the top of this issue. Using German jurisprudence as the focus, he explores the proper relationship between law and social theory. Total acceptance of a single social theory produced disasters. The worst was the racial theory of National Socialism. Because of this experience, postwar jurisprudence in the West Germany went on to deliberately narrow its focus to mere doctrine. Teubner believes that there is an alternative. That is called a "distanced approach." The post-modern world cannot be explained by a single social theory: multiple social theories co-exist as valid theories for respective part-areas. The law should "carefully examine the claims of all theories in order to do justice to the plurality of social rationalities" in the process of selective acceptance. This is the "transversality" of the law. However, "any authentic transfer of knowledge from social theory into the law is an impossibility ... because of the unyielding autonomy of the legal system." How can the law have the "responsiveness" to the external social phenomena? Legal doctrine treats social theories as external "challenges," and "responds to them with autonomous formation of norms." Then, where can the law obtain normative criteria? The law has its own "self-normativity" formed in its internal process that functions as self-reproduction of normative standards. However, social practices have their own "self-normativity" that generates normative orientations, and the law can have recourse to them. Teubner tells us how his thesis can be applied to concrete cases by using the "publication bias" where only positive research results are published in violation of the fundamental right of patients to health and by indicating what socially adequate development of the law will arise in this "distanced approach."

Asian countries have laws and legal doctrines. Any legal theory may not ignore them. However, testing the applicability of a legal theory like Teubner's that is developed in a different context is incumbent on Asian scholars or specialists in Asian law. The best way to show the relevance of Asia to a legal theory developed in a different context is to show the result of its application to Asia.¹ Such work will contribute to the refinement of the given theory.

On the other hand, empirical scholars may be tempted to examine the process that works under the veil of normative autonomy of the law. Who will produce specific normative constructions through what procedures under what influences? I believe these are legitimate research questions.

1. I wrote that "We need to work harder to present our works in such a way that will make visible the relevance of our works to outside scholars" in Miyazawa (2013a), p.125.

The second invited paper is David Nelken's "Thinking about Legal Cultures." Another giant who kindly accepted our invitation, Nelken reviews a variety of problems concerning "legal culture," which is certainly one of the most frequently used concepts in socio-legal studies. The main body of his review is divided into five parts under the rubrics of "The Meaning of Legal Culture," "Debating Legal Culture," "The Units of Legal Culture," "Explaining Legal Culture," and "Coherence and Change." The part on "Debating Legal Culture" is further divided into debates over "whether we really need the term," "how to make the term serviceable (given its various meanings)," and "where (and how) we should look for legal culture." This paper should be a required reading for any socio-legal scholar who uses the concept of "legal culture" in order to be aware of methodological issues entailed in one's own scientific endeavour.²

Nelken states that "[t]o judge by the sample of papers published in the first issue of this journal a clearer focus on the relationship between law and culture could represent a valuable route to finding a common language of understanding and evaluating differences in patterns of legally oriented paper," and discusses all the papers published in the first journal of this issue. I once wrote that "we should not assume that scholars outside our own group will know our works; we need to work harder to let them know."³ He is an exception. We should be grateful to him for his close reading and should work harder to present our work in such a way that will attract attention from scholars like him. In the latter regard, Nelken's following statement is instructive:

The study of gender structure and lawyer stratification in Japan by Mayumi Nakamura⁴ applies the normal socio-legal paradigm that would be used in the USA or elsewhere, and it is this strategy that allows it to show the specificities in the Japanese situation.⁵

The third invited paper is Chulwoo Lee's "Hegemony, Contestation, and Empowerment: The Politics of Law and Society Studies in South Korea." This is a tour de force that traces the development of socio-legal studies in South Korea from the pre-World War II era under Japanese rule, up to the present when some socio-legal scholars occupy policy-making positions in the government.⁶ Lee presents activities of various scholars and groups in the broader context of the rapidly changing political situation in South Korea. His description of the tension between being "cause scholars" and being scientific researchers is particularly gripping. It may be a good idea to commission a paper like this about socio-legal studies in other Asian countries.⁷

2. The best-known scholar who applied a concept closest to "legal culture" to Japan is Takeyoshi Kawashima. I presented his own explication of his concept of "legal consciousness" in terms of "social attitude" in social psychology in Miyazawa (1987), p. 223. Kawashima emphasized the usefulness of "legal consciousness" in providing explanations of individual law-related behaviour, at the closest, motivational level. In such a social psychological approach, the "legal culture" of the given group is the law-related "social attitude" held by a majority of its members. I argued that such a social psychological approach will make measurement of "legal culture" possible and will allow us to use "legal culture" either as an independent variable (cause) or dependent variable (result) while avoiding tautology. More recently, I discussed the instrumental use of cultural materials in the struggle over legal change in Miyazawa (2006).

