

1-1-2013

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Recommended Citation

Frank K. Upham, *Japanese Legal Reform in Institutional, Ideological, and Comparative Perspective*, 36 HASTINGS INT'L & COMP.L. Rev. 567 (2013).

Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol36/iss2/8

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Japanese Legal Reform in Institutional, Ideological, and Comparative Perspective

By FRANK K. UPHAM*

These remarks will not attempt to summarize or critique the excellent papers presented at the symposium. The issues are too broad; my knowledge, even as a commentator, is too shallow; and, as many of the papers make clear, it is too early to know the ultimate contours, much less pronounce judgment on the attainment, of many of the individual measures. Instead, I will step back from the vicissitudes of the last decade and try to put Japanese reforms in an institutional, ideological, and comparative context. First, much of the messiness, delay, and shortcomings of the reforms are the inevitable consequences of top-down reform in a democratic country. Second, the reforms depart substantially from "rule of law" ideology, at least if we accept the conventional definition of rule of law as the specialized application of legal rules to judicially determined facts through a politically neutral, transparent, and accountable process. Third, I believe that much of American criticism of the Japanese legal system (and of other countries, most prominently China) can be explained not by others' divergence from global norms, but by Americans' obsession with individual process and our meta-narrative of the individual confronting the state. I present each perhaps contentious argument in the sections that follow.

* Wilf Family Professor of Property Law, New York University School of Law. The research and writing of this article were supported by the Filomen D'Agostino Research Fund at New York University School of Law. I am grateful to Hank Zhou for research assistance and to the editors of *Hastings International and Comparative Law Review* and the participants in the symposium, *Successes, Failures, and Remaining Issues of the Justice System Reform in Japan*, for their corrections and suggestions.

I. Japan Is Not Stalin's USSR: Excuses for Shortcomings and Reasons for Limited Optimism

When Stalin decided to collectivize agriculture, he did not have to negotiate with the kulaks. When Deng Xiaoping decided to liquidate the communes and eliminate free education and health care in the rural sector, he did not have to negotiate with Chinese farmers. For better or worse, Japanese legal reformers operate in a democracy. The more apt comparison for them would be President Obama's passage of comprehensive health care. While it is true that the Justice System Reform Council (JSRC) was more diverse, open, and transparent than its predecessors, it could not itself legislate or control the innumerable decisions to be made by the government in its implementation of subsequent legislation. The interests of the Ministry of Justice (MoJ), the Supreme Court, the Japan Federation of Bar Associations (JFBA), and university law faculties were going to be heard, and where those interests conflicted with the goals of the Council, they would have to be addressed. That is why we call them *vested* interests - they cannot be easily destroyed in the ordinary course of politics. Even worse, we can be quite confident that the representatives of these institutions will not take as their immediate goals the best interests of Japan as a whole or, in some cases, even the long term interests of their own constituents. Instead they will attempt to protect the interests of their direct principals while couching their arguments in the terms of the greater good.

I am not being cynical. This process is not evil; it is democratic politics. There are two sound reasons to accept if not celebrate the role of interest groups like the MoJ or JFBA. First, experts, even disinterested ones, can be wrong. The recommendations were not a response to the demands of masses of citizens dissatisfied with the basic structure of Japanese justice. Members of the public considered judges to be socially isolated, but the most visible push for reform came from big business, which wanted an enhanced and enlarged bar to increase its power *vis-a-vis* Japanese bureaucrats and its international commercial rivals.¹ It was a top-down process shaped by experts' views of how Japanese society and legal system should evolve. By labeling it top-down, I do not mean that it was

1. Japanese legal academics also played a strong role, most notably Prof. Setsuo Miyazawa, the organizer of this symposium.

dominated by vested interests; nor is it meant as a condemnation.² Detachment and expertise are not bad things in policymaking, but they are also emphatically not guarantees of wisdom. For Americans of a certain age, this point can be brought home by the simple evocation of the phrase, "the best and the brightest," the title of a book chronicling the disastrous role of the most highly credentialed political elites in guiding the United States into the Vietnam War.

