LAW AND SOCIAL CHANGE IN POSTWAR JAPAN

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To my parents

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ONE

Models of Law and Social Change

THIS BOOK is about law and social change in contemporary Japan. It examines the way in which elites use legal rules and institutions to manage and direct conflict and control change at a social level. Given the common view of Japan as having little conflict and less law, this topic will strike some as unusual. In most accounts of postwar Japan, social life is portrayed as virtually conflict-free, the result of a society where the Confucian ideals of social harmony and antipathy toward law have been internalized by a loyal and cooperative population. In this view fundamental schisms in Japanese society are rare, the occasional individual disputes are handled quickly and effectively by traditional means such as mediation or conciliation, and lawyers and litigation are eschewed as socially disruptive.[1]

With this view of society prevailing, it is not surprising that observers of Japanese law have traditionally been concerned primarily with demonstrating and explaining its insignificance. When Japanese law has been dealt with at all, the focus has been on the minimal role that it plays in ordinary dispute resolution—on the low rate of litigation, the small number of lawyers, and the prevalence of mediation and conciliation. To explain these phenomena, most accounts have relied on cultural characteristics: a low legal consciousness and strong traditional values that predispose the Japanese to compromise. At their most extreme such accounts resort to mystical abstractions, such as "the gentle aesthetic of the Japanese mind," which their authors claim make the cold rationalism of litigation inappropriate in Japanese society.[2]

Recent scholarship, however, has attacked this description of the Japanese legal landscape. Legal scholars have argued that the definition used in determining the number of Japanese lawyers excludes large numbers of professionals who do what would be considered legal work elsewhere, and that the supposedly low litigation rate is actually within the normal range for industrialized democracies. Others have directly challenged the cultural approach and have instead attributed any relative Japanese disinclination to litigate to deliberately created barriers that render litigation less cost-effective than mediation or conciliation. They maintain that much that is considered traditional in Japanese legal phenomena is in fact a postwar creation, pointing out, *inter alia*, that litigation rates were higher in prewar than in postwar Japan. These scholars dismiss the cultural explanation as a politically convenient myth used by Japanese elites to legitimate the suppression of conflict.[3]

This critique has been enormously important in giving us institutional and political alternatives to the cultural explanation of Japanese legal phenomena. By freeing us from the relative immutability of culture, it has enabled us not only to explain more fully why certain phenomena exist but also to question whether law in Japan is in fact as irrelevant as conventional assumptions would have us believe. Emerging alongside this legal scholarship is a growing body of literature on Japanese social conflict that has revealed Japanese society to be much more complicated and contentious than the popular perception of harmony and consensus would imply. Many of these works give a good deal of attention to the role of law in particular instances of social and political conflict, but few have focused on the general role of law in social conflict or made an explicit argument for greater attention to law in the ordinary study of Japanese society or politics across a range of substantive areas.[4] It is the primary purpose of this book to build on both these bodies of scholarship to demonstrate not only that the assumption of law's insignificance is fundamentally incorrect but also that any description of Japanese society, particularly one that attempts to explain the process of social change within Japan, is incomplete without an account of how legal rules and institutions influence the course of conflict and the direction of social change.

To make this argument it is unnecessary to choose between the cultural and institutional theories of Japanese dispute resolution or to analyze the motivation of ordinary Japanese involved in individual instances of conflict. Unlike most other works on Japanese law, this

book is not primarily concerned with individual dispute resolution. Instead, it focuses on how legal rules and institutions are manipulated to create and maintain a framework within which social conflict and change occur in Japan. The social conflict examined does not involve the everyday disputes of landlord and tenant, creditor and debtor, or husband and wife; rather, it is conflict among organized groups of people with inconsistent interests: pollution victims as a group against polluting firms, minorities demanding social equality against the majority, women workers protesting discriminatory employment practices, and one industrial sector against another in the formation of national economic policy.

These are examples of conflict that results from conscious efforts to achieve group goals and that often demands significant change in the social order. The line between individual, diffused conflict and organized social movements is not impermeable: the former may develop into the latter; the latter may disintegrate into the former. Indeed, a clear conceptual demarcation between the two may not be possible. But there is a qualitative difference between a dispute between two neighbors over one's late-night piano playing and a dispute involving several hundred area residents organized to oppose the construction of a waste incinerator in their neighborhood. The difference is not only one of relative resources but of social importance and consequence as well. The pollution dispute has a greater chance of becoming a broad movement with implications beyond the particular dispute. It is more immediately threatening to political and social harmony, partly because it already involves more people and partly because it has the potential of challenging the prevailing social norms and order on a general rather than a particular level and in an organized rather than an ad hoc manner. It is the description and analysis of such conflict that form the bulk of this book, and it is the role of law in directing and managing the accompanying pressures for change that is its analytical focus.

