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Law in Japana: The Legal Order in a Changing Society, edited by Arthur T. von Mehren (1963)

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the preference of public welfare to individual rights must be taken seriously because the danger exists that it could result in the same situation that prevailed under the Meiji Constitution when fundamental human rights were granted only "within the limits of the law."

I see no reason for pessimism, on the whole. The progressive decisions of several district courts as well as some of the separate opinions of Supreme Court justices augur well for future developments. They show courage, imagination, and understanding of the spirit of the Constitution. We may expect further progress from the new men on the bench. It might be significant to note that in a decision of November, 1962, the Supreme Court declared a provision of the Customs Law unconstitutional because it violated private property rights.

These observations are in no way designed to detract from the great value of Mr. Maki's extremely interesting work and from the fine contribution it makes to our knowledge of Japan's highest tribunal and of the most important and exciting aspects of its performance.

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LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY. Edited by Arthur T. von Mehren.[1] Cambridge: Harvard University Press. 1963. Pp. 706, xxxviii. $15.00.

More than a decade has passed since the end of the American occupation. During this period, Japan has continued to prosper with a highly viable economy and a modern democratic polity. Much of this is attributable to one of the most successful military occupations in all history. America's influence on all aspects of Japanese society was great. How lasting it will be remains an intriguing question. *Law in Japan* is an appraisal of this influence in the law.

The book is an outgrowth of a conference on Japanese law sponsored by the Ford Foundation. At the conference, Japanese legal scholars presented papers describing aspects of the Japanese legal system. These articles have been edited, grouped, and analyzed in the present volume. The articles are arranged in three groups:

(1) "The Legal System and the Law's Processes"; (2) "The

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Individual, the State, and the Law"; and (3) "The Law and the Economy."

In the first article in Group I, the reader is presented with a description of the development of modern Japanese law from the beginning of Westernization during the latter half of the nineteenth century. In the 1890's, Japan drew heavily on the West to codify its basic law. The late Dean John H. Wigmore of Northwestern University School of Law spent three years in Japan, in which he sought to convince the Japanese of the wisdom of building on their own common law tradition,[2] but failed when the Japanese turned from their indigenous law to the French and German codes.

The second article describes the many methods of resolving disputes in Japan.[3] These include litigation, mediation, consultation, and arbitration. The latter three methods are part of the centuries-old Japanese tradition of avoiding litigation if possible. The American influence is evident here in the elevation of the status of the lawyer in Japanese society to give him a greater role in the settlement of disputes.

The last three articles in Group I describe changes in litigation and in the attorney's role in post-war Japan. In one, for example, the author describes the modification of the formerly extensive role of the judge in the settlement of disputes, and concludes that litigation today is at a "midway position [which] is in a real sense a fusion of the Continental and the Anglo-American philosophies." (p. 110) In another, the author notes that while the lawyer has a far greater role in post-war Japanese society, he still does not have the status of his American counterpart.

The final article in Group I deals with legal education in Japan, explaining Japan's unique method for training the new members of its legal profession. The aspiring member of the Bar becomes eligible to take the national legal examination by graduation from the law department of one of the Japanese universities, with the equivalent of a Bachelor of Arts degree. While this examination is extremely difficult (only about four percent pass), if he is successful, he receives a combination of practical and theoretical studies at the Legal Training and Research Institute for two years. Upon graduation from the

[2] Among the world's sixteen legal systems, according to Dean Wigmore, only in the English and Japanese systems did official judges decide cases according to judicial precedent. See WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEMS, 48-89. 503-520 (library ed. 1936).

[3] *Cf.* Wren, *Japanese Law or Logic,* Case & Com. Nov-Dec, 1963 p. 36.

Institute, he may choose a governmental career by becoming a judge or procurator, or he may enter private practice. The work at the Institute, which is a government sponsored institution, is the nearest Japanese equivalent to the American professional law school.