3. Miyazawa, *supra* note 1.

4. Nakamura (2014).

5. I wrote that we should "present works in terms of concepts and theories which are not bound by national or regional boundaries, so that potential collaborators outside our group will understand the relevance of our works to theirs" in Miyazawa, *supra* note 1, p. 137.

6. An earlier account of the socio-legal studies in South Korea is Yang (1989). Yang focused mainly on the work of Pyong-Choon Hahm in the 1980s. Lee tells us how the socio-legal studies in South Korea have changed in the quarter-century since Yang's paper.

7. On China, see Ji (1989). Of course, the Chinese socio-legal studies have developed dramatically in the quarter-century since Ji's paper.

For a Japanese scholar like me, his detailed description of the pre-World War II situation is revealing. For instance, most contemporary Japanese scholars probably do not know the militarism of Tomo-o Otaka and the two factions of Marxist scholars. Regarding the contemporary situation, I notice a significant difference between “cause scholars” in South Korean and those in Japan. While it can cause the tension mentioned above, “cause scholars” in South Korea can have an opportunity to participate in the policy-making process for legal reform because of the change in the government. There has been no such opportunity for “cause scholars” like me in Japan under the virtually uninterrupted control of the government by a conservative party. We have to find ways to influence from outside the government.

The fourth invited paper is Weidong Ji’s “The Rule of Law in a Chinese Way: Social Diversification and Reconstructing the System of Authority.” This is an impassioned presentation of “the basic route map for restructuring power and authority for contemporary China, with operations pointing towards one goal: a rule of law democracy.” Ji mentions that the Report of the 18th CPC (Communist Party of China) National Congress emphasized “the rule of law thinking” and “the rule of law style” and states that “China has seemingly reached a fundamental consensus over ‘rule of law democracy,’ where the remaining issue is how to put into practice the plan from the rule of law to democracy.” He argues that judicial reform, including the introduction of judicial review in the future, should be carried out in a top-down manner. On the other hand, in order to clean up local governments’ debts, mechanisms of “budget review,” “accountability review,” and “budget parliamentarism” should be introduced in a bottom-up manner from the local level. Such reforms are expected to motivate local governments to compete for the rule of law.

In conclusion, Ji states that:

In short, I believe that China’s political reform should start from the rule of law, while judicial reform is the most significant entry point for implementing the way of the rule of law. Where judicial reform comes into conflict with the existing power structure, there is a need to implement a bottom-up fiscal democratization, thereby budget parliamentarism constitutes another most significant entry point for implementing the rule of law. These two measures are complementary, capable of accelerating the transitioning process in China.

His argument that the bottom-up budgetary reform will help the top-down judicial reform seems to be unique to me. Every reader with expertise in China is invited to examine this important paper.⁸

Appropriately dovetailing Ji’s paper on the rule of law is the first submitted paper by Gangdong Xu, “Is China an Anomaly for the ‘Law Matters’ Hypothesis?” Many scholars argue that East Asian countries, particularly China, have achieved an economic development in spite of their weak legal systems and, hence, law does not matter for economic development. This paper challenges such a view and argues that “East Asian states could implement a unique developmental strategy: distorting relative prices so that more economic resources can be directed to capital accumulation, which, in turn, paves way for faster economic growth.” Xu presents a detailed description of the weakness of the Chinese legal and judicial system and Chinese government’s intentional use of such laws to distort prices of such factors as land, capital, and labour, to subsidize production, to encourage capital accumulation, and to depress consumer spending. This means that law has mattered for

8. Also see Ji (2013).

economic development in China in its own way, and this conclusion requires a more complicated theory about the relationship between law and economy.

The problem is that “China’s investment-driven growth has resulted in ... environmental degradation, slower job creation, urban–rural inequality, and production capacity over-expansion.” Xu criticizes that “the majority of the policy measures implemented thus far have not been directed towards laws and regulations that cause serious factor market distortions.” However, “China’s gradualist reform strategy allows the ruling elite to protect its rents in vital sectors,” and “any further reform may ... risk resistance or sabotage by the ruling elite.” Xu concludes, therefore, that “political reform ... is a task that the Party can no longer overlook.” Then, the fundamental nature of the roadblock to the reform appears to be the same as that in Ji’s paper.

The second submitted paper is Xiong Ha’s “Two Sides of Court Mediation in Today’s Southwest Grassroots China: An Empirical Study in T Court, Yunnan Province.” Ha first describes how local judges are embedded in *guanxi* of local political structure through such a seemingly benign event of having lunch together with local officials. This relationship can undermine judicial independence not in the sense of intervention by the party or the central government, but in the sense of more daily interactions with local officials. Ha, then, presents two cases. In the first case, the parties were a Muslim sister and a brother. The People’s Mediation Committee failed to solve the dispute, one party sued the other at the court, the judge failed to solve the dispute by mediation, and, finally, the judge decided the case by writing a judgment that relied on knowledge and suggestions of local leaders. In the second case, three parties were involved, two parties sued a same party, the two cases were handled by court mediation, and one of the plaintiffs received a favourable resolution.

