

スヘキ場合ニ於テ第三者ニシテ斯ル事實アルヲ

ヲ買收

件ヲ不

カ如キ

ルニア

スルニ

モノニシテ權利ノ濫用ニ外ナラス從テ斯ル不當

THE SPIRIT OF JAPANESE LAW



JOHN OWEN HALEY

侵害者ニ對シ侵害狀態

金ヲ以テ買取ラレタキ

請求ハ單ニ所有權ノ行

爲ハ全體ニ於テ專ラ不

社會觀念上所有權ノ目

THE SPIRIT OF JAPANESE LAW

John Owen Haley

The University of Georgia Press
Athens & London

Paperback edition, 2006
© 1998 by the University of Georgia Press
Athens, Georgia 30602
All rights reserved
Designed by Walton Harris
Set in 9.5 on 14 Trump by G&S Typesetters, Inc.

Printed digitally in the United States of America

The Library of Congress has cataloged the
hardcover edition of this book as follows:

Library of Congress Cataloging-in-Publication Data

Haley, John Owen.

The spirit of Japanese law / John Owen Haley.

xx, 251 p. ; 24 cm. — (The spirit of the laws)

Includes bibliographical references (p. [213]–246)
and index.

ISBN 0-8203-2022-6 (alk. paper)

1. Law—Japan—Philosophy. 2. Law—Moral and ethical
aspects—Japan. 3. Justice, Administration of—Japan.

I. Title. II. Series: Spirit of the laws (Athens, Georgia)

KNX440 .H35 1998

349.52—dc21 98-17860

Paperback ISBN-13: 978-0-8203-2887-4

ISBN-10: 0-8203-2887-1

British Library Cataloging-in-Publication Data available

www.ugapress.org

ACKNOWLEDGMENTS

Scholars form a very special sort of community. In all that we do we are peculiarly interdependent. We stand on others' shoulders to see more distant horizons. What we know and write reflects the ideas and research of past and present generations. What we say and profess has no meaning without the receptive listeners of present and future generations. Their reactions and responses make the efforts worthwhile. This book thus reflects what I have learned from others, especially my colleagues at the University of Washington—Don Clarke, Dan Foote, and Toshiko Takenaka. I also owe a special debt of gratitude to a small but growing band of friends in the field—Larry Beer, Frank Bennett, Vicki Beyer, Taimie Bryant, Harry First, Kōichirō Fujikura, Tony Freyer, Jean Grier, Masahito Inouye, David Johnson, Bob Leflar, Mark Levin, Percy Luney, Mitsuo Matsushita, Curtis Milhaupt, Setsuo Miyazawa, Minoru Nakatani, Kenneth Port, Mark Ramseyer, Dan Rosen, Arthur Rossett, Steve Salzberg, Alex Seita, Malcolm Smith, Veronica Taylor, Frank Upham, Michael Young—whose wisdom has been so generously shared. I remain equally indebted to Sharon Murata and Richard Torrance for their work as research assistants many years ago and more recently to Yana Hirata. Rob Britt of the University of Washington Gallagher Law Library provided invaluable help. Kristine M. Blakeslee of the University of Georgia Press saw this through. Nor could this book have been completed without the efforts of Kyle Morrison, Jane Fox, Vicki Mastoriodes, Jean Knight, and other members of the secretarial staff of the University of Washington School of Law.

