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Book Review

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BOOK REVIEW

LAW AND SOCIAL CHANGE IN POSTWAR JAPAN. By Frank K. Upham. Cambridge, Massachusetts: Harvard University Press, 1987: Pp. x, 269. N.p.

Professor Frank K. Upham's *Law and Social Change in Postwar Japan* represents a major contribution to Western understanding of the process of legal change in Japan. In four excellent case studies spanning subject matters as diverse as the treatment of minorities and industrial planning, Upham reveals a legal culture of considerable complexity, which challenges simple generalizations. From this material, Upham seeks to derive a number of central themes. Certain of these themes are insightful and solidly supported by Upham's own case studies and other materials on Japanese law. Other themes are more speculative, raising the danger that many of the complexities Upham has so effectively identified may again be lost from sight behind a new set of stereotypes. In any event, this book seems likely to generate considerable debate over the nature of law and legal change in Japan.

I. THE CASE STUDIES

A. *Pollution in Minamata City*

In his first case study, Upham examines Japan's response to environmental pollution.[1] During the 1950s and 1960s, as Japan engaged in heavy industrialization, a number of communities began experiencing very high levels of pollution-related illnesses and deaths. Upham focuses primarily upon the most famous of these incidents, that involving mercury pollution in Minamata City.

Minamata was once primarily a fishing village, but in 1908, it became home to the Chisso Corporation, a manufacturer of chemical fertilizers. Over the years, fishing catches dropped, and then cats, and later humans, began to develop a previously unknown disease that resulted in loss of control

1. F. UPHAM, LAW & SOCIAL CHANGE IN POSTWAR JAPAN 30-77 (1987) [hereinafter UPHAM].

over physical functions and, ultimately, death. By the mid-1950s, suspicions had focused on Chisso and its effluents.[2]

After mediation before a committee consisting of local politicians, in 1959 a victims' association agreed to a settlement in which Chisso paid victims various sums, ranging up to the equivalent of $830 in the case of death.[3] By the late 1960s, many victims had become unhappy with that settlement and split into several factions. One group opted for yet another round of mediation.[4] Another opted for what Upham refers to as "direct-negotiation,"[5] which included such confrontational tactics as demonstrations in front of Chisso headquarters and the so-called "one-share movement," in which victims each bought one share of Chisso stock so that they could attend the 1970 shareholders' meeting and voice their protests.[6] Yet a third group chose litigation, filing a tort suit against Chisso.[7]

As with direct-negotiation, the litigation originally had a strong moral component: the desire of the victims to demonstrate Chisso's wrongfulness and to obtain an apology

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2. Although "ominous evidence" of mercury poisoning appeared as early as 1953, Kim & Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L & COMP. L.Q. 491 (1979), the victims' shame and guilt, as well as their neighbors' belief that this affliction stemmed from poor hygienic practices, prevented the disease from being medically diagnosed for several years. UPHAM, *supra* note 1, at 31. For additional analysis of the Minamata pollution case, see Japanese and English sources enumerated *id.* at 234-35 n.2.

3. Upham notes that had external events not focused national attention on this case, these negotiations might have come to represent one of the more successful instances of Japanese informal dispute resolution. *Id.* at 33.

4. In fact, the majority of patients' families accepted the government's offer to mediate demands for greater compensation. Interestingly, those who chose this route are still regarded as having selfishly pursued their own well-being without due regard for the needs of the community or the class of victims at large. *Id.* at 37-38.

5. *Id.* at 38, 41.

6. Consider, for example, the thoughts of one of the decedents' relatives: "So we should put water in a big keg, then put some mercury in it, take it up to the stage and say, 'At this stockholders' meeting, if some of you important people at the top, some of you from Chisso Company sacrifice yourselves and become victims, then maybe we'll be ready to reconsider.' " Statement of Onoue Tokiyoshi, *id.* at 41.

7. *Id.* at 38-41.

from the company.[8] In 1973 the litigation achieved its aims, with a full victory for the plaintiffs, including recognition of the causal connection between the Chisso effluents and the disease and a requirement that Chisso cease production if it could not ensure the safety of effluents. This was followed by settlement of various subsidiary issues and a formal apology to the victims by the president of Chisso.[9]

Initially, the government had been slow to respond to pollution, even, according to Upham, suppressing a 1959 Ministry of Health and Welfare conclusion that mercury was the cause of the Minamata disease.[10] By 1966, however, the Ministry of Health and Welfare had issued a report recommending strict liability for pollution injury.[11] The strict liability recommendation was dropped following opposition from business groups and the Ministry of International Trade and Industry ("MITI"),[12] but in 1967, the Diet enacted the Basic Law for Environmental Pollution Control, which included provisions requiring the government to establish systems for administrative compensation of pollution victims and for mediation and arbitration of pollution disputes.[13] In 1970, the so-called "Pollution Diet" enacted var-

8. Upham calls the reader's attention to the plaintiffs' "remarkable . . . innocent faith in the legal system's ability to function as an instrument of moral justice, the apocalyptic and communal vision of litigation, and the total absence of the language of either legal rights or monetary compensation." *Id.* at 42. Citing Gotō Takanori, the activist lawyer who devised the one-share movement, Upham points to the victims' desire "to regain their human dignity through a human apology because they knew that compensation alone could not give them a reason for living." *Id.* at 45.

