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Law and custom in Japan: some comparative reflections

ALAN MACFARLANE

Japan is now one of the leading industrial capitalist countries in the world. It is widely held to be an economic miracle, emerging twice to dominate Asia. Yet this miracle has been achieved without leading to those two banes of almost all other advanced industrial societies, high and rising crime rates and an epidemic of civil litigation. If, as Haley suggests, 'Japan's success in reducing crime is an achievement that must be reckoned as its most spectacular postwar feat', then its ability to run the most sophisticated industrial market economy in the world with a very low level of litigious confrontation must be reckoned an equally singular achievement.[1]

Starting with the puzzle of Japanese crime, the situation is summed up by Beer as follows: 'Japan's system of criminal justice is effective and only rarely severe. The crime rate is very low, and Japan is a physically safe country in which to live.' The case is impressive, as can be seen from comparative figures for western countries and Japan. If we take for comparison the United States and Japan in 1975, we find the following rates per thousand: murder (9.6:1.9), rape (26:3.3), robbery (218:2.1), theft (4,800:927). Furthermore, if we look at the percentage change since 1960, we see the following contrast, again with the US as the first figure: murder (+ 125: -21), rape (+226: -42), robbery (+331: -56), theft (+230:0).[2] More recent figures suggest that the number of offences per 100,000 in 1990, though slightly up on 1973, is still, at 1,323, well below the 2,000 level of 1948. Furthermore, 'the incidence of violent offences has steadily decreased since 1964'.[3]

We might, of course, be inclined to explain away these startling figures by suggesting that there is underreporting in the Japanese case. It would appear that this is not so. It is stated that 'In Japan, the number of unreported cases of serious offences like murder and robbery is very small.'[4] Furthermore, Bayley answers the question of 'whether the Japanese figures can be trusted' in the affirmative. There have been a number of victimization surveys which show that in Japan 'many crimes, especially minor ones, are not reported to the police', but such surveys 'show the same margin of error as those reported in American surveys'.[5] The relatively low Japanese rates are not a statistical illusion.

Qualitative evidence bears out the figures. When the great American lawyer, Wigmore, visited Japan in the later nineteenth century and in the 1930s, he found a 'general peacefulness and happiness of society in Japan', noting that 'One can see in New York in one night such exhibitions of violence, brawling, and abandoned lawlessness as one would not see in an entire year in Tokyo.'[6] More recently, Bayley echoes the feeling: 'As American and European visitors quickly learn in Japan, cities are habitable places where one may move about freely at all times of the day and night without feeling anxious and taking extraordinary precautions.'[7]

There is other evidence of relative tranquillity. Many local studies bear out the absence of crime; for instance, in the study of Kamo village by Beardsley and others 'official records reveal no serious crime during the period 1934-45'.[8] Even the Japanese gangsters (*yakuza*) are relatively well-behaved and carry on a joking relationship with the police, to whom they are valuable assistants.[9] Guns are hardly ever used in crimes. We are told that guns are reported as being present in less than 20 crimes a year in Tokyo. 'The only legal handguns aside from those issued to the police are in the possession of members of the Olympic shooting team.'[10] To take just one of the most serious criminal threats to western industrial countries, drugs, we are told that 'Not only are the number of cases negligible by American standards, but hard-drug use continues to decline.'[11]

This very low crime rate is a puzzle. It does not seem to result from the fear of harsh legal penalties. Compared to the United States, Japan's sentences 'are fighter in every category of crime' except in the possibility of capital punishment for homicide (for which about three people per year are executed).[12] The lightness of punishment can be seen most clearly in relation to imprisonment: 'There is extensive use of suspended prosecution by public prosecutors, fines and suspended sentences by criminal courts, and dismissal and probation by family courts.' As a result, 'few offenders are sent to prisons or juvenile training schools'.[13] We are told that 'less than two per cent of all those convicted of a crime ever serve a jail sentence in Japan as compared with more than 45 per cent in the United States'.[14] The prison sentences are also very short. Recently, almost half the prison sentences in Japan have been for one year or less, while in America only 4 per cent are for such short periods.[15] It is thus not surprising to find that the Japanese prison population is low and falling: 'The average daily prison population was 50,596 in 1980, more than a 50 per cent decrease since 1950. '[16] This represents about 43 per 100,000 in Japan, as compared to 216 per 100,000 in America.[17]

Nor can the low prison population be explained by the inefficiency of the Japanese police or prosecution system. In both respects, the figures are also remarkable. The Japanese police solve 57 per cent of reported cases, as compared to the 20 per cent of the American police and 'the clearance rate for violent crimes against the person is 92 per cent in Japan and 43.7 per cent in the U.S...'.[18] Once the criminals have been caught, the rate of convictions of those brought to court is extraordinary in Japan. Conviction rates are variously estimated at 99 or 99.99 per cent of all cases that go to trial.[19] This is put down to two factors: weak cases can be dismissed or suspended, and suspects tend to acquiesce in their own prosecution.[20]