INTRODUCTION

This book is about law and legal institutions in Japan today. Legal rules and the values that they express and that motivate those who participate as the primary actors within the legal system are its primary focus. The aim is to isolate and explain patterns and approaches that appear at least to give Japanese law identity and coherence. How law is made and enforced is secondary.¹ Noted rarely and only in passing are the great preponderance of Japanese legislation and judicial cases that deal with common issues in common ways. No attempt is made to cover even exceptional Japanese approaches to the myriad issues that Japan, like other industrial societies, has to face. By necessity mention is made of some aspects of the history, development, and scope of law in Japan. A general understanding of the values and domain of law is essential to an appreciation of the principal themes—implicit as well as explicit—of law in Japan. Considerably greater attention, however, needs to be paid to the primary participants in Japan's legal system—legal scholars, lawyers in practice, prosecutors, and above all judges. They are law's actors. They are the ones who make and enforce legal rules. Their role, history, and organizational context provide insight into their shared as well as institutional values. What is intended is neither a history of Japanese law and legal institutions nor a study of law and society in contemporary Japan. Rather, the subject, as entitled, is the spirit of Japanese law.

Law has many meanings. The law of the anthropologist can comprise nearly any norm, rule, or principle, any sanction and mechanism for enforcement that can be identified in society. Community norms, custom and convention, the judgments of the wise, the pronouncements of the sacred, and the commands of the ruler all come within its domain. The law of the lawyer is not as expansive. Its

realm and reach are far more constrained. The law treated here is the law of lawyers. It is limited to the rules and principles, the remedies and sanctions, and the processes by which law is made. This limitation is not, however, arbitrary or insubstantial. To define law otherwise and more broadly would obscure much of what this book is about. The spirit of Japanese law is not simply the spirit of Japanese society. Except as reflected in the values and practices of those who make and enforce the legal rules—legislators and lawyers, prosecutors and police, jurists and judges—these values would not have particular or special application in the rules and principles of the state. We would not be able to distinguish differences that may have meaning and lead to insights with respect not only to the legal system, narrowly defined, but also to the broader society. With law like flowers we would miss the distinctions between species and thus the rich variety and complexity of what surrounds us.

To attempt such a study is also a daunting task. Much has been written in English on Japanese law. The works that describe particular areas of law seldom attempt, however, to explore deeper themes and values that underlie the diverse rules and principles that constitute the corpus of any particular field of law or that motivate the processes, institutions, and actors within the legal system. Closer to such an endeavor are those studies that deal with the interrelationships and reciprocal influences between the legal system and Japanese society. From them we learn how social organization and community controls, societal values, and social practices have helped to mold and in turn have been molded by legal rules and processes. We gain insight into the contribution of law to social change in Japan and elsewhere. Less attention, however, has been paid to the internal influences that guide and shape the development of legal rules and the patterns of their enforcement—how, for example, judicial administration or prosecutorial goals affect the rules and practices of the law.

Some would set aside cultural factors altogether or deny outright the significance of social distinctiveness, relying instead on a universal "rationality" of all actors, whether economic, political, or legal. They may argue that any quest for the "spirit" of law is a quixotic pursuit. Yet they too posit an institutional framework, processes, and

legal rules that establish the parameters within which rational choices are made. Assume rational behavior and it becomes apparent that context determines outcomes. Thus the whys and hows that explain the parameters of rational behavior force acknowledgment of the central role of shared values, beliefs, and expectations—in other words, culture—in establishing the critical conditions for social actions. So too culturally determined constructs within a legal system channel rational behavior to its often distinctive consequences. Even so, distinctive culture does not inexorably equate with distinctive law. The question remains whether some fundamental themes, patterns, or values distinguish Japanese law in ways that determine the often distinctive outcomes of rational choice in Japan.

A few might further question whether meaningful inquiry is possible into values intrinsic to any legal system without inclusion of cultural perspectives and the relationship of society to law as either process or rule in the affairs of daily life. To have significance, what is described must relate to the essentials of Japanese experience in the family, the workplace, or the neighborhood. In these areas textbook legal rules seem remarkably remote and formal legal processes seem distant and unfamiliar. Any discussion of law even partially divorced from social realities will fail to address the primary issues that Japanese confront on a daily basis. Surely if there is indeed something coherent in Japanese law, it must touch routine patterns of life in Japan.