9. *Id.* at 47. Despite the fact that the Minamata court's judgment was the largest in Japanese history, awarding up to $60,000 per person, the plaintiffs did not rest until the company's President knelt before them and guaranteed lifetime annuities and funds for research, clean-up and medical expenses. *Id.*

10. Even though this report "studiously avoided any mention of Chisso as the source" of the poisoning, the government disbanded its subcommittee that prepared the report and cancelled all government research grants to the team that provided the basis for the report. *Id.* at 33-34.

11. *Id.* at 58.

12. MITI and other agencies lobbied successfully for a "comprehensive system of extrajudicial dispute resolution" as opposed to an extension of the tort system to meet victims' needs. *Id.*

13. Upham shows that although these administrative means and provisions for mediation and arbitration appear to reflect "traditional values," they were incorporated into this law not because they pay homage to cul-

ious statutes aimed at strengthening pollution control. These measures included the Law for the Resolution of Pollution Disputes, which established a three-tier dispute resolution mechanism containing mediation, conciliation, and arbitration provisions.[14] These were followed in 1973 by the enactment of the Law for the Compensation of Pollution-Related Health Injury,[15] which established a comprehensive compensation scheme for victims of defined pollution-related illnesses, paid out of a fund financed by industries deemed to be responsible for pollution. Even later, the Diet enacted relatively weak versions of environmental impact assessment and public hearing requirements with respect to proposed new development activities.[16]

B. *Buraku Liberation*

For his second case study,[17] Upham focuses on the Burakumin, a minority group generally considered to be descendants of Tokugawa era outcasts and estimated to constitute 1-3% of the Japanese population. The Burakumin have faced rather severe discrimination.[18] In their efforts to eradicate that discrimination, though, the Burakumin—repre-

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tural values, but because of the political clout exercised by the powerful Federation of Economic Organizations (*Keidanren*) and MITI. *Id.*

14. Law for the Resolution of Pollution Disputes, *Kōgai funsō shori hō*, Law No. 108 of 1970, partially translated in J. GRESSER, K. FUJIKURA & A. MORISHIMA, ENVIRONMENTAL LAW IN JAPAN 407-10 (1981) [hereinafter ENVIRONMENTAL LAW]. For the law's provisions, see UPHAM, *supra* note 1, at 56-57.

15. *Kōgai kenkō higai hoshō hō*, Law No. 111 of 1973. For detailed discussion, see ENVIRONMENTAL LAW, *supra* note 14, at 295-323. According to Upham, this law was enacted when environmental plaintiff victories persuaded the government that preexisting law neither compensated victims adequately nor slowed the rush to litigate or protest objectionable pollution-related injuries. UPHAM, *supra* note 1, at 58.

16. As successive legislation became increasingly less rigorous, the Japanese Federation of Bar Associations and environmentalists came to criticize it as weaker than previously developed decisional law. *Id.* at 60.

17. *Id.* at 78-123.

18. Despite the fact that the Burakumin are "racially, linguistically, and culturally identical to other Japanese," *id.* at 79, they are victims of centuries of discrimination and prejudice. *Id.* It was not until the Emancipation Edict of 1871, *Eta kaihō rei*, Proclamation no. 61 of the *Dajōkan*, that the Burakumin were "liberat[ed] . . . from their feudal status as outcasts and 'nonhumans'." UPHAM, *supra* note 1, at 80.

sented by the Buraku Liberation League (BLL)—have rejected litigation in favor of a so-called "denunciation struggle," by which members of the Burakumin seek to convince other Japanese to reject and renounce prejudicial views.[19] According to Upham, implicit in these denunciation activities is the actual or threatened use of limited physical force by large groups of Burakumin.[20] These denunciation activities have occasionally led to criminal charges. Upham examines in detail one such case in which the courts essentially exonerated Burakumin who carried out these activities.[21] In that case, although the High Court ultimately found a Burakumin defendant guilty of assault,[22] it suspended his sentence and declared that denunciation activities, if kept within reasonable bounds, are a valid means of seeking redress for discrimination.[23]

In the late 1950s and 1960s, the BLL had been closely linked with the Japanese Communist Party and the Japanese Socialist Party in various causes. Presumably in part as a response to concern over this alliance, in 1961 the government

19. The goal of the denunciation struggle, or *kyūdan tōsō*, is to convince non-Burakumin Japanese to accept the BLL's interpretation of a given event, language, or policy. *Id.* at 78.

20. *Id.*

21. Upham describes the April 9, 1969 so-called "Yata Denunciation," in which, as a result of "denunciation," two BLL officials were charged with the unlawful imprisonment of three teachers. These teachers had supported a candidate in the March 1969 Osaka Teacher's Union election who issued an election pamphlet allegedly containing discriminatory materials. Moreover, they had purportedly reneged upon their promise to undergo denunciation voluntarily. When the teachers refused to recant, the BLL officials forced the issue and sharply questioned the teachers in front of a crowd for several hours.

