

## Legal Philosophy

by Hajime Yoshino  
Japan Association of Legal Philosophy

### Introduction

This report is aimed at a general review of major movements and works in the field of legal philosophy in Japan during the period January 1974 – June 1981. It is not easy to describe them in a few short pages, as such a period is rather long, on the one hand, and on the other, the topic of legal philosophy has been regarded as containing many different subjects and many directions, according to the position of various scholars. I therefore wish to classify existing works on legal philosophy into six categories on the basis of their subject matter: I. Textbooks and commemorative volumes, which treat various subjects of legal philosophy; II. Methodology of legal philosophy; III. Methodology of legal science and theory of legal reasoning and judicial process; IV. General theory of law and state; V. Theory of legal values and VI. History of legal philosophy and thoughts. According to the aforesaid classifications, I will shortly introduce the works of the past eight years. On account of the small space of this paper and the large number of works published in these years, I can only present a very limited number of works here. It is much to my regret that not every important and interesting work can be referred to in this report. For the same reason, I must treat in principle the monographic books and pick up on only certain exceptional articles.

Before going into the works of each category, the movements of the Japan Association of Legal Philosophy should be described. The Japan Association of Legal Philosophy holds a two-day meeting once a year, each time providing a special common theme. The following themes were discussed in the meetings of the years noted, and the annual for each year was published with the same title during the next year: (1) *Legal Philosophy: Its Tasks and Methods (The Annual of Legal Philosophy 1973 (abbr. ALP 1973))*; (2) *Justice (ALP 1974)*; (3) *Law and Morals (ALP 1975)*; (4) *Legal Philosophy and Science of Positive Law (ALP 1976)*; (5) *Problems Concerning Legal Norms (ALP 1977)*; (6) *Legal Philosophy in Japan (ALP 1978)*; (7) *Legal Philosophy in Japan II (ALP 1979)*; (8) *Law and Language (ALP 1980)*.

### I. Textbooks and Commemorative Volumes

Recently, Shimpei Kato, a leading figure during the pre- to post-war period, and other leading legal philosophers of the post-war generation have successively published textbooks of legal philosophy. Here I enumerate them according to the year of publication, continuing in number from the previously mentioned volumes: (9) José Llompert, *Introduction to Legal Philosophy* (Seibundo, 1975); (10) Seiichi Anan, *Legal Philosophy* (Seirinshoin Shinsha, 1975); (11) Mitsukuni Yasaki, *Legal Philosophy* (Chikuma Shobo, 1975); (12) Shimpei Kato, *Legal Philosophy* (Yuhikaku, 1975); (13) Mitsukuni Yasaki &

in: Science Council of Japan, *The Japan Annual of Law and Politics*, No. 30 (1982)

Tetsuo Yagi, *Introduction to Legal Philosophy* (Seirinshoin Shinsha, 1978); (14) Shigeru Inoue, *Legal Philosophy* (Iwanami Shoten, 1981).

All these works are products of great volition and great endeavour. This is especially true of Kato (12) and Yasaki (11). In my opinion, Japanese legal philosophers of roughly these past twenty years, especially those who want to build up their own system of legal philosophy (as is the case in textbooks), have more or less had to confront and try to overcome the "heavy blow of logical empiricism" given by Aomi's "*Outline of Legal Philosophy*" (1964, new ed. 1973), which asserted the application of analytical philosophy to legal philosophy. According to his outline, statements of science as well as philosophy must be intersubjective, and several problems of traditional legal philosophy, such as the problem concerning essential concepts of law, must be excluded as pseudo-problems which come as a result of misunderstanding the use of words.

While accepting the need for intersubjectivity in scientific and philosophical statements, Kato and Yasaki don't simply reject the main problems which have been investigated in traditional legal philosophy, and they try to give answers to them by establishing their own ways. As such a starting point or method, Kato uses "sound speculation" by moderating the criterion of intersubjectivity, and he investigates the problems of natural law, the concepts of law and the purpose of law. Yasaki stands on "critical empiricism", which is empiricism pertaining to the acquisition of knowledge, and he consults critical philosophies while analyzing the function and validity of the knowledge. He approaches thus the problems dealing with the methodology of law, the description of law, the theory of the value of law, etc., through the analysis of empirical materials such as cases and decisions. (14) is a compact introduction to legal philosophy by Inoue, who has already published many interesting monographical books referring to the modern analytical legal philosophy of Hart. Anan (10) and Llompert (9) take the position of Catholic Philosophy (Thomist) and thus have not had to be embarrassed by the above-mentioned blow which has much affected liberal thinkers. They systematize their introductions to legal philosophy on the background of a theory of natural law.

