1. Introduction – community and the law: a critical reassessment of American liberalism and Japanese modernity

This book analyses Japan’s legal order from a communitarian perspective. The analysis, however, is not restricted to Japan. Indeed, a central concern of this book is to direct the critical gaze of legal sociology to issues confronting all liberal legal orders in comparison to the Japanese context – not least, modern society in the United States. Although each of the chapters in this volume presents distinct arguments and may be read in any order without detracting from an understanding of the book’s themes, this Introduction collects together the elements of communitarianism and sketches its broad theoretical features.

Many in Japan have misgivings about communitarianism. The suspicion is that it cloaks a reactionary attempt to revive the old ways. In part, this wariness is attributable to Japan’s unique experience with modernisation. Despite the adoption of Western law and the establishment of a modern nation-state during the Meiji period, traditional social practices have continued to thrive and obstruct the reception of law in Japan. Thus, the debate on communitarianism has been shaped by hegemonic narratives disclaiming the traditional order and proclaiming a law-based society. The legal profession, with its privileged access to the law, and the bureaucracy, with its top-down approach to modernisation, have been particularly instrumental in internalising this discourse in Japan.

At the same time, those in positions of power have resisted embedding law in society. Japanese history shows that the nation’s ruling elite, responsible for placing Japan on the path of modernisation, commanded significant authority in society. It sought to dislodge the hateful shackles of law and to govern by invoking the power of patriarchy inherent in the traditional social order. In the aftermath of World War II, law became central to the State’s agenda of dismantling these power structures and democratising society. Some progressives, lawyers and legal academics insist, however, that these pre-War structures of power remain largely in place.

Today, a liberal order is gradually taking root in Japan, and society is largely embracing this development. The Japanese are resistant to calls to resurrect community. Even if that is a good idea, in principle, they are largely
pessimistic that sufficient social and cultural resources exist to restore community. Past attitudes towards law, such as a dislike for litigation and a reluctance to assert rights, have a weakened hold on the current generation of Japanese.

1. TOWARDS A LEGAL SOCIOLOGY OF COMMUNITARIANISM

Given the political dynamics surrounding the reception of law in Japan and the general population’s contemporary attitudes towards law, why then bring up the idea of community? I argue that law draws on an innate set of mechanisms that sustain order in a communally constructed society. This observation certainly furnishes an appropriate description of the Japanese legal order. Since its reception during the Meiji period, law in Japan has enlightened society and separated people from their embedded communitarian contexts to become modern, free individuals. But the march of law towards full realisation of this ideal has not been inexorable; it has encountered resistance from society along the way. From a legal perspective, this might suggest reluctant compromise; but from the functional perspective of society, the regulatory reach of law is infiltrating society and transforming the social order. Society is reconfiguring itself in the context of changes wrought by modernisation.

Japan compellingly illustrates these competing dynamics of the compromise/realisation of law and resistance/reconfiguration of society, having overlaid its traditional order with incongruent foreign laws. But the same phenomenon is equally apparent in contemporary Western societies. Indeed, communitarianism itself first gained its intellectual foothold in the United States. As a political tool, communitarianism was attractive: it could counteract the liberal assertion of rights and resurrect the family and local communities as the lynchpins of social unity. However, as a social theory, it was no rebuke to liberalism. Since law has completely penetrated every aspect of modern American life and constitutional protection has broadened to cover diverse individuals with disparate lifestyles, communitarianism – if anything – was little more than a call to build a new society. The United States has struggled to differentiate law from society because, ever since her founding days, America has accorded central importance to law in social life and enjoyed a strong tradition of liberalism. However, since the enactment of the Civil Rights Act in the latter part of the twentieth century, the feminist movement and rights activists in the disabled, gay and lesbian communities have widened law’s ambit for protecting individual rights and thereby exposed friction between society and the traditional order. Just like Japan’s experience with inheriting law, this activism is precipitating the dual dynamic of resistance and reconfiguration as American society embraces an expanded role for
law. There are several possible standpoints we may take on specific issues, and I am not intending to advance any particular one. As a legal sociologist, my task in this collection of essays is to analyse and report on the dynamics that interlace law and society.