There is a second reason to accept interest politics even if we acknowledge that a deliberative process of knowledgeable and independent specialists will have a better shot at identifying the national interest than leaving the protection of the hen house to the foxes, as most deliberative councils have done in the past. But acknowledging the value of detachment and expertise does not mean that it should be followed unconditionally. Change, even change unequivocally for the better, creates losers as well as winners. As the United Nations noted as long ago as 1951 in the context of development, "[v]ery few communities are willing to pay the full price of economic progress."³ The UN was concerned about subsistence farmers or handicraft weavers displaced by agribusiness and textile mills, not lawyers and law professors in one of the richest countries in the world. The process, however, is the same. One could argue that the proliferation of law schools could have been avoided by forcing universities to choose between law schools and undergraduate law departments, but doing so would have gravely threatened the futures of the undergraduate law professors. Similarly, proceeding steadily to the target of 3,000 annual test passers might have been consistent with the goals of the reforms, but it would be naïve to expect Japan's lawyers to give up their cartel rents without a fight. Winners will always extol intensified competition, but we are not all winners, and a fundamental goal of the democratic process should be protecting anyone from losing too much too quickly.

2. Far from being a closed process dominated by vested interests, Shunsuke Marushima, former Senior Staff of the Secretariat for the Justice System Reform Council and keynote speaker at this symposium, has noted that none of the 13 members initially advocated the introduction of lay participation. According to Marushima it was the process of solicitation of public opinion that changed their views.

3. U.N. DEP'T OF SOC. & ECON. AFFAIRS, MEASURES FOR THE ECONOMIC DEVELOPMENT OF UNDERDEVELOPED COUNTRIES (1951).

It is important to note that I am trying to excuse and explain, not celebrate. The frustration of social progress through the democratic defense of one's comfortable status quo may be democratic, but there is little else to say for the result, especially if the aborted process has produced additional losers. Institutional reform takes time, however, especially when the reform is as top-down and abrupt as this one has been, and there are signs of eventual success. The internationalization of the Japanese commercial bar; the apparently seamless success of the *saiban-in* system; and the active role of the prosecutorial review commission are all reasons for optimism. When it comes to legal education, on the other hand, it is hard to be celebratory. The declining bar passage rate and especially the relatively low rates for those with broader social experience, the return of the cram schools, and the specter of the indirect path to the exam all bode ill for the emergence of the socially integrated legal education and bar that was a fundamental goal of the reform process. Even here, however, there may be hope. While the declining number of applications and the closing of some law schools are costly, they are also signs of a shaking out of the system that may eventually – one hopes in years, not decades – yield a passage rate that will allow the educational innovations to realize the benefits envisioned for them.

II. The Move Away from Conventional Rule of Law Ideology

Whether or not my limited optimism is well founded, there is virtually unanimous praise for the long term goals of the reform measures that emerged from the JSRC process. I am not an exception, but I find both the direction of these reforms and their admiring reception intriguing from the larger perspective of what type of legal system contemporary societies need and what rule of law means in this context. To explain my reaction, I need to return to the status quo ante, the Japanese legal system as it stood in 1999.

If one's most fundamental goal for a legal system is "the rule of law, not men," it is difficult to find a contemporary legal system that comes closer to that ideal, at least in its literal interpretation, than pre-reform Japan. To provide a template for my argument, I summarize sociologist of law Marc Galanter's essay *The Modernization of Law*.⁴ Galanter looked first at the necessary

4. Marc Galanter, *The Modernization of Law*, reprinted in LAW AND THE

characteristics of legal rules and determined that they must be uniform and unvarying in application, rational and universalistic rather than intuitive or unique, and transactional in the sense of limited to facts legally relevant to the circumstances of the dispute. To implement such rules, certain personnel and institutions are required. Most fundamentally, juristic actors must be professionals. To find the applicable rule, to interpret it correctly, and to focus exclusively on its legal meaning all require specialized training, knowledge, discipline, and socialization. That training begins with legal education but to ensure that it is fully implemented, legal institutions, of which the judiciary is preeminent, must deepen, reinforce, and maintain professionalism. Without such relentless policing of the disciplinary boundaries, the rules will not be enforced uniformly and predictably against all legally identical persons in legally identical situations. One might summarize such a system as the substitution of stylized argument and reasoning, hierarchical authority, neutrality, and procedural regularity for the moral, social, or political context that would dominate a lay person's reaction to the dispute.⁵

