THE RULE OF LAW IN JAPAN

A Comparative Analysis

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To Beatrice Delphine Goodman without whose encouragement
this book would never have been written,
and whose shared enjoyment of Japan and things Japanese
have made it possible for me to pursue my own interests in Japan

Contents

1. Introduction

In the United States there are numerous "national law schools" notwithstanding the fact that like politics most law is local. It is of course, true that some law is federal in nature and thus uniform throughout the federalism system that is the US political system. But once we are past administrative law, constitutional law and some of the elective federal law subjects like anti trust, bankruptcy, or SEC law, etc. we are left with a basically local legal terrain. Contracts, torts, substantive criminal law—the basic building blocks of US law—are local in nature. American lawyers take national law schools for granted and rarely if ever think of how it is that a school such as Harvard can be the training grounds for lawyers in California, Georgia, New York, Texas, etc.

How is it that American lawyers, whose every day business is to interpret and apply State law, can be adequately trained in national law schools? Why can lawyers in national law firms easily assist colleagues in "out of their state" offices when the need arises? I suggest the answer lies in the fact that the Rule of Law grounded in notions of the English Common Law bind our legal system together. Not only is this true for the "original" 13 colonies but it applies to those States that were colonies of Civil Law countries and thus had a civil law base. This is not to say that real estate notions in New York and Texas are uniformly the same or that there are not regional legal theories such as the difference in water rights law in the Northeast compared with the Southwest. Of course such differences exist; and each State has its own state law concepts—which is the reason the question is raised in the first place. Nonetheless, the Rule of Law fashioned on basic notions of the English Common Law system act as a kind of glue holding the divergent state systems together and making national schools and transferable legal talent possible.

Examples come easily to mind. Whether a lawyer practices in Louisiana or Maine, case precedent is the guiding principle for understanding the legal rule applicable to the problem at hand. While there are state law refinements on the rules affecting contract, a "horse a hawk or a robe" will still serve as consideration throughout the 50 states. Fundamental to all state legal regimes is the concept that our activities are governed by legal rules that apply to us all and are not transient or dependent on society's quickly changing views. The law is to be found in statutes and court decisions and while courts may change rules they do so slowly, conservatively and in accord with logical development. We are all subject to the Rule of Law and can base our decisions—both personal and business—on the existing Rule of Law.

In Japan, on the other hand, federalism issues and conflicting state law issues do not arise because Japan has a unitary government system. Law is national in nature. Of course, there are local ordinances and even Prefecture rules to be considered. But, law is a matter of national authority and to the extent that local ordinances come into play it is because the national government has delegated power to the Prefecture or the local authority. While national/state "law" issues tend not to arise in Japan (conflict can arise between National and Prefecture authorities and courts may be called on to resolve such questions in limited cases), Japan does have its own conflicting ideas about law. When viewed by Americans the Japanese legal system seems a bouillabaisse of civil law rules and Codes, common law concepts and Constitution, a common law adversarial style prosecutorial system trying cases under a civil law style substantive criminal law and a common law style judiciary staffed with civil law selection process judges. Is there a similar "glue" that holds this mixture of legal concepts together? I suggest that there is—the "glue" is Japan's feudal past and the influence that that past and myths about that past has on Japanese life and law. That past is interpreted to stress relativity, harmony, group identity, substantive justice and subordination of individual rights to group or societal rights.

Judges are ordinary men and women who are learned in the law and have as their business the application of legal principles to the dispute before them. But because they are first persons in their own society they bring the ideas, notions, mores, cultural values and myths of their society to the problem at hand. This is the process of judging. Some call it judicial judgment, others common sense, others discretion, etc. But whatever label we place on it the fact remains that all judicial decisions are infected by the bias, education, training, experience, culture and background of the judicial officer. To American judges trained under a case law system that places primacy on the decisions of judges and stresses continuity and stability of legal principles, part of that "discretion" is logical application of prior decisions—and by extension logical applications of statutory language and legislative history—to the problem before them. But to Japanese judges, whose experience is fundamentally different from the American experience, the discretion to be exercised must be exercised in a way that is satisfactory to the Japanese public—in a manner consistent with cultural values, myths (if need be), and societal norms that may be different from norms that exist in the United States. To be consistent with these values, a decision may not reflect a syllogistic analysis of abstract logic. A decision must take account of the circumstances in which the parties presently find themselves and legal rules must be pliable to reflect the context in which the parties and the rule exist. Indeed, application of logical norms borrowed from Greek philosophers may have to be rejected in favor of application of notions that are part of the Japanese culture. The result of this process, to American eyes, may be that what you get in the application of a code, statute or constitutional provision may not be what you see when you read (with Western eyes and Western notions of logic) the provision at issue.

