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Reconsidering the “Rule of Law” in Japan with Special References to Race, Reparation, and Residential Property

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I. Problems: Recognizing the Important but Limited Nature of the Judicial Role

The “rule of law” has lots of meanings, for example: 1) no person is above the law; 2) similar cases should be treated similarly; 3) legal rules, especially criminal rules, should not be retroactive.¹ Historically, in terms of legal administration, it has also the connotation of 4) “checks and balances,” that is the constraint of governmental power and the institutional separation of judiciary power (Montesquieu, Dicey etc.; originally in the U.S., J. Adams)². In addition, there is an 5) emphasis on “predictability” and the “formal rationality” of self-contained legal systems (Weber).³ Finally it must have 6) general, clear, and well-publicized rules as required attributes for them to be obeyed (Fuller).⁴

However, it has been pointed out that internal tensions exist within the ideals of the rule of law, tension between formal crisp rules and muddy standards (Fallon, David Kennedy; originally Duncan Kennedy)⁵ and that

¹ E.g., JOHN RAWLS, *THEORY OF JUSTICE* (Harv. U.P., 1971) 237-38; JOSEPH RAZ, *THE AUTHORITY OF LAW* (Clarendon P., 1979) 217, 226-27; LON FULLER, *MORALITY OF LAW* (Yale U.P., 1964) 51-62.

² ALBERT DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF CONSTITUTION* (10th ed.) (Macmillan, 1964) (1908). Cf. *THE REVOLUTIONARY WRITING OF JOHN ADAMS* (selected by Bradley Thompson) (Liberty Fund, 2000) 74~. See also, JOHN FERLING, *JOHN ADAMS* (Henry Holt & Co., 1992) 79, 156 (mechanisms to balance power); DAVID MCCULLOUGH, *JOHN ADAMS* (Simon & Shuster, 2001) 562-63.

³ See, ANTHONY KRONMAN, *MAX WEBER* (Stanford U.P., 1983) 78~. Weber contrasted legal formality with, for example, khadi-justice as substantive and formless adjudication, and primitive law as formally irrational and illogical law.

⁴ FULLER, *supra* note 1, chap.2.

⁵ Richard Fallon, “*The Rule of Law*” as a Concept of Constitutional Discourse, 97 *COLUM. L. REV.* 1 (1997); David Kennedy, *Laws and Developments*, in: AMANDA PERRY & JOHN HATCHARD EDS., *CONTEMPLATING COMPLEXITY:*

the traditional static rule of law should be critically and pragmatically deconstructed from neglected minority perspectives (M.J. Radin).⁶

I support such recent critical thinking in Japan⁷: First, the political role of the judiciary as the last resort of the counter-majoritarian perspective⁸ should be emphasized all the more because the administrative branch has been, more often than not, inactive⁹ and because the legislative process has changed since the mid-1990s so that an increasing number of laws have become products of pork-barrel lobbying and often reflect neo-liberal and conservative voices — such as big real estate companies, enterprises, banks, and construction corporations.¹⁰

Since World War II, Japanese legislation was organized and controlled exclusively by a group of legal scholars called the “Legislative Com-
LAW AND DEVELOPMENT IN THE 21ST CENTURY (Cavendish P., 2003). See also Duncan Kennedy, *Form and Substance in Private-Law Adjudication*, 89 HARV. L. REV. 1685, at 1712, 1715-19, 1731-37, 1767 ~ (1976).

⁶ Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 BOSTON UNIV. L. REV. 781, 813 ~ (1989).

⁷ My general view has already been publicized in Japanese. See, Kunihiro Yoshida, *Reconsidering the “Rule of Law” in the 21st century* [21 seiki niokeru Minpou to Shakai wo kangaeru], 58 HOSHAKAIGAKU (LEGAL SOCIOLOGY) 115 (2003).

⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (Harv. U. P., 1980) 73 ~, 135 ~ (representation reinforcing function). See also, William Eskridge & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in: *NOMOS XXXVI: THE RULE OF LAW* (NYU P., 1994) 266-67. The term itself was first coined by ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (Bobbs-Merril, 1962).

⁹ Just think of e.g., tobacco regulation, racial reparation, low-income housing in Japan.

¹⁰ See, e.g. Product Liability Act of 1994, Consumer Contract Act of 2000, Amendments of Landlord & Tenant Act in 1991, 1999, partly removing the “just cause” eviction principles, and Amendment of Condominium Act in 2002, removing the judicial process in the case of condominium reconstruction.

mittee” (Hosei-shingikai). Traditionally, Japanese law has been the purview of intellectual elites. The original drafting of the Japanese Civil Code of 1896 (promulgated in 1898), itself was the product of discussions among academic elites. But so-called “democratization” has recently replaced this academic lawmaking process, making it more influenced by politics. Therefore, the role of the judiciary has become even more important to protect politically powerless, more vulnerable people.

Second, common saying has emerged in recent years “from administrative protection toward judicial protection.” This refers to the decrease of ex-ante administrative control, commonly called deregulation, a process I oppose. Even more disturbing, the Japanese Supreme Court has emphasized the “unitary and homogenous rule of law and legal culture”.¹¹

However, I will argue that the legal conflict of multiple values in modern society, especially since the 1980s has not been so simple. It is hard to find a linear value hierarchy in recent civil law cases, compared to cases in the 1960s and 1970s involving the infringement of fundamental human rights, such as life and health, notably, the Four Serious Public Pollution cases: the Minamata Disease case in Kumamoto, the Minamata Disease case in Niigata, the Yokkaichi Smog case, and the Itai-itai Disease case.¹² On the contrary, these days, most cases are litigated over the delicate “conflict of values,” to use Vilhelm Aubert’s term¹³, such as human dignity, personal identity, apology, religious beliefs or the ethical value of self-determination, and free expression. Many of these are hard cases involving such issues as defamation, reparation, sexual harassment,

¹¹ E.g., The Japanese Supreme Court, Thinking of Adjudication in the 21st Century (<http://courtdomino2.courts.go.jp/oshirase.nsf/>).