Group II contains a series of articles dealing with the expansion of individual rights since World War II. In each of these articles, the reader finds the imprint of American law. In the area of constitutional law, Japan has adopted judicial review, but the courts have consistently refused to hold legislation, which we might consider restrictive of the freedom of expression, unconstitutional. In *Koyama v. Japan*,[4] for example, the Supreme Court denied the appeal of the translator and publisher of the Japanese version of "Lady Chatterly's Lover." The defendants had been convicted of violating an Article of the Penal Code directed against obscene writings. The Court said:

> [T]o constitute an obscene writing, it is required that it offend the sense of shame, give rise to the stimulation and excitation of sexual desire, and violate the notions of virtuous sexual morality.... [A]lthough what we refer to is the stimulation and excitation given to the general reader by the work and the degree that this reader entertains a feeling of shame, these matters must be determined by the court. The court's standard for making this determination is the good judgment employed by society at large, i.e., the 'common sense of society.'... [O]n examining the translation in this case, it is not true that we cannot discover an artistic quality different from pornographic literature [literally, 'spring books'] in the depiction of the twelve sexual scenes pointed out therein by the public procurator, but even so these are quite bold, detailed, and realistic. They contravene the principle of privacy in sexual conduct and offend the feeling of shame to the extent that one would hesitate to read them aloud in not only the family circle but a public gathering as well.[5]

Professor Masami Ito of Tokyo University deplores the Supreme Court's basing its decision on the "twelve sexual scenes," rather than on the work as a whole, and finally concludes:

> For me, the most unsatisfactory part of the *Lady Chatterly* opinion is the dictum to the effect that, if the sensibility of society to obscenity is paralyzed, the judges must 'assume a critical attitude against the sickness and degeneration and play a clinical role.' This kind of thinking may lead to a judicial censorship that is hostile to freedom of expression. (p. 228)

In an article on administrative law, the writer notes that only those

[4] 11 Sai-han Keishu (Sup. Ct., Japan, 1957).
[5] Quoted in Ito, The Rule of Law: Constitutional Development in Law in Japan 226 (von Mehren ed. 1963).

statutes fostered by the Occupation (e.g. the Anti-Monopoly Law, which created the Fair Trade Commission) contain a "substantial evidence rule" which limits the reviewing court to determining whether an administrative agency's findings of fact are reasonably derived from the evidence. Otherwise, Japanese courts reviewing administrative findings, must conduct a trial de novo.

The principal change in family law in the post-war years was the breakdown of parental authority over children, according to the third writer in Group II. The next most significant change, he says, was the elevation of the status of women. Finally, with regard to the traditional role of the eldest son, who had the equivalent of the right of primogeniture and the responsibility for caring for the parents, he concludes that the law has not changed noticeably. Some interesting statistics, as well as a statement of the changes in the doctrinal law, support these conclusions.

The article on motor vehicle accidents reflects the growth of Japan during the postwar years. A governmental compulsory liability system provides the mechanism for compensation for personal injuries. The writer complains that the awards are often too little, and that property damage is not covered by the insurance.

The three articles on criminal law included in Group II are especially interesting. The first, describing "Some Aspects of Criminal Law," points out a number of changes in the substantive law of crimes since World War II. The second discusses the shift from the pre-war inquisitorial process to the present-day accusatorial system, wherein the procurator resembles his American counterpart, the district attorney. The third, and best of the three, is an excellent treatment of the "Therapeutic and Preventive Aspects of Criminal Justice in Japan." Some of the problems considered are the standardization of sentencing, presentencing investigations, recidivism, juvenile delinquency, and probation and parole.