It is also true that American judges will sometimes rely on a "strained" reading of a statute to reach a result that is consistent with their philosophical view or with the court's perception of society's view. If abstract logic were the be all and end all of American law there would hardly be the

numerous split decisions by appeals courts that characterize the American appellate system. Holmes is not the only one to appreciate the fact that the Common Law is based more on experience than on logic. But it is precisely that experience factor which forms the background for a syllogistic approach to law. One leg of the syllogism at work in most appellate cases is the experience that the legal system has had with similar issues. In other words, law has its own history and it is this history that plays a major role in deciding new cases.

Japan's legal history is fundamentally different from legal history in England and the United States. If indigenous legal experience is one leg of an American jurist's chair then in Japan that leg would simply be missing. The legal history of Japan is mostly a "borrowed" history with feudal Japan's notions of the function and purpose of law being fundamentally at odds with a "Rule of Law" society. It is simply asking too much to ask that such a society adopt as its own the cultural values that underlie the Codes that were borrowed from a fundamentally different society.

Moreover, the reasons for the borrowing of Codes may lead one to accept the Code in its entirety or to reject the notions in the Code that conflict with indigenous values—or at least with what are currently perceived as indigenous values. Some European countries willingly borrowed or adopted the notions of the Napoleonic Code and thus they wholeheartedly adopted the values underlying that Code. In the case of Japan the reasons for the borrowing of Western Codes is more complicated. It is true that a Western style legal system was needed for Japanese society to leap forward from the feudal society imposed by the Tokagawa rulers and that some saw the borrowing of Western Codes as a necessary step in Japan's economic and social development. But it is also true that Western Codes were borrowed for a less idealistic reason—namely as a means of getting the "barbarians" to relinquish the advantages they had forced Japan to give them under the unequal treaties extracted at the point of cannon on "black ships." If the Codes and the concepts underlying the Codes are viewed as alien systems adopted not because they were determined by the Japanese to be better than a home grown legal system but rather out of necessity, then it is reasonable for judges (reflecting this view) to give the Codes a "strained" interpretation to make them consistent with Japanese values.

The Japanese Constitution is a fine example of this kind of reasoning. The present Constitution was not written by and adopted by the Japanese political system because it was deemed as appropriate for the Japanese. Rather, the Constitution was written by Americans who were trying to change Japanese society through the Rule of Law represented by the Constitution. Prior to the adoption of the present Constitution the Japanese had prepared their own post World War II Constitution. The United States military authorities rejected this document, which represented an amendment rather than a complete re-writing of the Meiji Constitution, and American legal talent was called upon to write a Constitution for Japan. The question is not whether the average Japanese is better off with the American drafted Constitution than she would be if the Occupation Authorities had approved the Japanese drafted Constitution. Nor is the issue whether the great mass of the Japanese population preferred the American drafted Constitution to the Japanese draft. The answer to these questions while interesting does not

change the fact that judges are now being asked to interpret laws, Codes and Constitutions written by other societies with other values and, in a sense forced on Japanese society. When these Codes, Constitutions and laws are deemed to conflict with fundamental Japanese values or with Japanese historic norms or with myths accepted by the Japanese it is natural for judges to read these laws in a way which is consistent with these norms, values and myths. More is involved here than a strained interpretation of words. If need be a wholesale re-writing of the law by the judge may be called for and written provisions of the law will be sacrificed for the "greater Japanese good."

Moreover, since these Western imports contain concepts for which there was no Japanese language equivalent, it is impossible for a Westerner to get what the Westerner sees. The Japanese judge reads the words but as the concept is foreign she must come up with an interpretation that is understandable in Japanese terms. Sometimes this means an interpretation that appears to be fundamentally different from the written word. With these thoughts in mind it should come as no surprise that "what you see may not be what you get" when an American reads a Japanese Code or law or constitutional provision. While a disconnect between written law and law in practice may exist in any legal system, including the United States system, the fact is that this disconnect is much more marked in Japan than in the West.[1]

This text attempts to compare Japanese and American legal principles in selected areas with the above thoughts in mind. The format is designed to discuss the legal principles as applied in each society and provide material so that the reader can see how the Japanese interpretation in Japan may not reflect the conclusion that an American lawyer probably would come to in the same situation. Similarly examples are given of situations in which "what you see may not be what you get" in United States law. However, the primary focus is on the Japanese law questions and the United States discussion is for perspective purposes. Thus after a discussion of the legal principles in each society the text will discuss or raise questions as to whether "what you see is what you get" from the written Japanese law.