Just as puzzling as the crime rates are the rates of civil litigation and the absence of an extensive judicial machinery to deal with the supposedly rising tide of adversarial conflict often thought to be inevitably linked to competitive capitalism. Although we are warned that the 'relative lack of litigation is not... a uniquely Japanese phenomenon', it is certainly striking. As the same author agrees, 'There is little question that the Japanese generally use their courts less frequently than do Americans…'.[21] It is generally true that 'the traditional reluctance to file a lawsuit and to resort to a lawyer continues strong, and most litigation is still petty when measured by American standards'.[22] The ratio is quite startling. For instance, it has been reckoned that the 'number of civil suits per capita in Japanese courts is between one-tenth and one-twentieth of the number in common-law countries'.[23] Not only is it very low but, as industrial capitalism booms, the rate of litigation has been dropping: litigation 'has been *less* frequent in absolute numbers in the postwar years than the period from 1890 to the outbreak of the Sino-Japanese War in 1937'.[24]

An index of the low rate of litigation, linked as both cause and effect, is the scarcity of lawyers and judges in Japan. For instance, in 1977 the ratio of lawyers to the general population in Japan was 10 per cent of that in the United States. Almost all of these were concentrated in Tokyo and

Osaka.[25] Or, if we compare a supposedly less litigious society than America, we find that 'With less than two-thirds of Japan's population, Germany has nearly six times as many judges as Japan…'.[26] Again, we note the counter-intuitive tendency for the number of legal professionals to be dropping, rather than rising. We are told that 'Japan has fewer lawyers and judges per capita today than it did in the mid-1920s'; the number of judges has remained almost constant since 1890, while the population has almost tripled, so that 'Today there is approximately one judge for every 60,000 persons in Japan as compared to one judge for every 22,000 persons in 1890.'[27] This is not for want of willing aspirants to the legal profession. Whereas in 1975 in America 74 per cent passed their bar examination, in Japan it was only 1.7 per cent.[28] The Japanese may well share the view of Haley in relation to America that 'by increasing the number of judges to reduce our court delays, for instance, we may simply spur more litigation and greater social disintegration'.[29]

SOME PRELIMINARY EXPLANATIONS

We may wonder how to explain these odd patterns. There are various theories which overlap with each other. Some Japanese authorities suggest as reasons 'the vitality of informal social controls in Japanese life, their island location, the homogeneity of the population, the excellence of their police, prosecutors, and judges, the strict controls on firearms, and high levels of employment and economic well-being'. Outsiders suggest 'the customary respect for authority, and the sharing of responsibility between citizens and government for maintaining safe communities'.[30] Some point to general characteristics of Japanese culture and society which may be important. For instance, it has been suggested that rather than explaining the situation by citing the innate mentality of the Japanese, or a national emphasis on harmony of feeling, 'A better explanation may be grounded in the homogeneity and social immobility that breed responsibility, as well as in the hierarchical status roles in the Japanese social and family tradition.' Also important is the delegation of dispute settlement to other social groups such as the family and village.[31] Another suggests that 'Perhaps the homogeneity of Japanese society is conducive to these conditions ... small and intimate groups control the behaviour of their members. Informal social control through traditional institutions like family, school, and local community...'.[32]

An intriguing theory put forward by Haley is that the paradoxes of Japanese law and crime 'begin to unravel by viewing Japan as a society of law without sanctions'.[33] In other words, the system has for long depended on consent and mutual agreement and this continues into the present. 'The inability of the formal legal system to provide effective sanctions' is what is noticeable. Its weakness is its strength. This sounds right, but, of course, only poses further problems, for it merely redescribes the situation in other terms; it does not provide an explanation. This is also the criticism that can be made of the other most promising recent 'explanation', namely that by Braithwaite. As summarized by Haley, this is as follows: 'For Braithwaite Japan's success in reducing crime is best explained by what he labels " reintegrative shaming" coupled with a formal system that allows for the reintegration or restoration of contrite offenders back into the community.' Essentially, 'Crime control thus begins with community rather than legal condemnation.'[34] This again sounds plausible, but how is it that 'reintegrative shaming' is so effective in Japan, but of little efficacy in most western societies? In order to pursue these puzzles further, we need to use a comparative and historical approach.

IS THERE INDIVIDUAL OR GROUP RESPONSIBILITY?

Since group responsibility is one of the major explanations advanced to account for the low degree of crime in Japan, it is of particular interest. Montesquieu long ago noted that there was a tendency towards group responsibility in Japan, which contrasted with that in systems where the individual was alone held responsible. Thus he wrote of laws which 'punish a family or a whole ward for a single crime' and hence 'implant in the people a mutual distrust' and 'make every man the inspector, witness, and judge of his neighbour's conduct'.[35] It is well known that Japan has for long been a 'small group' society. The traditional legal entity was the 'house' (*ie*) or artificial kinship group, the ward or the village (*mura*). Concerning the last of these, for instance, Thomas Smith wrote of 'the legal personality that history had given the village: its competence to make contracts, borrow money, sue and be sued, and its collective responsibility in matters of taxation and criminal law'.[36] There were even smaller units of joint responsibility; for instance, 'the population of every village was divided into companies of five families each, one person being the company chief, and all the - members bearing mutual responsibility for each other's conduct'.[37] This is a system which reminds one of the 'tithing' system in early England. Nor has the system changed entirely. Even today, there are many cases reported where parents feel responsible for their children's offences, even though formally the position has changed.