22. Judgment of Jun. 3, 1975, 782 Hanrei Jihō 22. Reversed by the Osaka High Court Mar. 10, 1981, 996 Hanrei Jihō 34, *app. dismissed without discussion*, Decision of Mar. 2, 1982. *See* UPHAM, *supra* note 1, at 87-91, for case history and extensive quotation of the facts as described in the Osaka District Court's opinion.

23. The court held that because "[l]egal remedies against discrimination are definitely limited[, and t]heir scope is narrow and frequently there is nothing that can be done . . . it's justifiable for society to accept . . . denunciation against discrimination so long as the methods and tactics don't exceed reasonable limits." 782 Hanrei Jihō 23 at 31, translated at UPHAM, *supra* note 1, at 98. Moreover, the court held that reasonableness was a question to be decided "by reference to all the circumstances." *Id.*

created a special council to study the Buraku situation.[24] Four years later, that council issued a report stating clearly that discrimination against Burakumin was unfounded, yet nevertheless fundamentally linked to the basic structure of Japanese society.[25] The report also recommended legislation, which in 1969 resulted in passage of the Special Measures Law for Assimilation Projects.[26] This law accorded the government broad authority to undertake "special measures" to improve the Burakumin position, but, according to Upham, contained few concrete governmental obligations.[27] While the law has not eradicated discrimination to date, it has led to various special benefits and projects for the benefit of Burakumin communities.[28]

C. *Equal Employment*

The third area Upham examines is that of equal employment opportunity.[29] Although Article 14 of the Constitution of Japan prohibits sex discrimination,[30] Japanese courts have held that that provision does not extend to action by private parties;[31] and employment discrimination has been widespread in Japan.[32] Beginning in the 1960s, a number of

24. *Id.* at 84.

25. The Report by the Deliberative Council for Buraku Assimilation found that discrimination was pervasive and deeply rooted in Japanese society and it explicitly rejected the idea that this prejudicial atmosphere would dissolve without governmental intervention. It further found that this atmosphere was perpetuated because of social and economic discrimination and not by Burakumin's purported sloth or inferiority. *Id.* at 84-85.

26. *Dōwa taisaku jigyō tobuketsu sochi hō* (Law No. 60 of 1969), extended by Law No. 102 of 1978. *See* BURAKU LIBERATION RESEARCH INSTITUTE, LONG-SUFFERING BROTHERS AND SISTERS, UNITE! 259 (1981), for translation of this law.

27. Upham suggests that this legislation is best viewed not as a "statutory framework mandating specific public and private conduct," but as a "political statement in statutory form." UPHAM, *supra* note 1, at 86.

28. *Id.* at 119.

29. *Id.* at 124-165.

30. "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." KENPŌ art. 14(1).

31. UPHAM, *supra* note 1, at 130. Courts have implied a reasonableness standard and a state-action requirement into the Constitution's flat prohibition.

32. *Id.* at 126-29.

plaintiffs have challenged discriminatory employment practices in litigation based on Article 90 of the Civil Code, which provides in part that any "juristic act whose object is . . . contrary to public order or good morals is null and void."[33] Based on this provision, which Upham calls "hardly an obvious basis for a broad-based campaign against [universally practiced overt employment discrimination,]"[34] courts in over twenty cases dating from 1966 have struck down company policies mandating earlier retirement ages for women than for men and, in a few cases, lay-offs limited only to women.[35] The Ministry of Labor has extended the effect of these successful suits by bringing strong pressure upon other companies to abolish discriminatory retirement policies.[36] According to Upham, these efforts virtually eliminated these and similar discriminatory policies in Japan by the early 1980s.[37]

In addition, the government has taken steps on the statutory front to achieve greater employment opportunity for women. After long and at times quite bitter debate, in 1985 the Diet enacted the so-called Equal Employment Opportunity Act (EEOA).[38] That Act prohibits discrimination in retirement and lay-off policies, in certain fringe benefits, and in training and worker education. In contrast, the Act only adopts a best efforts standard in the areas of recruitment, hiring, and promotion, merely requiring employers to "strive" to achieve equality in those areas.[39] The Act also abolishes or relaxes certain protective provisions such as lim-

33. *Id.* at 130. The seminal case in this area, *Sumitomo Cement*, 17 Rōshū 1407 (1966) prohibited unreasonable discrimination based on sex in relationships wholly within the private sector. *See* UPHAM, *supra* note 1, at 131-33.

34. *Id.* Indeed, neither Article 90, nor the Civil Code's reference to the "essential equality of the sexes" in Article 1-2, was ever understood to create substantive rights or even to apply directly to ordinary cases. *Id.*

35. *Id.* at 133-34.

36. *Id.* at 134.

37. *Id.* at 129.

38. The Act for the Assurance of Equality of Opportunity and Treatment for Men and Women in Employment and the Enhancement of the Welfare of Female Workers (*Koyō no bunya ni okeru danjo no kintō na kikai oyobi taigū no kakuho tō joshi rōdōsha no fukushi no zōshin ni kansuru hōritsu*). *See* UPHAM, *supra* note 1, at 243 n.2, for a brief legislative history.

