

AUTHORITY WITHOUT POWER

LAW AND THE JAPANESE PARADOX

JOHN OWEN HALEY

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AUTHORITY WITHOUT POWER

Law And The Japanese Paradox

John Owen Haley

TO SHOEN ONO

Few Japanese lawyers have been as generous
in friendship and support
of foreign students in Japan.

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Authority without Power

Introduction

The Japanese Paradox

From a Western—especially an American—perspective, Japan appears to share many characteristics of other East Asian societies. The legacy of Chinese influence is manifest in Japan's language, its arts, religion, and the most basic perceptions of the individual's relationships to family, community, and nation. These include prevailing social definitions of authority and the role of the state. The Japanese like their East Asian neighbors seem to accept the prerogative of those who rule to intervene and regulate nearly all aspects of community life subject, however, to a moral obligation to govern with empathy and benevolence. As reflected in the legal system, these characteristics also include ideological concern for the preservation of personal ties of kinship and loyalty, avoidance of conflict, as well as mediation and conciliation in the settlement of disputes. Also apparent is a tendency to avoid legalistic approaches in the ordering of personal and corporate relationships, coupled with an almost fatalistic sense of the futility of most attempts to control or regulate the future, exemplified in a reticence to rely on law, whether contract or code, as the primary instrument of social ordering.

Although some observers perceive these characteristics to be peculiarly Japanese, they are aspects of Japan's cultural indebtedness to a broader tradition that Japan shares with China, Korea, and other historically sinicized societies of East Asia. One can accurately substitute Korea or China for Japan for many observations, which are usually offered with an explicit or implicit comparison with the West in mind, that purport to depict the distinctive features of the Japanese social, political, or legal environment.

How different Japan appears, however, in comparison with its East Asian neighbors. Relative to Korea or China, Japan is distinguished by its resemblance to the West. Its feudal-like experience with development of martial arts and rule by a distinctively organized military caste, the diffusion of political power, and the scope of community autonomy seem far less Asian and far more Western in kind. From an East Asian perspective, the bonds of family are weaker in Japan than those of territorial or corporate communities and of contract. Japan is also a more litigious, legalistic society, one in which the claims of rule by and of law seem quite relevant in comparison to other East Asian societies.

If few of the most characteristic features of Japan's social order and national polity appear unique—with manifest parallels to either the East or West—the list is still remarkable. It contains an almost endless pairing of opposites. Japan is notable as a society with both extraordinary institutional continuity along with institutional change; of cohesion with conflict, hierarchy with equality, cooperation with competition, and above all else a manifest prevalence of community control with an equally strong impulse toward independence and autonomy. Japan thus presents a multifaceted paradox. It is a nation where political rule appears strong but also weak; governance centralized but also diffused; the individual subservient but also achieving; the social order closed but also open.

These paradoxical features of Japanese society make it all the more difficult to fit Japan into any prescribed model of social, political, or economic behavior. Japan as well as those who study it seem almost destined to remain separate from the mainstream. One result is that scholars who specialize on Japan are often deeply divided on the most basic issues, such as the contribution of government policy or market competition in Japan's economic growth.¹ Scholarship on Japan is frequently criticized as isolated and uninformed by general theoretical constructs and comparative research. In response, Japan specialists argue that prevailing models do not apply and that too often comparative research fails to integrate effectively the Japanese experience.² For those in government or business who deal with Japan directly in negotiating policies or trade, the Japanese paradox can be equally frustrating and divisive. Fundamental assumptions of political and economic behavior do not seem to hold.³

Legal scholars and lawyers are not immune from these conflicts. A glance at the contemporary legal literature on Japan reveals equally divergent views. Legal scholars in Japan and abroad disagree over the most basic propositions regarding the role and use of law and the legal process.⁴

Law, however, is a special case. Law is territorial and legal systems are themselves self-defining, cultural belief systems. The nature and role of law are delineated in any society within its particular cultural and institutional matrix. Unlike economic or social theory, law makes few claims to universally valid propositions. Law like language is bound within particular historical social contexts.

It seems especially appropriate for a book about both law and Japan to attempt to explain the Japanese paradox. As a study of a legal order in a specific context, this book is intended to expand understanding of the function and limits of law in society. Japan's legal order thus becomes the focus for a broader exploration of the interrelationships of law, social order, and change. As a study of Japan, however, it is also an endeavor to gain a deeper and more accurate image of Japan and the impact of its history and shared habits on the institutions and processes of law and, in turn, their influence on that history and those habits. The purpose of this book therefore is twofold: to use Japan as a window to law and law as a window to Japan.

At the outset some attempt at clarification of common ground seems in order. The reader is entitled to know something of the underlying theory that

informs the analysis that follows and to have the pivotal terms, especially *authority*, *power*, and *legitimacy*, defined. Above all the word "law" can mean many things. There are no universally accepted views of the elements and functions of law or the relationships between law and alternative extralegal or social means of societal ordering and control. The propositions that form the basis of this analysis of Japanese law thus need to be clearly stated at the outset.