This group responsibility is, of course, probably one of the main reasons for the traditionally low levels of crime, as Montesquieu implied. If a person was convicted, this had enormous effects on all his wider relatives, his village and neighbours and others. As Sansom wrote of the situation in early modern Japan, 'they carried to extremes the principle of joint responsibility by punishing for the offence of an individual not only his family, but also his neighbours, and sometimes a whole village or even a whole district'.[38] Anyone contemplating a crime had to think very carefully before embarking on something which would have wide repercussions, and in the awareness that others would have a strong interest in detecting him.

This has given way to what is nowadays called the 'Managed society' (*kanri-shakai*). In this everyone keeps an eye on everyone else and no-one likes to deviate from the majority view. There is self-policing, not within the individual, but rather through mutual surveillance. There is an invisible power of conformity. People feel easy and relaxed when they behave like others. To step out of fine can be dangerous.[39]

In the past this was also clearly related to the control of physical movement. The bounded and highly self-policed small groups in which the Japanese have long lived is a social context to which many have ascribed the low crime rates of past and present. For instance, it was suggested that because 'no one can change his residence without a certificate of good conduct from the inhabitants of the vicinage he wishes to leave ... The result of this minutely ramified and thorough organization is said to be, that, no part of the empire affording a hiding-place for the criminal, there is not a country in the world where so few crimes against property are committed, and doors may be left unbarred with little fear of robbery.'[40]

If an individual does deviate, he or she suffers much indirect pressure through shaming and ostracism. This is the first major element of Braithwaite's argument to explain the criminal patterns of Japan. There is persistent community disapproval of wrongdoing - a process he terms 'shaming'…'.[41] The second feature of the pattern lies in what happens when an individual does commit an offence, the questions of punishment and re-integration.

THE PRESSURES TO CONFORMITY AND CONFESSION

An important continuum in legal systems runs from a great pressure to conformity at one end to systems which allow the individual to stand out against the group at the other extreme. Given the mutual responsibility and the intimate inter-relations, we will not be surprised to find where Japan lies on this continuum. Japan has historically stood a long way towards the 'confessional' end. This was traditionally a society where people were expected to confess their guilt, to show penitence. In law, as in the rest of life, the famous Japanese proverb applies: 'The protruding stake is hammered down.'[42]

The system before the changes introduced at the *Meiji* restoration was described by Longford: 'Under the old system no conviction could be made unless the prisoner confessed his guilt, and when... no doubt could exist as to his guilt, torture was used to extract a formal confession if the prisoner was obstinate. In still earlier days... The prisoner on his arrest was at once assumed to be guilty and if he failed to confess, torture of a very cruel nature ... was resorted to .....'.[42]

Although torture was abolished in 1868, the tradition of confession has continued. Most of those who come to court nowadays confess their guilt. This is sensible since it is still the case that contrition lightens the sentence very considerably. We are told that 'Confession, repentance, and absolution provide the underlying theme of the Japanese criminal process. At every stage... an individual ... gains by confessing, apologizing, and throwing himself upon the mercy of the authorities.'[44] 'A criminal who shows sincere repentance in court for his wrongful act ... has a much greater chance of receiving a less severe penalty….' .[45] Unexpectedly, the fact that guilty pleas are precluded by the constitution and there is consequently no plea bargaining, makes it easier, not more difficult, for people to confess.[46] 'An acknowledgement of guilt, therefore, does not affect trial proceedings in serious cases.'[47]

Thus, in many ways, Japanese law is an example of Foucault's idea of the moral reformatory.[48] The effects are not entirely negative, however. We are told that the aim of prisons in Japan today is to rehabilitate rather than punish offenders.[49] The primary aim of Japanese justice is correction, to bring people into line. Hence, according to Japanese judges, 'the primary purpose of trials is to correct behaviour, not to punish it, and if an apology seems to be sincere, the aim is deemed to have been achieved'.[50]

There is thus a strong moral tone, even today, in Japanese trials, a subjective element of morality which is different from that in a modem American or English court, but which would have been familiar in an ecclesiastical court in seventeenth-century England. Japanese law has a 'pronounced emphasis upon the defendant's moral blameworthiness'.[51] The whole atmosphere is much more like that of a traditional Indian or African court, where attempts are made to reintegrate the offender by obtaining an admission of guilt. This leads us to the second part of the underlying system of Japanese justice. There are 'effective societal and state efforts to reintegrate repentant wrong-doers back into the community.'[52] Such re-integration obviously depends on individuals acknowledging, in a sincere manner, their guilt, and promising not to commit an offence again.