Many of these doubts and questions relate to concern over claims to Japanese exceptionalism. The literature in English on law in Japan often leaves the impression of legal institutions and rules, the courts and codes, transplanted from abroad but pruned to fit into a very different garden, that continue to grow and develop as a unique national system. Too frequently neglected is the continuing identity of Japanese law within the civil law tradition and the shared concern of Japanese who tend these transplants so that they conform to the patterns of growth and development of their origins. Japanese contract practices and company behavior may differ, but the rules of Japanese contract and company law are not distinctively Japanese in any significant respect. The apparent values of Japanese law remain on the whole the values in time and place of their predominately European origins.

Thus there would appear to be very little if anything distinctive or exceptional to the rules and processes of the Japanese legal system that might enable us to point to a "spirit" of law as distinguished from the society from which legal rules emerge. Whatever the underlying values and norms that may have been expressed in traditional Japanese law, the legal rules of contemporary Japan have been adapted from European and, to a lesser extent, American sources. There is little within Japanese law, some say, that is fundamentally peculiar to Japan.

Few of the rules on contemporary Japanese law may be uniquely Japanese. Nonetheless, Japan has not simply replicated the laws or institutions of any one foreign legal system. If only as a hybrid, the mix of legal rules and legal institutions gives the Japanese legal system a distinguishing cast. More significant, however, is the combination of a continuous process of selective adoption of foreign models and the application of these adopted rules in the Japanese cultural or institutional environment. As described below, the autonomy of Japanese legal reforms as well as the choice of European legal doctrine and their enforcement in Japan's social and institutional context ensure the distinctiveness of Japanese law and its spirit.

To argue that law in Japan has distinctive characteristics is not, however, to say that Japan is exceptional in its peculiarity. We often lose sight of the similarity of Japan's experience in adapting its law and legal institutions to the civil law tradition with all but the handful of countries that share a legal heritage shaped by British colonial rule and remain within the common law tradition. In East Asia, for example, only the national legal systems of Malaysia and Singapore are today outside the ambit of the civil law tradition. Some, like Indonesia, reflect the influence of European colonial rule, but others, like Thailand and China, share with Japan the experience of self-selected reception of European law. Whether continental European or British in more immediate origin, all contemporary legal and political orders reflect the profound influence of Roman law. Whether assimilated by invading tribes, implanted by settlers, imposed by colonial rulers, or used as models by indigenous reformers, in the course of two millennia the institutions of Roman law have become universal. Of course, they are not everywhere the same. Ideas and in-

stitutions, whatever their origin, acquire in diverse settings over time transforming gloss that differentiates them from those at their source. In the process of adaptation and transformation, repeated patterns and themes begin to emerge that are as relevant to law as to other facets of social life. The "spirit" of any particular legal order thus comprises the pervasive themes, patterns, or values that appear repeatedly within it and shape and reshape the rules and processes of law. Japan is therefore no different from all other nation-states in dealing with the problems of accommodating the ideas and institutions of transplanted law within perhaps an even more mutable culture.

To discern and explain these themes, patterns, or values in contemporary Japanese law is the more daunting challenge of this book. It is one thing to say that distinguishing features exist but quite another to identify accurately what they are or mean. Despite the marginal advantages of a broader and implicitly comparative perspective, outside observers have neither the full store of knowledge nor the sensitivity of those who experience the system from within. Nor can this be a matter of purely subjective judgment or intuitive guess. Even without empirical tests, for the lawyer at least, a confirming standard does exist. The quality of the argument is evidenced in the accuracy of its forecast. The value of such a study therefore depends upon whether it enables us to predict more accurately the future course of Japanese law.