¹² On the Minamata Disease, see, FRANK UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (Harv.U.P., 1989) 30~; MASAZUMI HARADA, MINAMATA DISEASE (Minamata Disease Patients Alliance, 2004) 10~.

¹³ VILHELM AUBERT, THE HIDDEN SOCIETY (Bedminster P., 1965).

and Jehovah's Witness's refusal of blood transfusions. Furthermore, we are facing deepening discrepancies between the rich and the poor that generate crucial distributional disputes domestically and internationally in this globalized society of expanding market capitalism due to the demise of the socialist regime as well as the Internet computer highway and ever-increasing intellectual properties in developed countries.¹⁴

With this backdrop in mind, the unitary rule of law and the self-complacent notion of integral law as the right answer (Dworkin)¹⁵ should be critically reexamined from minority perspectives, i.e., those of the politically powerless in terms of race, class, and sex. The "pluralistic rule of law" in present-day multi-cultural society requires us to be attentive both to neglected interpretive communities and to income redistribution matters. In that sense, as Robert Cover has correctly pointed out¹⁶, the judiciary cannot and should not avoid political responsibility by recourse to legal precedent. Consequently, it is pedagogically important to raise political and social consciousness regarding public interest concerns, so that young jurists can analyze society critically. Unfortunately the legal education system in Japan, I fear, is moving in the opposite direction.

My position is conducive to judicial activism in this "Verrechtlichung" (law-abundant) society. At the same time, however, I also have ambivalence about the scope of the rule of law. As I will discuss later, it should also be recognized that formal legal (judicial) rules play a peripheral role in the actual world of social norms. As Stewart Macaulay's idea of

¹⁴ For the critical observation, see, Keith Aoki, *The Stakes of Intellectual Property Law*, in: DAVID KAIRYS ED., *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (3rd ed.) (Basic Books, 1998) 259.

¹⁵ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (Harv.U.P., 1977) 81-130; do., *LAW'S EMPIRE* (Harv.U.P., 1986).

¹⁶ Robert Cover, *Foreword: Nomos and Narratives*, 97 HARV. L. REV. 4, at 53 (1983) (included in: MARTHA MINOW ED., *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* (U. Michigan P., 1992)).

“private government” in the field of contract behavior¹⁷ suggests, judges and lawyers should have humility as well as courage. Legal scholars should deal with the multiplicity of legal phenomena with pluralistic approaches.

II . Examples

The theme of this panel is the “rule of law” in an international context. Even though what I am qualified to say as a domestic civil law scholar is limited, it seems to me that recent civil law cases often overlap with international law. Let me limit the scope and give you some examples on housing and reparation issues that I have been working on during my year at Harvard.

A . Resident Koreans’ Eviction cases

Utoro, a town in the southern part of Kyoto Prefecture, has about 300 Korean residents. Most of them are the descendants of people who were forced to move to Japan during WWII to build the Kyoto airport. They face eviction by a realtor who has acquired formal title of their land from a Nissan subsidiary. This case has been internationally publicized because of the violence of their displacement and the ensuing destruction of the whole neighborhood. Oddly enough, the case received little attention among civil law scholars until I published my article “reparation and prescription.”¹⁸

When I visited their community in the summer of 2001, their case,

¹⁷ E.g., Stewart Macaulay, *Private Government*, in: LEON LIPSON & STANTON WHEELER EDS., *LAW AND THE SOCIAL SCIENCES* (Russel Sage, 1986) 446-49.

¹⁸ Kunihiko Yoshida, *The Problems of Resident Koreans and their Recent Legal Claims: Reparations and Adverse Possession* [Zainichi Gaikokujinmondai to Jikouhougaku, Sengohosyou] (1)~(6), *JURIST* vol. 1214~17, 1219, 1220 (2001~02). For Utoro and Nakamura cases, see 1219 *JURIST* 128~.

arguing that they had established adverse possession, failed at every level including the Japanese Supreme Court.

There were three factors contributing to this outcome. First, most of the judges mechanically applied the strange, yet firmly established case law principle that the longer a person possesses land, the less likely it is that he or she can acquire ownership by adverse possession, because it is assumed he or she neglected to register the land after acquisition.¹⁹ Second, the residents, carelessly, legally speaking, asked Nissan to sell the land. The judges interpreted the request as incompatible with adverse possession, because it presupposed that the land belonged to somebody else. Third, the judges denied the applicability of International Covenant on Economic, Social, and Cultural Rights §11 to domestic cases among private citizens.

Besides the Utoro case, there are similar cases of displacement among other resident Koreans, such as those living in the Nakamura district adjacent to the Osaka International Airport. In this case, despite the occupation of the land by about 400 residents who have lived there for more than 50 years since the forced labor, the formal title still belongs to the government. It is reported that the residents have accepted the government offer of displacement that will be completed by 2007.²⁰

I think the judicial justifications for the denial of adverse possession are questionable. There was no official route available for the residents to register their land. Furthermore, their property notions are more communal than the individualistic land registration system. Regarding the second factor, the “careless” request to Nissan was proposed conditionally by lay people, that is, “under the condition that their claim of ownership was denied.” I would have given the residents’ proposal a more sympathetic interpretation.

¹⁹ Supreme Ct. Decision, July 8th, 1925, 4 MINSYU 412; do., August 28th, 1958, 12 (12) MINSYU 1936 etc.

²⁰ Asahi Shinbun May 11th, 2002 (Osaka edition).

In addition, according to the prominent property law scholar, Prof. Joseph Singer of Harvard University, who is attentive to property redistribution problems, adverse possession should be re-conceptualized from a relational property perspective, as a legal device to reallocate property entitlements as opposed to formal titles to the more vulnerable parties, in consideration of unequal social consequences.²¹ If we apply his thesis to the above displacement problems here, even in the Nakamura case, the residents’ long-term occupation of their land and housing could be protected: The government eviction claim would be estopped based on equity concerns.

More generally, I’d like to ask the Japanese judges who turned down the adverse possession and international human right claims flatly in short answers, how seriously they took not only the mechanical and syllogistic application of the legal principles they learned at law school or bar exam prep-schools, but also the social consequences of their decisions in the local neighborhoods and their political responsibilities as judges.