Whether one accepts this model as a noble goal for all societies or dismisses it as a silly positivist caricature – my predilection would be the latter – one cannot deny its rhetorical power in today's world. A virtually identical version labeled “governance” has dominated the World Bank and other international financial institutions' lending criteria requirements since the 1980s, and similar criteria under the express rule of law rubric constitute a central part of America's diplomatic and aid policies toward developing countries. Much of China's over two decades of legal reform has been aimed at creating precisely this kind of legal system, albeit only for nonpolitical cases. And yet Japan's legal reforms are a direct retreat from such an ideal.

The most obvious examples of this shift are the *saiban-in* system and the strengthening of the prosecutorial review commission.

BEHAVIORAL SCIENCES 1046-55 (Friedman & Macaulay eds., 2d ed. 1977). This version of the rule of law will be seen by most readers as highly formalistic and was certainly not the vision that dominated the reform process.

5. This description is of Japan's prereform *legal* system, not of the political and bureaucratic systems. Indeed the deference of the courts toward administrative action allowed bureaucrats wide discretion and flexibility that deviated from these characteristics. See FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987).

Including lay persons in these processes will inevitably introduce precisely the emotional, social, and political factors that “rule of law, not men” is aimed at excluding. Furthermore, these changes introduce these nonlegal factors into a legal system that had succeeded in excluding them as well as any legal system in the world has done. Although there is reason to think that the Japanese judiciary was at least mindful of the political preferences of the Liberal Democratic Party for the postwar period,⁶ Japanese judges otherwise epitomized the professionalism, competence, expertise, and neutrality of a formalist model of the rule of law. They were as immune from social pressures or extrinsic prejudices as a tightly controlled bureaucracy could make them, and when they failed, there was a rigid hierarchy to correct their mistakes and guide them back to the straight and narrow path. Japan’s procurators and attorneys may not be as celebrated as its judges, but they are likely more consistently competent and honest than their American counterparts.⁷

It is not only lay participation in adjudication that departs from the rule of law ideals of neutrality and objectivity. As David Johnson’s description of victims and surviving family members tearfully begging for death sentences in capital cases brings chillingly home, the new emphasis on victim and survivor participation is all about the interjection of emotion and passion into criminal cases, including the majority of cases still tried solely by professional judges.⁸ It is theoretically possible that victim participation is *not* meant to influence the verdict or the sentence. It can be justified by the value of procedural participation - the idea

6. Frank Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 L. & SOC. INQUIRY 421 (2005).

7. Scholars have argued that the accuracy of the Japanese system of civil litigation is the prime reason for Japan’s low rate of litigation - if the system is almost perfectly predictable, potential parties to litigation will know how adjudication will come out and no one will sue. Whether one buys this argument, the professionalism of Japanese jurists makes it plausible, something that would not pass the laugh test if said about American adjudication. See J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989). Because the *saiban-in* system applies only to serious criminal trials, this reliability of civil adjudication should continue.

8. David T. Johnson, *Killing Asahara: What Japan Can Learn About the Execution of an American Terrorist*, THE ASIA-PACIFIC JOURNAL (Sept. 17, 2012), http://www.japanfocus.org/-David_T_Johnson/3832. See also Setsuo Miyazawa, *The politics of increasing punitiveness and the rising populism in Japanese criminal justice policy*, 10 PUNISHMENT & SOC’Y, no. 1, 47-77 (Jan. 2008).

that survivors will be benefited by having a chance to confront the defendant and plead for his or her killing by the state – and still maintain the principle that their testimony should not affect the verdict or sentence. To argue thus, however, is not only exceedingly naïve, especially in capital cases where lay judges will be sitting; it is also exceedingly cynical, at least unless survivors are told emphatically that their testimony is for their own catharsis alone and will have no impact on the trial or the penalty.

