

**Class No. 12 (June 30, 2010)**

**Law and Culture: Japanese Law and Japanese-style Public- and -Private Structure; (2) On the Theme of Gender Issue**

**Yoshiko Terao, University of Tokyo Faculty of Law**

**I Law and right**

A new right carves out a new world.

A phrase of “sexual harassment” that has changed power relations between male and female on a grand scale

“Many social practices imposed upon women because we are women are not considered by the law to be based on our sex. The political argument around which this book revolves—although not the experiences that ground it—began with this realization. Sexual harassment has been not only legally allowed; it has been legally unthinkable. As I came to analyze it, sexual harassment also appeared neither incidental nor tangential to women’s inequality, but a crucial expression of it, a central dynamic in it. Is its centrality to women’s condition connected to its legal and social permissibility? In particular, is sex discrimination law as constructed, by inner logic as much as by outer limits, unable to grasp the true dimensions of women’s inequality? Does sex discrimination doctrine embody a conception of sexuality, gender, and power that can even begin to touch their fused reality as women experience it? These remain my concerns.” (Catharine A. MacKinnon, *Sexual Harassment of Working Women*, xi, 1979)

**The Struggle for Law (Der Kampf um’s Recht)**

“All the law in the world has been obtained by strife. Every principle of law which obtains had first to be wrung by force from those who denied it; and every legal right—the legal rights of a whole nation as well as those of individuals—supposes a continual readiness to assert it and defend it. The law is not mere theory, but living force. And hence it is that Justice which, in one hand, holds the scales, in which she weighs the right, carries in the other the sword with which she executes it. The sword without the scales is brute force, the scales without the sword is the impotence of law. The scales and the sword belong together, and the state of the law is perfect only where the power with which Justice carries the sword is equaled by the skill with

which she holds the scales.” (Rudolf von Jhering, *Der Kampf um's Recht (The Struggle for Law)*, English translation by John Joseph Lalor)

## II Japanese people hate lawsuit?: Is it a taboo on bringing out private matters to a public fuss?

- Number of lawyers
- To institute a law suit against people next door
- Why do people have a dislike for a trial?
- The English word “right” that was translated into “*kenri*” in Japanese: Yukichi Fukuzawa had it as “*tsugi*” [i.e., a universal principle]
- The word “*jiyu*” (freedom) that was difficult to be taken as something good.
- The word “individual” that was translated into “morals of oneself”

(Akira Yanabu, *Conditions for Formation of Translation of Words*, Iwanami Shinsho)

Politics are the public actions of free men.

Freedom is the privacy of men from public actions. (Bernard Crick, *In Defense of Politics* 18, 1964

Japanese *Ohyake* and *Watakushi*

## III Realization of Gender Equality Society and Japanese-style structure of “public-private”

Modern times and materialization of marriages for love: Formation of public domain in the West, and materialization of friendly domain by modern families  
Positioning of “love” in our country and “manliness,” and “public-private”

## IV Law and politics as dialogue over “rightness”

<Dialogue>

Yoshimichi Nakajima, *Society without Dialogue: Things compassion and tenderness crush to death*, PHP Shinsho

Oriza Hirata, *Lesson on Dialogue*, 2001

- One-on-one relationship
- To talk, listen, and judge by dragging along the real feeling and personal experience in one’s own life rather than erasing them
- To positively look for a confrontation with one’s companion rather than trying not to see or avoid it

- To treasure a trivial “gap” in the opinion from one’s companion and “expand” it by avoiding dichotomy between the views being either same with or different from each other
- To always stay open to a possibility that opinions of one’s own and companion may change midway

#### “The Rule of Law,” “Equality Before the Law”

The law that binds oneself, and the one that protects oneself: Law as a system of “justice,” and one as a “command

“The term *Recht* is, it is well known, used in our language in a twofold sense,—in an objective sense and in a subjective sense. Thus *Recht*, in the objective sense of the word, embraces all the principles of law enforced by the state; it is the legal ordering of life. But *Recht*, in the subjective sense of the word, is, so to speak, the precipitate of the abstract rule into the concrete legal right of the person. In both directions the law meets with opposition. In both directions it has to overcome that opposition; that is, it has to fight out or assert its existence through a struggle.” (Rudolf von Jhering, *Der Kampf um's Recht (The Struggle for Law)*, English translation by John Joseph Lalor)

#### “Formation of Politics”

“What distinguishes politics ...is action—the possibility of a shared, collective, deliberate, active intervention in our fate, in what would otherwise be the by-product of private decisions. Only in public life can we jointly, as a community, exercise the human capacity “to think what we are doing,” and take charge of the history in which we are all constantly engaged by drift and inadvertence. ...A family or other private association can inculcate principles of justice shared in a community, but only in public citizenship can we jointly take charge of and responsibility for those principles.” (Hanna F. Pitkin, *Justice: On Relating Private and Public, Political Theory vol.9*, 1981, pp.327, 344-45)

What is a difference between the case of merely insisting on interests and the situation for insisting on “their righteousness”? Assertion about their “righteousness” connotes that, “while these interests are beneficial to me in the current context, even if I, on a different footing, should be put in a disadvantageous position by paying high regard to such interests, I approve the righteousness of the insistence on the same interests.” It is also a method of a dialogue to say, “I just happen to be a beneficiary of these interests; the reason I advocate respect for them is not that they are beneficial to me, but that they are righteous.” No doubt there are

“assertions on righteousness” from different angles. It is the very function that is expected of public opinion to select an assertion on real righteousness among so many “assertions on righteousness.” And which is a dialogue that is different in quality from a method just to fix up a conflict of interests, compromise, and try and find some middle ground. A primary concept of the “right” is a medium for mutually certifying to shut out others upon the basis of relationship and an agreement with others. Accordingly the “right” grows into one only after it gets approved as “righteousness,” to be received with marked distinction, and through dialogues with other members of a community, and by citizens who are their colleagues. And it’s simply due to such dialogues that a “private person” can develop into a “citizen” and becomes awakened to one’s own worth to assume the responsibility of the “public.” (Y. Terao)

“The first outlook, the mentality of *homo faber*, characterizes us when we come to politics with our private interest firmly in hand, seeking by any means necessary to get as much as we can out of the system. It is a common condition, for the private is immediately visible in our daily lives and face-to-face relationships. But actual participation in political action, deliberation, and conflict may make us aware of our more remote and indirect connections with others, the long-range and large-scale significance of what we want and are doing. Drawn into public life by personal need, fear, ambition or interest, we are there forced to acknowledge the power of others and appeal to their standards, even as we try to get them to acknowledge our power and standards. We are forced to find or create a common language of purposes and aspirations, not merely to clothe our private outlook in public disguise, but to become aware ourselves of its public meaning. We are forced, as Joseph Tussman has put it, to transform “I want” into “I am entitled to,” a claim that becomes negotiable by public standards.<sup>84</sup> In the process, we learn to think about the standards themselves, about our stake in the existence of standards, of justice, of our community, even of our opponents and enemies in the community; so that afterwards we are changed. Economic man becomes a citizen.” (Hanna F. Pitkin, *Justice: On Relating Private and Public, Political Theory*)

