Japanese Law: An Economic Approach

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JAPANESE LAW

AN ECONOMIC APPROACH

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For Norma Wyse and Emi Nakazato
For Jennifer and Geoffrey Ramseyer, Mari and Mao Nakazato

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PREFACE

If you can't annoy somebody, Kingsley Amis once said, there's not much point in writing. In this book, we explain the basics of Japanese law in a way that we hope you—whether lawyer, law student, or legal scholar—will find clear, amusing, and maybe even annoying. If you read it through, we shall consider it a success. If you turn to the index to solve the legal problem you face, we shall think it a failure.

Make no mistake. If you want to use the index in this book to find the answer to your problem, do not bother. You will not find it. If you insist on trying, you commit malpractice. Inside every fat book is a thin book struggling to get out, and here it has gotten out. This is an anorexic book despite its three hundred pages, and as befits an anorexic essay, we have slashed all the detail. In fact, we have slashed whole areas of important law, whether antitrust, intellectual property, securities regulation, or any one of a dozen other fields. Instead, we have covered only the basic subjects that most U.S. lawyers and law students will have studied.

One cannot understand the details without the larger picture, and in this book, we offer that overview. This is not a book to read through the index. It is a book to read from front to back. Find a comfortable chair. Put on a CD. Get something to drink. And read. Worry about your legal problem later.

We offer no "essence" of Japanese law in this book. We capture no "core" of the Japanese legal system. We propose no generalization about the gist of Japanese law that distinguishes it from other advanced capitalist legal systems. We offer no essence, no core, no gist—because there is none. Law is not a coherent system that follows central organizing principles—not here, not in Japan, not even in those classic code countries like Germany and France. Anyone who claims otherwise is either wrong or lying. Law is an unruly, disjointed corpus. It reflects nothing more than the accumulated exigencies of lawmaking by legislatures, courts, and administrative agencies over time.

In Japan, the extant legal system reflects more than a century of lawmaking. During the earliest decades, Japan was an oligarchy. During the latest decades, it has been a fully functioning democracy. During the decades between, it was sometimes a democracy, sometimes a police state,

and sometimes an occupied colony. The law in place today reflects lawmaking during that entire period.[1]

Hypothetically political change could let a government start the law over. Hypothetically it could—but governments rarely do. For reasons explained at length in the new "positive political economy" literature, legal change in functioning democracies is seldom cheap to reverse.[2] As a result, legislators will seldom devote many resources to wiping the legal slate clean. Instead, the legal system will reflect the long-term accumulated detritus of political promises made and broken by shifting and reshifting coalitions over time. Although this process of lawmaking will follow coherent social scientific principles, the resulting body of law will be anything but coherent. Lawmaking depends on democratic politics, democratic politics reflects what voters want and interest groups will buy—and few voters or interest groups will care much about coherence. The resulting body of law—whether statutory or common law—will be internally chaotic. And that chaos is what this book is all about.

Mind you, legal chaos need not generate analytical incoherence. That the law lacks an internal logic does not mean our analysis need lack it, too. Instead, social scientific logic takes us a long way toward predicting both the effect that the law will have on what people do and the way that people will try to manipulate and use the law.

In discussing that interplay between law and human behavior, we take an economic approach. Some conclusions the economic model generates straightforwardly. One of the more basic involves the impact that a legal system can have on economic development, a theme we follow throughout the book. But the economic model also leads to a series of more detailed and perhaps counterintuitive observations that we scatter throughout the book.

Although we begin each chapter with a summary of the law, we follow each with a—very distinct—series of applications. There we use an economic intuition to explore some of these (often empirical) ramifications of the law in more detail. When we use that intuition, rest assured we keep it simple. We realize the world is composed of three types of people—those who can count and those who can't—and have written this book with the last group in mind.

We do not use economics because we think everyone (or anyone) always rationally maximizes. We all know no one does. We use economics because we think classic Chicago-school economic intuition (taken alone and

simply, without much elaboration) goes far toward explaining much (not all) law-related behavior in Japan. Surely, many readers will protest, Japan is a complex place, a multifaceted universe where every phenomenon results from the subtle interplay of myriad disparate and interconnected causes. Surely, they will claim, describing Japan as a world of rational maximizers is about as helpful as soprano Jane Eaglen's description of Norma as an opera where the druid princess is "pissed off with her husband because he's having it off with one of her virgins." We agree (how could we not?). But unless our critics tell us which of the myriad causes has what relative impact (they rarely do), the complexity is not much of an improvement.

The same readers will probably insist that we could explain more if we added culture to our spare model. What we would gain in explanatory breadth, however, we believe we would lose in theoretical parsimony. Consider this book an exercise in parsimony in comparative law. Consider it, in other words, an attempt to show just how far extremely spare economic models go toward explaining the world of law-related behavior.