Like Japanese law this text must be viewed in context. The relevant context is the change taking place in Japan as the text is being written. The Judicial Reform Council has called upon the government to adopt the Rule of Law as the guiding principle for Japanese society and has made suggestions that have as their goal the strengthening of the Rule of Law. Those suggestions deal first with the Judicial System and the participants in that system but are designed to extend outward like the ripples caused by a stone thrown into a pond to affect the entire society. How fast change is made and how far these changes reach remains to be seen. However, unlike previous changes the present movement for judicial reform is indigenous to Japan and therein lays the possibility for revolutionary change.

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[1] Support for this view may be found in Kenzo Takayanagi, A Century of Innovation: The Development of Japanese Law, 1868–1961 in ARTHUR TAYLOR von MEHREN, LAW IN JAPAN 5, 39 (Harvard University Press, 1963) suggesting that while the written law in Japan my be westernized such written law does not reflect law as it actually operators.

2. Foundations of the Legal System

2.1 UNITED STATES

The Declaration of Independence of the Thirteen Colonies that later became the United States sets forth numerous matters relating to the nature of law as understood in the colonies and by the drafters. The Declaration recites, "all men . . . are endowed . . . with certain unalienable rights." This declaration is a continuation of prior Western theories of natural rights that can trace their roots to pre-Christian philosophies as well as the philosophy of early Christian writers.[1] Moreover, the Declaration takes the position that these rights are not secondary to the notions of government or to the rules established by government but rather that it is the function of government "to secure these rights." In its catalogue of causes for the declared separation of the colonies from Great Britain, the Declaration refers numerous times to the legal requirements that Great Britain has failed to uphold. Thus, for example, the King is accused of refusing to assent to laws necessary for the public good; of interfering with legislative bodies by calling them together in "unusual, uncomfortable and distant places"; of obstructing the Laws of Naturalization; of obstructing the Administration of Justice; of making judges "dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Moreover, the King was accused of depriving those who lived in the colonies of the right to trial by jury in many cases and of "abolishing the free system of English Laws in a neighboring Province . . ." and threatening to do the same in the colonies.

The Declaration is clearly a document that far from rejecting the notion of a Rule of Law is founded on the assumption that the Rule of Law applies in the colonies (later to be the United States) and further that it is not just any law that applies but rather it is the "free system of English Laws" that applies. It is clear from the face of the document that the colonies, while objecting to British rule were not objecting to the English Common Law. Indeed, they were basing their rebellion on the common law and their rights under law.

Thus, when the United States comes into being it does not come into existence in a legal vacuum. Rather it comes into existence with an already established system of laws and a system for administering those laws; namely, the British system of Law and Equity. It is of course true that the

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[1] WILLIAM NOEL, THE RIGHT TO LIFE IN JAPAN (Routledge, 1997) 3.

newly established government, whether it be the Confederation originally established by the Articles of Confederation or the federalism system later created by the Constitution, could have rejected in its entirety the English system and written its own—perhaps it could have borrowed from the Civil Law systems of the continent of Europe—but the point is that it did not. This was a choice made by the United States, not a situation thrust upon the new government. It was a choice made based on the notion that the legal system was a good system and did not need to be fundamentally changed or rejected. After independence the pre-existing legal system continued in major part. Of course the substantive law was amended and changed to meet the new governing conditions and was further amended, as the various States deemed appropriate. This change continues to this day but no one would suggest that because substantive and procedural changes are taking place that the basic legal system has changed.