The Elements, Attributes, and Functions of Law

By definition, all legal systems, Japan's included, comprise two primary elements—norms and sanctions—and the related institutions and processes for making and enforcing legal rules. The first element requires little explanation: The substantive norms expressed as rules of law and the institutions and processes of their making are familiar in all societies with developed political institutions. We readily recognize, for example, legislatures, administrative agencies, courts, or their institutional analogues and the distinctive procedures of each for recognizing, articulating, or changing, as well as enforcing, identifiable rules and standards as law.

It is by means of the distinctive institutions and processes of lawmaking that legal norms and rules are distinguished from their nonlegal counterparts, which may be similar or even identical in content. Take, for example, law library rules. Those of public universities in the United States are ordinarily subject to rules adopted by a state agency to statutorily prescribed administrative rulemaking procedures and are commonly published in state administrative law codes. They are thus ordinarily treated as justiciable legal rules. Regardless of content or form, those of private universities are not, inasmuch as private universities are by definition not agencies of the state. Their rules are not law.

In any society a wide range of norms thus exist that may be enforced by a variety of sanctions. Yet neither the norm nor the sanction is considered law without special institutional recognition. In both Japan and the United States, for example, to keep one's word or promise and to honor one's parents are widely accepted social norms. The first is recognized in both countries in codes, statutes, and decisional law as the basis for the law of contract. Similarly in neither country is the norm of honoring one's parents a clearly recognized legal norm although in both it is reflected in certain legal rules.

Only a fraction of all the norms and sanctions that order social life in any community are actually defined as law. The choice is made by delineating the specific institutions and processes that make or enforce legal rules. In other words, legal systems must internally define which rules and sanctions are accorded the status of law by designating which institutional processes make and enforce legal as opposed to nonlegal rules. All legal orders must at least implicitly therefore have two separate categories of rules. The first encompass-

ses those norms regarded as the law in that system. The second, however, includes those rules that define which norms are to be included in the first category. The selection of norms and rules defined, to paraphrase H.L.A. Hart,⁵ as the "primary" legal rules of the law in a particular legal order is determined by the 'secondary' legal rules of that system. We must keep in mind, however, that secondary rules are particular to individual legal systems. Consequently no universal definition of law is possible. At best only some common attributes of law and legal processes can be described.

First, all societies in which a concept of law has evolved equate it with the rules and sanctions recognized and applied by those who exercise *political authority*. Although perhaps originating in deistic command or the implicit principles of some transcendental order, only in a theocratic state are such commands or principles fully equated with law. Even then, however, religious and political authority are generally combined. Similarly, as explained below, rules and sanctions evolved through custom or established by consensual communities should be distinguished from law, although perhaps functionally equivalent to legal rules and sanctions, unless they are at least incidentally recognized and applied by those with recognized political authority.

Another special attribute of legal norms is their *legitimacy*, in other words, community recognition of the bindingness of the norm and the appropriateness of the sanction for its violation. The legitimacy of legal rules is, however, indirect or contingent in that it derives from the legitimacy of the political authority that promulgates or enforces the law. Dictionary definitions to the contrary notwithstanding, not all law is legitimate. Community judgment of legitimate authority is grounded in culture and custom. Shared religious symbols, social myths, and "folk ways" sanctified by habit and expectation are the ultimate sources of legitimacy. Law as custom, too, acquires a mantle of acceptance. Otherwise rules articulated in a statute, judicial decision, or administrative regulation are legitimate as law ultimately as a result of the legitimacy of those processes themselves. Conversely, if the authority and processes used for prescribing a rule as law are deemed illegitimate, the rules they create also risk being considered illegitimate. If, however, the institutions and processes for lawmaking are themselves viewed as legitimate, they legitimate the rules they create.

This *contingent legitimacy* of law is especially important in order to understand the reception of Western law in modern Japan, which included both the introduction of continental European legal institutions in the late nineteenth and early twentieth centuries as well as the constitutional and other legal reforms under the postwar Allied Occupation (1945-52). The legitimacy of the new legal rules created by those in authority enabled dramatic social change despite conflict with preexisting customary and legal norms. This is not to say that the new Western norms were in all instances overriding. However, as detailed below, in nearly all cases the failure of a new derivative norm to supplant a conflicting customary norm was a consequence of the enforcement process—such as judicial recognition of the customary norm as preeminent or a failure to enforce the new norm altogether.