'Nough said. The test of theory is in the application. White cat, black cat, who cares so long as it catches mice, Deng Xiaoping once remarked. Consider this an attempt to show how well the economic cat catches legal mice. We do not think the model explains all of Japanese law-related behavior. We do not think it is the only way to explain that behavior. We do think it explains many of the more basic contours of that behavior—and leave it to you the reader to judge.

Readers who know Japanese law already will recognize that we ditch much of the intellectual baggage Japanese legal scholars use to explain their law to each other. In explaining the law, we do not explain it as Japanese law professors explain it. Rather, we use the categories, terms, and concepts that American professors use to explain U.S. law. Each chapter we self-consciously and straightforwardly organize according to the questions that U.S. scholars and lawyers ask of their own law.

We do this deliberately—but not out of any lack of respect for our Japanese colleagues. We do it for pedagogy—to enable readers readily to compare how U.S. and Japanese courts solve common problems. Most of the apparent differences between U.S. and Japanese law, we believe, are not differences in the ways courts decide cases. Instead, they capture differences in the ways academics explain the law to their audience. On most of the

issues that matter, in most of the ways the law "hits the road," U.S. law and Japanese law give very similar results. To make that point, we use our self-consciously parochial approach.

Maybe an analogy would help. On the one hand, if one asked a software engineer to contrast Macintosh OS with the latest Windows release, he would describe two radically different programs. After all, the two operating systems (at least so we are told) have radically different internal configurations. On the other hand, if one asked your average lawyer to contrast the two systems, he would describe two very similar programs. After all, the two systems (and this we know from experience) produce quite similar results. At least as the operating systems "hit the screen," they are for most purposes nearly identical.

Neither way of comparing the two systems is better than the other. It all depends on what one wants to do. One way contrasts the internal logic, and one contrasts the end result. For most lawyers, it is the end result that counts. For that simple reason, in this book we opt for the latter approach and give you the end result.[3]

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Throughout this project, we were fortunate to receive the always stimulating, helpful, and kind encouragement of Professor Hiroshi Kaneko, emeritus professor of the University of Tokyo and professor of law at Gakushüin University.

Several portions of this book have appeared as separate essays. We include them here in modified form with the permission of the publishers. Portions of chapter 4 originally appeared in J. Mark Ramseyer and Minoru Nakazato, "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan," 18 *Journal of Legal Studies* 263 (1989), reprinted by permission of the Journal of Legal Studies; and in J. Mark Ramseyer, "Products Liability through Private Ordering: Notes on a Japanese Experiment," 144 *University of Pennsylvania Law Review* 1823 (1996), reprinted by permission of the University of Pennsylvania Law Review. Part of chapter 5 originally appeared in Steven N. Kaplan and J. Mark Ramseyer, "Those Japanese Firms with their Disdain for Shareholders: Another Fable for the

Academy," 74 *Washington University Law Quarterly* (1996), reprinted by permission of the Washington University Law Quarterly and Steven Kaplan.

Scholarship is important and fun, but we dedicate this book to the people who remind us every day what really matters—to Norma Wyse and Emi Nakazato—and what real fun is—to Jennifer and Geoffrey Ramseyer and to Mari and Mao Nakazato.

CAVEATS

Cases

Why so many cases, you may ask, for we do rely heavily on court opinions in this book. Partly we do this to help readers understand the scope of the statutes. Partly we do this to help readers compare Japanese law with U.S. law, which is always presented through cases. And partly we do this simply because the rules the courts enforce *are* the law, and those court-enforced rules structure the contours of the bargains people reach in Japan. For reasons we explain throughout this book, the popular notion that Japanese behave in ways uncorrelated to judicial outcomes is flatly false.

Some readers of earlier drafts asked why we sometimes used lower court opinions when there were Supreme Court opinions on point. Others asked why we used old opinions when there were more recent ones available. And the most candid asked why we persistently chose cases involving love affairs, movie directors, prostitutes, mobsters, tax cheats, crooked politicians, and pyramid schemes when surely (they argued) we could have found cases more central to Japanese society.

We shall be candid in reply. We used the cases we did because we wanted a book that you would read. We could easily have used only the most recent cases, the cases from the highest courts, or the cases involving disputes central to the business community. We could easily have written a book with high court cases over soybean futures, over magnesium ore F.O.B. contracts, over standby letters of credit, over automobile accidents. But you would not have read it.

Perhaps you do *buy* books that deal with soybean futures, magnesium ore F.O.B. contracts, and standby letters of credit. Perhaps you even promise yourself you will read them. Somehow, though, we suspect you always find other more pressing, more urgent, or simply more intriguing things you need to do. You may eventually consult the book. But read it, never. Or aren't you, as Richard Blaine famously asked, the kind that tells?