Courts and judicial decisions are central in this endeavor. In Japan as in nearly all contemporary legal systems, however central the role of others—legal scholars, the practicing bar, or prosecutors—may appear, judges generally have the last official word. In applying legal rules made by others in individual cases, judges determine what the legal rule means as it applies in particular circumstances. However, judges do not always have the last word. So long as the parties themselves remain free to ignore the rules laid down by judges, they remain in control. Or, in the case of criminal justice, to the extent that the police or prosecutors are allowed to divert offenders onto other tracks for correction and thus to avoid adjudication, they define the rules. As in the case of most contract and other optional (or default) rules of private law, such freedom or diversion may itself be an explicit

value of the legal system. It may also be a consequence of less intentional features. Excessive costs and other barriers can prevent meaningful access to the courts, and process rules can preclude the justiciability of significant claims. Even in such instances, however, judges have a major role. They remain the principal actors in determining the accessibility of the courts, the legitimacy of alternative channels, and the effectiveness of legal rules in shaping social behavior.

The role of judges in Japan deserves special emphasis. John Henry Wigmore, who witnessed the formation of Japan's contemporary legal system as a teacher and advisor in Japan in the late nineteenth century, noted the historical similarity between Japan and England in the preeminence of adjudication and judge-made law.² Contemporary Japanese scholarship on Japan's legal history echoes Wigmore's observations.³ Today, too, Japanese courts play a central part in the process of creating and enforcing legal rules. The Japanese judiciary enjoys broad public trust. Japanese judges have an enviable record of honesty. Litigation has long been a forceful instrument of legal and political reform. The dynamics of law and social change in Japan can indeed be described in terms of the tensions between courts and their administrative rivals.⁴

To be able to predict what judges will do in future cases with any degree of certainty or probability, we must be able to identify collective aims and motives—not simply the justifications—judges have in reaching certain conclusions. Values are important. They are guideposts and references in forecasting what judges in a particular case are most likely to decide. Lawyers can and do routinely predict how judges will interpret and apply legal rules in most lawsuits. Such forecasting will usually be quite accurate to the extent that the rule is stated without ambiguity or ambivalence and the outcome of its application to a known set of facts can be predictably considered “fair” or “just” by the judge and, as perceived by the judge, the community at large. Add any uncertainty, as for example to the meaning of the language of the rule itself, the facts of the case, or the “justice” of the result, and prediction becomes a much more risky venture. This process of prediction is of course what much lawyering is all about—assessing the likely outcome of cases to be decided in the future by

judges based on prior cases and an understanding of the various conventions and beliefs that influence judicial behavior. In the process lawyers routinely make educated guesses as to the values judges hold and their influence on judicial decisions.

As guideposts, the most important values are those that are shared. In other words, culture—defined as shared values as well as habits, expectations, and beliefs—also counts. In any legal process, culture has several facets. Narrowed to judicial behavior, culture includes the values and beliefs shared within each of the various communities to which a judge belongs from the broadest, even global, scope to the narrowest scope of status, class, or profession. Defined in this way, culture encompasses the values and beliefs of not only the national community at large but also the legal profession and the judiciary.

Legal values are only one of several elements of a legal culture, which includes understandings about law, the legal process, and the judicial role that combine as constituent components of the legal system itself. The spirit of law as values is a piece of the puzzle of law itself. The spirit of Japanese law is thus as integral to the formal system of Japanese justice as the rules of its codes.

Unfortunately, too often the word “culture” is used without much care and as a result it loses its usefulness as an element of analysis. More precisely defined, culture becomes a critical factor in understanding the nature, role, and dynamics of law in any society. Culture is, however, simply a descriptive label. It does not—and should not—imply a normative judgment as to whether the habit or belief is valid or invalid, good or bad, rational or irrational. Culture is also frequently misused as a fixed, immutable element of social reality. We need to keep in mind that culture is also mutable. It changes. The important question is thus not whether values, expectations, and habits change but how and why.