COMPROMISE, RECONCILIATION AND MEDIATION

If we add together the features outlined above - the group responsibility, the mutual obligations, the need to continue to live together in multiplex face-to-face communities - it is not difficult to see some of the reasons behind what is often thought to be the most remarkable feature of law in Japan. This is its absence, or in other words the reluctance to use the courts and the preference for informal means of dispute settlement.

The widespread dislike of 'going to law' was a long-standing feature in Japan. It was agreed that litigation was to be discouraged. Thus we find as early as 1445 a proclamation that 'All quarrels and disputes are strictly forbidden. If this is disobeyed, both sides will be put to death, without inquiry into right and wrong.'[53] Every wise family counselled its members to avoid becoming embroiled in litigation. Thus the founder of the Hamaguchi house left the injunction: 'Endure patiently and await your turn; do not go to law.' In the constitution of the Horiuchi brewing family, it was written that 'We must never forget the saying, " the peasant should never run out of rape-seed, and never go to law".' In the Koyama family, members were exhorted to 'keep distant the hell of accusation'.[54] More recently this feature has been widely noted. 'The Japanese feel they are better off when not bothered by law. If they can do without law, so much the better. Law is something to be shunned…'.[55] Law 'is regarded in Japanese society as the "last resort" whose significance lies in it not being invoked'.[56]

The alternative was to use some form of conciliation or mediation at the local level. Thus, Beardsley and his collaborators wrote that 'Mediation is the manner in which Japanese farmers have settled their disputes for centuries...', and this is reflected in the adage 'Mediation is the god of the times.'[57] The vast majority of disputes were and are settled out of court. As Henderson puts it, 'Most private disputes on the village level were settled by didactic, or coerced, conciliation, as opposed to voluntary conciliation. An insistence upon a clear-cut, all-or-nothing decision in favour of one disputant rather than a compromise settlement in which each disputant conceded something was regarded as inimical to group harmony.'[58] Thus Smith writes that 'if there is one word that subsumes much of what there is of Tokugawa law, it is conciliation.'[59] Even when the informal conciliation did not work, the courts tried to enforce conciliation rather than give a black and white judgement.

There are today three major forms of conciliation. The first was widespread in *Tokugawa* villages and was informal conciliation or *jidan*. 'The second, called *chotei*, is primarily a formal pre-litigation procedure, and was devised piecemeal in Japan in the years between the two world wars. The third, *wakai*, is a direct German borrowing, a procedure by which the judge encourages and assists the disputants to reach a compromise settlement.'[60] As Henderson observes, 'all of [these] seem to have contained an element of coercion until after World War II ....'.[61] Thus it was not only that individuals wished to avoid formal court actions but that the law itself encouraged reconciliation. Even after formal courts were institutionalized, they have continued to try to avoid trying cases by adversarial means. It is estimated that in 1987 'roughly one third of all civil lawsuits in the first instance (district court) are concluded as default judgments or withdrawal of complaints ... another third are contested judgments; and the remaining third are in-court compromises.'[62]

There are various theories put forward to account for this preference for conciliation. One is linked implicitly to the widespread concept of group harmony (*wa*). The contrast is made between western assertiveness and Japanese desire for harmony. Henderson writes that 'we might characterize the American attitude as " I'm right and he's wrong. I'll take him to court, and the court will tell him so. " The Japanese attitude, on the other hand, seems to place more emphasis on group harmony than upon vindication of individual rights: "I'm right and he's wrong, but for the sake of group harmony it is better to compromise than to go to court."'[63] Or, as another writes, the kind of adversarial adjudication which makes one person right and the other wrong 'goes against the grain with most Japanese. We seek to establish a harmonious situation with which both parties are neither satisfied nor dissatisfied, where there is no loser or winner. This is the ideal we expect of adjudication.' If one were declared winner, the loser would be 'bound to be embittered against the winner, and even against the judge' and this would destroy harmony.[64] As Wigmore noted many years ago, there is 'a deep-seated opposition to whatever implies clash, clatter, shock, roughness,

strain... It was, and to a great extent still is, an ingrained principle of the Japanese social system that every dispute should, if by any means possible, be smoothed out by resort to private or public arbitration.'[65]

This in turn may be linked not only to the 'small group' nature of Japan, but also to Confucian teaching. Others have added the cost and delays in the law - though this has not entirely dampened enthusiasm for litigation in the west.[66] It has also been suggested that the very clash between an adversarial system ofjustice from the west and the compromise and conciliation system of the Japanese has meant a rise in various forms of 'formal', court-instituted, mediation systems which overcome the discrepancy. Conciliation has been institutionalized.[67]

It has also been noted that the Japanese take elaborate precautions to prevent disputes breaking out in the first place, for instance by making sure that all those affected by a decision are involved in making it and realize its implications. This is done, for instance, by the method known as 'root-binding' or *nemawashi*, whereby all those involved in a decision are bound into its implications. It is also done by the system of stamps of endorsement in Japanese organizations (*ringi*), another manifestation of the same desire to avoid confrontation.[68]

How can one explain this ambivalent Japanese legal system? As we have seen, analysts tend to make allusions to enduring characteristics of the Japanese, a dislike of conflict and love of harmony, Confucian ethics, small-group structure. What is universally agreed is that many of the present characteristics go back a long way. Hence it is necessary to give a brief, if necessarily superficial, historical sketch.

