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Comparative Law in Perspective

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COMPARATIVE LAW IN PERSPECTIVE

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Abstract: The use and study of comparative law has grown in scope and in importance—and no more so than in the area of commercial exchange between the United States and Japan. Comparative law is being applied more practically in the Courts; it is an agent of change and of harmonization between different peoples and economies. However, the respective concepts of law and its role in society, as well as the role of language in understanding the law, continue to make the use and study of comparative law a challenge. A real sensitivity to the cultural, structural and conceptual differences in the civil and common law systems requires an understanding of these problems.

INTRODUCTION

As technology and travel continue to shrink the world and integrate our economies, comparative law inevitably grows in importance both in the academy and in the legal profession. Comparative law has grown in importance because law becomes the only bridging agency to facilitate dealings between parties of differing national heritages. As law becomes the rational common-ground, underpinning our international private business, comparative law becomes a method to achieve gradual uniformity of legal and commercial practices in trade and investment worldwide.

Understanding national differences is a first step toward harmonization of private law, such as is taking place in Europe. More profound and less understood is the need for uniformity of domestic policy mixes (taxes, interest rates, labor laws and the like) in order to create a "level playing field" for private companies in all countries. This implies some uniformity in public law as well, especially in its justiciability and enforcement. As the globe continues to shrink, even life-styles are not irrelevant to the level playing field.

With all of this change comes also renewed recognition that a strong private sector and democratic government are the underlying forces propelling growth, and no one can doubt their symbiosis with justiciable rights underwritten by law. Just as the rule of law is the necessary legal dimension of democracy, so is justiciable private law (property, contracts, corporations) the legal dimension of a strong private sector in the economy. These essentials are rapidly gaining support, not simply from the bureaucratic

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elites around the world, but from the broad base of people aroused by the excesses of government in authoritarian and socialist countries.

This article looks at the important role of comparative law in commercial exchange between Japan and the United States. Part I reflects on the changes that have occurred in the field of comparative law—especially in Japan-U.S. relations—in my forty-odd years of studying Japanese law as an American lawyer. Part II briefly considers the special challenges of comparing Japanese and American law in the 1990's.

I. RECENT CHANGES IN COMPARATIVE LAW

When I graduated from law school in 1949, only a few law schools had courses called "comparative law." The American courses were then almost exclusively concerned with comparing the common law system, as a system, with the civil law system; such comparative law was entirely academic, with little concern for law practice. Civil law meant, at that time, French or German law. No Japanese law (or any other "Asian" law) was taught in any American law school then. Indeed, there was little justiciable public law to be found in Asia in 1949, except at a very shallow level.

Comparative law was regarded by our faculties and in our curricula as a "perspective course," meaning that it was more intellectual than practical. Of course it was not (and still is not) on the bar exam. It was an interesting subject for a diversion; rather like the student looking up from his desk and gazing out the window. This condition of comparative law forty years ago was a reflection of the American law school as a professional training ground for practicing lawyers, most of whom at that time had virtually no international work. It also reflected the more parochial law practices of the times; international intercourse at all levels was but a pale ghost of what it is today.

A look at the immense changes which have since occurred will suffice to show that comparative law is no longer only a diversion for the law student, but rather an everyday tool for our lawyers and business people.

1. Change of Emphasis

Comparative law has taken on a problem-solving emphasis, as businessmen and lawyers daily encounter both foreign and domestic law in their contracts, corporations, or lawsuits. Law school curricula now address this reality with courses such as "international transactions." Even more

realistically, new courses at the University of Washington are addressed specifically toward bilateral transactions between the U.S. and Japan.

2. Practical Application of Comparative Law in the Courts

Comparative law has come to embrace the comparative "contexts" of law in various countries. No longer is the emphasis simply on comparing rules and doctrine—sterile verbal exercises of definition and interpretation. *Application* of law to real life, in legal *cases*, requires understanding of comparative history, culture, society, and economics. This interdisciplinary aspect has enriched our intellectual lives at the law schools immensely, not to mention the challenges its added complexities have thrust upon us in litigation, and in the court reports of the decisions in such cases.

3. Integration with International Economic Law

Since World War II, a whole new field of law has spun off from public international law: international economic law. The new international economic law now sets the framework in which national private sectors can interact in the international markets, and uniformity is an immensely important by-product.