39. *Id.* at arts. 8 and 9. *See* discussion, UPHAM, *supra* note 1, at 153.

itations on overtime and late-night work by women.[40] In addition, the Act establishes a dispute resolution procedure to be administered by the Ministry of Labor, and contemplates the promulgation of numerous implementing guidelines by that Ministry.[41]

D. *Industrial Policy*

Finally, Upham examines the industrial planning process,[42] focusing especially on two incidents: one from 1965, when Sumitomo Metals sought to challenge its allocation under a steel production cartel administered by MITI;[43] and a series of cases stemming from the MITI-orchestrated oil price and production cartel of 1973.[44] In the former, Sumitomo Metals threatened legal action against MITI, but then backed down, in part because of the absence of an effective legal remedy but in larger part because of pressure from the bureaucracy and the business community. In the latter, the courts, especially the Tokyo High Court, concluded that informal MITI guidance will not normally insulate private participants in cartels from criminal liability. A result of these latter cases, according to Upham, is the Structurally Depressed Industries Law of 1983.[45] That Law effectively grants the Japanese Fair Trade Commission (FTC), MITI's chief bureaucratic rival in industrial policy, a veto power over MITI merger recommendations, but at the same time expressly gives MITI broad discretion in establishing cartels and recommending mergers in so-called "structurally-depressed industries."[46]

II. Basic Themes

On the whole, these case studies are excellent. At times, more elaboration would be useful, such as in Upham's description of the "one-share movement."[47] Nevertheless, in a

40. *Id.*
41. *Id.*
42. *Id.* at 166-204.
43. *Id.* at 176-84.
44. *Id.* at 184-88.
45. *Id.* at 190-91.
46. *Id.* at 192.
47. *See supra* note 6.

relatively concise space of roughly forty pages per case study, Upham provides an admirable range of information on Japanese society and the process of legal change. Moreover, the subject matter is of broad interest and the case studies display four very different modes of legal change. While the Burakumin case, in which litigation was consciously avoided, might not seem to fit with the other three case studies, where the litigation theme appears much more strongly, the conscious decision of the Burakumin to forgo litigation is of interest precisely because of the contrast it provides.[48] Furthermore, Upham is to be commended for his careful examination of the Burakumin issue, which, as he notes, has been studiously avoided by most Japanese scholars and publishing houses because of its highly controversial nature.[49]

Throughout these case studies, Upham emphasizes two major themes: the role of litigation in the process of legal change in Japan, and what he characterizes as the "informal" nature of the underlying legal structure.[50] Notwithstanding popular perceptions of Japan as a society in which there is little litigation or judicial activism, Upham effectively demonstrates that litigation and progressive judicial decisions can and do influence legal change in Japan. For example, decisions in the Minamata and other pollution cases contained substantial doctrinal developments. These include the placement of the burden of disproving causation on the pollution companies after the plaintiffs establish a *prima facie*

48. The Burakumin have tended to prefer denunciation tactics over litigation and mediation for two reasons. First, denunciation is a tactic entirely within their control, UPHAM, *supra* note 1, at 104, and thus does not rely on formalistic legal action or third parties. Second, the Burakumin perceive that only denunciation can guarantee them their constitutional rights because private and public legal redress are assumed to be unavailable. *Id.* at 106. Moreover, the Burakumin believe that denunciation itself is a fundamental human right (*kihonteki jinken*) guaranteed by the Constitution. *Id.*

49. *Id.* at 114.

50. Upham points to the informal yet institutionalized state of "cooperative interdependence of government and business" resulting from the work of deliberative councils, industry, academics, media, and consumer groups to investigate a problem and suggest a resolution often including preparation of a draft bill. *Id.* at 168.

case of causation through epidemiological studies,[51] and recognition of something akin to a strict liability standard by requiring the polluters to adopt the most advanced pollution control devices available, regardless of cost, and even to terminate operations if safety could not be ensured.[52] Likewise in the sex discrimination area, litigants were able to use a very general provision in the Civil Code to overturn certain long-standing discriminatory practices by employers.[53] These new standards were subsequently actively enforced by the Ministry of Labor and incorporated in the EEOA. Even in the industrial planning area, where litigation has been sparse, Upham makes a persuasive argument that judicially-recognized limits on the ability of MITI to shield industry-wide cartels from antitrust scrutiny have helped shift the balance of power between MITI and FTC and have affected subsequent legislation.[54] Moreover, Upham notes that, at least in the employment opportunity context, litigants and attorneys deliberately sought to influence the direction of the law through a series of incremental challenges.[55]

Upham could easily have multiplied the number of cases and fields in which litigation has influenced the process of legal change in Japan. Furthermore, he could have observed that, despite the image of a lack of judicial activism in Japan, Japanese judges themselves have in certain cases consciously set out to influence and change legal standards. An argument can be made that this in fact happened in the pollution cases themselves. When the judiciary was faced with the complex and difficult pollution litigation, the Japanese Supreme Court convened meetings of top judges from across Japan to study the issues and to seek effective means of handling the litigation. Similarly, after a flood of automobile accident cases threatened to swamp the Tokyo District Court, judges from that court deliberately developed a comprehensive set of standards to govern determination of appropriate compensation for victims, based upon such criteria as the nature of the accident and the age, sex and earning