Ha recognizes the positive function of court mediation in providing a pragmatic resolution in a highly heterogeneous context where diverse social values still exist. However, “China’s current court mediation policy is designed and promoted for political ends, and ... it is a quick response to circumstances of social unrest,” while “this institutional setting lacks systematic design and seems too eager for quick success and instant benefits.” Therefore, Ha argues that “China’s court mediation law is to ensure that the ill-suited cases should not be mediated in the court.”

Unlike court mediation in Japan, where two lay commissioners play a more important role than the presiding judge, court mediation in China is conducted only by the judge. Therefore, court mediation in China looks similar to a settlement induced by the judge in the course of litigation in Japan. I would like to know whether the transfer of the case from adjudication to mediation requires consent of both parties or not. It is also interesting that court mediation in China has been introduced for political ends to handle social unrest outside the formal litigation, because court mediation in Japan was also introduced in the 1920s to discourage litigation by tenants against landlords and by employees against employers. The government justified it in terms of Japanese culture. We should probably pay more attention to the political implication of the seemingly universal expansion of ADR (alternative dispute resolution) programmes.

The third submitted paper is Kevin Kwok-Yin Cheng’s “The Practice and Justification of Plea Bargaining by Hong Kong Criminal Defence Lawyers.” Unlike in other common-law jurisdictions, the existence of plea bargaining is officially denied in Hong Kong, while it is certainly a prevalent practice behind the scenes. Cheng observed courtroom proceedings and

conducted semi-structured interviews with criminal defence lawyers. The formal way of initiating the bargaining by the defence with a letter to the Department of Justice seems to be unique. How can you deny the existence of plea bargaining if it is initiated so formally? However, types of plea bargaining, justifications for plea bargaining by defence lawyers, explanation in terms of the “courtroom workgroup” model, and concerns over the risk of leading innocent defendants to plead guilty are mostly similar to those found in other jurisdictions. Still this paper is valuable for presenting reliable data. Every reader will agree with Cheng’s statement that “it is important for plea bargaining to be openly debated and discussed.” A comparative question from a Japanese perspective may be whether plea bargaining can exist in Japan where the prosecutors and defence lawyers do not belong to the same organization and their relationship is so antagonistic that they do not seem to form a “courtroom workgroup.” But this is a question that Japanese scholars should explore.

The fourth and final submitted paper is “The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development” by Richard Mitchell, Petra Mahy, and Peter Gahan. This is a comprehensive literature review of the entire history of labour law in India. Since Japan is in the middle of neoliberal deregulation of labour, the part on the recent literature that claims the causal relationship between allegedly too strong labour protection and slow economic development is particularly interesting to me.

In conclusion, the authors state that “Indian law is not effectively ‘protective’ of Indian labour,” while “Indian labour law does not appear to have been very successful in engineering industrial peace.” Any research on any topic requires a careful examination of the existing literature. In this sense, the authors are doing a great service to readers with interest in Indian labour law or comparative labour law. Furthermore, the authors suggest a new approach in the following statement:

Where formal or conventional ideas of labour law are ineffective or irrelevant, something else is relevant to labour’s condition. In India that includes the extensive influence of custom, caste, religion, and class in determining the rights of labour and the protections extended to it. This suggests that a new approach is warranted.

This is certainly a socio-legal approach. We may expect to see an empirical paper by the authors in the near future.

Finally, I would like to say a few words to Japanese colleagues, since Japan is conspicuously missing in this issue. Is that because Japan has nothing worth socio-legal analysis? I do not think so. For instance, 13 years have passed since the beginning of justice system reform.⁹ Some reforms seem to be stabilizing, while other reforms are being downgraded, and many areas are under review. This situation is providing a fertile soil for socio-legal examination. A more pressing issue is the legal aftermath of the Great East Japan Earthquake in March 2011, particularly that of the Fukushima Daiichi Nuclear Power Station disaster. Have law and lawyers provided adequate legal remedies to disaster victims? If the answer is negative, what new laws, policies, and dispute resolution mechanisms have been introduced? How is the legal profession coping with this situation? I know that several groups of scholars have been conducting research on this and related issues.¹⁰ Furthermore, generally speaking, many papers have been presented at annual meetings of the Japanese Association of Sociology of Law, the

9. For overviews of the justice system reform in Japan since 2011, see Miyazawa (2007; 2013b).

10. For early examples, see Osaka (2012) and Feldman (2013).

Law and Society Association, and the Research Committee on Sociology of Law. I would like to strongly encourage Japanese colleagues to submit their papers.

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