As commemorative volumes, which contain legal philosophical works, there are contained the following: (15) Kinen Ronbun Henshu Iinkai (ed.), *Problems of Jurisprudence* (A Commemoration of Prof. Kato's Retirement, Yuhikaku, 1977); (16) Tomoyoshi Okada, Toshio Hironaka & Yoichi Higuchi (eds.) *Social Science and Development of Thoughts* (A Commemoration of Prof. Sera's Retirement, Ochanomizu Shobo, 1977).

## II. Methodology of Legal Philosophy

The above mentioned textbooks deal with this topic, as I have mentioned. Here, I will introduce other works. In the first place, I must especially point out (1). In addition to these works, I present (17) Junichi Aomi, "A Reflection on the Tasks of Legal Philosophy - Surrounding the Problems of Weltanschauung in Legal Philosophy" (ref. (15)), and (18) *A Collection of Treatises on Legal Philosophy* (Bokutakusha, 1981). It is noteworthy that not only according to (9), (10), (11) and (12) but also according to (17) (i.e., according to almost all leading legal philosophers), the problem of "Weltanschauung" in the field of law is considered one of the main concerns of legal philosophy today. (19) Shigeki Tanaka, "On Analytical Empiricism in Legal Philosophy and Logical Positivism", 2 parts (*The Journal of Law and Politics*, Vol. 39 No. 1 and Vol. 31 No. 1) criticizes Aomi's stance. (20) Shinichi Kojo, *Methods of Theoretical Jurisprudence*.

(Sekaishisoshia, 1978), attempts to build up a phenomenological legal philosophy.

Over a five-year period (1976-1980) was published (21) Kazuo Amano, et al (eds.) *Lectures on Marxist Jurisprudence* (Nihon Hyoronsha) in eight volumes. The 7th volume is (22) *Criticism of Modern Legal Science*, which contains articles criticizing methods of modern legal philosophy such as logical positivism, Weberism, Behavioral Science, etc.

### III. Methodology of Legal Science, Theory of Legal Reasoning and Judicial Process

In these fields also were published many monographs which are interesting and contain fresh ideas. I will first enumerate works according to the year of publication: (23) Aomi (ed.), *Theory and Practice in Jurisprudence* (Gakuyoshobo, 1975); (24) Minoru Ishida, *Methods of Interpretation of Law* (Seirinshoin Shinsha, 1976); (25) Michitaro Kai, *Interpretation and Practice of Law* (Horitsu Bunkasha, 1977); (26) Hideo Uematsu, "Dogmatic Character of Jurisprudence" (ref. (15)); (4); (27) Naoki Kobayashi, *Principles of Constitutional Judgement*, 2 vols. (Nihon Hyoronsha, 1978); (28) Shigeaki Tanaka, *Law and Politics surrounding the Administration of Justice*, (Yuhikaku, 1979).

In (24) Ishida, relying on his knowledge of civil law and codes of civil procedure, analyzes the binding power of law on the interpretation of law, and the limits and functions of value judgements which may be brought into the interpretation, relating theory to concrete cases; and he attempts to build up a new, firm methodology of interpretation. (4) contains articles dealing with the boundary problems between legal philosophy and the sciences of positive law. In (22), the authors criticize interpretations in public law, private law, social law and international law in modern Japan from the Marxist point of view. (28) inquires systematically into the possibility of, and limits to, the role of policy-making by courts of justice in modern Japanese society. Tanaka, analyzing the mechanism of law and legal thinking, accepting legal-sociological approaches to social bases (Japanese legal culture, civil movements, struggles for rights) on which trials stand, and taking into account the realization of justice, investigates the role of the court. This large-scale, fresh and problem-posing work is to be highly valued.

### IV. General Theory of Law and State (including a Theory of Main Concepts Constituting it)

In this field, so many diverse problems have been discussed from such diverse points of view that it is very difficult to summarize quickly the movements and works in this field. I will, therefore, give here only a list of works which should be given special attention, according to their years of publication: (29) Tomonosuke Ohashi, "On the Effectiveness of Law" (*Hogaku Shirin*, Vol. 72 Nos. 3 & 4, 1975); (30) Setsuko Sato, "Some Approaches to the Concept of Right" (*Aoyama Hogaku*, Vol. 16 Nos. 3 & 4, 1974); (31) Isamu Fujita, *General Theory in Law and Economy* (Nihon Hyoronsha, 1975); (32) Yoshio Takeuchi, *State and Civilization* (Iwanami Shoten, 1975); (33) Yozo Watanabe, *The Structure of Modern Law* (Iwanami Shoten, 1975); (34) Shigeru Inoue, *A Discourse on Human Rights* (Iwanami Shoten, 1976); (35) Naoki Kobayashi, *Developments in Modern Fundamental Rights* (Iwanami Shoten, 1976); (35a) Naomi Nakamura, "Negation des Begriffs der 'Natur der Sache'" (ref. (3)); (36) Isao Kobayashi, "Explanations and Understanding of Human Action" (*Rikkyo Hogaku*, No. 17, 1978); (5); (37) Mitsunori Fukada, "Legal Norms and Legal Systems" (ref. (5)); (38) Ken Takeshita, "Gultigkeit und Normativitat des Rechts" (ref. (5)); (39) Kazuo Amano,