51. *Id.* at 44.
52. *Id.*
53. *See supra* note 32.
54. UPHAM, *supra* note 1, at 184-98.
55. *Id.* at 158.

capacity of the victim. These standards were subsequently published in pamphlet form and, with subsequent updates to take into account inflation and other factors, have been widely followed by courts throughout Japan, thus encouraging settlement of cases by rendering the ultimate outcome of litigation highly predictable.[56] Another example of an area in which both litigants and certain judges consciously changed legal standards is that of standards covering retrials. The record suggests that, after litigants had gradually chipped away at various doctrines greatly restricting the availability of retrials in a series of cases spanning more than twenty years, two jurists who had long opposed certain of the restrictions found themselves sitting on the same Petty Bench of the Japanese Supreme Court and joined in a decision that largely revolutionized prevailing doctrine.[57] In short, stereotypes of Japan as a society in which litigation plays little role in legal change mask a far more complex situation.

The second major theme emphasized by Upham is what he refers to as the "informal" nature of legal controls in Japan.[58] As he notes, in each of the four areas examined, the legal structure vests broad discretion in the bureaucracy. This is often accompanied by alternative dispute resolution provisions that keep most disputes out of court. Thus, for example, in both the pollution and sex discrimination fields alternative dispute resolution procedures have been estab-

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56. *See, e.g., Okino, Tokyo chisai minji kōtsūbu no songai baishō santei kijun to jitsumu keikō* (The standards for determination of damages of the civil transportation division of the Tokyo District Court, and trends in actual practice), 1 Bessatsu Hanrei Times 1 (April 1975).

57. For a more extended discussion of this episode, *see* Foote, *From Japan's Death Row to Freedom* (work in progress).

58. Upham argues that informality is the "ideal characteristic" for a society like Japan's, based on consensus, denial of individually defined self-interest, and the acceptance of a benevolent hierarchy. UPHAM, *supra* note 1, at 207. Informality allows for the formation of consensus, which, in turn, forms the basis for dispute resolution, *id.*, and minimizes the chance that any particular constituency could challenge the dominant mode of thinking and behavior. *Id.* Moreover, Upham suggests that "[w]ithout a formal and open policymaking process, government policies can appear as the inevitable and natural results of custom and consensus rather than as the conscious political choices among mutually antagonistic interests that they actually are." *Id.* at 208.

lished and the bureaucracy has been granted broad discretion to establish guidelines and remedy problems. In both the Burakumin and industrial planning fields, the bureaucracy similarly has broad authority to set goals and fashion methods for achieving them. In all of these areas, the bureaucracy is typically able to deal with matters in a relatively informal, non-public setting, with at most limited rights to subsequent judicial review.[59]

Upham takes his analysis one step further, however, and posits a direct link between the advent of litigation and attempts by the bureaucracy to restore its ability to deal with matters in an informal framework. Upham argues that whenever the bureaucrats perceive litigation as a potential threat to their authority, they promptly move to establish legislation that will take the disputes out of the judges' hands.[60]

Upham implies that this response reflects two objectives. The first is that of ensuring that the role of the judiciary remains limited. "Instead of tolerating the continuation and expansion of the judicial role, the bureaucracy steps in to recapture control of the social agenda [when faced with successful litigation]."[61] Through "manipulation of the legal framework," states Upham, "the Japanese government has attempted to prevent the development of litigation into an effective and ongoing vehicle for social change."[62] Upham thus seems to imply that if these disputes were left to the courts, judges might grant broader rights than the bureaucracy would be comfortable with and might somehow threaten the existing social order.

The second objective is to stem movements for social change before they reach the point at which they might pose a threat to the *status quo*. In effect, Upham seems to argue that the government deliberately co-opts protest movements by promptly providing remedies to the most serious problems before the movements can generate sufficient momentum to threaten more fundamental change.[63] Thus, for

59. *Id.* at 202.
60. *Id.* at 27.
61. *Id.*
62. *Id.* at 17-18.
63. *See*, for example, Upham's conclusion, *id.* at 27, that in the pollution and sex discrimination cases, in which the bureaucracy failed to grasp the severity and breadth of discontent, and did not even consider the pos-

example, in the pollution context the government quickly moved on three fronts to defuse the primary reasons for protest—namely, the wide-spread pollution and resulting pollution-related illnesses by providing for pollution control, establishment of a dispute resolution structure ensuring cheap and quick mediation and arbitration rather than litigation, and the establishment of a comprehensive compensation scheme for victims of pollution-related illnesses.[64] In part because it was able to do so, Upham suggests that the government was able to avoid "the possibility that the use of litigation and politics would forge the fragmented local citizens' movements into a nationally based movement which, although initially limited to environmental issues, would eventually extend to other issues as well,"[65] thus "hinder[ing] the coalescence of many localized conflicts into generalized national ones."[66]