Finally, some readers about to begin a book on Japan may be tempted to conjure up something exotically unique, a conflict-free society in which law is rarely needed and has little significance. Others may tend to emphasize exceptional features of Japan as a state-directed industrial producer, so homogeneous and conformist that law has little place. A glance should suffice to show that the idea of Japan as

xx Introduction

a harmonious, homogeneous, and conformist society is false, but whatever kernels of truth may be found in these or similar views, they ignore most of the landscape. Japan today has much more in common with its western industrial peers than its own past. As previously noted, Japan's legal system is no more unique than the French or German or any other national legal system. To focus on features of Japanese law that contribute to its singular identity is not, to repeat, to deny the equally if not more pervasive characteristics it shares with other industrial democracies, particularly those within the civil law world.

CONTENTS

Acknowledgments	<i>xi</i>
Introduction	<i>xiii</i>
1 Law's Values	<i>1</i>
2 Law's Domain	<i>21</i>
3 Law's Actors I	<i>40</i>
4 Crime and Community	<i>70</i>
5 Law's Actors II	<i>90</i>
6 Community Confirmed	<i>123</i>
7 The Sense of Society	<i>156</i>
8 Between the Individual and the State	<i>177</i>
Conclusion	<i>201</i>
Notes	<i>213</i>
Index	<i>247</i>

1 Law's Values

In Japan, as in any other country, some values and beliefs embodied in law are peculiar. They reflect the necessarily unique shared historical experience, habits, and values of Japanese society. Other values and beliefs, however, are less exceptional. In contemporary legal systems worldwide, most of law's values—albeit with different levels of emphasis and especially realization—are in fact universally shared. The legitimacy of legal rules and adherence to rule by law, judicial neutrality, and the independence of judges to decide individual cases free from personal gain or direct political intervention are among the most obvious. Others are common only within communities formed by particular legal traditions. Understandings on the sources of law differ, for example, between religious and secular legal traditions. Similarly, certainty and consistency are valued differently between the common law and civil law traditions. Japan thus tends to share the values and beliefs of the legal traditions to which it has past or present affinity. Important among them are fundamental assumptions and values common to all contemporary legal orders within the civil law tradition. These assumptions and values include a shared understanding of the nature of law itself.

JUDICIAL DECISIONS AS SOURCES OF LAW

Whatever the word “law” may mean in other contexts, within the institutional matrix of contemporary states law is today almost universally understood in positivist terms as, at least principally, an instrument of governmental control. Even the most fervent proponents of natural law are forced to admit that no legal rule or principle is

2 The Spirit of Japanese Law

truly realized without some form of positivist expression. Thus, in Japan, as elsewhere, law is defined as the rules and principles articulated by legally established institutions through formal processes also provided by law. As law these rules differ from both formal rules made and adhered to by institutions that do not exercise lawmaking authority as well as informal rules recognized and even enforced by the community, however binding or functionally equivalent to legal rules either may be.

Law has long been understood in Japan as an instrument of government control. Law comprises rules and principles intended as binding standards of conduct and behavior. All are today formally sourced in a legislated constitution, five basic codes, an ever increasing corpus of statutes as well as through statutory delegation of legislated power, the authority to regulate, cabinet orders, ministerial ordinances, and prefectural and other local government regulations. Whatever the primary source, however, legal rules and principles in codes and statute books remain mere words on paper until interpreted and applied in the context of actual cases and real-life situations.

Any system of law with a hierarchy of courts and concern for predictability inevitably develops a body of rules and principles articulated by judges in the course of adjudication as they interpret legislated rules, fill in gaps, and amplify the bare bones of codified or statutory language. Japanese scholars dispute the status of judicial decisions as a formal source of law.¹ Nonetheless, in Japan, as in all developed legal systems, judges adhere to prior decisions, particularly those of higher courts. Judicial decisions thus function in Japan, as elsewhere, in effect, if not in theory, as a secondary but significant source of law.