THE CHINESE STRATUM

We know very little of the situation before the seventh century AD in relation to law and custom. It is the second temporal layer of law, from the seventh to the ninth centuries, when Japan was heavily influenced by Chinese legal codes, that is the first one visible to us. It is somewhat equivalent to the 'reception' of Roman law in many European countries during the later middle ages. There is a good account by Sansom, of these codes and how they were introduced into Japan in the seventh and eighth centuries.[69] This led to the first national (*Taiho*) code of law. It looked for a while as if Japan would go in the direction of China, that is towards a centralized, written, code-based legal system, founded on Confucian ethics. A flavour of this early, uniform, codified law is given by Sansom:

> The importance of the pen in this culture of the sword was truly remarkable, Oral arguments played only a small part in judicial procedure, Pleadings were submitted in writing, while agreements as to property and service were regularly drawn up in the form of charters, deeds and bonds.[70]

The law was basically the same over most of Japan and widely enforced.

THE FEUDAL STRATUM

The centralized Chinese system began to evaporate under decentralizing tendencies from the ninth century onwards. This reaction against the Chinese codes reached its peak in the last twenty years of the twelfth century and lasted through to the sixteenth century and set Japan on a totally different course from that on mainland China. Japan then abandoned most of its earlier Chinese-inspired codified law, Thus Wigmore argued that judgements 'clearly showed that private law in Japan had

been developing in the form of an independent, judicially created system, a phenomenon which clearly distinguished the Japanese from the Chinese legal system'.[71] The situation is very reminiscent of what happened over much of Europe in the 'feudal' period in the ninth to twelfth centuries: 'Paralleling Western European experience, the political rulers of feudal Japan had early discovered in adjudication an efficient and effective means for establishing legitimacy and maintaining order.'[72]

The system which emerged in the later twelfth century had some surprising resemblances to the developing common law of England. It was based on judge-made customs and precedents and not on abstract and codified principles. Wigmore was the first to seize on the peculiarity of this feature, which survived until the nineteenth century. He surveyed the sixteen independent legal traditions in the world. Only five of these' have developed originally by case law'. In three of these five, the case law was developed by unofficial jurists, 'But in the last two of these five systems, in England and Japan, case law was developed by official judges...'. This 'puts the English and Japanese systems in a class by themselves, distinct from the rest of the world'. He held the question 'Why did England and Japan develop their systems by the same mode, that of official judges, although the conditions of race, religion and other culture were so different?' to be 'one of the most interesting problems in the evolution of institutions'.[73] Wigmore did not solve the question, partly because he limited his massive enquiry to the *Tokugawa* era. The solution, if it is to be found, must lie in the medieval period when this system of custom-based law was developed. Fortunately recent research is just beginning to uncover some of the outlines of the earlier system.

A new legal system (*Kamakura*) based on local, Japanese, customs gradually evolved. A famous landmark is the Formulary of *Joei* (1232) when what was 'in substance and in essence the house law of the Minamoto family became the common law of Japan, in particular as to questions of land tenure and rights arising therefrom...'.[74] This was a warrior code and a common law code combined. During the twelfth and thirteenth centuries, jurists 'increasingly refrained from citing the criminal code, referring instead to Japanese custom and collections of precedent'.[75] The process is well summarized by Henderson. In the period between the twelfth and the sixteenth centuries, Japanese society was 'often virtually headless without an effective government' and so 'regulated itself in the private sector largely by its own growth of customary law attuned to its rice culture and peculiar feudal institutions'.[76]

The most thorough analysis of *Kamakura* justice by a western expert is that by Jeffrey Mass. In a number of articles and books he has begun to probe into the customary basis for the system. Analysing the generation leading up to the 1232 *Joei* Formulary, he shows how the code was based on local customs. He writes that 'it was never *Kamakura's* intention to do more than give an assist to local custom. Towards that end laws and abstract principles simply yielded to the techniques of investigation.'[77] Or again, as far as possible *Kamakura* justice 'settled disputes by identifying and then confirming the precedents (*senrei*) of each troubled area ... To have indulged, by contrast, in abstract principles or didacticism would have availed little.'[78] This system was 'thus closely calibrated to the needs of a society that was lawless yet litigious, restive yet still respectful of higher authority'. Such a custom- and precedent-based system had enormous effects on judicial procedure: 'Flowing from this came basic attitudes toward impartiality, modes of proof, due process, and the right of appeal.' The process was more important than the principles. 'Because Kamakura had no written laws at first or any philosophical traditions and because the country's estates were accustomed to having individualized precedents (*senrei*) made the basis of judgments, it was natural for the bakufu [military government or shogunate] to stress procedure over principle.'[79] This process again strikes strong chords with anyone familiar with medieval and early modern English law.