B. Forced Foreign Laborers’ Reparation cases

There are lots of related discussions these days on reparation lawsuits regarding forced foreign — Korean and Chinese — labor for coal-mining, and the construction of airports, harbors, and the digging of huge caves to hide things such as factories and aircraft in Japan during WWII, as well as

²¹ Joseph Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 665 ~ (1988); do. , ENTITLEMENT: THE PARADOXES OF PROPERTY (Yale U.P., 2000) 45-46. Incidentally, it is reported that an estimated 400 million to 600 million people worldwide are squatters and that in 1995, Peru started the world’s largest effort to give property entitlements to urban squatters as a path to economic development: it has provided property rights in respect of the lands and houses they inhabit to more than 1.2 million households, totaling 6.3 million people. See, NEW YORK TIMES, Jan. 9th, 2003, C2 (by Alan Krueger).

sexual services in the case of the comfort women. A number of these sites, such as the gigantic artificial cave created by the hard labor of Korean workers for the Matsushiro Imperial Headquarters inside the mountains in Nagano Prefecture, still exist all over Japan, but have not been mentioned in public education. Many of them have been closed and filled with cement because they have deteriorated and are dangerous.²² The working conditions of forced laborers, in harsh environments such as Hokkaido, were extremely miserable and tragic.

However, most of these plaintiffs have lost their lawsuits, except for a few cases²³ and settlements.²⁴ Legal barriers include: (i) the tort actions becoming statute-barred due to the passage of 20 years since the alleged illegal act (§724 of Japanese Civil Code), (ii) the state immunity doctrine that absolves the government of responsibility for acts carried out before State Responsibility Act of 1947, (iii) the denial of appreciation on the unpaid salaries from the time they should have been paid to the present day. In addition, (iv) proof of causation is difficult.

Nevertheless, all of these rationales should be reexamined critically according to social and political considerations. First of all, the victims

²² According to the Ministry of Construction and Transportation, 777 out of 5003 underground caves have been considered dangerous (ASAHI SHINBUN, April 24th, 2003).

²³ E.g., Tokyo District Ct. July 12th, 2001, 1067 HANREI TIMES 119 (Chinese forced laborer Liu Lian Rin case); Kyoto District Ct. August 23rd, 2001, 1772 HANREI JIHO 121 (Ukishima Maru explosion case); Yamaguchi District (Shimonoseki Division) Ct. April 27th, 1998, 1642 HANREI JIHO 24 (comfort women case).

²⁴ E.g., Tokyo High Ct. Settlement, November 29th, 2000 (Hanaoka Chinese laborers case); Supreme Ct. Settlement, July 11th, 2000 (Fujikoshi Steel Co. case); Tokyo High Ct. Settlement, April 6th, 1999 (Nihon Steel Co. case). Out of court Settlement, September 18th, 1998 (New Nihon Steel Co (Kamaishi Factory) case).

didn't have the freedom to file lawsuits until recently, so perhaps statutory limitations on tort actions should be extended. Second, Japanese government officials themselves have admitted that lawsuits by individual citizens have nothing to do with inter-governmental treaties.²⁵ But they, on the other hand, officially argue that the reparation issue has been solved by the treaties of “economic assistance” between Japan and Korea, even though the Japanese government has never given monies in the name of reparation, nor has it publicly recognized its responsibility.²⁶

Third, frankly speaking, it might be odd to apply the obsolete state immunity doctrine in modern Japan, where state responsibility is ubiquitous, unlike in the United States. Fourth, the influx of the Korean population into Japan can be traced back to the change of the traditional Korean agricultural society because of the establishment of the private land property system in the 1910s, and to market forces since the depression era of the 1930s.²⁷ But the procurement of foreign laborers by a series of statutes in the 1930s²⁸ cannot be explained away by their free will

²⁵ E.g., Japanese-Korean Treaty in 1965 and the following statutes of economic assistance.

²⁶ The former Prime Minister Tomiichi Murayama, then the chief leader of Japanese Socialist Party, expressed his heartfelt regret with reference to comfort women and Korean labor in Sakhalin in August 1994. Yet there has been a conservative backlash since the mid-1990s.

²⁷ E.g., EDWIN GRAGERT, LANDOWNERSHIP UNDER COLONIAL RULE: KOREA'S JAPANESE EXPERIENCE 1900-1935 (U. Hawaii P., 1994) 137~, 159-61. Hiroshi Miyajima's voluminous work also emphasizes the establishment of the private property system by the land investigation project in the 1910s, that facilitated the market transactions afterwards, contrary to the traditional criticism of the land confiscation by the project (RESEARCH OF THE LAND INVESTIGATION PROJECT IN KOREA [Chosen Tochi Chosajigyo no Kenkyu] (Oriental Research Center of Tokyo Univ., 1991)549~).

²⁸ Official notifications for procurement of Korean labor were issued from the Welfare Minister and the Japanese Governor Office in Korea in 1939, 1941, and 1944.

(free choice) without any official complicity by the Japanese government of the day.

To be sure, we have to concede the partial nature of problem-solving by the adjudicatory reparation approach, even when it is approved. On the one hand, it will generate inequality problems between successful plaintiffs and victims who do not win or do not even file lawsuits. On the other hand, reparation cannot be complete. It is impossible to compensate for all the damage incurred in the past during wartime and colonization (mass torts), even if the legal hurdles created by the passage of time can be cleared. Furthermore it might be argued that plaintiffs may become more aggressive and that such greedy behavior might cause antagonistic relationship between neighboring nations.

How shall we respond to these dilemmas? First, as Hannah Arendt and more recently Martha Minow have emphasized, official approval implies the possibility of forgiveness as opposed to vengeance by the victims.²⁹ And as Eric Yamamoto argues, it can open the way to reconciliation and the solution of interracial justice grievances in this multi-cultural society.³⁰

Second, because of the limited scope of the adjudicatory approach, we have to think about a broader array of possibilities for restorative justice that might serve to retrieve the dignity of victims and to expand communal efforts in pursuit of the reparation of relationships in its broader sense, including official apologies, conciliation, therapeutic remedies, creation of memorials and monuments that share memories and common understanding, and the advancement of public education with regard to mass atrocities. According to Prof. Minow, even the apology itself is inadequate

²⁹ HANNAH ARENDT, *THE HUMAN CONDITION* (U. Chicago P., 1958); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (Beacon P., 1998) 14~.