Of course, my argument takes society to be a coherent unit of analysis, much like law itself, which, in turn, assumes that society is self-contained and cohesive. I readily concede this. This is why, in Part III of this book, I clearly set out my stance on how communitarianism functions in a diverse society. Nevertheless, given that law largely operates within the bounds of society and that society is constituted by principles essentially unlike those making up law, law must negotiate and accommodate society whenever it is invoked. To dismiss this and believe in the enduring triumphalism of legal principles is to succumb to the ideology of law as the ultimate truth – or, in the context of Japan’s reception of law, to believe that modernisation is largely attributable to law ‘from above’. Pragmatically, the discipline of legal sociology has concerned itself with the preconditions for the realisation of law by investigating those social factors that resist the reception of law or problematising the insufficiency of legal resources. In Japan, especially during the post-War phase of legal enlightenment, legal sociology was directed to explaining modernisation by law. It depicted Western-style rule of law as the ideal and painted Japanese society as a backwater for failing to embrace such law.

Yet legal sociology, a discipline devoted to observing how law functions in society, can potentially free us from this ideological grip of law. To be sure, Weberian jurisprudence on the historical development of societies and legal anthropological studies of law in tribal societies have also proved useful in expanding our intellectual outlook and in telling us about the possible shape law may take and its relevant social context. However, such works are very rigid in how they view the historical trajectory of modern law or are unsatisfying in their observations of the intersections between law and society. It is legal sociology – with its influences in, and from, critical legal theory and modern social theory – that has placed law’s inter-relationship with society on the intellectual map. The many insights of legal sociology have also informed the writing of this book. Critical studies have exemplified how modern liberal law is steeped in its own historical contingencies and profoundly enmeshed in social conflict and oppression. Since it is no longer arguable that law embodies all truth and, as such, transcends society, this opens up a number of empirical questions as to the multiple intersections between law and society.

Nevertheless, unlike much critical theory, this book does not content itself with delegitimising law’s false claims to neutrality and autonomy. It delves more deeply, examining the legal sociology of how, for example, law’s attributes operate as legal ideology in constructing relations between lawyers and clients. Such observations provide specific insights into questions of how law
comes into conflict with society’s constitutive principles – insights that are otherwise invisible in the sweeping jurisprudential debate between liberalism and communitarianism. Take, for instance, the problem of clients losing meaningful control over their disputes because their lawyers push a legalistic approach premised on the autonomy of law. The priority given to ‘rights talk’ in this micro-level invocation of law might lead to the conclusion that there is a lack of moral discourse, something that communitarianism would see as problematic due to the threat to social unity. However, such an analysis also sets us on the path to finding specific solutions for resurrecting dialogue in the law and connecting law and society – for example, by re-thinking professional responsibility.

That is precisely the theme in Chapter 2, ‘Invoking Law as Narrative: Lawyers’ Ethics and the Discourse of Law’. The chapter begins by contrasting professional responsibility provisions in Japan and the United States. Thus, article 1 of the Lawyers’ Law in Japan proclaims that the mission of lawyers is ‘to defend fundamental human rights and realise social justice’. By contrast, the United States takes the position that lawyers, as the ‘representative of clients’, should zealously assert their clients’ rights in accordance with their client’s instructions – a model of client-centred advocacy that is still almost unheard of in Japan.

The chapter explores how the American code of partisan lawyering derives from robust liberal ideals of protecting individual autonomy. Even so, the chapter shows that when clients retain a lawyer with a view to invoking law as an autonomous subject, they actually divest themselves of all power to reach an acceptable agreement with the other party. This is more than just a problem of powerless clients lacking the relative expertise of their lawyers. The problem lies more fundamentally with liberal discourse itself which excludes a space outside of the law for parties to engage in moral dialogue – a space where clients can set their own goals for invoking the law and agree upon a resolution of their disputes with the other side. On a more profound level, the sense of the modern – which hypothesises a clear-cut schema of subjects versus objects and postulates the essential ‘otherness’ of human beings – limits our conceptual frameworks and dictates the language of the law.