In the Burakumin area, Upham suggests that the government has been happy with the BLL's choice of denunciation rather than litigation, because "[b]y keeping these controversies out of the courts, the government can prevent the crystallization of the BLL's grievances into questions of equality, discrimination, and social structure that have universal normative appeal."[67] In the employment opportunity field as well, Upham argues that enactment of the EEOA was largely a response to the success of litigation in this field when he states that the EEOA was both "an attempt by the Ministry [of Labor] to regain the initiative in the area of women's rights in employment,"[68] and a means of defusing the movement for full equality. By expressly prohibiting forms of discrimination that had already been declared illegal by the courts, the EEOA may have ensured that the women's

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sibility that aggrieved persons might choose to litigate their complaints, "victims discovered for perhaps the first time in postwar Japan that the courts could provide a forum for the public articulation of the grievances of parties outside the ruling coalition and thereby enable outsiders to circumvent the elite control of the political and social agenda that is inherent in bureaucratic informality."

64. *Id.* at 56-58.

65. *Id.* at 56.

66. *Id.* at 65.

67. *Id.* at 121.

68. *Id.* at 155.

movement would not develop "into a political movement with the independent power to withstand the intervention and manipulation of the government represented by the passage of the EEOA."[69] Presumably, the phrase "intervention and manipulation" refers primarily to the fact that the EEOA establishes only hortatory provisions with respect to decisions on hiring and promotion matters that might otherwise directly affect male dominance of the managerial classes. Upham further suggests that the system for mediation of employment discrimination disputes before they reach the courts makes it far less likely that litigants will be able to successfully challenge those practices if the Ministry of Labor itself does not choose to do so.[70]

III. Discussion

Upham raises stimulating issues, and there is much truth to many of his observations. Yet even though I never expected to become an apologist for the Japanese bureaucracy, I am troubled by his implication that the bureaucracy is somehow fundamentally insincere, that it is motivated largely by a desire to maintain its primacy and co-opt movements for social change.

I am troubled first at a factual level. Initially, it bears note that any such response by the bureaucracy is in any event not universal. As the retrial and automobile accident cases reveal,[71] the bureaucracy certainly does not always respond to judicially-developed doctrinal advances. Nor is it a sufficient response simply to say that those cases did not involve threats to the existing social and legal order. At least in the retrial cases, nationwide movements, including petition drives that had assembled millions of signatures, had arisen surrounding several of the controversial convictions. Moreover, those movements, which often involved coalitions that included the Japanese Communist Party, challenged not only the retrial standards themselves, but many other aspects of the justice system. The bureaucracy may well have been able to head off those movements if it had responded earlier with proposals for more modest revision of the retrial stan-

69. *Id.* at 158.
70. *Id.* at 104, 219.
71. *See supra* notes 55-56.

dards. Furthermore, while the automobile accident cases presumably did not threaten social disruption, this would seem to be an area especially suited for resolution by the bureaucracy rather than the courts.

Even Upham's own examples are problematic, moreover, for in at least a number of them, questions exist regarding the extent to which the fear of successful litigation actually influenced the passage of legislation. Because one obviously would not expect a bureaucrat to admit that a law was designed to bypass litigation and co-opt citizens' movements, Upham's analysis largely rests on assumptions relating to the timing and substance of the legislation ultimately enacted. Yet upon closer examination, the evidence of a causal link between successful litigation and legislative revision is at best mixed.

In the pollution case, for example, an advisory committee to the Ministry of Health and Welfare issued a report in 1966 that Upham characterizes as "surprising" for its progressive nature.[72] This occurred even before any of the major pollution suits had been filed. Just one year later, when most litigation was still in the planning stage, the Diet enacted the Basic Law for Environmental Pollution Control,[73] requiring the establishment of systems for the mediation and arbitration of pollution disputes and for administrative compensation of victims. Moreover, none of the major cases had been decided, even at the district court level, when the Diet enacted the 1970 Law for the Resolution of Pollution Disputes,[74] with its comprehensive complaint settlement procedure. By this time, the issue of pollution control had generated broad public support throughout Japan, which at least in part was fostered by the extensive publicity surrounding major pollution disputes and the associated litigation. Yet the government had in fact begun to move even before litigation was filed and had enacted broad portions of the final legislative package before the first litigation appeared.

In contrast, the enactment of the EEOA did not occur until nearly twenty years after the first successful litigation

72. UPHAM, *supra* note 1, at 58.

73. *Id.* at 58.

74. *See supra* note 14.

challenging discriminatory retirement policies.[75] Here too, however, the timing of enactment suggests that the litigation successes may not have been an important factor behind the passage of the legislation. As Upham notes, most commentators in Japan have attributed the enactment of the EEOA to a pledge by the government of Japan to ratify the U.N. Convention on the Elimination of All Forms of Discrimination Against Women[76] by 1985, the final year in the U.N.-declared Decade of Women.[77] In order to be in a position to ratify that convention, Japan had to amend a number of domestic laws, including, as most commentators agree, the EEOA.