4. Agent of Harmonization

Comparative law has become the agent for harmonizing discordant legal systems globally. The movement for harmonization has recently picked up momentum, largely because comparative lawyers are gradually bringing to light the differences in legal regimes. At the same time, we are learning how inconvenient excessive diversity is in the conduct of international business. Visionaries may even be able to see a day in the distant future when comparative law, by accomplishing the goal of uniformity, may even put itself out of business!

These are but the most prominent of the many post-World War II changes that have engulfed our field, which was once seen as only an academic diversion. Comparative law, in this sense, is now at the center of dynamic international interaction. Comparativists have become a necessary component of every large law firm in America, and they will become more

prominent in Japan as it continues to integrate and dismantle its nationalistic corporatism.

II. THREE KEY PROBLEMS OF COMPARISON

In comparing the laws of countries as different as Japan and the U.S., three underlying philosophical problems are especially basic: (1) the concept of law in the culture, (2) the role of law in the society, and (3) the interplay of law and language. Any comparativist writing about Japanese law in English must confront these critical issues, whether his interest is macrosystemic or microdoctrinal, and whether his focus is in academia or legal practice.

1. Concept of Law in Japanese Culture

The idea of "law" itself and its relation to culture in general has until recently not been adequately examined. In order to see this problem in an Asian perspective, a recent analysis of the Shanghai Mixed Court (1911-1927)[1] is a useful as well as absorbing story. Though the focus is on China, the message speaks for Japan as well. Combining Chinese and foreigners on the same bench, the Mixed Court was a unique experience. By 1911, its powers extended to cases in Shanghai by foreigners against Chinese (not Chinese against foreigners), and cases by Shanghai Chinese against other Shanghai Chinese. For about sixteen years the Mixed Court handled a heavy case load reasonably well, despite the fact that the Chinese magistrate and the foreign assessors on the Court had wholly different views as to what they were doing. The differing views stemmed from the fundamental incompatibility between Chinese and Western systems for dispute resolution and for maintenance of order in society.

Broadly speaking the West depends largely on a legal system and courts for these functions, whereas China had no such things in its culture as law, courts or adjudication. Instead, China depended solely on hierarchy, authority and a "system of discipline." The differing perspectives of the Chinese and foreigners as to the mission of the Mixed Court and as to the role of law in its decisions make a study of the Shanghai Mixed Court revealing to all foreign students of Confucianistic societies, including Japan.

The fundamental point raised by Japanese language and culture affects the most basic sort of comparability: Is there an idea comparable to western

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[1] *See* Thomas B. Stephens, *Order and Discipline in China: The Shanghai Mixed Court*, 1911-1927 (U of Wash Press, 1992).

justiciable "law," in the deepest and broadest sense, in Confucian philosophy or governance, past or present? Though it may seem to some to be rather late in the day for such an inquiry, we should raise this question forthrightly and answer it clearly: there was no such idea of law in Tokugawa Japan. Tokugawa thinking and governance (following Chinese models) were based on Confucianistic, elitist authority; governance (as well as language and thought) were based on hierarchy and inequality, and on orders, obedience and duties. In disputes, the goal and the process was *adjustment* among the parties or, if needed, instruction from the magistrate; it did not involve official application of legal rules or popular assertion of rights, as in Western adjudication. Westerners, from the Greeks and the Biblical era onward, have seen "law" as based on principle—universal, given, and external to those bound. Western "law" is based on equality and rights, assertable in the adjudicative process, from the bottom up, by the citizenry.

If there was no adjudication in pre-Meiji Japan, nor any understanding of the idea of "law" in Japanese culture, and if there was therefore no "right" in early Japan, then surely it is correct to assert that the description in much of our Western literature on Tokugawa "law," or even on much of Japanese bureaucratic practices today, proceeding as it does in the rhetoric of modern western law, can do little but thoroughly confuse readers about Japanese governance. This is because it wrongly presumes for Japan the existence of something comparable to our ideas, concepts and institutions of "law." This obfuscating usage of English translates all of our legalisms backward, as if they were to be found in Japan.

I recommend the Mixed Court in Shanghai as a case-study to demonstrate concretely, as seen in its day-to-day operations, day-by-day the basic differences in the two systems of "law" and "discipline." I think it is relevant to much Japanese practice and administrative guidance even today. The Mixed Court shows the lack of comparability between the essentials of our legal system and the Chinese disciplinary system by showing the travails of this unique "court" of foreign judges and Chinese administrators (not judges) working in a Confucianistic Chinese setting. Despite entirely different perceptions of the basic tenets of governance, they worked together to resolve disputes.