Two features may be highlighted. The first is the development of a system of gathering evidence. We are told that

when it became apparent at one stage (1205) that no original proofs were available, witnesses from the disputed area were summoned for interrogation before the *dazaifu* (ancient government headquarters staff). The latter in its report noted that hereditary rights could be established only by public writ, but that in the absence of such documents, depositions from local personnel would have to suffice.[80]

Summarizing the procedure in the period up to 122 1, Mass writes that 'the use of plaintiff (*sojo*) and defence statements (*chinjo*) as well as writs of inquiry (*toijo*) and subpoenas (*meshibumi*), the taking of depositions from or calling of witnesses, and the differentiation among types of evidence, all became standard from very early on'.[81] This could easily be read as-a description of the procedure in some of the English Common Law and Equity courts in the later middle ages. The system was early becoming institutionalized: 'By the late 1220s- and for a century thereafter - virtually all settlement edicts were (1) issued bureaucratically (i.e. not by the lord himself), and (2) contained references of some kind to the lodging of a formal complaint.'[82]

This was a system with 'enormous potential', whose 'principal objective was equity for the litigants rather than aggrandisement by their judges'.[83] In other words, the courts were not inquisitorial extensions of royal power, but forums for adversarial justice. Adversarial justice in the royal courts is one of the most striking features of English law and it is therefore intriguing to find the same development in Japan. We are told that '*Shoen* law varied considerably from place to place, but one commonly shared feature was that *shoen* court procedure began to show elements of an adversary, as opposed to an inquisitorial system.'[84] Or again we are told that in the 1232 *Kamakura* system and its later developments, 'scholars have found that the *Hyojoshu* (Council of State) relied increasingly on precedent rather than on statute and allowed at times the use of an adversary system in civil law cases, both features of English common law as well'.[85] The two decades before 1232 'saw a number of advances in the way that Kamakura handled suits. And these were indeed suits: the system was accusatorial, with litigation initiated by the plaintiff. '[86] One of the innovations of this period was 'the *taiketsu*, or face-to-face confrontation of disputants'.[87]

The system that developed, like that in England, had to allow for variations in custom and clashes of interest and changing power structures. It thus had to be very flexible. This was achieved through the use of custom as the basis, with precedent and judge-made law as the procedure. If the *Joei* Formulary had tried to 'impose a uniform set of regulations, it would have conflicted with the limitless variety of estate-based customs'. Furthermore, 'Because the society of the vassal was itself ever-changing, it was readily anticipated that the code, like a constitution, would be supplemented by legislation.'[88] As in England, the central guiding principle was 'reasonableness', a very flexible and pragmatic approach which can bend with time. Japanese law, we are told 'represented not so much the creation of binding rules as the establishment of standards; its underlying principle, "*dori*", conveyed reasonableness, not literalness'.[89]

During the sixteenth century, after the further disintegration of the 'time of troubles', the laws of powerful feudal lords were further emphasized and the centralizing tendency re-asserted itself. 'Each powerful family compiled or amended its house-law, and it is probably true to say that there was more legislation, and more enforcement during the 16th century than there had ever been before.'[90] Yet the basic shape of precedent, customary, oral, minimal, reason-based law was not altered.

THE CENTRALIZED FEUDAL STRATUM

These particularistic laws were not suppressed when Japan was finally unified under the *Tokugawa* shogunate in the late sixteenth century. As Sansom put it, *Tokugawa* legislation consisted merely of 'statements in writing of the principles underlying customary laws, which they did not replace but only supplemented'.[91]

There was a huge diversity of local custom, held together by a powerful shogun, who nevertheless did not interfere with local justice. This helps to explain both the absence of 'Law' during the *Tokugawa* period and the essential 'lawfulness' of society. This system of law based on respect for local custom was combined with a minimal uniform national civil and criminal law: 'Though the shogunate government allowed a great measure of autonomy to the lords of the various clans in legal and political administration, supreme power belonged to the shogunate, and in legislation the general principle that the laws of the daimiates must be based on the central laws was rigidly enforced '.[92] The system lasted until the late nineteenth century when, at the *Meiji* restoration, the Japanese suddenly discovered that they would not be treated as equals by the west unless they made their law 'modern' and 'universal'. Thus Henderson is able to conclude of this long period that the view that 'the premodem Japanese law of private relations was unwritten customary law requires surprisingly little qualification throughout the entire thousand years involved'. Indeed, 'between the ninth and nineteenth centuries, the mainstream of Japanese laws was indigenous and embodied in unwritten customs'.[93] As in England, the development of contract law emerged in the interstices of this system: 'Taken as a whole, this complex of Tokugawa rules and remedies for contract enforcement resembles much the English forms-of-action at the early common law courts. As Sir Henry Maine put it, "substantive law has at first the look of being gradually secreted in the interstices of procedure".'[94]

Yet over time, while many of the deeper principles were similar, the execution of these principles was so different that we notice an increasing divergence between England and Japan. After a period in the thirteenth century when *Kamakura* and Angevin justice look as if they were moving in similar directions, the increasing turbulence of the later middle ages in Japan led to a weakening of central justice. Paradoxically, despite the firm unification of Japan under the *Tokugawa* in the later sixteenth century, this weakening, or rather disinclination to become involved in providing judicial services, was emphasized by the various shoguns from the seventeenth century onwards.