et al (eds.) *General Theory of State and Law* (Vol. 3 of (21)); (40) Setsuko Sato, "New Rights as the Core of Suum" (*Aoyama Hogaku*, Vol. 21 Nos. 3 & 4, 1980); (41) Masamichi Moriya, "Law, Language and Life Styles" (ref. (8)); (42) Yasutomo Morigiwa, "Law and Speech Act" (ref. (8)); (43) Tatsuo Inoue, "Some Remarks on the Concept of Legal Proposition" (*Shakai Kagaku Kiyo*, No. 30, 1981).

### V. Theory of Legal Values

As mentioned before, the problem of Weltanschauung is unanimously treated as the main question of legal philosophy, yet there are not many works which directly treat justice itself. In the following, I enumerate the important works in this field according to the year of publication. (44) Ryuei Tsueshita, "The Naturalistic Fallacy Reconsidered" (ref. (2)); (45) Shigeaki Tanaka, "Justice, Liberty and Equality" (ref. (2)); (46) Terushiro Sera "Law and Morals in Medieval Europe" (ref. (3)); (47) Tsuneko Kikkawa, "The Draft Penal Code and Moralism" (ref. (3)); (48) Yoshiomi Mishima, "Law and Morals in Civil Society" (ref. (3)); (49) *Annual of Natural Law Study* (Horitsu Bunkasha, 1974); (50) José Llompart, *The Historicity of Law* (Seibundo, 1977); (51) Yoshimi Fujikawa, *Introduction to Theory of Justice* (Ronsosha, 1979); (52) Haruhiro Tanetani, *Sciences of Modern Natural Law and Realization of Declaration of Rights* (Yuhikaku, 1980).

It is, I think, very difficult to give an answer to "What is justice?" It seems that in the spirit of this modern, scientific age, value relativism has influence on study in this field in Japan. The authors seldom define their attitudes nor try to find their own answers. Most of the studies of justice are works pertaining to historical thought which try to approach justice by inquiring into theory of justice in the West. In this inquiry, a theory of natural law is chosen as the object in many cases. It is, however, noteworthy that Rawls is recently sometimes written about in our country as well (e.g. (45)). (50) is an original theory of natural law. Llompart, maintaining that natural law is changeable and historical, tries to make natural law approximate to empirical social facts. (49) was published for the purpose of the study of natural law in 1967, but was discontinued in 1975, much to be regretted.

### VI. History of Legal Philosophy and Legal Thought

In this period there is much more literature on the history of legal thought than on any other aspect of legal philosophy. This is because legal philosophical scholars in Japan are still much interested in legal philosophy in the West. It is to be noted that inquiries into German legal thought are rich, and much attention has come to be paid recently to the history of Japanese legal thought.

First, the following were published as textbooks of the history of legal thought: (53) Yukitoshi Zenke, *General Remarks on History of Legal Thought* (Seibundo, 1976); (54) Takeji Tsuneto, *A History of Legal Thought* (Chikuma Shobo, 1977); (55) Yoshimi Mishima, *A History of Legal Thought* (Seirinshoin Shinsha, 1980); (56) Mitsukuni Yasaki, *A History of Legal Thought* (Nihon Hyoronsha, 1981). It should be noted that we also have textbooks in the field of the history of legal science: (57) Junichi Aomi et al (eds.), *A History of Legal Science* (Tokyo Univ. Press, 1976); (58) Masayasu Hasegawa, *A History of Controversies of Legal Science* (Gakuyo Shobo, 1976).

Next, I will present legal historical works according to their countries. In the

field of history of German legal thought, much concern has been directed towards Hans Kelsen. The following works are to be noted: (59) Kisaburo Yokota, *The Collected Articles on Pure Theory of Law*, 2 vols. (Yuhikaku, 1976, 1977); (60) Hiroshi Takahashi, *Methods and Structures in Kelsen's Jurisprudence* (Kyushu Univ. Press, 1979); (61) Ryuichi Nagao, *Hans Kelsen and his Milieu* (Bokutakusha, 1980) (Nagao edited 10 volumes of translations of Kelsen's works); (62) Takashi Tejima, *A Study of Kelsenism* (Bokutakusha, 1981). Besides studies on Kelsen were published: (63) Hiromichi Imai, "Die Rechtsphilosophische Bedeutung der 'Kritik der reinen Vernunft'" (*Hogaku Ronso* Bd. 100, Nr. 1, Bd. 101, Nr. 1, 1977); (64) Rin-Itsu Kawakami, *Civil Ideas and Legal Theory in Germany* (Sobun Sha, 1978); (65) Hideo Sasakura, *Der Staat und die Rechtswissenschaft im modernen Deutschland* (Tokyo Univ. Press, 1978); (66) Kyoshi Katagi, *The Problem of Ethics, Law and State in Kant* (Horitsu Bunka Sha, 1979); (67) Junichi Murakami, *Liberty and Fidelity of Germanic Law* (Tokyo Univ. Press, 1979).