The emphasis in Japan on judicial precedent seems to be particularly strong. Predictability is not the sole concern. Notions of fairness that like cases require like outcomes and the mandate of a unitary system of national law underlie a special stress on consistency.² In one of the classic prewar studies of the role of precedent, Izutarō Suehiro (1888–1951) added a third impetus: the recognition of the imperfection of all legal rules over time and the related need for adapting legal rules to changing social conditions. In his words: "Legislation is the

work of the human mind. It is impossible to make a perfect product that will meet all the exigencies of the changing world. Even if it be possible to have a law which fits perfectly all social conditions at a certain point of time, change in the society will immediately make it an imperfect product. Only judicial precedents can supply the contents to fill the original and subsequent gaps and so afford the people with criteria for their conduct."³

Hence, the 1890 Court Organization Law required the Great Court of Cassation (*Daishin'in*) to sit en banc when overruling a precedent.⁴ The 1947 Court Law similarly precludes today petty bench decisions contrary to prior interpretations of the constitution and other laws and regulations.⁵ The Code of Criminal Procedure provides as formal grounds for appeal on questions of law a lower court judgment at variance with judicial precedent as well as the absence of a judicial precedent on point.⁶ Even without such formal recognition, however, Japanese judges themselves have long considered themselves bound by judicial precedent.⁷ Since the early 1920s, the Japanese courts have selected for publication decisions of their highest court as "judicial precedents" (*hanrei*). Before 1923, the official compilation of judicial decisions by the Great Court of Cassation was simply entitled as a record of judgment (*hanketsuroku*).

Nor is adherence to precedent a modern innovation. Whether buttressed by some special cultural concern for continuity or deference to hierarchical authority or simply the manifestation of past practice, historically judicial lawmaking has been a characteristic phenomenon of law. In Japan as in England, which as previously mentioned Wigmore noted many years ago, much of traditional law was created in the context of adjudication by administrative officials. Today, in any event, whatever scholars may say, lawyers and the courts alike rely upon and cite judicial decisions as controlling authority.

As in other civil law systems, scholars too are among law's primary actors. They play a significant role in articulating the rationale and theory of legal rules. In Japan they have historically formed a connecting bridge for the introduction of ideas and institutions from abroad. In the seventh and eighth centuries a corps of official court scholars versed in T'ang law assisted in drafting and explicating Japan's first

4 The Spirit of Japanese Law

codes.⁸ The tradition of Chinese learning continued into the eighteenth and mid-nineteenth centuries.⁹ Scholars today continue this tradition of transmitting legal concepts and theory. They are also critics. In both roles they reinforce the importance of judicial decisions by challenging the underlying orientations and continuing to introduce reforms from outside sources. Once consensus among scholars is reached, scholarly opinion (*gakusetsu*) becomes an important source of law as well.

Some would add custom (*kanshū*) and reason (*jōri*) to the list of sources of law.¹⁰ Custom is expressly acknowledged as a source of law, for example, in article 1 of the Japanese Commercial Code as well as article 2 of Japan's basic conflict of laws statute, the *Hōrei*.¹¹ Customary rules, however, only acquire the attributes of law indirectly when recognized by judges and to a lesser extent by scholars. A customary norm may appear to operate as a legal rule in the sense of its influence as an apparent, socially enforced, standard for behavior. Yet custom like culture is not immutable. Customary norms change. Nonconforming conduct is the catalyst and imitation, the driving force. Once articulated and enforced by a court or other formal law-enforcing institution, however, customary norms become fixed as legal rule. A rule thus created is no longer fettered by the vicissitudes of social change. Only when incorporated through legislation or adjudication are any of the three—scholarly opinion, custom, or reason—truly transformed into legal rules. In the end judges decide what scholarship, which custom, and how reason becomes law.

LAW AND MORALS

Japanese are not alone in taking for granted a definition of law and legal rules as instruments of governmental control and ordering. Few others today would disagree. Whatever its sources, ends, or formulations, law, in the words of Roscoe Pound, is a mechanism of "efficacious social engineering."¹² Law works because it binds. We are compelled to obey. By what force is seldom even questioned. Most presume the legitimacy of state-directed means of coercion through judges,