At a superficial level, this is at least partly a language problem. One can see that we are getting too much use out of "law," "court," "judge," and other legal terms, by using the same word to denote two or more things worthy of distinction. Or, some might feel that we are trying to appropriate to our own cause exclusive use of these good words. But though part of the problem is one of definition, there is surely more. There is something

distinctive about the *lawyer's* law of legislated rules applied by independent courts; and there is something different about the "orders" (do-as-you-are-told-and-don't-talk-back "law") and "administration" in *disciplinary* systems. Indeed in modern American (as well as Chinese and Japanese) administration, there is plenty of de facto do-as-you-are-told "law" side by side with real justiciable law, and indeed lawyers continually call them all, in all sorts of contexts, simply "law." If we do nothing else, we can make a good case for two names for these two kinds of everyday "law": justiciable law and from-top-down, unchallengeable, administrative orders called "guidance."

But the significance of this point is not confined to quibbling about terminology. The point is that there is no way to understand and describe the sophisticated workings of Chinese or Japanese governance, past or present, without starting with premises which involve their philosophy, culture and sociology. These traditions knew no formal adjudication as we know it today. The traditional Japanese system was different indeed, and to a degree it persists. Therefore, the traditional Japanese system must have its own language; it needs an administrative language of a "disciplinary" system. Indeed this is why the term "administrative guidance" emerged in Japan—simply because it is anomalous in a "legal" system. Terminology from a "legal" system will only confuse by causing readers to think we are discussing comparative law, whereas really we are discussing politics and sociology. It is this terminological difficulty that has delayed my own study of the 18th century *Kujikata Osadamegaki* for many years.[2]

The point goes much deeper. Take Japanese studies, for example. There is no place for comparative law in understanding traditional Japan because there was no justiciable law of our sort in traditional Japan—no justiciable rules, independent bar, independent bench, trials or adjudication. There was only administration. We should therefore save our *legal* terms for our justiciable legal system, so as to distinguish our penchant for justiciable law from the techniques the Japanese used to maintain order and to settle disputes. This will not only clarify our thinking, but enable us to better understand and appreciate Japanese thinking, unencumbered by law.

For Western comparativists this distinction comes at a good time, as we in the West are continuing to study and embrace so-called "alternative dispute resolution." In China and Japan these techniques have always been the mainstream, not "alternatives" at all. Presumably our embrace of these newly-found (for us) methods is in part a recognition of the limitations of our

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[2] *See Yoshirō Hiramatsu hakushi tsuitō rombunshū henshū iinkai (Ed. Com. for Memorial Essays in honor of the late Dr. Yoshiro Hiramatsu)*, ed., Hito keibatsu no rekishi-teki ksatsu (Historical Considerations of Law and Punishment) 489-544 (Nagoya Daigaku Shuppankai. 1987).

legal system to serve all of our people; some of our problems seem to be handled better by the "alternatives" newly emerging in America. This recognition would in turn logically imply some appreciation for the Chinese and Japanese ways, and force us to reevaluate both systems: the legal system which prevails in the West and the Confucianistic, disciplinary system which is still strong in Japan and China.

My academic endeavors in Japanese law started in 1950 with a Ph.D. on the Japanese traditional system.[3] At that time conciliation, mediation and alternative dispute resolution were of no interest to American lawyers and barely mentioned in our legal literature. Now, 40 years later, "alternate dispute resolution" is an ubiquitous neologism spreading through the courts, the law curriculum, and our daily lives.

2. The Role of Law In Japanese Society

Of course our perspectives on the role of law vary with our own backgrounds. Individualism seems more prominent in American than in Japanese daily life, and therefore practicing lawyers play a larger role in the U.S. By contrast, it seems to me that in Japan duties overshadow justiciable rights. Therefore, bureaucrats and other authority figures play a larger role in society than do lawyers.

The role of law in Japanese society is comparatively minor for historical reasons. As emphasized in the preceding section, the word "law" here means Western law: it connotes "justiciable law" or "lawyer's law." "Law" implies a verbalized written rule, enacted by a legislature representing voters, and applied by independent courts at the behest of citizens aided by practicing lawyers.