My point is not that lay participation is a bad thing. On the contrary, the interjection of social values into adjudication is both inevitable and an important link to popular legitimacy.⁹ Legal systems are invariably political creatures and if lay participation and survivor testimony contribute to social trust in the legal system, some departure from strict professionalism may not be too high a price to pay. It is nonetheless interesting that in a global legal culture where transparency and accountability are constantly urged on developing countries, a movement away from these values by a rich democracy would be praised with little attention to what seems from one perspective to be a deviation from the perceived wisdom. Legal transparency is not increased by adding non-professionals to judicial panels, especially when the participants are forbidden to discuss the process publicly.¹⁰ Nor is accountability. Japanese judges are not politically accountable as are the many American judges who must run for the office in partisan elections, but collegiate decision-making and the scrutiny of the Supreme Court Secretariat provide a level of professional accountability that is well above that of the U.S. But the point may not be about legal accuracy or competence at all. It may be about the sense of democratic participation in one's government. The sense of having been heard

9. General social values are already part of adjudication through the "general clauses" of the Civil Code (Articles 1-2 and 90), and the Japanese judiciary has historically used these clauses aggressively. See Frank Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH U. L. REV 1493 (2011). Of course, if one buys the criticism of the prereform judiciary as socially isolated, these cases were no more than the best guesses of this tiny group as to what society needed or desired.

10. Mark Levin & Virginia Tice, *Japan's New Citizen Judges: How Secrecy Imperils Judicial Reform*, 19 THE ASIA-PACIFIC JOURNAL (May 9, 2009), <http://www.japanfocus.org/-Virginia-Tice/3141>. For another instance of the Supreme Court's desire for confidentiality, see Daniel H. Foote, *The Supreme Court and the Push for Transparency in Lower Court Appointments in Japan*, 88 WASH. U. L. REV. 1745 (2011).

is extremely important in whether someone considers an encounter with the legal system to have been fair, and the value of participation may resonate to society more generally, especially in Japan where conventional wisdom is that citizens are more deferential to government than in the U.S.¹¹ That said, it remains worth noting that this departure occurs in a world where global legal reform rhetoric continues to preach the opposite course.

III. American Legal Culture and Foreign Legal Systems

I conclude with a brief reflection on the meaning of substantive and procedural justice in the Japanese and American legal systems. Japan's political system has been characterized as a performance-legitimated regime.¹² Japanese citizens trusted their government because it delivered the goods. This characterization was often contrasted with the United States, which was considered a process-legitimated regime. Japanese voters returned the Liberal Democratic Party to power repeatedly because of high economic growth, low levels of inequality, social stability, international peace, etc. They did not vote for the LDP because they felt they were consulted by or actively participated in governmental policy and decision-making or because the government was conducted through open and accountable procedures. In the United States, by contrast, citizens responded favorably to an active role in the government and demanded open and accountable procedures. If the procedures were understandable and appropriate, they could tolerate disappointing results.

Since both countries were representative democracies, the differences were on a spectrum. But the differences were nonetheless real, and their respective legal systems were central to creating and maintaining the distinct natures of the two regimes.

11. For the effect of jury service, see JOHN GASTIL, D. PIERRE DEESS, PHILIP WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010). It is interesting in this context to note that the appearance rate of those called to serve as *saiban-in* is considerably higher than that of Americans called to jury duty. See Supreme Court Report. As of May 2012, 79.1% of Japanese summoned to serve as lay judges appeared as directed.

12. This concept was elaborated at the symposium by Tom Ginsburg, who argued that Japanese legal reforms were part of a political transformation from "performance legitimation" to "participation legitimation." See Ginsburg, *Competitive Modernization: The Politics of Legal & State Reform in Northeast Asia* (publication forthcoming, on file with the author).