Group III, on "The Law and the Economy," consists of five articles on labor law, trade regulation, commercial law, corporate law, and income taxation. With the exception of commercial law, the doctrines in all of these areas reflect the influence of the Occupation. Labor law, like the Japanese labor movement, has grown "from its infancy in the troubled times of the early postwar years . . . into adolescence—a period of awkwardness, emotional instability, somewhat uncontrolled strength, impatience and limited experience." (p. 472)

With the greater dispersion of stock ownership in the post-war period, a modernization of the corporate law has contributed to a greater shareholder participation in management. Proxy fights and derivative suits are not unknown, and the securities market, with regulatory laws modeled after the American securities acts, is comparable to our own. The writer laments "the absence of public-spirited citizens like Lewis D. Gilbert or Wilma Soss," (p. 553) and concludes that shareholders' rights "have not yet been fully explored by Japanese investors." (p. 566) On the other hand, "the disclosure philosophy [of the securities law] has proved to be highly effective, [and] annual reports of registered or listed corporations have become very much more informative." (p. 566)

In the field of trade regulation, the Occupation succeeded in breaking up—superficially—the Zaibatsu, and in bringing about the enactment of the Anti-Monopoly Law. The latter statute has "served as a restraining influence on [the establishment] of cartels, [but] its enforcement is anemic today.... [T]he text of the statute and the decisions implementing it in the past remain and could be resuscitated easily by an administration sympathetic to their principles. There is, of course, no immediate prospect of this happening." (p. 505)

In income taxation, the Occupation went further in seeking to bring about change than in any other aspect of the economy. The Shoup Reports of 1949-50 established the initial pattern for Japanese income taxation in the post-war era by abolishing the distinction between capital gain and ordinary income and introducing an elaborate averaging system. When the Americans left, the Japanese proceeded to modify substantially their income tax law.

In commercial law, the influence of the Occupation was not great. Prior to the Meiji Restoration of 1868, Japan had a well developed indigenous commercial law. Interestingly, in the early years of Westernization, it appeared that Japan would follow American banking practices; but toward the end of the nineteenth century, she turned more to Europe for guidance in the field of finance. Sophisticated banking, factoring, security devices, and negotiable instruments have long characterized the Japanese commercial world, and the Occupation did little to change this.

Law in Japan is not a definitive treatise of the law of Japan. Rather, it is a potpourri of various aspects of Japanese society where law is involved. Some of the articles (e.g. Professor Ito's paper on constitu-

tional law) are written in the analysis-of-doctrine fashion that characterizes the typical American law review article. Others, such as Procurator Haruo Abe's discussion of the "Therapeutic and Preventive Aspects of Criminal Justice in Japan" are descriptive of practices of the Japanese judicial system. All are extremely interesting reading, particularly for the American who seeks to learn of the effects of the Occupation on Japanese law.

Editor von Mehren has done a fine job of arranging the papers in an orderly fashion, and providing a commentary at the end of each group of articles in which he summarizes the remarks of the Japanese and American scholars attending the conference. Credit should also be given to the sixteen American editorial collaborators who assisted the seventeen Japanese authors, and to Dr. David F. Cavers, Fessenden Professor of Law at the Harvard Law School, who has provided a description of "The Japanese American Program for Cooperation in Legal Studies." (pp. xv-xxxviii) Finally, the book contains a complete index, a table of cases, and a table of statutes, and is very beautifully bound.

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AMERICAN-JAPANESE PRIVATE INTERNATIONAL LAW. By Albert A. Ehrenzweig,[1] Sueo Ikehara,[2] and Norman Jensen.[3] (For The Parker School of Foreign & Comparative Law- being Vol. 12 Bilateral Studies) Dobbs Ferry, N.Y.: Oceana Publications Inc., 1964. Pp. 173. $7.50.

This book proves that Rudyard Kipling was right when he said that east is east and west is west and never the twain shall meet. It also proves that in spite of this they can work together. The second discovery of Japan, following unconditional surrender at the end of World War II, came in a more complex period of history than the first by Commodore Perry. The first was not followed up by the Americans as assiduously as by the Europeans and thus we find that that portion of the Japanese legal system which is westernized is civilian in general and German in this special field. Another thing this book proves,

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