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THE RULE OF LAW IN JAPAN

A Comparative Analysis

Second revised edition

CARL F. GOODMAN

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Preface to the Second Revised Edition

In the five years since the publication of the First Edition, Japan has seen a burgeoning of changes in its legal system. The Recommendations of the Judicial Reform Council have spurred several pieces of legislation designed to carry out the Council's objective of making Japan a Rule of Law society. In addition, the Supreme Court of Japan has rendered several important decisions in such important areas as freedom of religion and the Yasukuni Shrine, family law, discrimination, the right to vote, hostile mergers etc. A brief smattering of just some of the changes serves to show just how dramatic the flow of new laws and new interpretations of old laws has been.

Among the more significant changes has been a complete revamping of the education system for lawyers – seventy-four new graduate-level law schools have begun operations and have graduated their initial classes – a new Bar Examination for graduates of the new schools has been instituted and clinical education for law students has been instituted in some schools. The number of people passing the Bar Examination has dramatically increased, as the goal of admitting 3,000 new entrants to the ranks of judges, prosecutors and lawyers by 2010 is soon to be reached. The Secretariat has followed the Council's suggestion and is increasing the ranks of the judicial corps by approximately fifty new judges a year.

A new Labor Court has come into being to handle employer/employee disputes in the hope that litigation under the 1996 Code of Civil Procedure can be obviated by decisions of the mixed lay/professional tribunal. At the same time the Secretariat is moving forward with plans to place the new *saiban'in* system of lay/professional judges in operation by next year. Mock criminal trials before such panels have been utilized to fine tune the system and an education program has sought to make the system more 'friendly' to those who might be selected to be lay judges. The jurisdictional limit for the Summary Court has been raised again so as to bring within the compass of this closest to the population court more cases than ever before.

The Supreme Court of Japan in a series of cases has modified the restrictive rule of its Fuji Bank decision and has somewhat expanded the scope of documents that a court may order be produced in litigation. At the same time the Court has more clearly defined the government's obligations to produce documents in litigation and its obligations when it seeks to object to production of documents. Further the Court has better defined the relationship between private company secret documents and government secret documents in situations where the government is in possession of private company documents containing secrets. The extent of a news reporter's privilege not to disclose sources has also been the subject of recent Supreme Court analysis.

The Administrative Case Litigation Law has been amended in several respects – potentially the most significant change being a liberalization of the standing rule to allow the 'legal interest' requirement to encompass legal interests contained in legislation other than the legislation under which a *shobun* has been rendered. The Supreme Court has begun a process of liberalizing the rules under which parties to litigation may be able to get production of document previously off limits because produced in-house by one of the parties (typically the corporate defendant). Japanese law firms on the American model with 100 or more attorneys are now firmly established as are merged Japanese and American firms.

On the substantive law level, a law for the Prevention of Spousal Violence was adopted in 2004 giving wives, for the first time an opportunity to obtain restraining orders against abusive husbands. As of April 2007, wives can make claim for up to 50% of a husband's pension in a divorce proceeding – immediately after the April 2007 effective date, divorce rates jumped by 6%. The Equal Employment Opportunity Law has undergone its second amendment, changing its focus from a law that prohibits discrimination against women to a law that prohibits discrimination based on gender. Moreover, sexual harassment is specifically made unlawful and certain categories of 'indirect discrimination' are, for the first time, made subject to the law. At the same time the Supreme Court reversed the High Court and upheld Tokyo's unified employment system that prohibited any non-Japanese citizen from obtaining a supervisory position in the City Government Civil Service System.

The Consumer Contract Law is in effect as is new legislation designed to protect spouses from spousal abuse. Women have been granted the right to a portion of their husband's pension in a divorce, causing an increase in the divorce rate of elderly couples at just the time when baby boomer husbands find themselves being retired under mandatory retirement systems. A whistle blower protection law has come into being and while no age discrimination in employment act has found its way into Japan, legislation has been passed to ease the retirement burden of those forced out by mandatory retirement systems.

A new Corporation Law containing provisions that authorizes American style boards with 'outside directors', permits greater use of stock options and legitimizes triangular mergers has been adopted. The nature of cross shareholding has changed as banks and insurance companies have been required to sell some of their holdings and the number of shares of Japanese companies in foreign hands has increased substantially. Hostile mergers, once unthinkable in Japan,

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are sufficiently thinkable that poison pill legislation has been adopted and the powerful METI has published guidelines concerning the appropriate use of poison pills.

The Japanese Criminal Law system has been rocked by a series of cases involving 'false confessions' raising questions about interrogation techniques and heralding some changes – even some movement by the Prosecutors' Office on the question of recording confessions.

After essentially lying dormant for years, the doctrine of Judicial Review found voice in two decisions of the Supreme Court. The Court held the limitation of liability provision of the Post Office law unconstitutional and found the restriction on the right to vote of Japanese overseas on assignment for their employer was similarly in violation of the basic Supreme Law.

Dramatic changes also appeared to be taking shape on the political front. For the first time the Upper House of the Japanese Diet is in the hands of a party other than the ruling LDP. The election results forced a prime minister to take responsibility for his party's loss by stepping down. And, although the outgoing prime minister was able to muscle a Constitutional Referendum Law through the Diet, the newly constituted Upper House made it clear that it would not be easy to gain the required two-thirds vote of each House for Constitutional Amendment. Notwithstanding the prohibitions of Article 9 of the Constitution, the government was able (prior to the Upper House election) to pass legislation creating a new Cabinet level Ministry of Defense. Still, the newly formulated Upper House refused to budge on the government's request that it reauthorize refueling operations undertaken by Japan for the United States in connection with the Afghanistan war, causing such operations to be halted and Japanese ships to return to their home ports.