At the heart of the United States system of government is the concept of law. Indeed, law is what binds the now 50 states together as one country. In essence the United States is created by a contract that we call a Constitution. Being the formative document of the government, this contract has attributes that make it a kind of "super contract" and thus there may be special rules applied to its interpretation, but in essence the document is a contractual undertaking by otherwise sovereign States to give up part of their sovereignty to a new entity called the United States. The document contains all of the elements that the common law typically requires of a contract—the document itself is an offer that only has binding effect when it is accepted ("the Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.") and we can impute "consideration" through the mutual promises of the accepting States to be bound by the terms of the Constitution. Like most contracts it is subject to amendment when the parties to the contract agree to its amendment, and the terms of agreement are set forth in the contract document (Article V). Most issues of interpretation are decided as would any contractual question by a court of law and to assure that parochial "State" concerns do not infect the judicial interpretation of the Constitution a Federal Court system is established with jurisdiction to decide cases arising under the Constitution, Treaties and laws made by the newly created government (Article III). Like most contracts this one did not foresee all future issues and did not provide for all contingencies. In most cases these blanks are determined by judicial decision but the most fundamental of legal questions—whether a consenting State could withdraw its consent and leave the federation—was ultimately decided by a civil war.

To understand the system of laws that the colonies and thus the new United States government accepted, one must understand something of the history of English law because that is the history of United States law and one must understand something of the nature of the society that was transplanted from England to the "new world." The conquest of England by the French Duke of Normandy in 1066 at the Battle of Hastings led to a fundamental difference between the rulers of France (to whom the Duke was supposed to owe fealty under the rules of the feudal legal system) and the new rulers of England who, while claiming their ancestral rights in France declared themselves rulers in their own right in England. This schism

brought about a further schism when the rulers in England began the process of creating their own legal system for their newly acquired Kingdom. Unable to rule through armed occupation in such a large territory, the early English Kings used the legal system to further the King's rule. To assure that the King's writ ran throughout the Kingdom, the traveling judges of the King's court used local custom and communication between themselves to establish a common law throughout the Kingdom. To know what this law was, decisions were written down and future judges referred back to these decisions in deciding cases later brought to the courts for decision. Few "statutes" were enacted in the early days—it is for this reason that we are so familiar with the few that were enacted such as the Statute of Uses (the basis for the law of trusts) and the Statute of Frauds (designed to prevent fraud by requiring that certain contracts be in writing). To determine what the law is that should be applied to the facts at hand, the judges were assisted by the parties to the case who marshaled the evidence and arguments (including prior precedents) and presented them to the judge. The adversarial common law system based on precedent that exists in the United States today is based on this model.

Because the King of England utilized the legal system and his Royal Court and traveling judges to extend his rule throughout England it was important that the populace view the Royal Court as fair and honest. Consistency of decision-making was one method of demonstrating honesty. Rules applied in earlier cases were applied again in later cases demonstrating that the rules had not changed simply to aid a particular party to the litigation. Moreover, the King welcomed the rise of professionals who created forms (writs) to be used by litigants and who provided advice on how to deal with litigation. These early professionals tended to come from the local Inn's that catered to litigants who had traveled to the site of the Court in order to be heard (hence the English Bar's relationship to the Inns of Court). The resulting system came to be viewed with favor and litigants lined up to have disputes resolved by the King's judges who traveled on Circuit throughout England (hence the rise of Circuit Court Judges—American Judges also traveled on Circuit in the early days of the Federal Judiciary).

This process of law making may be viewed as a "bottoms up" system where the law is created (or "found") as a consequence of lawsuits brought by individuals (later corporations and other juridical entities). Precedent is created from earlier cases and it is the bringing of these cases that results in the development of the law. Since the judges do not have the option of declining to decide a case because of uncertainty as to the law to be applied, new cases arising out of new circumstances had to be decided based on previous rules in analogous or at least somewhat relevant or similar cases. These new decisions in turn created new rules to be applied in future cases. In essence the development of the law was based on the types of cases brought to the court by the public.

One effect of this type of system is to remove from public officials and place in the hands of the litigating public the ability to determine the agenda for the development of law. Of course, the public officials have the power through the passage of legislation (adoption of Statutes) to change or influence the law made by the judges. When a statute was adopted it was made in the setting of pre-existing rules "found" or adopted or created by the law

courts. Thus statutes were not written "on a clean slate" nor were they viewed as the totality of the law. The pre-existing "common law" applied by the judges was the foundation on which the new statute was engrafted and the statute was not viewed as "occupying the entire field." Rather, in the common law model statutes were viewed as modifications of the existing body of law and were interpreted based on the existing body of law and the intention of the statute to modify that pre-existing law. However, it was not considered that the intent of the statute was to completely obliterate the pre-existing law. Rather only those parts of the existing law that were intended to be changed were affected and only to the extent of the intended change. To determine what part of the law was changed and how it was intended to be changed the society looked to the judges who then applied the Statutes to new fact patterns brought before them by litigants. In essence the same judiciary that had created the original common law was called upon to interpret just how far the new statute was intended to change the common law. It is not surprising that these judges were not always hospitable to an interpretation of the statutes that worked a substantial modification of the rules that the judges had earlier created.