2. A CRITIQUE OF AMERICAN LIBERALISM

A distinctive liberal legal order underpinned by a modernist philosophy pervades contemporary society in the United States. With law penetrating all aspects of society, disputes are left to legal professionals instead of the parties, reinforcing party estrangement rather than relationship-building. Yet commu-
nity life experiences are also breeding new ideas for social life and enabling an alternative vision for society. This is due to the hermeneutical endeavour where people interpret the world around them and project new meanings about the world through their acts – which, in turn, builds new narratives into the law. Although a liberal ideology of law marginalises this endeavour, I argue we should be sensitive to it. We should commit to the possibility of constructing an inter-subjective world based on mutual understanding between clients and other parties.

This analysis of lawyers’ ethics – more a critical analysis of modern American society than a direct appraisal of the Japanese legal order – appears as the first substantive chapter in this book since it most starkly highlights the overarching themes of this book: the rationale for examining law from a communitarian perspective and the methodology for doing so. Chapters 3 and 4 are similarly focused on contemporary society in the United States. Chapters 2 and 4 are more explicit in comparing the US with the Japanese case; Chapter 3, less overtly so. As a Japanese researcher, however, I always retain an intrinsically comparative perspective. This allows me to observe the US legal order and to read what American scholars say about their own society from a discreet distance and with dispassion. Yet hermeneutics tells us that we must also see the world as the Americans do if we are to understand their law. I have spent long periods of time in the United States conducting my research, and I read scholarly literature with this experience in mind. Thus, I develop a communitarian analysis not so much as a tool for analysing Japanese law. Rather, I want to take advantage of my upbringing in Japan – a society that strongly retains its communal roots – so as to envision a model of law that transcends national borders and applies universally to all contemporary societies.

I move now to explain the core arguments in each of the remaining chapters and their significance in the book’s overall design. Chapter 3, ‘The Moral Foundations of Tort Liability’, explores the much-heralded ‘crisis’ in American tort law. It examines how law derives from the interaction of a liberal understanding of law, welfare state legal policy and the communitarian logic of everyday life. Torts, unlike contracts, are not planned or necessarily intended legal acts; they typically arise from largely unforeseen accidents. Yet victims pursue liability against those with whom they share a relationship, such as corporations, medical practitioners or property owners. The raison d’être for invoking law rests heavily on how the parties see themselves vis-à-vis the accident and the other party. This sets the expectations parties have of the law and, in turn, shapes the development of tort law in society.

To date, tort law debates have centred on either entrenching individualised principles of liability or minimising the transaction costs associated with spreading the financial costs of accidents. In this chapter, I refer to these two
competing conceptions of justice as ‘individual justice’ and ‘total justice’, and I explore their ramifications in the real world. ‘Communitarian justice’ is my alternative for plugging the gaps left by the other two conceptions of justice. Communitarian justice imagines social actors who can humanise their contextual connection with the accident and the other party. I show how this perspective has actually influenced the direction of both tort doctrine and harm restoration; and I also explore the practical implications this has for law more generally.

Chapter 4, ‘Post-Divorce Child Visitations and Parental Rights: Insights from Comparative Legal Cultures’, goes on to compare Japan and the US with respect to post-divorce child visitations. In the US, the courts are robust in their support of visitation petitions and visitations regularly take place across the country. In Japan, however, many non-custodial visitation petitions are turned down on the ground that it would be ‘contrary to the welfare of the child’. For example, the child might be happy in her new household or otherwise might not wish to visit with the non-custodian parent. A close investigation of case law and academic commentary reveals the reasons for the divergence. Under liberal family law in the US, visitation rights fall within the rights of all parents to raise their children, and they cannot be denied unless there is a prior determination that the parent is sufficiently unsuitable to justify the deprivation of parental rights. Under Japanese family law, the court’s assessment of the child’s welfare always takes precedence over parents’ rights. A further distinction lies in the conception of the family. Japanese family law envisions the family as a stand-alone unit and preserves the family as a self-contained entity. The US is more reductionist and extends a right to the individual to form a family. This, in turn, gives rise to questions about the constitutional protection of the right and the coordination of competing private rights.