Rest assured, except where otherwise noted, we use cases that are good law. Given a choice between a Supreme Court case involving breach of contract for the delivery of steel ingots and a lower court opinion on breach of contract to hush up a passionate affair, however, we have consistently cho-

sen the affair. Call it unprincipled, call it pandering—we are not proud. Most ordinary mortals we know enjoy reading about the foibles and weaknesses that plague other ordinary mortals. In this book, we pander to those ordinary readers.

Other Countries

We skip the European and South American parallels. Several readers urged us to make those comparisons. Given the French and German antecedents to much modern Japanese law, we agree that the comparisons could be interesting.

We nonetheless avoid the Continental parallels for simple reasons of expertise. Between the two of us, we are fairly certain we know U.S. and Japanese law. We have less confidence about anywhere else. As we show throughout this book, however, even civil-law regimes like Japan depend crucially on the case law, and many commonly held stereotypes about empirical law-related phenomena are flatly wrong. Although we could rely on secondary sources for information about other civil-law systems, we have no reason to think the secondary materials about those systems are any better than the materials about Japan. Put most bluntly, we have seen too many comparativists use bad secondary sources to rape Japanese law for us to try the same thing on Europe or South America.

Names

Throughout the book, we give Japanese names in the American format: given name first, family name last.

We have tried to render Japanese names in their most common readings. Because many Japanese names have multiple readings, we cannot claim that the reading we assign is necessarily the one the person himself uses.

When a case involves potentially embarrassing material in Japan, the court reporter often includes only pseudonyms. Names like Tarō Kōno and Hanako Otsuyama are the Japanese equivalent of John Doe and Mary Roe.

Citation Format

Many Japanese reported opinions appear in several reporters. Paralleling its rules for U.S. opinions, the *Bluebook* mandates primary citation to the official reporter. Unfortunately the rule is perverse in the extreme: far more U.S. libraries carry one or both of the principal private reporters (the *Hanrei jihō* and *Hanrei taimuzu*) than carry any official source. Accord-

ingly, we ignore the *Bluebook* rule and cite cases by the most commonly available source in which it appears.

In most other respects, we cite cases in a way that tracks the *Bluebook* rules for U.S. cases: party names, the court reporter with volume and page numbers, the court, and the date. Because Japanese scholars often cite cases by the exact date decided, we give the month and date as well as the year. We ignore those *Bluebook* rules for Japanese material that (perversely again) track European citation practices rather than U.S. practice.

In translating from the Japanese, we believe in using English. For that reason, we have consistently tried to convert our translations into ordinary, idiomatic English. And, again, for that reason, we translate *hō* as "Act" rather than "Law" when part of the title of an act (who's heard of the "Sherman Law" after all?), and *jō* as "section" rather than "article" when referring to a section of an act (is the definition of income in article 61 of the IRC?). As to why so many Japan experts have so steadfastly done the contrary for so many years, we have not a clue.

Dollar Exchange Equivalents

Given the fluctuations in foreign exchange rates during much of this century, we keep all references to money in their original nominal amounts. To estimate dollar equivalents, turn to the following exchange-rate table.

EXCHANGE RATES

Year	¥/$	Year	¥/$	Year	¥/$	Year	¥/$
1891	1.25	1917	1.98	1943	4.25	1969	358.05
1893	1.65	1919	1.98	1945	*	1971	315.70
1895	1.98	1921	2.08	1947	*	1973	281.00
1897	2.01	1923	2.05	1949	*	1975	306.15
1899	2.02	1925	2.45	1951	361.05	1977	241.05
1901	2.03	1927	2.11	1953	360.80	1979	241.00
1903	2.02	1929	2.17	1955	360.80	1981	221.10
1905	2.02	1931	2.05	1957	360.80	1983	233.45
1907	2.03	1933	3.96	1959	359.80	1985	201.35
1909	2.02	1935	3.50	1961	361.80	1987	151.00
1911	2.03	1937	3.47	1963	362.40	1989	130.00
1913	2.03	1939	3.85	1965	361.40	1991	135.00
1915	2.05	1941	4.26	1967	362.20	1993	118.00

Sources: The rates are from Nihon tōkei kyōkai, ed., *Nihon chōki tōkei sōran* [Long-Term Japanese Statistics] (Tokyo: Nihon tōkei kyōkai, 1988), vol. 3, table 10-11, and supplemented by Sōmuchō tōkeikyoku, ed., *Nihon tōkei nenkan* [Japanese Statistical Yearbook] (Tokyo: Sōmuchō, 1996), table 12-16.

*Hyperinflation in Japan.

Note: Each rate is the average for the year where available; otherwise, it is the mean of the high and low for the year.

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