The apparatus of "justiciability" which enforces *right* is rather uniquely developed in the United States, at least in the degree to which it is used everyday by the citizenry. This sort of law was first imported into Japan only about a hundred years ago, and then only in the private law. The public law has only begun to become justiciable since 1947. As a new and alien system, law has been superimposed on a highly structured Confucian society in which justiciable law had little part. Even today Japan is largely *socially* governed by "do-as-you-are-told law" imposed by social groupings (family, school, company or community) without recourse to courts. Just as the U.S. uses law excessively perhaps, Japan is at the opposite pole among modern democratic polities in using law very little. The contrasting positions of the two nations

[3] *See* Dan Fenno Henderson, *Conciliation and Japanese Law* 2 Vols. (U of Wash Press, 1965).

on the use of something so fundamental to Americans as "law" makes communication difficult for us both.

In this sense, I would suggest that the Japanese people may not be appropriately described as "law-abiding." For the most part, their controls are more socially ingrained and enforced by immobility and communal adhesion; they are less affected by individualistic concerns for rights conferred by external law of the kind we now study in comparative law. In the home, school, workplace, and neighborhood, proper behavior is so socially prescribed and invisibly enforced that state-imposed transparent law is not only weak, but arguably quite superfluous in private dealings. It is crucial for lawyers to understand that today Japan is still *socially* disciplined[4] to a remarkable degree, and comparatively less affected by justiciable rights enforced by the courts. This is especially true of the public law, where justiciable law is remarkably atrophied. Perhaps this is because social controls remain so authoritative and efficient in imposing duties without correlative rights.

The Japanese have developed a sophisticated central bureaucracy, a system of administration, and a structure of private law based on imported codes. The legal literature—treatises, commentaries, and case law—is voluminous, systematic, and refined. The mix of social and legal institutions, however, remains subtle and still elusive to most foreign comparative lawyers. We have had too little exposure to the inner workings of Japanese society and its business community. This is because essentially the subject matter is, in our terms, more sociology than law; the real workings of society are not described by the rules and procedures of the legal system. In that sense the real workings are concealed (not revealed) by the law, however much the law may be co-opted by social groups, and be influential, as *tatemae*.

3. The Interplay of Law and Language

The third problem of comparison is the relationship of language to reason, and reason to law. This facet of U.S./Japanese comparison is especially troublesome. Here again this is not simply a problem of "law" with all its Western connotations, or even of comparative sociology; it is rather a problem of comparative *culture* at a level even more basic to a people's national life. The Japanese language is both subtle and complex for the

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[4] *See* John O. Haley, *Authority without Power*, pp. 285 (Oxford U Press, 1991) (for a fresh and incisive analysis of law and Japanese society).

comparativist because of the traditional lack of law in the culture, and the initial difficulty of expressing law, with its proper Western connotation, in traditional Japanese language. Added to this was the inherent parochialism imposed by the foreign scholars' own language and culture, in which "law" has been central from the Bible onward.

Language is essentially, in its nouns at least, classification. As such, it is inherently imperfect in translating the infinite richness of individual examples (or events) into reality, even within a single system such as our American law. American lawyers deal routinely with comparisons of different rules from state-to-state on a daily basis, but this kind of comparative law concerns a single culture and society. In a Japanese comparative law practice, the difficulties of law and language inevitably are compounded by the problem of translating, into English, concepts from a language, society, and culture as different as Japan's.[5]

The rule-of-law and judicial process are fraught with the interpretation and application problems which accrue from the inherent imperfections of language and the concomitant difficulties of classification and translation. While these concepts are now parts of a democratic value system embraced in the constitutional verbiage of both the United States and Japan, they are implemented quite differently in fact. Translation of Japanese law into common-law English therefore requires an uncommon sensitivity to structural and conceptual differences in the civil and common law systems, as well as an awareness of the relatively shallow presence of law in Japanese society.

CONCLUSION

There can be no doubt that comparative law has come of age; it has not only grown immensely in its intellectual sphere within the ivory towers of learning, but it has moved into the law offices and the main streams of commerce and industry. Comparative law has become professionalized, commercialized, industrialized, even securitized in recent years. The bench and bar must become more efficient and prompt in dispensing justice to keep up with these trends. Given Japan's expanding influence in the world, surely a more cosmopolitan bar will be needed in both countries in the future.

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[5] Nowhere is this difficulty more vividly expressed than in discussing Rinsho Mitsukuri's 1869 translation of the Code Napoleon. *See* Ken Mukai and Nobuyuki Toshitani, *Meiji zenki ni okeru mimpō-ten hensan no keika to mondai-ten*, 14 Hōseishi kenkyū 214-45 (1964) (there is an English translation in 1 Law in Japan: an Annual 23-59 at 38 (1967).