The attribute of contingent legitimacy also underscores the crucial importance of broad societal acceptance of the legitimacy of political authority. Again, the endurance of the legal reforms initiated by the new political leaders of Meiji Japan as well as those nearly a century later of American military commanders during the Allied Occupation can be explained at least in part by the recognition on the part of Japanese society generally that their authority was legitimate. This acceptance of authority was therefore fundamental to Japan's capacity to adapt to institutional and economic transformation without political and social upheaval. Hence the factors that contribute to political legitimacy ultimately also determine legal legitimacy.

"Institutionalized" and "customary" legal orders should also be differentiated. At least in so doing we are better able to deal analytically with the role of culture—which for the purposes of this study simply means values, habits, and expectations widely shared throughout a society. An institutionalized system is one in which either or both the making and enforcing of rules occur through established procedures and institutions—functions exercised by established political authority. Nearly all contemporary societies have institutionalized legal orders in which legislatures, administrative bodies, and courts are the basic institutions for lawmaking and law enforcing. We can easily envision, however, institutionalized systems with much simpler arrangements—such as, councils of elders or chieftains—for performing these tasks. Moreover, in complex societies, as noted before, a variety of institutions exist, only a few of which make or enforce law. Nonetheless, whatever the structure, a hierarchy of political authority remains a prerequisite to any institutionalized system.

A noninstitutionalized or customary order, in contrast, is one in which rules are either made or enforced or both by means of consensus and habitual community behavior. Although we would be hard pressed to identify a purely customary social order—for by definition no hierarchy of authority could exist in such a society and thus equality among all members (however defined) would be required—all societies do contain a variety of constituent customary orders, however peripheral or minor they may seem. In any event, in such an order, both norms, as customary rules and standards, and sanctions exist, but they require community consensus to remain viable. Since custom to be custom depends upon mutual conformity, a norm that ceases to be recognized by the community as a legitimate or binding guide for conduct ceases by definition to be a customary rule. Similarly, only the sanctions a community can and will apply against nonconforming conduct remain viable. No functional distinction exists, of course, between the customary rules in a noninstitutionalized system, although perhaps labeled "law," and the customary rules in an institutionalized order, even if distinguished from the norms defined as "law." What matters is to distinguish between rules and sanctions viewed as "law" in an institutionalized system from what is customary in both.

A primary attribute of legal rules is, as noted above, their indirect or contingent legitimacy effected by the legitimacy of the institutions and processes through which they are recognized or created. In contrast, customary norms

are by definition legitimate as custom and thus depend directly upon community acceptance or consensus to remain viable. We can identify, for example, customary rules of conduct by conforming conduct. If the conduct changes, the rule is thereby altered. With custom, notes Roberto Unger, "There is a point at which deviations from the rule remake the rule itself. Thus, every act leads a double life: it constitutes conformity or disobedience to custom at the same time that it becomes part of the social process by which custom is defined."⁶ As Unger recognizes, to codify custom is to transform it into law. The result, however, is to free what had been a customary rule from dependence upon habit and consent. Instead, as law it becomes dependent like all other legal norms on institutional processes for definition, change, and continued legitimacy. In a sense two rules exist, one is legal and as such dependant on institutional processes and the other customary supported by continued habit. The distinction remains obscure until one or the other changes and conflict between law and custom ensues.

Like custom the viability of legal norms as viable rules or "living law" also depends ultimately upon voluntary compliance and consent. In the end habit and consent sustain law even in regimes of terror, which risk losing the capacity to legitimate norms and sanctions as their political institutions and legal processes themselves lose legitimacy. Institutionalized legal rules are, nevertheless, more resistant as law than custom to changes in community attitudes and impulse in that their legitimacy, unlike custom, is effected by a lawmaking process instead of direct consent. Moreover, because process rather than belief and behavior legitimates legal rules, lawmaking institutions have the capacity to create consensus and thus to introduce new rules. The end result is a third attribute of law: its *consensus-creating capacity*. Imagine, for instance, a community in which there is a shared customary proscription, for instance, against eating meat. As a customary norm such a taboo begins to diminish as soon as anyone in the community begins to eat meat openly. If one person may, then anyone (at least in the same peer group) may, and as such nonconforming conduct spreads, the customary prohibition fades. Conversely, a statute proscribing use or possession of meat may be effective even without universal acceptance of the rule within the community. At least some members of the community can be expected to obey the statute and refrain from eating meat simply because it is against the law.

Omitted in this illustration is the question of sanctions and enforcement. Most definitions of law and discussions of legal systems fail to distinguish lawmaking from law enforcing. To many such joinder may appear necessary as an intrinsic feature of law. Not so. Law without sanctions or lawmaking without law enforcement may be rare but not inconceivable. A rule is no less legitimate and no less binding because the community lacks either the means or will to compel conformity. As noted at the outset, law enforcing is a distinct and separate component of any legal order.

A fourth attribute of legal rules is indeed what might be labeled their *justiciability* or capacity for formal enforcement. As noted, in all communities legal norms can be and are in fact enforced by a variety of extralegal means,