³⁰ ERIC YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHT AMERICA* (NYU P., 1999) 7-12, 19, 174~.

because of its one-sidedness. She argues for communication between wrongdoer and victim, based on the acceptance of responsibility by the wrongdoer.³¹ Her insightful remarks help us see how far the official stance of the Japanese government still is from the restorative ideal. It is no wonder that the project to provide monetary awards for former Korean comfort women has turned out to be a failure.³²

But we can hold out a slender hope for the true repair of bilateral relationships in Asia from the efforts of local historians in Hokkaido. They have communicated, at the grassroots level, with the victims of forced labor and their relatives for more than 20 years. Annual meetings and visits to historic sites have also been held for the youngsters of both countries as part of expansive history education, based on self-critical recognition of responsibility and on dissatisfaction with governmental inaction.³³

Third, it should be noted that the reparation lawsuits themselves have symbolic and political meanings, in spite of their limitations. To be sure, a collective solution by the state will eventually be required in mass victim cases. Prof. David Lyons is right when he focuses on income redistribution and desegregation policy as the means to achieve corrective justice ideals, rather than reparation adjudication, in the context of the systemic legacy of slavery practices.³⁴

³¹ MINOW, *supra* note 29, at 21~, 91~, 114-15 (the problem of apology). The Truth and Reconciliation Commission in South Africa has been considered an effort to give victims a chance to forgive the wrongdoers (66~).

³² The project to provide monetary reparation for Korean comfort women, called the Fund for Asian Women, was withdrawn in May 2002.

³³ The efforts of the historian groups in Fukagawa and Kushiro are worth mentioning. For their achievement, see Yoshida, *supra* note 18 (4), 1217 JURIST 105-07.

³⁴ David Lyons, *Unfinished Business: Racial Junctures in US History and their Legacy*, in: LUKAS MEYER ED., JUSTICE IN TIME: RESPONDING TO HISTORICAL JUSTICE (Nomos, 2004) 271~.

However, successful adjudicatory approaches can play a significant political role by providing incentives to silent and inactive governments. It might also have an important educational effect that will enlighten Japanese citizens about past tragic events and encourage them to take seriously the problems of discrimination and the imbalance of residential property distribution for the Korean community in Japan.

With these political arguments in mind, once again I'd like to ask the judges concerned how much they thought out the political meanings, consequences, and their adjudicatory responsibilities, when they decided *against reparation based only on the syllogistic application of legal precedents that had entirely different contexts.*

C. The Tragic History of Ainu Property Confiscation

Next we'll move to the property dispute of the Ainu, the indigenous people in Hokkaido. There are two prominent cases, first, regarding the illegality of the construction of the Nibutani Dam that submerged Ainu sacred land under Nibutani Lake³⁵, and second, regarding the recent nominal money return process as payment for taking their communal lands more than 50 years ago (§3 of the Supplemental provisions to Ainu Cultural Promotion Act of 1997).³⁶

³⁵ Sapporo District Ct. March 27th, 1997, 1598 HANREI JIHO 33, is famous for the recognition of the Ainu people's right to enjoy the cultural heritage and for the declaration of the illegality of constructing the Nibutani Dam. But, as a "circumstance judgment", it did not reverse the illegal rulings confiscating Ainu land, and the dam remains. Nibutani is a village in the Hidaka District of central Hokkaido, where the greatest proportion of the local population are Ainu (some 70%).

³⁶ Sapporo District Ct. March 7th, 2002 (unpublished) (see, Hokkaido Shinbun March 8th, p.2) denied the standing — the case and controversy — of the plaintiffs.

Let me state first their tragic property history.³⁷ The Ainu were traditionally a nomadic ethnic group in northern Japan, primarily in Hokkaido. Occupying spacious area, they had their own notion of communal property, in terms of fishing and hunting, and paid high regard to the environmental ecosystem. However, they endured one after another hardship after the Meiji Restoration, through the Japanese state’s introduction of the so-called modern individualistic private property system in Hokkaido.

First, through a series of land regulations in the Meiji era (1872, 1877, 1886, 1897), most of the unoccupied lands in Hokkaido became private property, and the indigenous Ainu’s territory was designated as state land. These steps ignored traditional Ainu hunting rights which had been divided into hunting areas called Iwor, which were generally exclusive to a particular group.³⁸ The government then extravagantly allocated the state property to immigrants from mainland Japan,³⁹ who were often entrepreneurs only interested in harvesting huge swathes of forest.

As Joseph Singer has pointed out regarding the origins of American property title,⁴⁰ original property title was forcefully taken in a problematic procedure similar to “conquest” and failed to adequately protect the rights of first possessors (Locke). To make matters worse, Ainu traditional hunting and fishing were regulated and prohibited by legislation,⁴¹ which

³⁷ For details, see, Kunihiko Yoshida, *The Ainu Racial Group, their Property, and the Philosophy of Environmentalism in Multi-cultural Society: With Emphasis on the cases of Chikabumi and Nibutani* [Ainuminzoku to Shoyuiken, Kankyouhogo, Tabunkasyugi] (1)(2), JURIST 1163, 1165 (1999). More generally, RICHARD SIDDLE, RACE, RESISTANCE, AND THE AINU OF JAPAN (Routledge, 1996) 51~.

³⁸ Hokkaido Land Claim Act of 1877 §16.

³⁹ Hokkaido Land Allotment Act of 1886 §6; Hokkaido Uncultivated Land Division Act of 1897.

⁴⁰ Joseph Singer, *Starting Property*, 46 ST. LOUIS UNIV. L. J. 565, at 567 (2002).

⁴¹ Regulation of Hunting Deer in 1889. River Act of 1896 prohibited the fishing

led to terrible starvation.