As far as studies of Japanese legal thought are concerned, it is to be noted that the Japan Association of Legal Philosophy took "Japanese Legal Philosophy" as the title theme of its annual meetings in 1978 and 1979, in celebration of the 30th anniversary of its founding. (6) contains articles concerning certain Japanese legal thinkers or philosophers: Azusa ONO, Amane NISHI, Yujiro KAKO, Shigeru NAKAJIMA, Kyo TSUNETO and Toshiyoshi MIYAZAWA. (7) also contains articles concerning Amane NISHI, Nobushige HOZUMI, Kojiro WADA, Tomoo OTAKA, Yoshio HIROHAMA, Kameji KIMURA, and Kotaro TANAKA. The following works are also to be mentioned: (68) Takeshi Ishida, *Law and Politics in the History of Japanese Modern Thought* (Iwanami Shoten, 1976); (69) Yoshiyuki Noda & Junichi Aomi (eds.), *History of Legal Thought in Modern Japan* (Yuhikaku, 1979); and (70) Ryuichi Nagao, *A Study of History of Japanese Legal Thought* (Sobun Sha, 1981).

As regards legal thought in England, there are to be noted: (71) Tetsuo Yagi, *A Study of Analytical Jurisprudence* (Chikuma Shobo, 1977) and (72) Kozo Ishii, "Blackstone's Legal Thought (1) & (2)" (*Ryukoku Hogaku*, Vol. 10, No. 3, 1978; Vol. 12, No. 2, 1979). That of the United States is found in (73) Takeo Hayakawa, *Development of American Jurisprudence* (Ichiryu Sha, 1975). For Chinese legal thought there is (74) Makoto Nemoto, *Chinese Traditional Society and Its Legal Thought* (Toyo Tetsugaku Kenkyujo, 1978).

I will make some comments about the above works. Most general textbooks on the history of legal thought are systematic introductions of great value. This is especially true of (56) and (60). Kelsen is highly valued among Japanese legal philosophers because of his criticism of ideology, his methodology of jurisprudence, and his argument on the theory of justice. (70) is an excellent study probing into Japanese thinking, particularly into important Japanese legal thought from the end of Edo-era to the immediate post-war days. Here, it may be added that Nagao has had extensive impact upon the revival of studies about Kelsen, and on the prosperity of study on the history of Japanese legal thought.

#### Conclusion

Before finishing this report, I will present some statistical data which represent trends of Japanese legal philosophy in this period, and up on which the above descriptions are based. The total amount of literature on legal philosophy in Japan in the period (January 1974 - June 1981) which I have collected so far amounts to 487

works. Following are their numbers according to the classification which I used in this report: I. Textbooks and commemorative volumes: 12; II. Methodology of legal philosophy: 39; III. Methodology of legal science and theory of legal reasoning and judicial process: 99 (Methodology of legal science and theory of legal reasoning: 85; Theory of judicial process: 9; Theory of legislation: 5); IV. General theory of law and state: 45; V. Theory of legal values: 92 (Theory of justice or morals in law: 37; Theory of natural law: 55); VI. History of legal thought: 179 (General: 11; German: 84; Japanese: 28; English: 18; Ancient and middle ages: 17; Of the USA: 8; French: 7; Chinese and Korean: 3; Others: 3); VII. Others: 19. The number of works which bear the names of Western thinkers in the title amount to 211 (therefore almost half of all the works). There are following Western legal philosophers in titles, (based on at least three works about them): Kelsen: 22; Hegel: 19; Rousseau: 15; Kant: 10; Hobbes: 8; Jhering: 5; Locke: 5; Rawls: 5; Blackstone: 4; Plato: 4; Ehrlich: 4; H.L.A. Hart: 4; Radbruch: 4; Adam Smith: 3; Fuller: 3; Kantorowicz: 3.

It is the fact that in this period Japanese legal philosophers have also much directed their efforts towards the study and examination of Western legal philosophies and thoughts. However, they now devote themselves not so much to mere presentations, acceptance, or refashionment of those ideas, but try also to produce creative works by means of newly developed methods, on the basis of earlier studies. These endeavours have produced successful results in some cases (for example in (11), (12), (18) and (28)). Now, one could begin to expect further rapid developments in Japanese legal philosophy and hope that it will make great contributions to Western legal philosophy as well as, in the not too distant future, in contrast to the past direction of things.