Since the early 1990s and the slowdown in economic growth, however, Japan has begun to change, and its legal system and specifically the reforms discussed at this symposium are an integral part of this transformation. The Justice System Reform Council was explicit about law's role in opening up Japanese government and society, and many of the specific reforms can be interpreted as creating a more open and accountable bureaucracy. The increase in the number of legal professionals, the strengthening of the prosecutorial review commission, the *saiban-in* system, enhanced access to governmentally controlled information, and the easing of restrictions to administrative litigation were all intended to give citizens a greater sense of agency *vis a vis* their government. Whether one characterizes this trend as "Americanization" or not, they constitute a move toward a more participatory and procedurally oriented regime, in other words, towards procedural legitimacy and away from a purely result oriented, performance-legitimated regime.

Americans are likely to applaud this transformation.¹³ We not only utilize law and legal processes in a wide range of seemingly nonlegal areas, but we are also enthusiastic proselytizers of our legal values, or at least of what we would like to believe are our values. Americans dominate cross-national legal reform efforts and particularly international financial institutions like the World Bank, and our Congressional granting of preferential market access to developing countries that score well on rule of law indices gives financial clout to our rhetorical aspirations. There is nothing inherently wrong with such advocacy. Even when honored more in the breach than in reality, due process and procedural justice are worthy goals. In evaluating Japanese reforms, however, it may be useful to keep in mind what may be lost when foreign legal systems move closer to the American model.

Americans value process over result and equality of

13. Of course many Japanese share Americans' celebration of procedural justice just as many Americans would sacrifice some process for more substantive equality and fairness. I am dealing here with generalizations and stereotypes, but the fact that generalizations and stereotypes are pejorative terms does not mean that they are incorrect. See also Mark A. Levin, *Circumstances That Would Prejudice Impartiality: The Meaning of Fairness in Japanese Jurisprudence*, 36 HASTINGS INT'L & COMP. L. REV 475 (2013) (included in this HICLR symposium issue). See also Levin, *Civil Justice and the Constitution: Limits on Instrumental Judicial Administration in Japan*, 20 PAC. RIM L. & POL'Y J. 289 & n.109 (2011).

opportunity over material equality, and American law is legitimated by elaborate and potentially dramatic procedures. In land use, we grant a person whose land is being taken by the state and transferred to a more productive or politically connected person a long series of procedures through which to "fight city hall." In the end, the development usually goes through, but due process has been vindicated. In criminal justice, the gap between procedural ideal and substantive reality is even starker. America incarcerates fourteen times more people than Japan and five to six times more people than China. The picture deteriorates further when one notes that incarcerated Americans are overwhelmingly poor black males convicted largely of non-violent crimes. Nor is it much consolation to point to the procedural protections theoretically available to each of these poor defendants. As we all know, the vast majority of American defendants do not invoke the exclusionary rule or make impassioned pleas to the jury. They plead guilty. It is largely the relatively few rich defendants who take full advantage of each procedural step. In these and countless other situations, Americans erect elaborate procedures that allow us to believe in the virtues of our legal system while simultaneously masking the injustice of its operation. And yet Americans feel no hesitation in urging and at times coercing other nations to adopt what we feel is a just system.

The days of active American legal proselytizing in Japan are largely over, but the questions are the same: What are the possible downsides of Japan adopting a more procedurally oriented legal system? Does an enhanced "perception of fairness" mean a greater tolerance of actual unfairness? For example, should the State Department, when it awards millions of dollars for Americans to help China reform its legal system in the American image, include additional millions to build additional prisons? Does the shift from a performance-legitimated regime to one premised more on procedural and participatory values mean that Japan should expect greater substantive inequality? My point is not that Japan should ignore procedural justice and governmental openness. I intend only a word of caution: Americans seem largely oblivious to the substantive injustice of our criminal justice system and it is entirely possible that our elaborate and dramatic system of procedural justice helps us forget the actual results. One would hope that, as Japan continues to shift toward a procedurally rich legal system, the Japanese will be careful not to lose the substantive justice that has been a hallmark of their legal system for the last six decades.