Second, the Meiji government tried to encourage the Ainu to convert to settled agriculture using a statute called the Hokkaido Former Natives Protection Act of 1899. This act was modeled on the General Allotment Act (Dawes Act) of 1887, which was an attempt by the U.S. government to turn American Indians into propertied citizens through land grants.⁴²

As in the United States, the Japanese statute was discriminatory. First, the allotted land, mostly barren, was provided under the strict condition that it be fully cultivated within 15 years (§§1, 3).⁴³ As might be expected, many Ainu people, who once had a nomadic lifestyle, had difficulties becoming farmers, and thus lost the land they were allotted due to this proviso. Second, as for the allotted land, alienation/ transfer and mortgage financing was prohibited, later allowed only with the permission of the Hokkaido Governor (Director General) (§2 and the 1937 Amendment). These criteria were in many ways similar to “redlining,” the discriminatory housing financing practiced by Federal Housing Administration (FHA) in the United States between 1930s and 1950s.⁴⁴ And it had similarly disadvantageous effects for Ainu. They had no way to gain financial credit, except by recourse to long-term lease contracts that were only allowed exceptionally through §2.

Furthermore, in certain Ainu neighborhoods, most prominently Chi-

of salmon.

⁴² See, e.g., Siddle, *supra* note 37, at 69.

⁴³ The size was supposed to be 49590 m² by law. On the other hand, according to the 1897 Act, the lands given to the entrepreneurs from mainland Japan was more than 100 times per person/ 200 times per corporation as large as the Ainu allotted land.

⁴⁴ For redlining practices, see KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (Oxford U.P., 1985) 190~; DOUGLASS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (Harv. U.P., 1993) 51~.

kabumi in Asahikawa, enforcement of the statute was postponed until the mid-1930s,⁴⁵ in part because the Ainu community there was located close to military bases. To make matters worse, four-fifths of their allotted lands were kept by the Governor (Director General) of Hokkaido as community lands and thereafter often used for schools, road construction, military factories and so on. The nominal monetary return for such takings has now been hotly debated, as mentioned at the beginning of this section.

Lastly, the lands allotted to the Ainu were the object of land reform shortly after WWII, which resulted in further inequities.⁴⁶ Much of the land was compulsorily transferred to practicing farmers the Ainu leased their land to, because many Ainu, still unaccustomed to agriculture, were not farming their lands themselves.

Even from this brief overview of the Ainu’s tragic property history, astute readers might find potential for reparation litigation connected to recent lawsuits. But in the face of the overwhelmingly daunting tasks at hand, the possibility of successful reparation lawsuits is almost nil. In other words, in the Ainu context, the necessary political and social support is lacking to attain justice. For example, (i) many Ainu people, in this downward spiral, suffer from poverty, living from hand to mouth in low-income occupations, most typically as day laborers, and often rely on

⁴⁵ By the Asahikawa City Former Natives Land Provision Act in 1934.

⁴⁶ About a quarter (25.6%) of the allotted lands were subject to the land reform. Such practices were approved by the Supreme Court (*Sup. Ct. August 21st, 1962*, 16 (8) MINSYU 1787).

⁴⁷ The social welfare rate among Ainu in Hokkaido (38.8 permil) is more than twice as high as the average rate in Hokkaido (16.4 mermil). See, REPORT OF SURVEY ON HOKKAIDO UTARI (Ainu) LIVING CONDITIONS [Hokkaido Utari Seikatsujittai Chosahoukokusyo] (1994) 7.

⁴⁸ A former Statesperson of the House of Councilors, Shigeru Kayano might be such an exceptional case. He, a plaintiff of Nibutani Dam lawsuit, has published a number of books, including MONUMENT OF AINU [Ainu no Ishibumi] (Asahi Shinbun Co, 1980), and was a founder of the Ainu Cultural Promotion Act in

social welfare.⁴⁷ (ii) Ainu are generally politically powerless⁴⁸, and they have often found themselves caught in double-bind, catch 22 dilemmas. For example, many Ainu ended up earning a living for a while, building the Nibutani dam, which destroyed part of their own cultural heritage and the ecosystem along the Saru River that Ainu traditionally esteemed.

(iii) Because of the assimilation policy as well as past discrimination and oppression, Ainu racial identity, or race-consciousness is still low and their political leadership is almost nonexistent. Furthermore, (iv) after the promulgation of Ainu Cultural Promotion Act (see note 48), Ainu claims are paradoxically likely to be depoliticized, in spite of their worsening situation. (v) We should add that, unlike in the U.S., pro bono legal services to support Ainu do not exist in the Japanese legal education system. Civil law scholars are, in general, indifferent to racial segregation issues and problems that are invisible to the public.

Against this backdrop of obstacles, what will be required for the judiciary to be effective as a last legal resort? Probably not the formalistic interpretation of standing requirements, nor the mechanical calculation of their nominal damages. Despite the limited scope of judiciary power, a sympathetic approach to minority perspectives is crucial.

D. Kobe Earthquake and its Aftermath — Housing Disputes

Kobe and some other Kansai districts were hit by a terrible earthquake in January 1995. The quake destroyed many buildings and killed more than 5000 people. In the tremor's aftermath, more than a hundred condominium buildings, totaling more than 145,000 units, were demolished, even though 90 percent of them could have been renovated. There have been, and still persist, lawsuits regarding the alleged consensus to the demolition of buildings, in which the right to live in renovated housing has

1997.

been turned down by majority rule.⁴⁹

It is important to recognize that biased governmental policy provided support for over-demolition.⁵⁰ All the costs for the demolition of damaged buildings and four-fifths of the subsequent planning costs have been supported publicly,⁵¹ whereas no financial assistance was provided for the renovation of housing. As is often the case with the construction industry, the political power of general construction contractors probably accounts for this financial bias.

Furthermore, the strict, yet somewhat odd division of private and public property still persists, largely unquestioned, in this background. Not a single victim of the earthquake could get financial aid for their damaged housing unless it was torn down, because the dogged notion of privateness completely excludes public help.⁵² This is unjustifiable, and does not make sense. Temporary housing available for 2 years of limited use, and high-rise tower rehabilitation housing have been built with public funds for only a limited number of victims. Yet, roads, parks, and, to our surprise, the allegedly unnecessary Kobe Airport have been constructed by public expenditures. Considering this fact, it is easy to understand the serious dissatisfaction of Kobe citizens.