These differences in the treatment of visitation rights reveal the pervasiveness of liberalism in the US conception of legal order. Methodologically, this chapter is interpretative in approach. Although the ‘welfare of the child’ and the ‘best interests of the child’ appear to be similar doctrinal tests, Japan and the US judge them differently and have distinct social contexts that furnish specific meanings to legal terms. Therefore, it is important to isolate what these social contexts are and, in turn, to develop a method for re-interpreting law. The general tone of this chapter is upbeat. Although liberalist law is not ideal – with divorce rates on the rise and the emergence of complex, post-divorce families – it does provide a workable framework for guiding children through the trauma of divorce. It also ensures relatively trouble-free visitations by vesting parents with the right to visit with their children. To truly satisfy the test of the welfare of the child, then, the visiting non-custodial parent must show a commitment to raising the child and must cooperate with the custodian to ensure a successful visitation. Everyday morality reaffirming the value of
the family must transform visitations into a ‘supra-right’ – something more than just a parental ‘right’.

3. A NORMATIVE THEORY OF COMMUNITY AND THE LAW

The preceding case studies on lawyers’ ethics, tort litigation and post-divorce child visitations call for building better inter-personal relationships, even in liberalist legal orders. As such, they demonstrate the need for a supra-legal, moral dialogue. Of course, individuals can engage in moral dialogue of their own accord by drawing on their own internalised sense of morality. However, primary morality resides in society and shapes both universal law as well as the social order. This is hardly a remarkable idea, but it is key to sustaining moral dialogue. Nevertheless, we must be wary of clothing society with ambiguous moral authority and fettering individual lifestyle choices. Equally, we must be critical of allowing morality to cement the status quo and suppress all critical voices. Ultimately, this becomes a question of balance. The next two chapters in this book consider how we can avoid the pitfalls of pernicious conservatism, maintain a critical posture and, at the same time, envisage a social order that is good and decent.

Chapter 5, ‘Rights and Community’, examines the relationship between rights and the interpretation of community. Human rights have made a significant impact on society today. They have succeeded in addressing oppression and exclusion within the prevailing social order, and have embraced groups formerly without vested rights as equal members of society. As such, human rights have had a positive influence on how the community is constructed. But is this enough? To ensure full community membership for those groups newly vested with rights and embraced by society, they need to be able to negotiate interpersonal relationships from a position of equality and to participate in collective decision-making. Yet existing theories on the legal protection of individual rights presume that people are detached from one another – that they have an inner core others cannot see and that the only way to interact is by expressing their specific intentions. The problem with this assumption is that it impoverishes the language required to negotiate relationships.

Further, critical theory on the public-private divide in liberalism observes that the ‘private’ – where the concern of liberalism is with individual liberty – is, in fact, a refuge for deep-rooted oppression and discrimination, and that this should be made ‘public’ and subject to regulation by law. The object is to expand the range of human rights. However, even if we draw a fresh line between the private and the public, discrimination may still infiltrate the private – a space law tends to ignore – and the pattern of segregation and
exclusion will repeat itself. To avoid this vicious cycle and envision a truly egalitarian community, the ‘private’ must be more than just private; it must be where individuals can internalise public principles. The ‘public’, too, must be more than a system of norms that sets out the boundaries between private realms. It must be a place which nourishes the sensitivity to intuit that exclusion and discrimination are unjust – a sensitivity that inspires efforts to redraw the distinction between the private and the public. Chapter 4, however, is more than just a searching critique of how liberalism seeks to secure individual liberty by drawing fine lines between the public and the private. Communitarianism posits the needs for a third space – the ‘community’ – in which the ‘public’ and the ‘private’ collapse into and co-exist with one another.

Chapter 6, ‘Communitarianism and Constitutional Interpretation’ carries these themes one step further. A communitarian perspective informed by critical theory’s insights into the limits of liberalism is necessary to uproot oppression and discrimination in society, and to build a less repressive and more equal society. The chapter analyses the link between law and community, and examines in particular the constitutional protection of human rights. The argument here is two-pronged: first, community grounds the law; and, secondly, law constructs community.