At the same time, the Supreme Court of Japan has held that the Family Registrar was correct in refusing to register as their child a child born of a Surrogate mother (in the United States) utilizing the sperm and egg of a married Japanese couple. Rather than recognizing the genetic child as the child of the genetic parents, the Court found that this was not a child of the 'blood' and suggested adoption, leaving it to the political branch of the government to decide whether and if so what form a surrogacy law should take. And it is not just surrogate birth that has run into older notions of bloodlines. A child conceived after the death of his/her biological father, whose sperm was set aside so that it could be used by his wife in the event of his death, was likewise found not to be the 'natural' child of its admitted biological/genetic parents – who admittedly had both consented to have the sperm utilized in the event of death. Recognition of such children was contrary to Japanese public policy – indeed the judgment of an American Court recognizing the surrogate delivered child as the child of its Japanese genetic parents and not the child of the surrogate was refused comity because it was against public policy to recognize the parentage. But Japanese public policy was not offended when an uncle married his niece, lived with her as man and wife for over forty years and had two children with her. Although the marriage was never recorded, as required by the Family Register Law and Civil Code, and although the Civil Code specifically denies such close relatives capacity to marry, and although the Court recognized the eugenic

reasons for prohibiting such marriage, the survivor was held to be a widow so as to receive widow's benefits. Recognizing the marriage for widow benefit purposes did not violate public policy – especially as the local community, the family, the uncle's employer and the local Mayor saw no problem with the 'common law' or de facto marriage. The Court also noted that such marriages were historically recognized in rural farming communities of Japan before the adoption of the Civil Code. And, while a Japanese niece 'married' to her uncle in violation of both the Civil Code and Family Register Law is a 'surviving spouse' for social welfare pension purposes, a non-Japanese spouse whose Japanese husband leaves her to take up with another woman is not a spouse for Immigration Law purposes and can be denied a spousal visa and be deported.

Questions can be raised as to how far reaching the changes adopted in response to the Law Reform Council's recommendations as well as other changes in substantive and procedural law really are. Is it likely that the experiment with a mixed lay/professional court for certain criminal cases will prove successful, in the sense that the Japanese Bar sought when it tried (unsuccessfully) to get a modified jury system adopted and had to settle for the *saiban'in* system? Will poison pill measures adopted after the hostile offer is made make it impossible for a market in hostile takeovers to take root in Japan? Will the criminal conviction (and prison sentence) of an entrepreneur and a fund manager who attempted a hostile takeover, so chill the market that others will be afraid to attempt to change the cozy relationship between corporate managers and lifetime employees that results in entrenched management's self perpetuation? How 'independent' will new 'outside' Directors be and have they and will they make any substantive change in company boardrooms? Are the limitations on conduct that can be considered 'indirect discrimination' so meager that no effective 'effects' test will emerge in Japan's equality law? Are the discussions and movement in the confession area simply window dressing for continuation of the present system or even worse a smokescreen to make it appear that coerced confessions are really made of the suspect's free will? And while the reconfigured Upper House was able to delay the Marine Self-Defense Force's refueling operations, the Lower House utilized (for the first time in over half a century) its power to override the Upper House's rejection of a law and ordered the fleet back to the Indian Ocean.

In short, while considering these and other changes in Japanese law that have taken place in the years since publication of the first edition it is well to keep in mind the admonition – what you see may not be what you get.

About the Author

Carl F. Goodman is Adjunct Professor of Japan/United States Comparative Law at Georgetown University Law Center and also at George Washington University School of Law, in Washington D.C. He has been a Visiting Professor at the Temple University Tokyo Faculty of Law and was a Fulbright Researcher at Tokyo University. He is the 2005 recipient of the Georgetown University Law Center Charles Fehy Distinguished Adjunct Professor Award. In private law practice he was a partner in the International firm of Surrey and Morse and became a partner in Jones, Day, Reavis and Pogue when the firms merged in 1986. While in private practice Professor Goodman had an active international practice based in part on representation of Japanese clients. He is a retired partner of Jones Day and upon retirement became Professor of Anglo-American Law at Hiroshima University, Faculty of Law in Hiroshima Japan. He was on the Hirodai faculty from 1992–1995.

Professor Goodman started his legal career as an Honors Program hire in the United States Department of Justice. As a Foreign Service Reserve Officer he represented the United States as the United States Agent before the International Lake Ontario Claims Tribunal (United States and Canada) – a claims arbitration dealing with certain problems related to the St. Lawrence River and Lake Ontario. Professor Goodman's exposure to Japan began in the mid-1960s when, as a member of the Legal Advisor's Office, he represented the State Department in negotiations with Japan concerning air routes to and from Japan and the United States. He ended his government career as General Counsel of the then-United States Civil Service Commission.

Before teaching Japan/United States Comparative Law, Professor Goodman had been Adjunct Professor of Administrative Law at the Brooklyn Law School and was Adjunct Professor of Public Personnel Law at Georgetown University when he was General Counsel of the Civil Service Commission. He is the author of *Handbook on Public Personnel Law* published in 1978, as well as *Justice and Civil Procedure in Japan* published in 2005.

Professor Goodman is a life member of the American Law Institute, a former Chairman of the Administrative Law Committee of the Association of the Bar of the City of New York and a former Member of the Council of the Administrative Law Section of the American Bar Association. Since his return to the United States from Japan in 1995, he has visited Japan on several occasions and lectured at various Japanese Law Faculties.

Professor Goodman lives in Bethesda, Maryland, and Becket, Massachusetts, with his wife Beatrice.

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Chapter 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 everyday 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' thirteen 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 fifty 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 have 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 Tokugawa 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

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