⁴⁹ E.g., Kobe District Ct. June 21st, 1999, 1705 HANREI JIHO 112; Osaka District Ct. (Itami Division) October 31st, 2001 unpublished. Cf. Kobe District Ct. January 31st, 2001, 1757 HANREI JIHO 123, that nullified the majority decision of demolition.

⁵⁰ For the detail, see Kunihiro Yoshida, *An Overview of Housing Problems in Japan: From the Perspective of Public Protection of Housing Property* [Kyojuuhougaku no Hukanzu] (1)~(3), MINJI KENSYU 549~551 (2003), esp. 550 MINJI KENSYU 7~.

⁵¹ By the ministerial ordinances of the Ministry of Welfare in 1995 and of the Ministry of Construction in 1994.

⁵² According to the Act for Aid to Rehabilitate Earthquake Victims' Daily Lives in 1998, the victims can get means-tested financial aid for lots of things, except for renovation of houses.

In contrast, Governor Katayama of Tottori Prefecture decided to financially support up to 3 million yen per unit for renovation of damaged housing after the Western-Tottori Earthquake in October 2000. Katayama's brave and quick decision, which broke nonsensical legal precedents regarding restoration of the damaged local neighborhoods, has attracted lots of attention and praise from all over Japan.⁵³

Didn't the judges, when they adjudicated the demolition disputes, hesitate in simply applying the majority rule of condominium owners? The co-property associations of condominiums are often artificial, fragile, and, as in the Kobe case, likely to be prey to misinforming counselors.

As a matter of fact, it is reported that the majority of residents who supported demolition relied on misinformation from irresponsible consultants, and later regretted their decisions. In such cases, I think, the validity of corporate self-determination could be questioned. Did the judges concerned seriously consider the skewed housing financing subsidy scheme before they made legal decisions, and make a politically responsible judgment?

To make matters worse, in the course of the so-called "democratization" of the legislative process, which actually means the proliferation of deregulation and the increased pressure from politically and economically powerful groups of construction and real estate companies, the Condominium Act of 1962 §62 on demolition decisions, was revised in December 2002. Regretfully, the adjudicatory procedure which existed as a last resort for minority residents, has been removed because of efficiency concerns.

E. Leprosy Patients' Segregation

⁵³ For the difference of the local government's responses between Kobe and Tottori, see, KAZUO HAYAKAWA, EARTHQUAKE AND HOUSING WELFARE [Saigai to Kyojuuhukushi] (Sango-kan, 2001) 182~.

Among the ubiquitous judicial passivism of recent years, one outstanding exception was provided by the Kumamoto lower court case, which cleared the legal obstacle of statutory limitation of action (§724 of Japanese Civil Code) by counting the limitation period as beginning from the recent abolishment of Leprosy Prevention Act.⁵⁴ As a result, it awarded more than 100 million yen in damages to each segregated leprosy patient plaintiff. Since the Koizumi government declined to appeal the decision, the court's ruling has had very important precedential value, leading to administrative reparation remedies for all Hansen's disease patients.

The treatment of leprosy patients has a shameful history. Through legislation,⁵⁵ patients' residences were publicly segregated and their lives were regulated to an extreme. They were forced to enter one of 13 national sanatoriums situated from Aomori in the north to Okinawa in the south (§6). They were not allowed to go outside of the sanatoriums, and their lives inside were severely disciplined (§§15, 16, 28 (sanctions)). They were also obligated to either be sterilized or undergo abortions.⁵⁶

Such statutes persisted for almost a century until the abolishment in March 1996, in spite of proposals to abolish such discriminatory practices by the international medical conference on leprosy since the mid-1950s.

III. Challenges: Limitation of the Role of Law?/ Degeneration of Legal Education?

A. Limited Role of Judicial Law?

While we do need to move toward much greater judicial activism, given

⁵⁴ Kumamoto District Ct. May 11th, 2001, 1748 Hanrei Jiho 30.

⁵⁵ Leprosy Prevention Act of 1907, 1931, 1953.

⁵⁶ Eugenic Protection Act of 1948 §§ 3 I ③, 14 I ③.

the unsatisfactory performance of the legislative and administrative branches, we can't help realizing the limits of the adjudicative role that judges can play. How effective are legal rules? How easily are they evaded by actual private dealings or by actions outside of court?

Examples are endless: (1) in custody disputes, the most hotly debated issue in family law, one might find it useless to reflect on the detailed standards of adjudication. Does it make any sense to discuss “the best interest of the child”, when abductions of children are rampant? The parent who ends up living with the child, wins, no matter what the court decides. Interestingly enough, it has been observed that the role of judges in cases of custody adjudication is similar to that of managerial administrators (Mnookin).⁵⁷ (2) The influential theory of penalty defaults in the field of contract law focuses more on the strategic “contracting out” of negotiation and reduces, to a degree, the role of formal default rules (Ayers & Gertner).⁵⁸ (3) In the area of ever-expanding cyberspace and intellectual property concerns, especially patents, we may well feel that fairness and “human flourishing” is overwhelmed by this mammoth and feel unable to regulate it.⁵⁹ (4) The same thing can be said about torts. In

⁵⁷ Robert Mnookin, *Child-Custody Adjudication in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226 (1975). See also, KUNIHICO YOSHIDA, CIVIL LAW INTERPRETATION AND TRANSFORMATION OF PROPERTY THEORIES [Minpoukaishaku to yureugoku Shoyuuron] (Yuhikaku, 2000) chap.6.

⁵⁸ Ian Ayers & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Defaults Rules*, 99 Yale L.J. 87 (1989). See also, KUNIHICO YOSHIDA, RELATIONAL DEVELOPMENT OF CONTRACT AND HEALTH LAW [Keiyakuhou Ijhou no Kankeitekitenkai] (Yuhikaku, 2003) chap.3. Such broadened analysis of the relationship between the formal rules and the strategic actual behavior could be found compatible with Mnookin's idea of “negotiation in the shadow of the law” (with Kornhauser, 88 Yale L.J. 950 (1979)).