Whether a series of discrete grievances coalesces into a broad social movement (or an established movement fragments into myriad individual disputes) will depend ultimately on the existence of political allies, the depth of commitment and political resources of the disputants, and the normative appeal of the underlying issues.[5] Such outcomes are, in other words, largely determined by politics, not legal doctrines or institutions. But the latter can play a substantial role in influencing the manner in which individual grievances develop into

social conflict and emerge in the political arena. Within a given society, it is the legal system that determines what forums are available to disputants and what forms of conflict are appropriate. Form and forum in turn will affect the identity and number of potential political allies, the mode of internal organization within groups, the chance of alliances among groups, and the way in which the parties' divergent normative positions are presented to each other and to the public. By influencing these variables of social conflict, law can influence the shape and direction of social change. Although politics may ultimately be the controlling factor, formal legal rules and institutions are not irrelevant, even in Japan.

To investigate how law affects the course of social conflict and change in Japan, this book examines four case studies: the evolution of the antipollution movement and the development of government pollution control policy; the struggle by an outcaste group to overcome and eliminate social discrimination; the elimination of sex discrimination in working conditions, wages, and personnel practices; and the formation and implementation of economic policy by the Ministry of International Trade and Industry. These areas were chosen because, to varying degrees, they are areas of conflict and change in all industrialized democracies and thus provide a basis for comparative analysis.

The presentation and analysis of the case studies focus on the legal framework within which social conflict develops and evolves. I shall examine, therefore, not only whether the aggrieved parties chose litigation, mediation, or violent self-help but also what their options were and how those options were broadened or narrowed by legal doctrine or government policy. In analyzing the government's responses to the appearance of social conflict, I shall focus not only on its response to the substantive grievances and the persons who articulated them but also on its response to the tactics used. Throughout I shall be looking at the social role of the courts and legal doctrine not only when the former become the vehicle for protest, but also when the latter ostensibly precludes any recourse to the courts. In the first three case studies, innovative and independent avenues of social protest were developed, and I shall look closely at how the government has attempted to close these avenues by manipulating their legal environment so that subsequent groups and individuals will find them unavailable or unnecessary for the effective redress of their grievances.

The first case is the Japanese experience with industrial pollution from the 1950s to the 1980s. It is well known, there is a wealth of

material available, both factual and interpretative. The tactics chosen by the pollution victims include not only the expected mediation but also both violent confrontation and litigation, two forms of protest that are much more significant in Japan than most Westerners believe and that figure prominently in the other case studies as well. But its status as a completed event makes the pollution experience particularly valuable because it can serve both as a model against which we can measure the other three cases and as a prologue because, although the litigation's direct long-term influence on environmental policy appears minimal, a political event of the magnitude of Japan's antipollution struggle inevitably changes the political and social context within which it occurs. It was a warning to the government that change was occurring, and it is probably not coincidental that the late sixties and seventies also saw the appearance of social conflict in many other areas, including minority and women's rights, the independence of local government, and even industrial policy. Although none of these areas has threatened the social fabric or the Liberal Democratic Party's political control to the extent that the antipollution movement did, they do provide additional opportunities to analyze the role of law in social change in Japan.

Three subsequent areas of inquiry have been chosen. Two concern the management of ongoing social conflict: the Burakumin liberation movement and the struggle of women against employment discrimination. The last area, the creation and implementation of industrial policy, concerns the prevention of conflict by the manipulation of administrative procedures and legal doctrines and the management of interest-group formation. The first two were chosen not only for their intrinsic interest, comparative importance, and availability of materials but also for the contrasting tactics of the groups involved, particularly their attitudes toward and use of litigation. The Burakumin, ethnic Japanese who are the descendants of Tokugawa Period (1603–1868) outcastes, adamantly reject the formality of the judicial process. Instead they use a tactic called "denunciation" (*kyūdan*), which draws on the tradition of symbolic violent protest that also underlay the confrontational tactics of the pollution victims. Japanese women, on the other hand, have pursued a litigation campaign reminiscent of the civil rights and environment struggles in the United States, using the courts to press for basic social reforms not easily attained solely through political means. The two different movements provide complementary views of the role of the legal system in ongoing social change in Japan

in terms of both the effectiveness of the different tactics and the government's and the judiciary's reaction to them. Their study can help us learn more about the use of traditional versus liberal legalistic modes of protest and specifically about the former's continued viability in the 1980s for achieving nontraditional goals such as equality of opportunity and treatment.

The fourth case study, administrative practice in the context of industrial policy, approaches the interaction of law and social change from a different perspective. Rather than analyzing how the legal system is involved in ongoing conflict, a study of industrial policy can show us how the effective preclusion of litigation by restrictive legal doctrines can hinder the emergence of conflict by helping maintain an informal relationship between the government and business interests, by limiting and controlling access to the process of policymaking, and by discouraging the formation of interest groups that might disrupt the process. My focus will be on the legal nature of the making and implementing of government policy, specifically the constant consultation with affected industry representatives, and the legal doctrines governing judicial review of administrative action.