The first prong – that community grounds the law – may appear self-contradictory given that law is generally supposed to guarantee individual liberty. Community, as it is conventionally understood, shackles individuals to community standards. In Japan, modernisation was meant to have installed law in society to supplant all-pervasive traditional community attitudes. Yet legal interpretation invariably draws on general attitudes and commonly held values in society. Society appears to collect together the views of its members and publicly determine what law should apply, independently of the State. Of course, judges may push their own view as to the correct interpretation of the law, even if it goes against prevailing attitudes in society. As such, society does not always generate the law. However, law is only ‘law’ once it functions in society, and the acceptability of law in society crucially turns on whether it so functions as the law.

When a law-imparting society is considered as speaking with a single voice, then a community comes into existence. Yet the reality is that society is torn by inner conflict. We may imagine multiple communities depending on how we untangle the different voices. A ‘conservative’ community is unconcerned with intra-society conflict and holds that society’s voice can be located in the will of the majority. By contrast, a ‘liberal’ community regards competing values as unavoidable due to the inherent separability of individuals, and finds the single, law-imparting voice in a liberal law in which there is universal consent for preserving one’s personal freedom. A ‘republican’ community believes that the common good is discoverable through deliberation.
However, this book employs critical theory to reveal society as a ‘structuralist’ community. In such a society, true conflict does not lie in the superficial clash of values or political discord, but in deeply embedded structural conflicts. In a structuralist community, the search is for community that can speak with a single voice about eradicating such conflicts. Various hegemonic discourses may subdue and purge structural conflicts from the surface of society, but they never really disappear. When the oppressed rise up in defiance, or less coherently complain about their plight, structural tensions percolating under the surface re-emerge. Others then hear about their struggle or grievances, and solidarity builds in society to overcome such structural oppression. This transition – from repression to resistance, to sympathy and then to liberation – portends a non-oppressive, egalitarian community. A structuralist community is where such a desirable end-goal is well within the people’s imaginative grasp.

The latter part of Chapter 5 observes the processes of constructing such a community through the interpretation of law. It takes as a case study the right to self-determination. This liberal right preserves the competency of the individual to enjoy self-determination without any interference from the State, and, as such, appears innately incompatible with the idea of community. Indeed, the debate in the US over whether the right to privacy protects women’s reproductive rights raises the very issue of whether society may impose its moral agenda on women and restrict women’s right to self-determination. However, social existence presupposes that people are connected to one another and that the self is the subject of others’ concern. Intervention and support are pre-requisites for autonomy. People can achieve autonomy only when their neighbours can build an environment that makes autonomy possible. Self-determination, then, is more than simply setting the parameters of individual freedom. Although self-determination implies people refrain from imposing their own moral judgments on what others might do, formal respect for individuality is not enough. A deeper, more multicultural respect for self-identity is required.

Liberty – that which individuals use and which the State guarantees through law – is insufficient to build meaningful social relations. We need a multi-layered society that can extend support to all sorts of individuals. Community allows us to view society as a site of human interaction. My argument is that law can be conscious of and produce such a community in the everyday practice of legal interpretation.

4. A RE-EVALUATION OF JAPANESE MODERNITY

The first two-thirds of this book set out the core of my communitarian theory;
the remaining chapters focus on the question of the modernisation of Japanese law. Two processes – not necessarily equally present throughout each stage in Japanese history, but certainly co-existing – have informed law’s development in Japan. The first is ‘modernisation’: the transformation of Japan into a modern society by the adoption of Western law. The second is ‘structuration’: the assimilation of law into the organising principles of Japanese society, that is, the reproduction of deep-rooted structures in Japanese society irrespective of the passage of history. Communitarianism is relevant to this discussion. As Japan experienced the reception of law and its enlightenment of society, much talk centred on the glaring incompatibility between Western liberal law and Japan’s pre-law communitarian order. But my analysis of Japan’s reception of law shows that communitarian principles did not so much conflict with Western law. Instead, they actually supplemented the limits inherent within liberal law, thereby generating the peculiarities of law in Japan.