⁵⁹ E.g., LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (Basic books, 1999); STUART BIEGEL, BEYOND OUR CONTROL?: CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE (MIT P., 2001).

medical malpractice cases, organizational and managerial CQI [Continuous Quality Improvement] theorists often pointedly criticize the individualistic adjudicatory malpractice approach, the so-called “bad apple” theory, by noting that it does not lead to the systematic improvement of health care (Berwick).⁶⁰ (5) In housing law as well, the “informality perspective” as opposed to formal case law, has been recognized and considered valid in low-income housing markets (Duncan Kennedy).⁶¹

So much for domestic law. Let’s move to international law. (6) In the field of employment, pension, and environmental regulation in the European Union, the critical legal scientists have argued that decentralized, experimental “soft law” by an “open method of coordination,” as opposed to traditional top-down precise rule by bureaucratic method, will prove to be the prominent future mode of law (Trubek).⁶² (7) Leading “law and development” scholars have critiqued formality and stigmatizing morality in the rhetoric of the rule of law and emphasized informal solutions in the “contestations of political and economic choices” (David Kennedy).⁶³ The rule of law includes the tension between economic institutionalism and democratic empowerment.

⁶⁰ DONALD BERWICK ET AL., *CURING HEALTH CARE: NEW STRATEGIC FOR QUALITY IMPROVEMENT* (Jossey-Bass Pub., 1990) 32~. See also, Yoshida, *supra* note 58, chap. 7.

⁶¹ Duncan Kennedy, *Legal Economics of U.S. Low Income Housing Market in Light of Informality Analysis*, 4 J. LAW IN SOC. 71 (2002).

⁶² David Trubek, *Soft Law and Hard Law* (unpublished paper) (2003). See also, David Trubek & James Mosher, *New Governance, Employment Policy, and the European Social Model*, in: JONATHAN ZEITLIN & DAVID TRUBEK, *GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS* (Oxford U.P., 2003) 33~.

⁶³ David Kennedy, *supra* note 5. See also, HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (Bantam Books, 2000).

I won't go on. The main thing I want to stress is the need for recognition of multiplicities of legal phenomena. My argument sounds circular, but I think the meaning of core rules is still important and should not be neglected despite my reservations mentioned above. Thus, normative justice should be pursued pluralistically, and multi-culturally: either from a formal/informal perspective, or from a legislative/governmental/juristic perspective, or through informal negotiation. Having said that, I still think, on the other hand, that the political ramifications of adjudication may well give impetus to new ways of thinking in other fields.

Therefore, getting back to the subject of reparation, as I have already said, due to the partial nature of adjudicative procedure, we have to look for many ways to reconcile grievances, to facilitate restorative communicative actions, and to reallocate unbalanced and biased income distribution because of past exploitation and confiscation of property as an agenda of legislative and administrative policy on corrective justice. At the same time, we should also emphasize the ex-ante symbolic function of adjudication in giving signals to governments and educating/enlightening citizens, aside from ex-post relief for the particular plaintiffs on the same ground of partiality.

B. Demise of Critical Legal Education? : With Reference to the Methodological Change of Legal Interpretation

The next nagging question is as follows: If we move towards an adjudicative society, how can we ensure that judges play a more politically active role? Is present legal education adequate to nurture responsible lawyers with broad and penetrating views who will implement considerations in pursuit of the critical rule of law?

Probably not. The already patterned, mechanically syllogistic education

will be aggravated by the introduction in 2004 of a Japanese-style law school system quite different from American legal education. All of the worthwhile components of U.S. law schools, e.g., (1) interdisciplinary academic education, (2) pro-bono clinical education of reaching out to the poor, (3) interactive consideration of law and society or law and policy, are missing as Japanese legal education mimics the non-academic prep schools to increase the numbers of students who can pass the bar exams. Isn't it appalling to imagine that most judges adjudicate highly contested issues, by applying only patterned, closed, legal knowledge without the required sensitivities to concern themselves with the socially and politically vulnerable parties?

Civil law education is now withering toward closed traditional legal dogmatism isolated from broader consequential policy deliberation. I assume that this is ironically related to the methodological debates more than a decade ago about legal interpretation, whose ramifications were unexpected by the discussants, most notably Prof. Yoshio Hirai.⁶⁴ I use the term "unexpected", because his actual work includes critical moments of developing arguments, and taking account of policy considerations, as his concrete study on torts shows.⁶⁵

Historically, Japanese civil law scholars have been receptive to the American Legal Realism movements, interestingly enough, most influenced by the radical strand, e.g., Jerome Frank⁶⁶ from a different

⁶⁴ YOSHIO HIRAI, NOTES ON BASIS OF LEGAL ARGUMENTS [Hougakukisoron Oboegaki] (Yuhikaku, 1989); do., SEQUEL [Zoku Hougakukisoron Oboegaki] (Yuhikaku, 1991).

⁶⁵ Yoshio Hirai, THEORIES OF DAMAGES [Songaibaisyohou no Riron] (Tokyo U.P., 1971); do., PROSPECTS OF MODERN TORT LAW THEORIES [Gendaihoukouihougaku no Ichitenbou] (Ichiryusha, 1980). In addition, he also theorizes the policy considerations (do., THEORY OF LEGAL POLICY [Hou-seisakugaku] (Yuhikaku, 1987 (2ed ed., 1995)).

⁶⁶ For example, Prof. Kawashima has been heavily influenced by Frank's LAW

background: the historical lack of legal and doctrinal arguments.⁶⁷ One of the most influential figures in the Japanese civil law scholarship, Sakae Wagatsuma, studied sociological jurisprudence with the realist precursor Roscoe Pound in the 1920s.⁶⁸ Another civil law scholar, Prof. Izutaro Suehiro also worked on “lebendiges Recht”, that is “law in action,” to use the term of Karl Llewellyn, influenced by German legal sociologist Eugen Ehrlich in the era of “Freirechtsbewegung” (free right movement).⁶⁹ Thus, under the strong influence of Takeyoshi Kawashima’s work that dealt with American Legal Realism in depth,⁷⁰ the methodology of “interest balancing” has naturally and eclectically become the mainstream of civil law interpretation and has been dominant until recently (Katoh, Hoshino etc.).⁷¹

However, around 1990, Prof. Hirai criticized the predominance of

AND MODERN MIND (Brentano’s, 1930), that his mentor Prof. Izutaro Suehiro gave him as a remembrance, when he passed away.