Thus although the Tokugawa shoguns are thought of as having imposed a form of 'centralized feudalism', the centralization was not applied beyond a minimum level to the law, thus making it very different from the situation in England. As Duus comments, 'Unlike the post-feudal monarchies of Western Europe, the bakufu never ... even attempted to establish a truly national system of law. '[95] I Indeed, the *Tokugawa* went even further, positively discouraging all recourse to the shogun's courts: 'Tokugawa officialdom had constructed a formidable system of procedural barriers to obtaining final judgment in the Shogunate's courts.'[96] The aim was to delegate justice, rather than centralize it: 'Rather than cherish the right to adjudicate, the prevailing official attitude at all levels of feudal authority was that civil disputes should be settled by the villagers themselves.'[97] This was a policy not only of the shogun, but of all lords: 'To encourage self-reliance, the overlord denied the village access to his courts or police for enforcement of civil law, except in cases verified by the headman's seal.'[98]

As has been pointed out, this is a great contrast with Europe. Japan followed neither the absolutist model, based on Roman law, of continental Europe, nor the centralized feudalism and

strong courts based on English common law: 'This extreme decentralization of justice in the Tokugawa regime contrasts sharply with the more familiar experience of feudal Europe.'[99] From an English perspective, we see a country which in the twelfth and thirteenth centuries looked as if it was moving rapidly in the direction of a customary, judge-based, oral, adversarial system revolving around the King's courts, very similar to that in England in the thirteenth century onwards. Yet, instead of developing this, Japan swung in another direction - taking the principle of delegation within feudalism to its logical limits, rather than the alternative principle of centralization. The result was that by the later seventeenth century there was a marked divergence between English and Japanese justice, a difference which had not existed some centuries earlier.

The contrast is well described by Haley. Tokugawa justice was unavailable to ordinary people and this 'was in stark contrast with Angevin England where the monarchy achieved dominion by extending the King's justice, through greater access to the King's courts and by fashioning new and more effective remedies'. In Japan, 'community autonomy and weak government remained hidden behind a veil of ritualized deference to authority'.[100]

By the 1860s, Japan presented an odd combination of characteristics. It was a sophisticated, commercial society, yet a society with hardly any 'Law' with a capital 'L'. There were very few autonomous courts, no lawyers and barristers, few police. There was hardly a discrete and autonomous world of law. Almost all disputes were settled on the basis of local custom and through informal pressures. Indeed, given this development, intelligent Japanese in the later nineteenth century found the development of a large autonomous legal realm one of the most puzzling features of the west, and one of which they did not approve. Thus Fukuzawa is reported to have found the western legal system incomprehensible. Summarizing his views, Henderson reports that Fukuzawa could not see how, in dealing with law, 'scholars could treat [it] as a subject of scientific study or that professionals could learn in order to protect the rogues of society in criminal trials'.[101]

ROMAN LAW AND ANGLO-AMERICAN LAW

The notions of western law in its two major variants were suddenly introduced into this setting, both under tremendous external pressure. After the Meiji restoration in 1868, lawyers from France and Germany helped to redraft all the Japanese legal codes. This naturally incorporated many of the principles of Roman law, with its inquisitorial, status-based judicial system. After defeat in the Pacific War in 1945, the laws were again re-drafted, now incorporating many, but not all, of the principles of Anglo-American law, for instance those concerning equality before the law and adversarial justice.

Given these many layers, it is not difficult to understand the present contradictory mixture in Japan. Japan has an ancient and continuous system of local customary law onto which was grafted first a European Roman law system, and later an Anglo-American rights-based system. There are few countries which have had a history of law which is at the same time so continuous and yet which has moved so dramatically between seven systems, each based on different principles. The fact that at various stages Japan went through stages which were structurally very similar to those in Europe -Chinese formalism approximating Roman law, the Kamakura experiment having remarkable resemblances to medieval English common law - helps to explain a feature interestingly noted by Haley: 'That Japan had so little difficulty in adapting first continental European legal institutions and later American law models deserves special emphasis. Japan, in fact, readily absorbed new Western legal institutions, codes, statutes, and procedures with remarkable ease. "" The answer must lie, as Wigmore noted in a series of articles in the 1890s, in

the fact that 'few institutions of modem European law were without some analogue or parallel in customary Japanese practice, if not in the more formalized rules of Tokugawa law.'[103]

CONCLUSION: DIFFERENCES AND SIMILARITIES

Given this historical development, it is not hard to see why one should have a sense of both familiarity and strangeness when looking at Japan from a western perspective. The strong roots in feudal custom, precedent and oral tradition give the Japanese system some very familiar features. These have been complemented by other principles recently and directly taken from western Roman law and Common law. Yet there is also a sense of difference, which could be ascribed to a number of factors.