Chapter 7, ‘Japanese Modernity Revisited: A Critique of the Theory and Practice of Kawashima’s Sociology of Law’, is the first to take up this theme. The chapter examines the powerfully influential work of Takeyoshi Kawashima, who saw law’s potential for enlightening post-war Japanese society. Kawashima highlighted the strongly individualistic liberalism inherent in the modern law that Japan was borrowing from the West. Historically, during the rise of capitalism in the West, this law created free individuals liberated from the shackles of status-based systems and made market transactions the new norm. However, Kawashima also noted that individuals in Japan were strongly bound to village communities – the outcome of Japan’s distinctive rice-farming practices – and that prevailing Japanese attitudes were in sharp contrast to the individualism of law. This, Kawashima pointed out, would obstruct law’s penetration in society. The ‘legal consciousness’ of the Japanese, according to Kawashima, comprised long-standing traditional Japanese attitudes, cultivated in farming communities and antithetical to law, which would continue to imbue people’s moral sensitivities despite the advent of industrialisation and urbanisation in the modern era.

This dialectic between the modernity ideal and traditional Japanese society contrasts two types of societies: one that is constituted by law, and another that rejects law as alien. Practically speaking, law’s enlightenment of society would guide Japan from the former to the latter. Yet once Japan had effected democratic reforms and revived the economy, society itself no longer needed the enlightenment of law – or, more precisely, the people no longer felt the need for law. But this does not suggest, as Kawashima claimed, a return to a traditional society hostile to law. Instead, law was adopted and adapted in a Japanese way, and this law then served as the foundation for an industrialised society.

Of course, a deep divide separates Japan and the West in terms of how far law has penetrated society. This has continued to drive criticism of Japanese
society, and the project to enlighten society through law remains firmly on foot. Discursively, the notion that Japan is ‘not yet modern’ – that Japan has failed to embed law in society, despite ostensibly borrowing Western law and acquiring economic superpower status – continues to powerfully shape the way Japanese have viewed their society over the post-war period. This paradoxical understanding of modernity is universally shared among societies that have attempted to modernise by borrowing and adopting Western law. This might be the curse of Orientalism; but since a copy can never be more than the original, there is an endless cycle of adoption and adaptation of the copied by the copier.

The book concludes with Chapter 8, ‘Litigation in Japan and the Modernisation Thesis’, an empirical analysis of litigation in Japanese society over the 50 years since World War II. This chapter demonstrates how modernisation and structuration – the two competing vectors related to the reception of law – played themselves out over this period. When Kawashima published his work on legal consciousness and the project to enlighten society through law was in high gear, the post-war economy was in recovery and litigation rates were on the rise. However, when Japan shifted to an era of high economic growth, litigation rates stalled and even trended downwards. This continued for 35 years until the bursting of the ‘bubble economy’ in 1991. Japan was held out as an industrialised society that does not ‘use’ law. The legal consciousness of the Japanese was repeatedly called into question due to the discernible difference between how ‘modern’ Japan was when measured by rate of industrialisation compared to how ‘modern’ she was in terms of extent of engagement with law.

However, a multi-parametric analysis reveals that Japanese consciousness and behaviour did change over this period – and irrevocably so. This is also evident with litigation behaviour. When we disentangle what has and has not changed, we can see that law has been assimilated by Japanese society on its own terms and has developed into something quintessentially Japanese. When we use the benchmark of the extent to which Japan has adopted modern Western law, we fail to see this process. Some may argue that this is evidence of the adaptation of universal Western law by autochthonous Japanese culture. Instead, the Japanese experience with the reception of Western law shows how society restores what is unilaterally excised by modern law.

Such is the universal of law: law must function within the confines of society. This ties in with the book’s larger theme of interpreting Japanese legal order from a communitarian perspective. The critique in the first part of the book – targeting the liberal legal order in contemporary US society in comparison to Japan – is therefore part of the larger project of socially contextualising modernity in Japan.