Upham implies that these commentators are mistaken. As support, he points to the fact that certain of the standards in the EEOA closely parallel prior court decisions.[78] This is not necessarily of great significance in determining the motives behind the EEOA, however, since in any event one would not expect the legislators simply to ignore an established line of judicial precedent. Moreover, the first successful litigation in the sex discrimination area had come nearly twenty years prior to enactment of the EEOA and had been followed by a steady string of other successes over the years.[79] In addition, the Ministry of Labor had already moved to enforce these judicially-announced standards actively through informal guidance of industry.[80] There appear to have been no major new developments in litigation in the early 1980s that would have posed a new threat grave enough to spur the enactment of new legislation. At the

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75. *See* UPHAM, *supra* note 1, at 131 for Upham's account of the landmark 1966 case, *Sumitomo Cement*, and *id.* at 243 n.2, for the history of the enactment of the EEOA.

76. The Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. ST/LEG/SER.E/3 (1985).

77. UPHAM, *supra* note 1, at 151.

78. *Id.* at 155. Despite the fact that he acknowledges that he is aware of only one reference to the *Sumitomo Cement* line of cases in the government's effort to enact the EEOA, *id.* at 151 n.64, Upham does maintain that "[i]n large part . . . the passage of the [EEOA] . . . [was] the result of . . . plaintiff's success in convincing the judiciary to declare illegal a wide range of explicitly discriminatory practices." *Id.* at 129.

79. *See id.* at 131-44 for discussion of these cases.

80. *Id.* at 138.

same time, the impact of the government's pledge to the U.N. is undeniable. The years 1984 and 1985 saw a broad flurry of activity extending across various legal fields in Japan concerning the amendment of statutory provisions that had been discriminatory on the basis of gender. As another notable example, in 1984 the Diet enacted broad amendments to the Nationality Act, which previously had restricted Japanese citizenship to children of Japanese *fathers*.[81] In short, the timing and history of the enactment of the EEOA lend strong support to the view that its enactment was a direct result of the government's pledge to the U.N., and that successful litigation in the field was only tangentially related to its enactment.

In addition, Upham's analysis rests on the implicit assumption that if litigation were allowed to run its course, Japanese courts would issue opinions that might pose a threat to the existing social order. Yet the existing evidence suggests otherwise. Although there have been a few notable exceptions,[82] the Japanese judiciary, while independent, has not been noted for its activism. This is not surprising, given that the conservative Liberal Democratic Party has had effective control over judicial appointments for nearly forty years.

Of the four cases Upham has examined, the courts traditionally have deferred almost completely to the bureaucracy in cases involving business planning. In the oil cartel cases, the FTC and MITI had taken opposing positions, so the courts could not avoid favoring one side of the bureaucracy or the other. Despite the ramifications of the decisions in the oil cartel cases, the courts have not sought to play an active role in the industrial planning process. Had they not been

81. Nationality Act. These changes came despite a marked lack of success in legal challenges to the Nationality Act by children born to foreign fathers and Japanese mothers.

82. These include the so-called *Naganuma Case*, Judgment of Sept. 7, 1973, *translated in part in* THE JAPANESE LEGAL SYSTEM 712-715 (H. Tanaka ed. 1976), in which the Sapporo District Court held that Japan's maintenance of Self-Defense Forces violated the Constitution of Japan. This case and various incidents surrounding it represented a key episode in the debate over membership of judges in the so-called Young Lawyers' League, an organization holding liberal views. For a discussion of that episode, see THE CONSTITUTIONAL CASE LAW OF JAPAN 16-19 (H. Itoh and L. Beer eds. 1978).

forced to take a stance by the bureaucratic infighting, the courts may well have deferred in this case as well.

In the pollution area, the courts did adopt broad changes in doctrine with far-reaching implications, but they did so only after careful consideration of the issues and possible alternatives. Upham suggests that, had the government not supplied various remedies in the pollution control field, litigation may have led to further successes in what he terms the second and third generation environmental cases (involving such matters as noise pollution and general ecological concerns)[83] and might have led to the coalescence of various groups seeking broad social change in various fields.[84] Both propositions are highly speculative. In fact, despite the enactment of the pollution-related legislation, litigants continue to pursue second and third generation suits, but with only limited success. Moreover, core pollution controversies tend to bring together coalitions of people with rather disparate interests, ranging from the highly conservative to the truly radical, yet, notwithstanding more permanent alliances as found in the Greens in Europe, most such coalitions have tended to split sharply once the focus has shifted away from the environment. Still, it is arguable that the speculative possibility of the rise of broad-based citizens' movements may have helped spur the bureaucracy into action on pollution.

Any possible connection between the advent of legislation and litigation seems even more tenuous in the employment discrimination area. Despite nearly two decades of success in cases challenging discriminatory retirement policies, Japanese litigants have had at best very limited success in challenges to discriminatory promotion policies and, as Upham notes, given existing law and existing judicial attitudes there is virtually no hope for success in lawsuits challenging discriminatory hiring.[85] Particularly in light of

83. UPHAM, *supra* note 1, at 65.

84. Upham points to the fact that Japan has no recognized tradition of the "pluralistic politics that would result from the coalescence of 'citizens' movements," or *shimin undō*. In fact, many Japanese see these movements as "fundamentally disruptive to the established ways of power" in much the same way as many Americans viewed the civil rights movement of the 1960s. *Id.* at 54.