One is obviously the complete difference in religious background. Much of western law and the concept of the person on which it is based flows from Christianity, with its stress on the individual believer. The more hierarchical and status-based law and social structure of Japan, particularly of the Tokugawa period, is clearly related to its ancient Confucian and Buddhist tradition, emphasized by the heavy influence of China in language and other aspects of culture.

Secondly, there are those who argue that the difference of an agrarian economy has had a pervasive influence. Put very simply, it is argued that the degree of co-operation required for the irrigated rice cultivation of much of Japan is much greater than for the dry grain farming of much of Europe. This may indeed partly help to explain why Japanese group responsibility and feeling has traditionally been higher than that in Europe, a fact which, as we have seen, is reflected in the legal system.

Thirdly, while there are some striking similarities in the family systems of Japan and of north-western Europe, there is also a major difference. Although the Japanese house (*ie*) is an artificially recruited entity (that is to say members were often not related by blood before their adoption into the family), it is much more powerful than any equivalent in western Europe or America. Hence all family relations are much stronger. In relation to the family, Japan is much closer to a society based on 'status' than to one based on 'contract'. This difference has, of course, been declining rapidly in recent decades. Yet the solid 'blocks' of kin-related individuals do provide an essential background to Japan's more group-based legal responsibility system.[104]

One consequence and manifestation of all of these features was the difference in patterns of social and geographical mobility as between England and Japan. For instance, while we know that England from at least the twelfth century was a highly mobile society, both geographically and socially, with most people moving in both senses very considerably during their fife-times, most Japanese have, at least in the seventeenth to the mid-nineteenth centuries, found it more difficult to move either physically or socially. The immobility was perhaps less pronounced than in many agrarian civilizations but, put on a scale with England at one end, it was marked. As we have seen, this tends to encourage attempts to solve disputes by informal, conciliatory methods. For instance, it is suggested that the immobility made the village 'largely free from outside interference so long as it policed itself and paid its rice tax'. It also made investigation easier since 'everybody knew everybody else, as well as everyone's property and dealings'.[105]

Reverting to political history again, the English and Japanese cases provide an interesting comparison. England is well known as an 'island in law', where a legal system which found its origins in customary law was maintained through the centuries.'" There was a linear development of law and legal institutions from the middle ages to the twentieth century. No

alternative legal system was imposed. A centralized system of judge-made law (albeit with some Parliamentary intervention) was developed in England, and a law-soaked society emerged with a preference for contract and private property.

At the other end of the world, there was another 'island in law', which developed from Chinese-influenced roots into an alternative system of customary law, similar in some respects to that in England, but less elaborate and centralized. After an early movement in the same direction as England the paths diverged: in Japan, courts, juries, lawyers did not develop. In Japan, people tried to reconcile most differences by face-to-face methods. If these failed and serious crimes were reported, a harsh and savage punishment was meted out. By the middle of the nineteenth century, Japan had an almost 'invisible' legal system, the only major commercial and advanced country in the world without a large legal apparatus. As Smith, paraphrasing Henderson, wrote, 'The Tokugawa legal system has long intrigued Western scholars ... for the peculiarity, as one of them has pointed out, that there is so little of it.'[107]

Then, under the threat of technological and military dominance by the west, the Japanese were forced to import two layers of western legal concepts - first Roman, then English. Yet, as with all things, Japanese people took what was useful and rejected the rest. Thus on the surface Japan has a western form of law, adversarial, with judges, courts, police. Yet below this surface it retains many of those elements which have been used through a thousand years of informal settlement of disputes and social control. This in turn is based on a well-preserved social structure founded on mutual obligation rather than on the assertion of individual rights. The two levels are suggested by Hendry: 'The whole Western-inspired arrangement was set up to satisfy the world at large... For the most part, however, it continues to function along the lines of more customary practices which have quite different moral underpinnings.'[108]

Thus the Japanese are able to combine a modem technology and economy with a fairly traditional legal system. The outward signs are the very low and falling crime and litigation rates to which I first drew attention. The inner dynamics are a little less puzzling when we see how the long history of Japan has been worked out in its mutual relations first to its great mainland neighbour China and later to the technologically dominant west. In these sets of mutual relation, an alternative legal structure, which does not lie easily within any of the normal comparative classifications, was developed in Japan. This legal system persists today, based on a very unusual intersection of a 'modern' legal framework with a 'traditional' attitude towards dispute settlement.

ACKNOWLEDGEMENTS

Any virtue which this piece contains will come from the fact that it is written by a non-Japanologist who is looking at Japan from the outside. This does, however, entail a heavy reliance on the detailed work of Japanologists, whose work deserves to be more widely known. Hence I am particularly grateful to the authorities from whose work I have had to quote at rather unusual length. I am grateful to Sarah Harrison and Jerry Martin for their comments on earlier drafts of this paper and to Kenichi and Toshiko Nakamura for answering my many questions. An earlier version of this paper was presented at an Eason-Weinmann Colloquium 'Dimensions of Customary Law', in Siena, Italy in June 1993.

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