The selection of industrial policy as the fourth case study may at first appear anomalous. Not only is overt conflict almost totally absent, but industrial policy covers a different set of issues. The first three phenomena have to do with disadvantaged groups struggling for either material existence or legal rights against entrenched, powerful groups with totally different backgrounds and interests. Industrial policy, on the other hand, directly involves only a small number of businessmen and bureaucrats, whose interests are often complementary and whose backgrounds are substantially similar. But if we look beyond the immediate parties to the industrial policy process and ask who might become involved if the legal rules governing participation were changed, we can surmise that the entry of new groups, including environmentalists and consumer advocates, would quickly transform the current seemingly smooth process into one with abundant overt conflict. The legal exclusion of such groups is part of the government's strategy for maintaining control over the issues in the industrial policy debate and parallels the analogous development of legal rules and institutions to hinder the further emergence of independent players in the antipollution and antidiscrimination movements as well.

Two Western Models

The constant theme throughout these four case studies is the role of law in the government's struggle to control the process of social conflict and the nature and direction of social change. To find and keep this thread through the mass of detail in the case studies that follow, it will be helpful to have in mind two models of the role that law might play in the process of social change. Although both combine elements of the normative and the descriptive, neither represents a legal system that exists, has ever existed, or ever will exist in any society. They are introduced here neither as alternative visions of the proper role of law in social conflict and change nor as descriptions of other legal systems with which Japan can be compared; their role is solely to act as intellectual reference points against which the Japanese phenomena can be evaluated.[6]

The first model emphasizes the role of rules. It hypothesizes a legal system where legal professionals use specialized techniques to find and apply unambiguous rules to clear fact situations independent of external influence. Judicial decisions are reached through specialized modes of legal reasoning proceeding from established rules or principles uniformly applied to all cases. Under the rule-centered model there is a clear differentiation of law from other sources of normative learning, and law eventually supersedes all other state-sponsored forms of conflict resolution. Laws are obeyed largely because they are enacted in a procedurally correct manner, are rationally applied, and are so perceived by the public.[7]

Individuals in this imaginary world are willing to submit to the legal process because they believe in the desirability of formal procedures guaranteeing that universal rules will be followed in the official resolution of all disputes. Neither the government nor the society, in the form of social customs or mores, has the power to intervene in the uniform application of universal norms by the legal system. Since obedience is to the impersonal order of law rather than to the particular loyalties of social life, informal or nonlegal control of social behavior is difficult in those spheres of life that the law purports to control. Even in those spheres that law leaves untouched, informal social controls are limited by the legal rules controlling the process of conflict resolution, so that even outside its formal purview a rule-centered legal system weakens if not displaces other means of social control.

This model has profound implications for the independent existence of social values that have not been enacted as formal legal norms. The conditions of rule-centered law—the universal rules uniformly applied, the specialized and independent corps of professionals, and the appearance of rigor and inevitability of its law-finding technique—make it the only legitimate mode of authoritative dispute resolution. Indeed, dispute resolution is not only the courts' monopoly but also their paramount role in society, and litigation under a rule-centered regime can be termed dispute-resolution litigation. Because the courts apply norms created independently of the judges and parties in the immediate dispute and because the formality and procedure of litigation prevent the judge from distorting the norms or their application, the dispute is resolved in accord with universal norms. And because the norms are knowable in advance and the process of judicial decision making is consistent, the parties to a dispute or potential dispute can accurately predict its results. Legal predictability in turn makes economic planning possible and has frequently been associated with the rise of capitalism. But the ability to predict with confidence when and how state authority can be called upon to intervene coercively in private affairs, an ability that the model assumes for all citizens, is also an extraordinarily destabilizing weapon in ordinary social disputes except in those rare situations where the norms of acceptable social behavior correspond exactly with the formal legal rules.

The social role of the legal system under such conditions is both revolutionary and limited. It is revolutionary in the sense that it removes the state and society from the dispute process by creating a private world where individuals can act contrary to all social and political values not formalized in legal rules. Under other forms of political domination, the state can intervene in individual disputes to fashion ad hoc resolutions appropriate to its own social and political agenda at that time and place. Even if the state should choose not to intervene, the disputing parties and the third-party decision maker are subject to the informal pressures of the society of which they are a part. Whether one calls such pressure traditional values or elite domination, without the formal rationality of rule-centered law the parties are not free to act in their own interests or the judge to decide in accord with universal norms.

In a society where citizens' actual behavior is at odds with the legal norms or where the government wishes to play an active role in directing and controlling social behavior at all levels, therefore, the rule-