⁶⁷ For a detailed analysis of the background difference, YOSHIDA, *supra* note 57, chap. 1.

⁶⁸ Sakae Wagatsuma, *Reflection on the Methodologies of Private Law* [Shihou no Houhouron nikansuru Ichikousatsu], in: do., SUPERIOR STATUS OF OBLIGATIONS IN MODERN LAW [Kindaihou niokeru Saiken no Yuuet-sutekichii] (Yuhikaku, 1953) (original 1926).

⁶⁹ E.g., IZUTARO SUEHIRO, PREFACE TO PROPERTY LAW [Bukkenhou Josetsu](Ichiryusha, 1960) (original 1921). Prof. Suehiro was the first Japanese scholar to study at an American law school, because he could not study in Germany as his predecessors did during WWI.

⁷⁰ TAKEYOSHI KAWASHIMA, LEGAL METHODOLOGY AS SCIENCE [Kagaku toshiteno Houritsugaku] (Kobundo, 1964).

⁷¹ ICHIRO KATOH, LOGIC AND INTEREST BALANCING IN CIVIL LAW [Minpou niokeru Ronri to Riekikouryou] (Yuhikaku, 1974); Eiichi Hoshino, *Preface to Civil Law Interpretation* [Minpoukaisyakuron Josetsu], in: do., SELECTIONS OF CIVIL LAW ARTICLES [Minpouronsyu] vol.1 (Yuhikaku, 1970); Akira Yonekura, *Introduction to Civil Law* [Minpou no Manabikata], HOGAKU KYOSITU 79 (1987).

substantial extra-legal rhetoric and argued instead for doctrinal critical discussions as “arguments” (see, note 64). Unfortunately for Japanese civil law scholarship, it seems to me that the followers — the present majority of civil law scholars — have just accepted Hirai’s criticism partially and in a mundane way, causing the impoverishment of dynamic interpretation under the sway of the old-fashioned statically syllogistic, patterned, and conceptual dogmatism that has been overcome in the U.S. by the *American Legal Realism* movement. The recent methodological shift, which fits ironically into the unimaginative prep-school legal education, has shown us, sad to say, how superficial the legacy of legal realism has been in Japan, in spite of the apparent affinity between the two countries.

IV. Conclusions: Any Hope? or Dystopia of the Rule of Law?

A. The Only Possible Solution: Critical Analysis of “Law and Society”

Is there any way to overcome this daunting situation? I assume that the only way is to go back once again to the harbinger era of legal realism and its intellectual progeny, critical legal studies, and to reconsider the relationship between “law and society.” We need to criticize petrified legal precedents that have often been subject to the influence of neo-conservative pressure groups. To make such sociological legal criticism effective, we must have keen, sensitive, and critical social vision about *income redistribution, fair housing, health care, equal conditions in the working place, and equality in family life, and a more humane, imaginative sense of the social situation of vulnerable people, that is, the socially powerless in terms of class, race, and gender.* To use the language of Frank Michelman, and originally the late Robert Cover, dialogic, critical-transformative legal practices, i.e., jurisgenerative politics outside of formal channels of electoral and legislative politics, require our constant

reach for inclusion of marginal others hitherto excluded, and bringing those absent voices into legal-doctrinal presence. Michelman also notes that judges are better situated to listen to voices on the margins.⁷²

Thus, critical education to produce good lawyers in every legal field is the pivotal point to retrieving the healthy dynamism of the “rule of law.” Needless to say, it is essential to continue critical legal research to perform our task of critical legal education.⁷³

B. Vicious Circle of the Unhealthy “Rule of Law” and How to Avoid it

Let’s take a moment and look at what kind of vicious circle we are now caught in. Most of the prominent civil law scholars I have talked to directly about this issue, are in fact privately critical of the recent reforms in legal education, even if they refuse to say so publicly. Yet the situation has been deteriorating by the odd power of group pressure. Furthermore, the Japanese Supreme Court, as I already have mentioned, continues to stress the monolithic “rule of law”.

However, the recent uncontrollable reform lays bare the complete lack of any internal critical engine: it reveals the decadence of our legal world, doesn’t it? How can we expect to have a critical and healthy “rule of law” in this difficult situation? Are we going to face the dystopic “rule of law” driven by the selfishly rent-seeking, i.e., money-making lawyers in each branch?⁷⁴

⁷² Frank Michelman, *Law’s Republic*, 97 YALE L. REV. 1493, at 1529, 1531, 1537 (1988). He criticizes *Bowers v. Hardwick*, 478 U.S. 186 (1986), by saying that it has the effect of endorsing and reinforcing majoritarian denigration and suppression of homosexual identity (id. at 1533). For the term of ‘jurisgenesis’, see, Cover, *supra* note 16, at 4-19.

⁷³ The division of research and education that has been prevalently argued nowadays in Japan is not understandable at all to me in this regard.

⁷⁴ For this universal problem, see, e.g., ANTHONY KRONMAN, *LOST*

Here, the critique of monolithic collective pressures by Kazuhiko Kasaya, a prominent historian and expert of samurai society in the Tokugawa era (1600-1868),⁷⁵ is quite helpful. He argues that the self-critical institutional mechanism of “checks and balances” from vassals was developed by the original warrior ethic (bushido) and that it supported the resilience, flexibility, and strength of the Japanese organization from the bottom-up (the practice of overthrowing of lords by vassals is a typical example). Such critical individualism, that existed even in the minds of Tokugawa-Japanese warriors, might be the key (or what else?) to future hope for a more critical mode of the “rule of law.”

LAWYERS: FAILING IDEALS OF LEGAL PROFESSIONS (Harv. U.P., 1993).

⁷⁵ KAZUHIKO KASAYA, PHILOSOPHY OF WARRIORS: STRENGTH OF JAPANESE ORGANIZATION [Samurai no Shisou] (Nihon Keizai Shinbun, 1993) 53~, 63~, 145~.