Unlike the common law system, the civil law system that was developed on the continent of Europe was a system based on an entirely different philosophy. Here was no "bottoms up" system but rather a "top down" system of law making. The "top down" model of lawmaking has a long and honorable tradition. The Code of laws found in the Bible's first five books of Moses represents a "top down" model of law making. In the case of the Bible one may view the rules of law as emanating from Godhead or as a set of laws given by Moses to the people. In either event it is a top down system that depends neither on public involvement nor judicial determinations for either its validity or its agenda. Numerous well-respected Codes given to the public by "law givers" are important in the history of Western culture. Roman law modeled on the Code of Justinian was a Code based or civil law system. Similarly the law governing the Roman Catholic Church and its members, the Canon Law, was a Code based system. The Napoleonic Code spread the Civil Law model to all of modern Western Europe.

Under the civil law system's top down model judges were neither as important nor as influential as judges in the common law system. The role of the judge in the civil law system was not to make the law—the law was contained in the Code—but rather to apply the law as found in the Code to the facts presented. Judges in this system were interpreters of the law made by others. The entire body of the law was to be found in the Code handed down to the judges for their use in deciding cases. When a change or modification or addition was made to the Code that new provision became the law and what had preceded it was of no further consequence. The statutes or Code changes were not viewed as "floating" on a body of pre-existing law but rather were viewed as completely replacing the pre-existing law. Judges applying the Code to facts presented had no vested interest in preserving pre-existing rules, as the judges had not made those rules just as the judges also did not make the newer rules.

In one sense civil law judges are fundamentally different from common law judges in that the civil law judge is not a lawmaker but rather a "law finder" or applier. It is true that with the advent of appeals courts in a civil

law system, lower court judges will want to follow precedents made by appellate courts so as not to face the embarrassment of reversal on appeal and thus precedent has significance. However, precedent is not considered as binding as the binding law is the Code. Appeals courts, not concerned that they will be reversed by some higher court are not bound by precedent and in many civil law systems judges are required to take an oath to decide cases based on their own interpretation of the Code and not on some other judge's interpretation, thus diminishing the role of precedent. For the common law judge, the law is contained in the precedents and Codes are at best mere modifications of the precedent law. The judge is not simply a law applier but rather the judge is a lawmaker and the Code is simply one tool, albeit a very significant tool (since the judge has an obligation not to eviscerate the statute law) used in the making of the law.

In another sense civil law and common law judges are quite similar—this is the sense of the ultimate purpose of their sitting on a case. That is to say both have the obligation to decide the right and wrong of the case before them. Both have the obligation to apply the law (whether it be Code or statute on the one hand or judge made or common law on the other) to the facts presented and determine the winner and loser of the case before the judge. Litigation in both the civil law and common law systems is not a "zero sum" game—rather it is a game with a clear winner and a clear loser. The determination of winner and loser is based on a professional application of a body of rules—namely the Rule of Law.

Because of its "bottoms up" nature, some view the common law system as a more democratic system than the civil law system. "Bottoms up" law tends to derive its rules from the actions of the general public and from judges who are a part of that general public. "Top down" law is viewed by some as law imposed by a ruling hierarchy on the public and thus hostile to democratic ideals. Such notions may have had validity in the days preceding the American Revolution and the rise of democratic government, and it may well be that this difference in legal system is one of the reasons why democratic ideals arose in England and the United States before they were adopted on the continent. In fact, this notion may be one of the reasons why the Colonies accepted the common law system of England as good for the new nation they were creating. But, in modern times where legislative bodies are democratically elected and where common law judges are appointed and not elected, it can be argued that the civil law system better represents the democratically assented to will of the people. Civil law judges do not make law but rather operate more like professional technicians who apply the rules given to them by democratically elected representatives of the people. In the United States common law system of today, on the other hand, appointed judges (with life time tenure) who are not subject to the popular will continue to make law and view democratically adopted rules (statutes) as merely modifications of an already existing body of law created by the same appointed judges or their predecessors.

In any event, in pre-colonial England the common law system was viewed as a good system for resolving disputes and was supported by the general public as well as by public officials. When in 1215 King John was forced by the rebellious Noble's in his Kingdom to sign a peace treaty with them to resolve disputes, that document contained provisions granting legal rights