85. *Id.* at 130.

Upham's observation that "judges' criteria [regarding what constitutes fair treatment for women] are likely to resemble those of the bureaucracy,"[86] it seems unlikely that the bureaucracy would have viewed second and third generation employment discrimination litigation as enough of a threat to necessitate the introduction of legislation.

This deference may at least in part reflect judges' own doubts over a perceived lack of institutional competence of the judiciary as compared to the bureaucracy. In Japan, both bureaucrats and judges are career public servants. Whereas the bureaucrats typically deal heavily in both long-term and short-term planning and are rotated through a number of different positions so that they may gain broader perspective on issues, judges tend to remain highly cloistered, rotating from court to court but experiencing little contact with the outside world. Given these differences in experience, judges may well feel reluctant to second-guess policy choices made by the bureaucracy. In any event, however, given the generally non-activist nature of Japanese courts and the broad deference such courts have traditionally shown to bureaucratic decisions, it seems unlikely that a major motive for the legislation was a fear by the bureaucrats that judges might issue decisions potentially disruptive of the existing social order.

Nonetheless, it is true that the bureaucracy has maintained a central role in each of the areas examined and that, through such mechanisms as the dispute resolution procedures and control over policy-making, the bureaucracy's role is likely to continue to far outweigh any involvement of the judiciary. A key underlying issue concerns the propriety of this bureaucratic dominance. Implicit in many of Upham's statements—his references to "manipulation of the legal framework,"[87] "prevent[ing] the crystallization of . . . grievances,"[88] and the like—is a belief that the bureaucracy has improperly stifled debate, co-opted movements for reform, and restricted the ability of the courts to play a role in social, or at least legal, change.

It is not readily apparent to me that that is the case. Arguably, the EEOA, by explicitly adopting only hortatory pro-

86. *Id.* at 164.
87. *See supra* note 61.
88. *See supra* note 66.

visions regarding the elimination of discrimination in hiring and promotion policies, will insulate management from meaningful challenges with respect to such matters, thereby preserving the status quo. It bears note, however, that many people in Japan regard even this as an unwarranted departure from existing law, under which management was regarded as having virtually absolute discretion at the hiring stage. Moreover, it is possible that these hortatory provisions will in fact *accelerate* change in hiring policies, either by providing litigants with a firm legal principle that had not previously existed or by providing the Ministry of Labor with a legal basis for the drafting of guidelines and the use of "administrative guidance" to exhort employers to eliminate discrimination in hiring and promotions. Only time will tell in which direction the primary impact of the EEOA lies.

In any event, it seems safe to say that the pollution episode reflects an era of very rapid legal and social change in which legislation achieved in a few years what might have taken many times longer through the courts; indeed, many aspects of the resulting legislation, such as the compensation scheme, arguably could never have been achieved without legislative and bureaucratic action. It is possible that, in the long run, even broader change would have resulted had the matter been left to the courts. It is also possible that, as with workmen's compensation statutes, a seemingly progressive system will come over time to appear quite regressive as compensation levels fail to keep pace with inflation. The pollution compensation program may also become outdated if the list of covered pollution-related diseases is not updated to reflect later discoveries. Yet these potential shortcomings should not obscure the fact that, when enacted, the compensation law and other pollution-related legislation represented a sweeping, forward-looking response to social ills.

While I am thus ultimately unconvinced by many of Upham's views on the motives of the bureaucracy, I share his concern with the largely unfettered domination of the policy-making process by the bureaucracy. As Upham discusses, the policy-making process to a large extent occurs informally behind closed doors, with some access for business, academic and other elites through the so-called *shingikai* (deliberative councils), but with virtually no access before the fact for the mass media or for the general public through public

hearings or other means. Moreover, the bureaucracy itself performs much of the job of administering the laws it proposes through informal guidance, generally free from after-the-fact judicial review. Thus, in a theme recurring through each of the four case studies, legal structures continue to vest very broad, often unreviewable discretion in the bureaucracy. Questions abound regarding the legitimacy and scope of that discretion and the manner in which it is exercised. Such questions, however, entail a much broader inquiry into the role of the bureaucracy in its overall setting and extend significantly beyond a consideration of the relationship of the bureaucracy and judiciary.

IV. Conclusion

Law and Social Change in Postwar Japan is a valuable work that effectively explores the themes of the role of litigation in legal change and the informality of legal structures in several diverse areas of Japanese law. Yet by going beyond those themes and suggesting a clearer dichotomy than I believe exists between the Japanese bureaucracy and the Japanese judiciary, Upham risks creating a new set of potentially misleading stereotypes. Given the very complexity of the bureaucratic and judicial roles in Japan, there is ample evidence to support a number of divergent opinions regarding the nature of the relationship between the bureaucracy and the judiciary. Upham's work promises to spur much lively debate, which ultimately should lead to a deeper understanding of this complex relationship.

Daniel H. Foote